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UNIVERSITY OF UTAH COLLEGE OF LAW

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ESSAY IN LAW

Professional Standards Versus Personal Ethics: The Lawyer's Dilemma*

*Michael D. Zimmerman***

Nineteen years ago, I sat in this auditorium waiting to receive my diploma. I could not wait for the proceedings to be over, to be through with school and finally on my way into the real world. I do not remember what the commencement speaker said on that June day in 1969. I suspect that in nineteen years, few of you will recall who spoke, much less what was said today. But if some of you remember my remarks for at least a little while, I will have accomplished my purpose.

During the past three years, you have acquired many of the skills that are necessary for the practice of law. However, you have not been taught how to use those skills in an ethical manner. Let me define my terms. I am not using the term "ethical" to describe what is permitted or required by the formal rules of conduct that specify a lawyer's professional duties. Rather, I am using the term "ethical" in its more general sense—the study of standards of right conduct, how human beings ought to act toward each other. In other words, you have not been taught how to reconcile your role as a lawyer with your role as an ethical human being.

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* These remarks were given as the commencement address at the University of Utah College of Law May 21, 1988.

** Associate Justice of the Utah Supreme Court. B.S., University of Utah, 1966; J.D., University of Utah 1969; Professor of Law, University of Utah, 1976-1978. I want to thank my law clerks, Robert L. Flores and Phyllis J. Vetter, for their assistance. Little originality is claimed for the content of these remarks. The following materials were of assistance in my preparation, and I recommend them to the reader: Flynn, *Professional Ethics and the Lawyer's Duty to Self*, 1976 WASH. U.L.Q. 429; Luban, *The Adversary System Excuse*, in THE GOOD LAWYER, LAWYERS' ROLES AND LAWYERS' ETHICS (D. Luban ed. 1983); Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984); Morris, *Power and Responsibility Among Lawyers and Clients: Comment on Ellmann's* Lawyers and Clients, 34 UCLA L. REV. 781 (1987); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29; Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

I especially want to acknowledge reliance on Chapter 4 of David Luban's fine book for the ideas and terminology used in describing the adversary system excuse, as well as for the reference to the *Spaulding* case and the quotations from William Whewell and Murray Schwartz.

While in law school, you have been trained to see legal problems apart from their ethical content. I do not fault your professors for that. It was necessary to make you "think like a lawyer." I, too, followed the same pattern when I was a professor here. It is important that you learn to think about legal problems analytically, to see all sides of a problem and to recognize that whether something is legally possible is quite a different question from whether it is ethically proper. Your professors necessarily stripped you of a certain innocence and freed you from many of the value-laden preconceptions you brought with you to law school, because those preconceptions would have prevented you from effectively dealing with issues you will encounter in practice.

As a result of that training, you have become accustomed to the value-neutral analytical mode of thinking. Many of you have forgotten the dissonance you experienced early in your law school career between your pre-law school ethical self and the value-neutral legal way of looking at things. I want to reawaken your awareness of that dissonance. That awareness is healthy; indeed, I think it is essential to your becoming a good lawyer while remaining a decent human being. For only by being acutely aware of this dissonance can you confront what I think is one of the principal moral dilemmas faced by lawyers: the place of personal ethics in the adversary system. It is in this context that the conflict between your professional standards of conduct and your personal ethics becomes most clear. For the role of an adversary, as it is commonly conceived and defined by the profession, may justify you in doing—may even command you to do—things that your own personal sense of ethics would never permit.

Let me give you an example of a situation illustrating the tension between professional standards of conduct and personal ethics. It is taken from a reported case that arose in Minnesota in 1962.[1] A youth named Spaulding was badly injured in an automobile accident. He sued the driver of the car in which he was riding for damages. The driver's lawyer had a doctor examine Spaulding. The doctor discovered a life-threatening aortic aneurysm that was apparently caused by the accident. Spaulding's own doctor had not discovered the problem. Spaulding offered to settle the case for $6500. The driver's lawyer apparently realized that if Spaulding knew of the aneurysm, he would demand much more. The driver's lawyer did not disclose the existence of the aneurysm, and the case

1. Spaulding v. Zimmerman, 263 Minn. 346, 116 N.W.2d 704 (1962).

was settled for $6500. The driver's counsel never told Spaulding of the aneurysm, even after the settlement was consummated.

The driver's lawyer in the *Spaulding* case was acting properly within his role as an advocate. The Minnesota Supreme Court said that the lawyer had no professional duty to disclose the existence of the aneurysm to Spaulding because Spaulding and the lawyer's client were adversaries. Indeed, not only would the lawyer have no duty to disclose the information, but under the present American Bar Association's Model Rules of Professional Conduct, unless his client authorized its release, the lawyer would be bound by the code of the profession to keep that information a secret.[2]

The *Spaulding* facts are most troubling. It is hard enough to accept the fact that the driver's lawyer was professionally correct when he did not tell Spaulding of the aneurysm before the settlement. But I suspect that most people find it morally inexcusable that the lawyer remained silent after the case had settled, leaving Spaulding's life at risk. Yet the general position of the profession is that the driver's lawyer was not morally accountable for what might have happened later. As one respected scholar put it, "When acting as an advocate for a client . . . a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved."[3]

This lack of moral accountability is grounded in theory on the claim that the adversary system is morally good, so those serving it can assume that if they fulfill their roles properly according to its rules, the system will produce moral results. This is what I will refer to today, in the words of David Luban, as the "adversary system excuse" that frees lawyers from moral responsibility for their acts.

Let us examine the source of this ethically troubling claim for amorality—the adversary system model—as well as the assumptions on which it is based. A dispute arises between two parties, each of whom claims to be entitled to some relief under the law. Each party hires a lawyer. The lawyers investigate the facts, gather the evidence, and present it to a neutral third party—either judge or jury. In so doing, each lawyer strives to persuade this third party that his or her client's version of the facts is true and that his or her client is entitled to all that the law allows. In this effort,

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2. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1983).

3. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 673 (1978), *quoted in* Luban, *The Adversary System Excuse*, in THE GOOD LAWYER, LAWYERS' ROLES AND LAWYERS' ETHICS 84 (D. Luban ed. 1983).

the lawyer is not to make moral judgments about the correctness of his or her client's cause or the justness of the result sought; the lawyer is to be an instrument of the client, and the lawyer's efforts to win are limited only by the bounds of the law and by any applicable standard of professional conduct. Under the model, it is assumed that the neutral party, be it judge or jury, will perceive the true state of the facts from the differing versions of both counsel. Once the facts have been found, the third party will then properly apply the law to the facts.

What are the consequences of lawyers' permitting themselves to be assigned a role that requires them to subordinate their personal ethical values to the rules of the adversary system, to become amoral instruments of their clients? I think the consequences are several. First, the failure of individual lawyers to confront the ethical contradictions this role forces upon them is the reason for much of the ambivalence many lawyers develop toward their careers. Second, and perhaps more importantly, many lawyers are less effective in meeting the real needs of their clients because they see their role as limited to being a tool of their clients. This also means that lawyers conduct themselves at times toward other lawyers in a less than constructive manner, even outside the litigation context. Third, those who adhere rigidly to the requirements of the advocate's role as defined by the model and use it to avoid ethical responsibility for their acts are the cause of much of the criticism the profession draws from the public today. And finally, aside from the purely practical consequences, there is the moral issue. Consider the following quotation:

> [E]very man is, in an unofficial sense, by being a moral agent, a Judge of right and wrong, and an Advocate of what is right . . . . This general character of a moral agent, he cannot put off, by putting on any professional character . . . . If he mixes up his character as an Advocate, with his character as a Moral Agent . . . he acts immorally. He makes the Moral Rule subordinate to the Professional Rule. He sells to his Client, not only his skill and learning, but himself. He makes it the Supreme Object of his life to be, not a good man, but a successful Lawyer.[4]

This was written by an Englishman 143 years ago, but it sounds familiar to all of us today.

Given the obviously undesirable consequences of the adversary

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4. 1 W. WHEWELL, THE ELEMENTS OF MORALITY, INCLUDING POLITY 258-59 (1845), *quoted in* Luban, *supra* note 3, at 84.

system excuse for amoral conduct, can the theoretical justifications offered in support of the claims for the adversary system's moral authority withstand scrutiny? I think not. Time does not allow me to address more than one of these arguments. Let us consider the one probably most commonly used.

The claim is made that unless each party is served by a zealous advocate who is free of any ethical responsibility for his or her actions, the adversary system will not function properly because clients may be deprived of adequate representation. I accept this argument, but only in the context of criminal prosecutions. There it is true that if the defense lawyer is to make moral judgments about the results of successful representation of a client, rather than zealously pursuing victory, then many of those charged with crimes would be defenseless. When the full might of the state is arrayed against the individual in an attempt to deprive him or her of life or liberty, it is proper for a lawyer to act in the sole interest of the client without regard for the consequences of victory.

I do not think the validity of this justification rests on anything inherently moral in the adversary system. Instead, the justification is political in nature. It should always be difficult for the state to deprive anyone of life or liberty. Although we might not like to acknowledge it, the criminal defendant stands as a surrogate for us all in an unequal contest with the state.

This justification for the moral authority of the adversary role, however, is limited to criminal cases. It does not extend to civil litigation between private parties, much less to nonlitigation settings. In the context of civil litigation, the necessity for an advocate freed of ethical constraints is not nearly so clear. The goal of the adversary system in civil litigation is to determine the true state of the facts and give the parties that to which they are entitled under the law. But any observer of the system will concede that in civil litigation the adversary system does not always live up to its goal. It is not uncommon for lawyers, like everyone else in every other line of work, to be of unequal skill or diligence, or for their clients to have unequal economic resources to sustain the battle, or for the neutral party to be less than perfect in insight or knowledge of the law. Under these circumstances, it is hard to understand how the goal of determining truth and giving the parties that to which the law entitles them is served by adding a requirement for an amoral advocate. Such an advocate may only make the natural inequalities worse. For example, Spaulding did not receive damages for the aneurysm because the workings of the adversary

system kept the pertinent information from him and from the court that approved the settlement. To the extent that the system fails to discover the truth or permits one party to take more or less from the other than is rightfully due under the law, the system cannot claim that it results are proper in any grand moral sense, and the justification for amoral conduct by lawyers is lost.

If you take the time to examine other justifications offered for the supposed moral authority of the adversary system, you will find them similarly deficient.[5] But even if the adversary system could carry the claims for moral authority laid on it, it would not apply to much of what lawyers do outside the actual courtroom context. At least ninety percent of all civil cases are settled by negotiations between the parties; many other disputes are resolved without even contemplating litigation. Because the neutral judge or jury so necessary to the integrity of the adversary system model is absent from the processes that lead to these dispute resolutions, it is hard to understand how one can seek ethical shelter for acts done in these contexts by invoking the adversary system model.

I can only conclude, then, that the adversary system model lacks the moral authority the legal community usually assigns to it and that it certainly cannot warrant use of the adversary system excuse in many of the situations in which it seems to be commonly relied upon. Therefore, except when defending persons charged with crimes, I do not think you can legitimately take comfortable refuge behind the adversary system excuse to avoid the tough ethical issues you will confront in practice, and you cannot avoid moral responsibility for the choices you make for yourself and your clients.

I thought it was necessary for today's audience to address the claims of moral authority made for the adversary system. However, I frankly doubt very much that many lawyers have consciously thought about the problem and have affirmatively adopted the posture of an amoral technician only after having been persuaded by the strength of these claims. Yet I think any lawyer will acknowledge that lawyers often behave as though they have accepted these claims, as though they are sheltered by the adversary system excuse in virtually all they do. So how does this notion that the system frees lawyers from moral responsibility for their acts become so thoroughly ingrained in lawyers and the legal culture? For the answer, I think we must look to law school and the first years

5. *See, e.g.*, Luban, *supra* note 3, at 93-117.

of practice.

When I first entered law school, I thought that the education I was receiving was narrowing, was forcing me to think of all problems and all relationships between people only as various manifestations of legal principles. It also seemed odd to train myself to argue one position and then another with equal ease and without any substantial reference to what was just or fair. But after a while, the relativity of truth and the ability to separate personal ethics from legal analysis became second nature to me, as it is supposed to in law school. I assume that most law students go through the same process. During that process, they learn to separate personal ethical judgments from legal judgments. This mode of thinking is a necessary tool for a lawyer, but it should be obvious that it creates a natural environment for the adversary system excuse.

So we now have a law school graduate, already inclined to a certain analytical schizophrenia when ethical and legal issues become intertwined, who then moves into practice. How does that graduate learn to grapple with the ethical dilemmas presented by the adversary system? In my experience, most new lawyers do not sit down and deeply contemplate the ethical problems presented by the advocate's role, nor is the subject covered in any formal post-graduate education or training. Instead, any learning on the subject will be picked up almost subconsciously from the legal culture. Young lawyers take their cues, as I did, from other lawyers and from the pressures of practice. Both inevitably push you toward the shelter of the adversary system excuse. That is because the view that the lawyer is an amoral instrument is quite comfortable to those faced with the difficult issues and heavy pressures of the practice of law. Gradually, this attitude settles into place. Before long, the new graduate has unconsciously accepted the adversary system excuse and has incorporated it into his or her personality.

At this point, you may be rather discouraged. It may sound like I have been describing a virulent disease that permeates the legal culture, one from which there is no escape. There is no question that at least in its minor manifestations, the disease is widespread. But in its major forms, it is rather limited. Moreover, because it seems to be contracted subconsciously in most cases from the lawyer's surroundings, it can be escaped by *thinking*. That is the way good lawyers have escaped it over the years—by being sensitive to the ethical implications of what they do and by thinking

and talking the issues over with others, including their clients. You can do the same.

Although I cannot tell you how to resolve all the difficult questions you will face, there are some concrete suggestions I can give to assist you. First, watch out for the little problems. The questions of life and death, such as in the *Spaulding* case, would prompt any lawyer to think of larger ethical issues. But the smaller and more mundane issues encountered day to day may not. And I think that, over time, that is where lawyers often get led astray. The pressures to do what will help you win are great, both from within and from without. Hold those pressures at bay long enough to let yourself think about the ethical issues.

My second suggestion is to seek good role models. There are plenty of these in practice, men and women of integrity and principle who do resist the cultural pressures of the profession to become amoral instrumentalities. Look for lawyers who are respected for their fairness and integrity in dealing with others, lawyers who seek not to satisfy their own egos but to solve clients' problems. Listen to comments about the quality of a lawyer's *judgment*. My own experience is that those with reputations for good judgment are those who are true to their ethical selves, who transcend their role as an instrument and who become positive moral agents. Watch and learn from those people.

My third suggestion is to rely on your own good judgment. Do you remember how I described the dissonance that I, and probably many of you, felt when we first had to put aside our personal ethical judgments in law school to learn how to analyze legal issues? Remember that feeling now, and recapture the awareness of the dissonance. Now that you have learned the methods of legal thinking and analysis, refamiliarize yourself with those personal ethical standards you set aside three years ago. Integrate your newly found talents and powers into your larger ethical system.

In time, you will become more sure of your judgments and more aware of ethical issues when they present themselves. There will be few easy answers, but you will be a better lawyer for making the effort to remain true to yourself. And ultimately you will serve your clients better. Clients, after all, usually look to their lawyer for cues as to what they can and should expect from the legal system and their lawyer. Give them the proper message, raise the ethical issues with them, and you will find it relatively infrequent that a client persists in asking for something that you are uncomfortable doing.

I hope I have not sounded like an Old Testament Jeremiah today, but it seemed important to raise some issues with you that are not addressed often enough in law school and are seldom part of your training in the practice. I have confidence that with awareness, you will be able to avoid unthinking reliance on the adversary system excuse.

For those of you who may be wondering, Spaulding did survive. A doctor discovered the aneurysm while Spaulding was undergoing an induction physical.

Congratulations on your graduation. And enjoy the practice of law. It may be challenging, but it should also be fun.

Fairness Over Fortuity: Retroactivity Revisited and Revised

L. Anita Richardson & Leonard B. Mandell***

I. Introduction: Why Retroactivity?

The significance of a judicial opinion is not limited to the litigants before the court, particularly when the opinion is that of the United States Supreme Court construing the criminal rights amendments to the Constitution.[1] Often other litigants with claims identical to the claim the Court resolved will seek the advantage of

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* Assistant Corporation Counsel, City of Chicago, Illinois; J.D., Northern Illinois University College of Law, 1985; Ph.D., University of Nebraska, 1975; M.A., University of Nebraska, 1973; B.A., University of Missouri-Kansas City, 1971.

** Assistant Dean, Northern Illinois University College of Law; J.D., Boston College Law School, 1976; B.A., University of Connecticut, 1972.

1. The fourth, fifth, sixth, eighth, and fourteenth amendments are the criminal rights amendments. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The fifth amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id. amend. V. The sixth amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

Id. amend. VI. The eighth amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Id. amend. VIII. The fourteenth amendment provides:

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

Id. amend. XIV, § 1.

the new ruling. This advantage is obtained when the Court extends a ruling to those who, but for fortuitous circumstances,[2] might have been before the Court, thereby receiving the immediate benefit of the decision.

The Constitution does not speak to the retroactive[3] or prospective[4] application of Supreme Court decisions. It is the Court

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2. The Court has acknowledged that chance plays a major role in determining which cases it selects for review as well as when review is granted. For example, in Stovall v. Denno, 388 U.S. 293 (1967), the Court stated:

> Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. *But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making.*

Id. at 301 (footnote omitted; emphasis added); *see* passages quoted *infra* notes 294-95, 302. Neither the Court nor any of its members, however, have identified those "sound principles of decision-making" that would justify the cost of permitting chance to play the primary role in discriminating between defendants with the same constitutional grievances. *See infra* notes 257-92 and accompanying text.

3. A judicial opinion is retroactive when it applies new or modified law to cases originating prior to the law creating or law changing decision. A decision is fully retroactive if it extends to litigants in all prior cases in which the issue was raised, even though their cases are not before the court.

A decision may be retroactive to some litigants but not to others, creating retroactive dualism that is the subject of this Article. Retroactive dualism refers to the automatic application of law creating and law modifying decisions on matters of constitutional criminal law to all direct review defendants who preserved the issue, while generally denying retroactive application to collateral review defendants who also preserved the issue. In this context, direct review encompasses (1) the entire process of appellate review in state courts as provided by state law, and (2) discretionary review by the United States Supreme Court under a petition for writ of certiorari of a final state appellate court decision. *See* Linkletter v. Walker, 381 U.S. 618, 622 n.5 (1965).

4. There are two types of prospective application of judicial opinions. The first is pure prospectivity. A law creating or law modifying judicial opinion is purely prospective when it applies only to litigants whose cases or claims of error arise after the date of decision. When a decision is purely prospective, the issues before the court are adjudicated under prior, rather than changed, law.

The Supreme Court has given purely prospective effect to certain of its law creating and law modifying holdings. *See, e.g.*, Cipriona v. City of Houma, 395 U.S. 701 (1969) (civil case, decided on constitutional grounds, holding that provisions limiting who could vote in elections authorizing the issuance of revenue bonds violated the fourteenth amendment guarantee of equal protection, but further holding that its decision would not apply to invalidate an election already final under state law); Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (civil, nonconstitutional case, holding that certain changes to Mississippi's election laws violated the Voting Rights Act of 1965, but giving its holding purely prospective effect by declining to invalidate completed elections, including those before it); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964) (civil, nonconstitutional case, giving purely prospective effect to a decision announcing a new rule governing preservation of the right to return to federal court to litigate federal claims when the federal court initially abstained); James v. United States, 366 U.S. 213 (1961) (plurality opinion) (criminal case, arising under federal statutory law, giving purely prospective effect to a decision overruling

alone that makes this determination.[5] Historically, its decisions were retroactive as a matter of course.[6] This principle applied both to criminal and civil decisions.[7] Therefore, as a general rule, the Court's holdings creating or broadening constitutional rights available to criminal defendants extended retroactively to those defendants who had raised the same claim in other cases.[8] Retroactivity

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a prior decision that precluded prosecution for failure to report proceeds of embezzlement as taxable income).

An alternative to pure prospectivity is quasi-prospectivity, under which a law creating or law modifying holding is applied to the litigants before the court, but otherwise only to litigants whose cases or claimed errors arise after the date of the law changing decision. The Court has used the case or controversy requirement of article III, § 2 to justify quasi-prospectivity. *See Stovall*, 388 U.S. at 301. Under this rationale, the case or controversy requirement compels the Court to apply a law creating or law modifying decision at least to the benefit of the prevailing party. To ignore this requirement creates an anomaly: the Court withholding a remedy to the prevailing party even though presented within a concrete dispute that it fully adjudicated. It also creates a possible constitutional violation in that refusal to apply new law to the case generating it transforms the decision into an advisory opinion guiding only future adjudication that, under article III, is beyond the Court's jurisdiction. As pointed out earlier in this footnote, however, the case or controversy requirement has not stopped the Court from according purely prospective effect to certain of its holdings.

The Court has generally applied quasi-prospectivity rather than pure prospectivity. *See, e.g.*, Daniel v. Louisiana, 420 U.S. 31 (1975); Mackey v. United States, 401 U.S. 667 (1971) (plurality opinion); Williams v. United States, 401 U.S. 646 (1971) (plurality opinion); Desist v. United States, 394 U.S. 244 (1969) (plurality opinion); DeStefano v. Woods, 392 U.S. 631 (1968); *Stovall*, 388 U.S. at 293; Johnson v. New Jersey, 384 U.S. 719 (1966).

5. "[W]e believe that the Constitution neither prohibits nor requires retrospective effect." *Linkletter*, 381 U.S. at 629.

6. *See, e.g.*, Solem v. Stumes, 465 U.S. 638, 642 (1984) (noting that "a legal system based on precedent has a built-in presumption of retroactivity"); United States v. Johnson, 457 U.S. 537, 542 (1982).

7. *See Linkletter*, 381 U.S. at 627.

8. Reference here is to the fact that defendants ordinarily cannot take advantage of a retroactive holding unless they have raised the same issue later decided by the Court. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 84 (1977). This principle is merely an extension of the general rule that issues and errors that were not raised in lower court proceedings will not be considered by the Court. *See, e.g.*, Tacon v. Arizona, 410 U.S. 351, 352 (1973); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). Thus judicial retroactivity is circumscribed by various rules of criminal procedure governing preservation of errors. *See infra* notes 307-09 and accompanying text.

The effect of the common law rule of full judicial retroactivity may be more apparent than real because, in practice, common law principles of res judicata functioned to limit the retroactive impact of judicial decisions to direct review defendants. *See Mackey*, 401 U.S. at 677-84 (Harlan, J., concurring and dissenting) (explaining how retroactivity differs in the context of direct and collateral review); *Desist*, 394 U.S. at 258-61 (Harlan, J., dissenting) (same); Fay v. Noia, 372 U.S. 391, 448 (1963) (Harlan, J., dissenting) (noting that res judicata generally barred retroactive application of new decisions to collateral review defendants); *see also* Haddad, *The Finality Distinction in Supreme Court Retroactivity Analysis: An Inadequate Surrogate for Modification of the Scope of Federal Habeas Corpus*, 79 Nw. U.L. Rev. 1062, 1069 (1984). For the definition of "direct review" and "collateral review"

also applied to the Court's holdings fashioning the rules necessary to implement these constitutional rights.[9] These general principles, however, were superseded in 1965 by *Linkletter v. Walker*,[10] which concluded that the Court was free to determine the retroactive

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defendants, *see supra* note 3.

Res judicata bars future consideration of all claims and legal issues, constitutional or otherwise, that the parties litigated or could have litigated in a prior, and now final, proceeding. By definition, direct review defendants are the only defendants who have not litigated their alleged constitutional errors to finality. Also by definition, collateral review defendants are the only defendants who have litigated their claimed constitutional errors to finality. Thus, while the common law rule of full judicial retroactivity made the Court's constitutionally based law changing opinions technically available to all defendants, regardless of their direct review or collateral review status, res judicata operated to limit meaningful availability of these opinions to direct review defendants only.

The gloss of res judicata on the rule of full judicial retroactivity created a sub rosa system of differential, unequal treatment. Direct review defendants could secure the advantage of a favorable law changing decision, assuming the proper preservation of error, while collateral review defendants preserving the identical constitutional error were foreclosed by the bar of res judicata from the beneficial impact of the same decision. *See, e.g., Noia*, 372 U.S. at 259 (Harlan, J., dissenting). Res judicata in the context of retroactivity applied to defendants seeking collateral review under federal habeas corpus as well as to defendants seeking state habeas corpus or other state law post-conviction remedy.

The Court abolished this inequality of treatment in Brown v. Allen, 344 U.S. 443 (1953). In that case, the Court held that prior decisions of state courts on matters of federal constitutional law were not res judicata for a federal court sitting in collateral review pursuant to the federal habeas corpus statute. *Id.* at 458 (opinion of Reed, J.); *id.* at 506 (opinion of Frankfurter, J.); *see Desist*, 394 U.S. at 244 (Harlan, J., dissenting). After *Brown*, res judicata no longer precluded retroactive application of the Court's constitutionally based criminal law decisions to all defendants, regardless of their appellate status, who had raised and preserved as error the constitutional question later decided. Thus a final state court decision on a matter of federal constitutional law could be relitigated if the state court had rendered a decision incorrect in light of the Court's law creating or law changing holding. By removing the bar of res judicata as it relates to judicial retroactivity, *Brown* gave substance to the promise embodied in the common law rule of full judicial retroactivity. *But see* Stone v. Powell, 428 U.S. 465, 481-82, 494 (1976) (no federal habeas corpus review for alleged violations of fourth amendment when the state has provided full and fair opportunity to litigate claim). Removal of the bar of res judicata, together with the selective incorporation of many of the criminal rights amendments into the due process clause of the fourteenth amendment, led the Court into the morass of retroactive dualism. *See infra* text accompanying notes 57-85.

9. This Article focuses on the retroactive and prospective reach accorded to constitutionally based criminal rights and implementing rules. By constitutional criminal rights we mean the textual rights afforded defendants by the Constitution's criminal rights amendments, such as the fourth amendment prohibition against unreasonable search and seizure, and the fifth amendment privilege against self-incrimination. For the text of the criminal rights amendments, see *supra* note 1. By implementing rules, we mean those judicially crafted regulations or guidelines intended to secure textual rights. Illustrative of implementing rules are the fourth and fifth amendments' exclusionary rules under which evidence secured as a result of an unreasonable search or seizure or in violation of the privilege against self-incrimination cannot be used to prove the crime alleged.

10. 381 U.S. 618 (1965).

reach of its decisions as the circumstances of each case required.[11]

The Court's latest examination of the retroactivity of its opinions occurred in *Allen v. Hardy*[12] and *Griffith v. Kentucky*.[13] Both cases addressed the retroactive reach of *Batson v. Kentucky*.[14] In *Batson*, the Court held that a prosecutor's use of peremptory challenges to dismiss prospective jurors solely because of their race violates the equal protection clause.[15] The *Batson* Court did not address the retroactive reach of its decision;[16] that issue was decided in *Allen* and *Griffith*. In *Allen*, decided on a petition for certiorari and without benefit of briefs,[17] the Court held that *Batson* did not extend to defendants whose convictions were final at the time that decision was announced.[18] In *Griffith*, the Court held that *Batson* did extend to defendants whose cases were not final but were pending on direct review at the time of decision.[19]

Allen and *Griffith* embody the law as it currently stands with respect to the retroactive effect of the Court's opinions concerning the Constitution's criminal rights amendments and their implementing rules. *Allen*, in effect, crystallized a strong presumption against the retroactive operation of the Court's decisions to defendants whose convictions are final and subject to challenge only indirectly on collateral review.[20] *Griffith* established automatic retroactivity for defendants whose convictions are not final and remain subject to direct appellate attack.[21]

Allen and *Griffith* establish a direct-collateral review dichotomy in criminal law retroactivity. This Article traces the evolution of this dichotomy and challenges its validity on grounds that it is based solely on fortuity.[22] It is the authors' position that fairness should trump fortuity so that collateral review as well as direct review defendants receive the retroactive benefit of the Court's criminal law decisions.[23] According to this view, *Allen* was decided in-

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11. *Id.* at 629.
12. 478 U.S. 255 (1986).
13. 479 U.S. 314 (1987).
14. 476 U.S. 79 (1986).
15. *Id.* at 85.
16. *Id.* at 79.
17. *See Allen*, 478 U.S. at 261-62 (Marshall & Stevens, JJ., dissenting).
18. *Id.* at 257-58 (majority opinion).
19. *See Griffith*, 479 U.S. at 316.
20. *Allen*, 478 U.S. at 258-59.
21. *See Griffith*, 479 U.S. at 328.
22. A similar criticism was made in Beytagh, *Ten Years of Non-Retroactivity: A Critique and Proposal*, 61 VA. L. REV. 1557, 1599-1603 (1975).
23. *See infra* notes 293-311 and accompanying text.

correctly. Recently, the Court once again considered the retroactive operation of its criminal law decisions.[24] Unfortunately, the Court again held that *Batson* could not be applied retroactively to a collateral review defendent. The authors disagree, and urge the Court to reconsider the issue and hold, once and for all, that fairness and justice require abolition of the direct-collateral review dichotomy and warrant a rule of full retroactivity for all its criminal law decisions.

II. *Linkletter v. Walker*: Reconfiguring Judicial Retroactivity

The rule of full retroactivity for United States Supreme Court decisions was examined in depth for the first time in *Linkletter v. Walker*.[25] *Linkletter* addressed the retroactive application of the exclusionary rule announced in *Mapp v. Ohio*.[26] The *Mapp* Court held that evidence seized by state law enforcement officials in violation of the fourth amendment was inadmissible.[27] The petitioner in *Linkletter*, a criminal defendant, sought the retroactive benefit of the *Mapp* exclusionary rule despite the fact that his case had become final[28] prior to the *Mapp* decision.

The *Linkletter* Court began its analysis by acknowledging the common law principle of full retroactivity for judicial rulings, including its own.[29] The Court, however, held that retroactivity was not constitutionally required,[30] concluding that it could determine for itself the retroactive or prospective reach of it decisions.[31] To facilitate this choice, the Court promulgated a balancing test, weighing on a case-by-case basis[32] the prior history of the decision to be applied retroactively, its purpose, and the anticipated effect of its retroactive application.[33]

To appreciate the ultimate significance of the issue presented in *Linkletter*, it is important to understand the timing of the appeal and the nature of the benefit sought. *Linkletter* was before

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24. Teague v. Lane, 57 U.S.L.W. 4233 (U.S. Feb. 22, 1989).
25. 381 U.S. 618, 622-29 (1965).
26. 367 U.S. 643 (1961).
27. *Id.* at 655.
28. A case is final when "the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before [the] decision in *Mapp v. Ohio*." *Linkletter*, 381 U.S. at 622 n.5.
29. *Id.* at 622.
30. *Id.* at 629.
31. *Id.*
32. *Id.*
33. *Id.* at 629, 636.

the Court on denial of federal habeas corpus relief,[34] a form of limited collateral review available in federal court to ensure that a prisoner held under color of state law is held in accordance with federal law.[35] The collateral status of the petitioner's case in *Linkletter* was critical because the Court took as established that the exclusionary rule operated retroactively to the advantage of all defendants whose cases were pending on direct appellate review at the time *Mapp* was decided.[36] As to the nature of the benefit sought, the Court was not asked to extend a right explicitly set forth in the Constitution;[37] it was asked to extend a rule of criminal procedure crafted by the Court[38] to reinforce the prohibition against unreasonable searches and seizures. Moreover, the rule the Court was urged to apply retroactively was newly created. Prior to *Mapp*, illegally seized evidence was admissible.[39]

In light of these factors, the *Linkletter* Court enunciated a three-part test governing the retroactive operation of newly articulated constitutional rules of criminal procedure to defendants who already have received the benefit of direct appellate review. Under this test, the Court weighs the purpose of the new rule, the reliance placed on the prior rule, and the effect retroactive application of the new rule would have on the administration of justice.[40]

The *Linkletter* Court proceeded to identify the fundamental purposes served by constitutional rules of criminal procedure. One purpose concerns effectuating the truth-seeking function of trial. The Court observed that certain rules enhance the fairness of a trial and ensure that guilt is determined in strict accordance with law,[41] while other rules serve to deter constitutionally proscribed conduct on the part of law enforcement officials.[42] The Court em-

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34. *Id.* at 621.

35. The scope of federal habeas corpus review is defined as follows:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (1982).

36. *Linkletter*, 381 U.S. at 622 & n.4.

37. *Id.* at 630.

38. As to the judicially created nature of the exclusionary rule in the fourth amendment context, see, *e.g.*, Illinois v. Krull, 480 U.S. 340 (1987); United States v. Calandra, 414 U.S. 338, 348 (1974); *Mapp*, 367 U.S. at 648.

39. Wolf v. Colorado, 338 U.S. 25, 32 (1949) (overruled by Mapp v. Ohio, 367 U.S. 643 (1961)).

40. *See Linkletter*, 381 U.S. at 636.

41. *Id.* at 637-39 & n.20.

42. *Id.* at 636-37.

phasized that the exclusionary rule did not bear on the fairness of trial or the validity of its result.[43] Far from enhancing the truth-seeking function of trial, the exclusionary rule was intended to deter unlawful searches and seizures.[44] Indeed, the Court noted that deterrence was gained at the expense of excluding reliable and probative, although illegally obtained, evidence.[45] Acknowledging the constitutional necessity of deterring official illegality, the *Linkletter* Court nonetheless concluded that deterrence would not be furthered where law enforcement officials proceeded in legitimate reliance on *Wolf v. Colorado*,[46] a case extending the fourth amendment to the states, but expressly refusing to exclude evidence obtained by its violation.[47]

The *Linkletter* Court then examined the impact on the administration of justice if *Mapp* were applied retroactively to cases already final.[48] Here the Court expressed grave concern about the difficulty entailed in retrying defendants whose cases were long since closed solely because a procedural rule, unrelated to the fairness of trial or the accurate determination of guilt, was not applied at trial.[49] Because the exclusionary rule would not enhance "the very integrity of the fact-finding process"[50] but, if anything, would penalize reasonable law enforcement reliance at substantial cost to the administration of justice, the Court struck the balance against the retroactive operation of *Mapp* to collateral review defendants.[51]

A strong dissent by Justice Black, joined by Justice Douglas, focused on "the arbitrary and discriminatory nature of the judicial contrivance utilized here to break the promise of *Mapp* by keeping all people in jail who [were] unfortunate enough to have had their

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43. *Id.* at 637-38.

44. *Id.* at 636-37.

45. *Id.* at 638-39.

46. 338 U.S. 25 (1949).

47. *Id.* at 33. In *Linkletter*, the Court made explicit reference to law enforcement reliance on *Wolf*. "[T]he States relied on *Wolf* and followed its command." *Linkletter*, 381 U.S. at 637.

48. *See Linkletter*, 381 U.S. at 637-38.

49. The Court stated:

> Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice.

Id.

50. *Id.* at 639.

51. *See id.* at 639-40.

unconstitutional convictions affirmed before June 19, 1961 [(the date of the *Mapp* decision)]."[52] Justice Black sounded an oft-repeated dissenting theme.[53] Only the arbitrariness of fortuity controls which cases are final and which are pending on direct review when the Court announces a constitutional right or rule of criminal procedure.[54]

The sheer arbitrariness of distinguishing between direct review and collateral review defendants for purposes of retroactivity is the fundamental criticism of both the philosophy and the test of *Linkletter*. But in fairness it is important to remember that *Linkletter* embodies the Court's reaction to two dramatic lines of cases it was deciding contemporaneously with *Linkletter*. On the one hand, the Court was making incumbent on the states the guarantees of most of the Constitution's criminal rights amendments as well as the rules fashioned to secure those rights.[55] On the other hand, the Court was broadening the availability of federal habeas corpus relief by relaxing its procedural prerequisites.[56]

III. *Linkletter* IN PERSPECTIVE

Linkletter was decided June 7, 1965, substantially contemporaneous with the Court's expansive interpretation of the due process clause of the fourteenth amendment as incorporating many of the guarantees of the criminal rights amendments.[57] For example, four years prior to *Linkletter*, in *Mapp v. Ohio*,[58] the Court extended the exclusionary rule, a remedy for unreasonable searches and seizures, to the states.[59] Three years prior to *Linkletter*, in *Robinson v. California*,[60] the Court concluded that the eighth amendment prohibition against cruel and unusual punishment applied to the states through the due process clause.[61] Two years

52. *Id.* at 641 (Black & Douglas, JJ., dissenting).

53. *See, e.g.*, United States v. Peltier, 422 U.S. 531, 543 (1975) (Douglas, J., dissenting); Daniel v. Louisiana, 420 U.S. 31, 33-34 (1975) (Douglas, J., dissenting); Mackey v. United States, 401 U.S. 667, 713-14 (1971) (Douglas & Black, JJ., dissenting); Desist v. United States, 394 U.S. 244, 255-56 (1969) (Douglas, J., dissenting); Stovall v. Denno, 388 U.S. 293, 303-04 (1967) (Black, J., dissenting).

54. *See supra* note 2; *infra* notes 293-306 and accompanying text.

55. *See infra* notes 57-72 and accompanying text.

56. *See infra* notes 73-79 and accompanying text.

57. For the text of these amendments, see *supra* note 1.

58. 367 U.S. 643 (1961).

59. *Id.* at 655.

60. 370 U.S. 660 (1962).

61. *Id.* at 667.

prior to *Linkletter*, in *Gideon v. Wainwright*,[62] the Court held that the sixth amendment right to counsel at all felony trials was an element of due process that the states were obliged to honor.[63] One year prior to *Linkletter*, in *Malloy v. Hogan*,[64] the Court incorporated the fifth amendment privilege against self-incrimination into the due process clause.[65] *Malloy* was followed one week later by *Escobedo v. Illinois*,[66] in which the Court held that the sixth amendment right to counsel required that custodial defendants, whose request for an attorney has been refused, must be informed of their unconditional right to remain silent.[67]

These dramatic rulings were followed by others defining the precise scope of the states' new responsibilities in prosecuting criminal defendants. For example, in *Pointer v. Texas*,[68] decided just two months before *Linkletter*, the Court held that the sixth amendment right of cross-examination applied to the states through the due process clause.[69] In *Griffin v. California*,[70] decided less than two months before *Linkletter*, the Court concluded that the privilege against self-incrimination, as incorporated by the due process clause, preludes both prosecutorial comment on a defendant's silence and a jury instruction that such silence could support an inference of guilt.[71]

These decisions prompted major modifications in the process

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62. 372 U.S. 335 (1963).

63. *Id.*; *see also* Douglas v. California, 372 U.S. 353, 356-58 (1963) (a direct review case in which the Court, relying on Griffin v. Illinois, 361 U.S. 12 (1956) (plurality opinion), held that, when a state provides for an appeal as of right, equal protection requires that the state provide appellate counsel for indigent defendants); Eskridge v. Washington State Bd. of Prison Terms & Paroles, 357 U.S. 214, 216 (1958) (a case on review of denial of state law habeas corpus relief holding, again in reliance on *Griffin*, that, when a state provides an appeal as of right, equal protection requires that the appeal be meaningful regardless of ability to pay); Griffin v. Illinois, 351 U.S. 12, 18-20 (1956) (plurality opinion) (a case on review of denial of state law post-conviction relief holding that when an appeal raises issues going to the conduct of trial, a meaningful appeal may require the state to provide a free trial transcript to an indigent appellant). Although neither the *Douglas* nor the *Eskridge* Courts discussed the retroactive application of *Griffin*, the result in each case was reached in reliance on this case. Thus, reading these three cases together, it appears that *Griffin* was given full retroactive effect, even though at most retroactivity was an ancillary issue in these cases.

64. 378 U.S. 1 (1964).

65. *Id.* at 3, 8.

66. 378 U.S. 478 (1964).

67. *Id.* at 490-91.

68. 380 U.S. 400 (1965).

69. *Id.* at 406.

70. 380 U.S. 609 (1965).

71. *Id.* at 615.

by which states prosecuted criminal defendants. They were not the only source, however, of significant change. Also contemporaneous with *Linkletter* and selective incorporation of the Bill of Rights[72] was the substantial expansion of the availability of federal habeas corpus relief to state law defendants. The leading case is *Fay v. Noia*,[73] decided two years before *Linkletter*.

Noia was convicted of felony murder solely on the basis of his signed confession.[74] Noia could have appealed his conviction on grounds that his confession was coerced.[75] He chose not to do so because, if successful on appeal, any retrial might result in imposition of the death penalty.[76] After defaulting on his right of appeal, Noia sought federal habeas corpus relief. In affirming the grant of habeas relief, the *Noia* Court concluded that failure to prosecute an appeal could not serve as an adequate and independent state law procedural ground barring federal habeas corpus relief.[77] The Court also concluded that the exhaustion requirement of federal habeas corpus relief[78] only applies when avenues of state law re-

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72. "Incorporation" refers to the judicial theory that substantive and procedural due process, as provided by the fourteenth amendment, take meaning from all or portions of the first eight amendments to the Constitution. As a result, the obligations of the states to their citizens are defined in terms of those amendments, or specific provisions thereof, expressly incorporated into the due process clause.

There are three theories of incorporation. Partial incorporation is the dominant theory. Under this view, only certain rights set forth in the first eight amendments are included in the due process clause. These rights become part of the due process clause on a case-by-case basis. *See* Palko v. Connecticut, 302 U.S. 319, 323-25 (1937).

The other two theories of incorporation are total incorporation and incorporation plus. Under total incorporation, all rights set out in the first eight amendments are incorporated into the due process clause but no others. *See* Adamson v. California, 322 U.S. 46, 89 (1947) (Black, J., dissenting). Under incorporation plus, due process includes not only the rights articulated in the first eight amendments but additional rights established as circumstances and experience require. *Id.* at 124 (Murphy & Rutledge, JJ., dissenting). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 11-2 to -3 (1988).

73. 372 U.S. 391 (1963).

74. *Id.* at 395.

75. *Id.* at 395-98 & n.3.

76. *Id.* at 396-97 n.3, 439-40.

77. *Id.* at 399-400.

78. The exhaustion requirement is set out at 28 U.S.C. § 2254(b)-(c) (1982). Subsection (b) provides:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

Id. § 2254(b).

Subsection (c) provides: "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the

view remain open at the time the habeas petition is filed.[79] Thus, under *Noia*, state law defendants could secure habeas corpus relief even though they failed to follow state law procedures for asserting and preserving errors or defaulted on available state law remedies.[80]

Noia, in conjunction with selective incorporation, meant that state law defendants could seek federal habeas corpus relief each time another of the Constitution's criminal rights provisions was extended to the states and each time the Court fashioned a new rule to ensure full implementation of an incorporated right.[81] These two lines of authority had the effect of reopening state law convictions that were constitutional when rendered.[82] Because convicted defendants were held in violation of the Constitution, as newly construed, federal habeas corpus as a remedy for unlawful detention applied. Moreover, convicted defendants, who may have failed to preserve the newly decided issue as error or whose cases were final because all channels of direct review were exhausted or closed by default, could proceed under federal habeas corpus review to avail themselves of newly available rights or their implementing rules. Convicted defendants whose cases were pending on direct review could seek the immediate benefit of these decisions and, if unsuccessful, could seek their benefit collaterally on a petition for writ of habeas corpus.

Thus it appeared that large numbers of defendants, constitutionally convicted and incarcerated under the law as it existed prior to selective incorporation and *Noia*, would have to be released or retried with all that entailed for the administration of the

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right under the law of the State to raise, by any available procedure, the question presented." *Id.* § 2254(c).

79. *See Noia*, 372 U.S. at 434-35 & n.42.

80. *Id.* at 438-40.

81. *See id.* at 399-400, 426, 428-33. *Noia*, however, no longer controls the granting of federal habeas corpus relief. Under current Supreme Court authority, a defendant petitioning for habeas corpus relief must exhaust available state law remedies and preserve all claims of error or show cause and prejudice for failing to preserve. *See infra* notes 307-08.

82. *See Noia*, 372 U.S. at 410; Desist v. United States, 394 U.S. 244, 261 (1969) (Harlan, J., dissenting). In *Desist*, Justice Harlan noted:

> The conflict between retroactivity and finality only became of major importance with the Court's decision in *Fay v. Noia*. For the first time, it was there held that, at least in some instances, a habeas petitioner could successfully attack his conviction collaterally despite the fact that the "new" rule had not even been suggested in the original proceedings. Thus, *Noia* opened the door for large numbers of prisoners to relitigate their convictions each time a "new" constitutional rule was announced by this Court.

Id.

criminal justice systems throughout the fifty states.[83] Such a situation quickly raised the specter of prison doors opening wide to disgorge massive numbers of convicted felons into the community.[84]

Only prospective application of the Court's criminal law decisions could reduce the threat of retrials and alleviate the fear of mass release.[85] It was within this context that *Linkletter* was decided and within this context that *Linkletter* and its progeny take their meaning.

IV. Twenty Years of *Linkletter*: A Tortured Tale

Linkletter seemed to establish a rule of retroactivity governing both the Court's decisions construing the Constitution's criminal rights amendments and its decisions enunciating rules that implemented those rights. Such holdings were retroactive automatically to all cases pending on direct review, but would extend to cases already final only if the defendant could satisfy *Linkletter*'s three-part purpose, reliance, and effect test.[86] Thus there would be per se retroactivity as to direct review defendants and a rebuttable presumption against retroactivity for collateral review defendants. Appearances, however, can be deceiving. In actuality, it took the Court twenty-two years to announce the direct-collateral rule *Linkletter* suggested—twenty-two years to rearticulate a rule of criminal rights retroactivity that is as fundamentally arbitrary and indefensible today as it was in 1965. A guided tour of the Court's retroactivity jurisprudence illustrates why this conclusion is

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83. This point was recognized by the *Noia* Court: "More recently, further applications of the Fourteenth Amendment in state criminal proceedings have led the Court to find correspondingly more numerous occasions upon which federal habeas would lie." *Noia*, 372 U.S. at 410.

84. *See, e.g.*, Williams v. United States, 401 U.S. 646, 654-55 (1971); Stovall v. Denno, 388 U.S. 293, 300 (1967); Johnson v. New Jersey, 384 U.S. 719, 731-32 (1966).

85. As Justice Harlan noted:

> Today's decisions mark another milestone in the development of the Court's "retroactivity" doctrine, which came into being somewhat less than six years ago in *Linkletter v. Walker*. That doctrine was the product of the Court's disquietude with the impact of its fast-moving pace of constitutional innovation in the criminal field. Some members of the Court, and I have come to regret that I was among them, initially grasped this doctrine as a way of limiting the reach of decisions that seemed to them fundamentally unsound.

Mackey v. United States, 401 U.S. 667, 676 (1971) (Harlan, J., concurring and dissenting) (citation omitted); *see Desist*, 394 U.S. at 258 (Harlan, J., dissenting).

86. *Linkletter*, 381 U.S. at 629, 636; *see also* United States v. Johnson, 457 U.S. 537, 543 (1982) ("[A]fter *Linkletter* and *Shott*, it appeared that all newly declared constitutional rules of criminal procedure would apply retrospectively at least to judgments of conviction not yet final when the rule was established.").

inescapable.

The Court initially adhered to *Linkletter*'s direct-collateral distinction. For example, in *Tehan v. United States ex rel. Shott*,[87] decided one year after *Linkletter*, the Court was asked to apply the rule announced in *Griffin v. California*[88] retroactively to collateral review defendants. In *Griffin*, the Court held that the privilege against self-incrimination is violated when either the prosecution or the court comments on the fact that the defendant remained silent.[89] The *Tehan* Court invoked *Linkletter*'s purpose, reliance, and effect rationale to hold that collateral review retroactivity would neither appreciably enhance the truth-seeking function of trial so as to overcome official reliance on the law as it stood prior to *Griffin*, nor compensate for the adverse consequences of retrying cases long since final.[90]

As will become apparent, the Court developed a veritable litany to decline collateral review retroactivity to most of its decisions concerning criminal rights and their implementing rules. Like clockwork, the Court would define purpose solely in terms of the truth-seeking role of trial and strike the balance against collateral review retroactivity because of the minimal contribution to truth-seeking when weighed against law enforcement reliance and the specter of retrials.

So seductive was the purpose, reliance, and effect test, particularly the definition of purpose as the pursuit of truth, that the Court altogether abandoned *Linkletter*'s direct-collateral review dichotomy and its implied rule of automatic direct review retroactivity. There followed several cases in which some of the most controversial of the Court's decisions were applied quasi-prospectively; that is, to the litigants before it and, otherwise, only to litigants in future cases. For example, in *Johnson v. New Jersey*,[91] the Court held that *Escobedo v. Illinois*[92] and *Miranda v. Arizona*[93] would apply quasi-prospectively to trials beginning after the dates of those decisions.[94] On the facts presented in *Johnson*, the Court im-

87. 382 U.S. 406 (1966).

88. 380 U.S. 609 (1965). *Griffin* applied retroactively to direct review defendants. *See* O'Connor v. Ohio, 382 U.S. 286 (1965).

89. *See Shott*, 382 U.S. at 407.

90. *See id.* at 413-20.

91. 384 U.S. 719 (1966).

92. 378 U.S. 478 (1964).

93. 384 U.S. 436 (1966).

94. *Johnson*, 384 U.S. at 734-35. The limitation in *Johnson* was extended to retrials in Jenkins v. Delaware, 395 U.S. 213 (1969). In *Jenkins*, the Court concluded that the rules

plied that reliable, probative evidence, which clearly facilitates the guilt determination process, could be lost under *Escobedo* and *Miranda*.[95] For the *Johnson* Court, this risk was unacceptable, especially given the availability of due process to challenge the use of any incriminating statement as involuntary or coerced.[96] Because *Escobedo* and *Miranda* fashioned rules insufficiently related to truth and the validity of verdicts,[97] law enforcement reliance on pre-*Escobedo* and pre-*Miranda* law, coupled with the substantial likelihood of large numbers of retrials for both direct review and collateral review defendants,[98] made retroactivity beyond the immediate litigants unacceptable.

The Court's abandonment of *Linkletter*'s direct-collateral dichotomy and its romance with the truth-seeking purpose of trial continued along two separate tracks. In the first line of cases, the Court continued to give only quasi-prospective effect to many of its criminal rights holdings, and its decisions crafting rules implementing those rights, whenever it concluded that the reliability of trial would be advanced only minimally, while reliance on prior law was reasonable, and large numbers of retrials were likely. Under

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announced in *Escobedo* and *Miranda* did not apply to a defendant's retrial commencing after the date of those decisions if the defendant's original trial occurred before those decisions were announced. *See id.* at 221-22. Having already established in *Johnson* that *Escobedo* and *Miranda* were not central to the truth-seeking function of trial, the *Jenkins* Court focused on law enforcement reliance and the costs occasioned by the loss of evidence during retrial. *See id.* at 218-21. The Court held that those factors warranted the quasi-prospective operation of *Escobedo* and *Miranda* to a defendant's retrial if his first trial occurred prior to those decisions. *See id.* at 221-22.

95. *See Johnson*, 384 U.S. at 724-25. For example, during closing statements to the jury, lawyers for both defendants stated that their clients' confessions were true. *Id.*

96. *Id.* at 730-31; *see also* Jackson v. Denno, 378 U.S. 368, 376 (1964); Michigan v. Payne, 412 U.S. 47, 50-51 (1973); Stovall v. Denno, 388 U.S. 293, 299 (1967) (relying on the availability of a due process argument to justify the quasi-prospective effect given to United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), both holding that the pretrial identification of a defendant without counsel present violated the sixth amendment right to counsel). The *Stovall* Court noted: "[I]t remains open to all persons to allege and prove, as Stovall attempts to do in this case, that the confrontation resulted in such unfairness that it infringed his right to due process of law." *Stovall*, 388 U.S. at 299.

97. *See Johnson*, 384 U.S. at 729-30. The *Johnson* Court noted:

> We are thus concerned with a question of *probabilities* and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial . . . . [W]hile *Escobedo* and *Miranda* guard against the possibility of unreliable statements in every instance of in-custody interrogation, *they encompass situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion.*

Id. (emphasis added).

98. *Id.* at 732-33, 735.

this rationale, in *Stovall v. Denno*,[99] the Court gave quasi-prospective effect to its holdings in *United States v. Wade*[100] and *Gilbert v. California*[101] that pretrial identifications in the absence of counsel violated the right to counsel.[102] Similarly, finding that the truth-seeking function of trial was not enhanced sufficiently to outweigh legitimate reliance and the negative impact on the administration of justice, the Court, in *DeStefano v. Woods*,[103] applied quasi-prospectively its decisions in *Duncan v. Louisiana*[104] and *Bloom v. Illinois*,[105] under which the right to trial by jury was extended to serious criminal cases.[106] In *Desist v. United States*,[107] the Court employed an identical analysis to accord quasi-prospective application to its decision in *Katz v. United States*,[108] which held that electronic surveillance is a search for purposes of the fourth amendment.[109]

This trend continued in *Williams v. United States*.[110] In *Williams*, the Court again concluded that truth-seeking was advanced insufficiently to overcome legitimate reliance on prior law and the

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99. 388 U.S. 293 (1967).

100. 388 U.S. 218 (1967).

101. 388 U.S. 263 (1967).

102. *See Wade*, 388 U.S. at 235-38; *Gilbert*, 388 U.S. at 272.

The *Stovall* Court ruled that *Wade* and *Gilbert* applied only to identifications occurring after June 12, 1967, the date of those decisions. "We recognize that *Wade* and *Gilbert* are, therefore, the only victims of pretrial confrontations in the absence of counsel to have the benefit of the rules established in their cases." *Stovall*, 388 U.S. at 300-01.

103. 392 U.S. 631 (1968).

104. 391 U.S. 145 (1968).

105. 391 U.S. 194 (1968).

106. *See DeStefano*, 392 U.S. at 633. However, in Brown v. Louisiana, 447 U.S. 323, 334-37 (1980), another trial-by-jury case, the Court seemed to reach a very different result. In *Brown*, the Court appeared to conclude that the holding of Burch v. Louisiana, 441 U.S. 130 (1979), was fully retroactive. *Burch* held that a conviction for a non-petty criminal offense by a non-unanimous six-person jury violates the sixth amendment right to a jury trial. *Id.* at 134. Although the *Brown* Court did not use the words "fully retroactive," its language and reasoning would appear to leave no doubt that the Court believed and intended its decision to be fully retroactive. *See Brown*, 447 U.S. at 334-35 & n.13; *see also* Bourgeois v. Whitley, 784 F.2d 718, 720 n.1 (5th Cir. 1986) (granting habeas corpus relief by treating *Burch* as fully retroactive).

The *Duncan* Court held that the states must afford a trial by jury, on request, in serious criminal cases. *See Duncan*, 391 U.S. at 161-62. In *Bloom*, the Court held that the right to trial by jury also applies to prosecutions for serious criminal contempt. *See Bloom*, 391 U.S. at 208-11.

107. 394 U.S. 244 (1969).

108. 389 U.S. 347 (1967).

109. *Id.* at 353. The *Desist* Court ruled that *Katz* applied only to cases in which the state seeks to introduce evidence gained by electronic surveillance after December 18, 1967, the date of the *Katz* opinion. *See Desist*, 394 U.S. at 254.

110. 401 U.S. 646 (1971).

threat that large numbers of retrials posed to the operation of the nation's criminal justice systems.[111] *Williams* gave quasi-prospective effect to *Chimel v. California*,[112] which limited the permissible scope of a search incident to arrest.[113] In *Daniel v. Louisiana*,[114] the Court used identical reasoning to accord quasi-prospective effect to *Taylor v. Louisiana*,[115] which held the right to trial by jury required a jury drawn from a fair cross-section of the community.[116] Similarly, in *Michigan v. Payne*,[117] the Court accorded only quasi-prospective effect to its holding in *North Carolina v. Pearce*,[118] which enunciated procedures governing sentencing when a defendant, who succeeds in overturning his conviction on appeal, is retried, again convicted, and given a harsher sentence than was imposed on the first conviction.[119] Further, in *Gosa v. Mayden*,[120]

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111. *Id.* at 656.

112. 395 U.S. 752 (1969).

113. *Id.* at 766, 768. The *Williams* Court held that the *Chimel* rule governed only those searches and seizures occurring after June 23, 1969, the date on which *Chimel* was decided. *See Williams*, 401 U.S. at 656.

114. 420 U.S. 31, 32-33 (1975).

115. 419 U.S. 522 (1975).

116. *See Taylor*, 419 U.S. at 553. The *Daniel* Court concluded that the fair cross-section requirement of *Taylor* governed only convictions rendered by juries empaneled after January 21, 1975, the date of the *Taylor* opinion. *See Daniel*, 420 U.S. at 32.

117. 412 U.S. 47 (1973).

118. 395 U.S. 711 (1969).

119. The *Pearce* Court found no constitutional barrier to the imposition of a harsher sentence after conviction on retrial. *See id.* at 723. The Court concluded, however, that the harsher sentence must be predicated on a record clearly containing "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id.* at 726.

Payne's analysis of the retroactive or prospective reach of *Pearce* was somewhat novel. First, in applying the purpose prong of the *Linkletter* test, the *Payne* Court acknowledged that the issues involved in the sentencing of a defendant, after the defendant has prevailed on appeal, implicated the integrity of the sentencing process. *See Payne*, 412 U.S. at 52-54. Here the Court, in essence, recognized that values other than truth warrant serious attention. A few years earlier, this same value was the basis of the fully retroactive holding in Witherspoon v. Illinois, 391 U.S. 510 (1968). *See infra* note 160. Second, the *Payne* Court was considering judicial, rather than law enforcement, conduct. On this point, the Court accorded great weight to reasonable judicial reliance on prior law, especially in light of the fact that "[j]udicial impropriety in resentencing process, . . . surely is not a common practice." *Payne*, 412 U.S. at 54. In the end, sentencing integrity was outweighed by reasonable judicial reliance and also by the Court's concern for the disabling impact of new sentencing hearings on the administration of justice in the event the sentencing record did not reflect a proper basis for a harsher sentence on retrial. *See id.* at 56-57. In further support of its decision, the Court noted that due process prohibits imposition of a harsher sentence after retrial in retaliation for an earlier successful appeal. *See id.* at 50. Thus due process stands as an ever-ready basis to attack the sentence on retrial. The Court reasoned, therefore, that refusing retroactivity to *Pearce* would not deny relief to a defendant whose sentence on retrial was based solely or predominantly on his success in a prior appeal. *See id.* at 54.

the Court afforded quasi-prospective operation to *O'Callahan v. Parker*,[121] which held that military personnel accused of nonservice-related crimes are entitled to grand jury indictment and a civilian trial.[122] The plurality in *Gosa* stressed that the decision in *O'Callahan* was not intended, and did not function, as a remedy to a perceived "defect in the truth-determining process in the military trial."[123] The *Gosa* Court also emphasized the military's reasonable and long-standing reliance on prior law[124] and expressed great concern that giving full retroactive effect to *O'Callahan* would invalidate numerous convictions.[125] Also, in *United States v. Peltier*,[126] the Court gave quasi-prospective application to its decision in *Almeida-Sanchez v. United States*,[127] which invalidated the search of an automobile by the Border Patrol without a warrant or probable cause.[128] In so holding, the *Peltier* Court concluded that the integrity of trial as a truth-seeking forum was not implicated by its decision in *Almeida-Sanchez*, while law enforcement reliance on prior law was both substantial and reasonable.[129]

In a parallel line of cases, the Court focused almost exclusively on the truth-seeking function of trial. If the Court concluded that a constitutionally based criminal right or implementing rule went to the heart of the truth-seeking function, the right or rule was accorded full retroactive effect. Full retroactivity was automatic without any analysis of law enforcement reliance or any consideration of the burdens posed by retrials on the operation of criminal justice systems. For example, the Court accorded full retroactive effect to *Malloy v. Hogan*,[130] which incorporated the privilege

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120. 413 U.S. 665, 685 (1973).

121. 395 U.S. 258 (1969). Even though this case subsequently was overruled, *see* Solario v. United States, 107 S. Ct. 2924 (1987), its retroactivity analysis still holds true.

122. *Id.* at 273-74.

123. *Gosa*, 413 U.S. at 682.

124. *Id.*

125. *Id.* at 683.

126. 422 U.S. 531, 534 (1975).

127. 413 U.S. 266 (1973).

128. *Id.* at 269-72.

129. *Peltier*, 422 U.S. at 537-41. *Peltier* was before the Court on direct review. The Court's refusal to accord retroactive effect to direct review defendants, however, also extends to collateral review defendants. Under *Linkletter* and its progeny, direct review defendants are treated more favorably than their collateral review counterparts. Direct review defendants more often receive the benefit of a law changing decision than do collateral review defendants. When the Court denies retroactive effect to the favorably treated class of direct review defendants, it must deny that effect to collateral review defendants.

130. 378 U.S. 1 (1964). The Court has treated *Malloy* as fully retroactive. *See* Miranda v. Arizona, 384 U.S. 463, 464-65 (1966); Stevens v. Marks, 383 U.S. 234, 238 n.4 (1966).

against self-incrimination into the due process clause.[131] Similarly, in *Roberts v. Russell*,[132] the Court accorded full retroactive effect to *Bruton v. United States*,[133] which held that the confession of a nontestifying codefendant could not be admitted at a joint trial, even with a limiting instruction that the jury could use the confession only against the confessing codefendant and not against the nonconfessing codefendant.[134] According to the *Bruton* Court, the likelihood that the jury would disregard or forget the limiting instruction and use the confession against all codefendants significantly jeopardized the trial as a forum for ascertaining truth and accurately determining guilt or innocence.[135] Because the very integrity of trial and verdict were threatened, the *Roberts* Court held that full retroactivity was warranted without further analysis.[136]

Enhancing truth was again the rationale in *Berger v. California*.[137] The *Berger*[138] Court made its decision in *Barber v. Page*[139] fully retroactive. In *Barber*, the Court held the right to confront witnesses prohibits the admission at trial of preliminary hearing testimony unless the prosecution made a good faith attempt to secure the witness' presence at trial.[140] Likewise, the Supreme Court consistently accorded full retroactivity to its right-to-counsel cases.[141] Additionally, in *Ivan V. v. City of New York*,[142] the Court

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131. *See Malloy*, 378 U.S. at 3, 6.
132. 392 U.S. 293 (1968).
133. 391 U.S. 123 (1968).
134. *Id.* at 136-37.
135. *Id.* at 135-36.
136. *Roberts*, 392 U.S. at 295.
137. 393 U.S. 314 (1969).
138. *Id.* at 315.
139. 390 U.S. 719 (1968).
140. *Id.* at 724-26.
141. *See* Berry v. City of Cincinnati, 414 U.S. 29, 29 (1973) (a collateral review case on denial of state habeas corpus relief in which the Court gave full retroactive effect to its holding in Argersinger v. Hamlin, 407 U.S. 25, 37 (1972), that no person may be imprisoned for any offense unless represented by counsel during trial); Kitchens v. Smith, 401 U.S. 847, 847 (1971) (a collateral review case on denial of state habeas corpus relief in which the Court accorded full retroactive effect to its holding that a defendant who pleads guilty must be represented by counsel at the time his plea is entered); Arsenault v. Massachusetts, 393 U.S. 5, 6 (1968) (a collateral review case from denial of state post-conviction relief in which the Court accorded full retroactive effect to its holding in White v. Maryland, 373 U.S. 59, 60 (1963), that a plea of guilty to a capital offense, entered during a preliminary hearing and without benefit of counsel, cannot be introduced at trial); McConnel v. Rhay, 393 U.S. 2, 3-4 (1968) (a collateral review case from denial of state habeas corpus relief in which the Court gave full retroactive reach to its decision in Mempa v. Rhay, 389 U.S. 128, 137 (1967), that counsel must be provided during a probation revocation hearing where incarceration is the penalty if probation is revoked). Further, the Supreme Court has held repeatedly that its decision in Gideon v. Wainwright, 372 U.S. 335, 342 (1963), incorporating the sixth amend-

concluded that full retroactivity[143] was appropriate for its decision in *In re Winship*.[144] The *Winship* Court held that due process required that guilt be established beyond a reasonable doubt in an adjudication of delinquency.[145] In holding *Winship* fully retroactive, the *Ivan V.* Court stressed that the reasonable doubt standard of guilt goes to the very heart of trial as a forum for ascertaining guilt or innocence.[146] The *Ivan V.* Court made it clear that once a right or implementing rule squarely implicates the validity of trial, retroactivity follows as a matter of law.[147] Further fostering the truth-seeking function of trial, the Court, in *Hankerson v. North Carolina*,[148] accorded full retroactivity[149] to *Mullaney v. Wilber*,[150] which held the prosecution must prove each element of the crime charged beyond a reasonable doubt, including state of mind.[151]

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ment right to counsel into the due process clause of the fourteenth amendment, is fully retroactive. *See, e.g., Kitchens*, 401 U.S. at 847; *Arsenault*, 393 U.S. at 6; Burgett v. Texas, 389 U.S. 109, 114 (1967). *Contra* Adams v. Illinois, 405 U.S. 278, 281-83 (1972) (plurality opinion) (giving only quasi-prospective effect to Coleman v. Alabama, 399 U.S. 1, 9-10 (1970) (plurality opinion), which held that an accused is entitled to counsel at a preliminary hearing). In concluding that the *Coleman* holding applied only to preliminary hearings occurring after the date of the *Coleman* opinion, the *Adams* Court reasoned that the presence of counsel at a preliminary hearing insufficiently implicated the truth ascertaining purpose of trial and, thus, did not warrant full retroactivity. *See id.* at 282. Applying the *Linkletter* test, the Court concluded that law enforcement reliance and due regard for the effective administration of justice counseled for the quasi-prospective application of the *Coleman* decision. *Id.* at 283-84.

142. 407 U.S. 203 (1972).

143. *Id.* at 205.

144. 397 U.S. 358 (1970).

145. *Id.* at 364.

146. *See Ivan V.*, 407 U.S. at 204-05.

147. *Id.*

148. 432 U.S. 233 (1977).

149. *Id.* at 243-44.

150. 421 U.S. 684 (1975).

151. *Id.* at 704. The latest retroactivity case, Yates v. Aiken, 108 S. Ct. 534 (1988), concerns a variation of *Mullaney* and its progeny, Sandstrom v. Montana, 442 U.S. 510 (1979), and Francis v. Franklin, 471 U.S. 307 (1985). In *Sandstrom*, a unanimous Court held that due process prohibits the use of jury instructions that, as construed by a reasonable jury, create a presumption having the effect of relieving the prosecution of its burden of proof on the issue of intent. *See Sandstrom*, 442 U.S. at 524. In *Francis*, the Court followed *Mullaney* and *Sandstrom* to hold due process forbids jury instructions that, when taken as a whole, have the effect of creating a mandatory rebuttable presumption relieving the prosecution of its constitutional obligation of proving state of mind beyond a reasonable doubt. *See Francis*, 471 U.S. at 313, 317, 326. *Mullaney* and *Sandstrom* were decided before *Yates* was tried; *Francis* was decided after his conviction was final.

Yates sought state, and later federal, habeas corpus relief on grounds that his jury was instructed in violation of *Sandstrom* and *Francis*. His jury was instructed " 'that malice is implied or presumed from the use of a deadly weapon.' " *Yates*, 108 S. Ct. at 535 (quoting

The Court's emphasis on the truth-seeking function of trial as dispositive of the retroactivity-prospectivity question has obscured a third line of cases. Under this line, full retroactivity is accorded to substantive rights that have the effect of barring either conviction or punishment.[152] To illustrate, both *Stewart v. Massachu-*

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jury instructions).

A unanimous Court concluded that *Francis'* reaffirmation of *Mullaney* and *Sandstrom* operated retroactively to invalidate Yates' conviction and death sentence for felony murder and armed robbery. *Id.* at 534. The *Yates* Court predicated its decision on the familiar rule, *see* United States v. Johnson, 457 U.S. 537, 549 (1982), that retroactivity is automatic when the decision to be applied retroactively is not, in fact, new law but rather is settled law applied to new or different facts. *Yates*, 108 S. Ct. at 537-38. *Yates*, therefore, is not directly relevant to the issues addressed in this Article, which concern the retroactive reach accorded to unanticipated law creating or law changing decisions.

152. *See, e.g.*, James v. United States, 366 U.S. 213, 221-22 (1961). In *James*, the defendant was convicted of failing to report embezzled funds as gross income for the year in which the funds were embezzled. *Id.* at 214. The conviction and its affirmance conflicted with the Court's prior holding in Commissioner v. Wilcox, 327 U.S. 404, 408 (1946), under which embezzled funds were not subject to the aforementioned reporting requirement. The *James* Court, however, overruled *Wilcox*, thereby approving criminal prosecutions for failure to report embezzled funds. *See James*, 366 U.S. at 221. A plurality of the Court declined to apply its overruling decision to those "who might have relied on it." *Id. James* was given purely prospective effect so that the defendant's conviction was invalidated under prior, but overruled, law.

The Supreme Court has shown similar solicitude for defendants in giving full retroactive reach to overruling decisions that have the effect of invalidating the legal basis for earlier convictions. An example involves certain registration and taxation provisions of the Internal Revenue Code that require gamblers to register and pay various taxes, including an occupational tax. Not infrequently, information obtained through compliance with these provisions is used to convict those who register and pay the related taxes for violating federal and state laws prohibiting gambling. In two cases, United States v. Lewis, 348 U.S. 419, 421-22 (1955), and United States v. Kahriger, 345 U.S. 22, 32-33 (1952), the Court held that registering as a gambler and paying the gambling occupation tax did not require the individual to incriminate himself. The *Lewis* and *Kahriger* Courts further held that the privilege could not be asserted as a defense in a prosecution for failure to register and pay the tax. In 1968, the Court reached the opposite result in Marchetti v. United States, 390 U.S. 39, 54 (1968), and overruled *Lewis* and *Kahriger*. *See* Grosso v. United States, 390 U.S. 62, 66-69 (1968) (concluding that payment of the gambling excise tax requires the payor to give information that could be incriminating, and therefore the privilege could be asserted as a defense to a prosecution for failure to pay the excise tax).

Three years later, in 1971, United States v. United States Coin & Currency, 401 U.S. 715, 722 (1971), presented the issue of whether *Marchetti* and *Grosso* would apply retroactively to invalidate convictions rendered under the overruled cases. The defendant in *United States Coin* had been convicted for failing to register as a gambler and for failing to pay various gambling taxes. The government then sought forfeiture of funds in the defendant's possession when he was arrested. *Id.* at 716. The Court concluded that forfeiture was a punishment for failing to register and pay taxes that, under *Marchetti* and *Grosso*, was conduct that could not be punished. *Id.* at 723-24. The Court held that the privilege against self-incrimination precluded forfeiture for the same reasons and to the same extent as it precluded prosecution for the underlying conduct. *Id.* The Court then held that its decision was fully retroactive because "the conduct being penalized is constitutionally immune from

setts[153] and *Moore v. Illinois*[154] gave full retroactivity to the holding in *Furman v. Georgia*.[155] *Furman* invalidated the arbitrary imposition of the death penalty based on the eighth amendment substantive right to be free from cruel and unusual punishment. Similarly, in *Robinson v. Neil*,[156] the Court accorded full retroactivity[157] to *Waller v. Florida*,[158] which held the eighth amendment prohibition against double jeopardy precluded separate trials by a municipality and the state for the same essential offense.[159]

Anyone following the Supreme Court's retroactivity jurisprudence in these cases would be justified in concluding that the *Lin-*

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punishment." *Id.* at 724.

The Court reached the opposite result in Mackey v. United States, 401 U.S. 667, 674-75 (1971), decided the same day as *United States Coin*. The plurality in *Mackey* accorded only quasi-prospective effect to *Marchetti* and *Grosso* insofar as these cases preclude introducing evidence gained from a gambler's compliance with federal law requiring him to register and pay certain taxes. *Id.* at 675. Accordingly, *Marchetti* and *Grosso* were unavailable to defendants whose prosecutions occurred before the date of those decisions.

The conflicting results on the retroactive-prospective reach of *Marchetti* and *Grosso* can be explained, in part, by the facts of *Mackey*. The defendant in *Mackey* did not fail to register and pay certain taxes. Instead, he filed both wagering tax returns and income tax returns. The income tax returns, however, understated the defendant's income when compared to the wagering tax returns. Both returns were admitted into evidence, and the defendant was convicted of filing fraudulent income tax returns. *Id.* at 668-69.

The nature of the conviction is significant. Unlike the convictions in *Marchetti* and *Grosso*, Mackey was convicted for conduct that did not implicate the privilege against self-incrimination. Unlike filing forms specifically related to gambling, the filing of income tax returns does not compel the filing party to provide potentially incriminatory material. The mere fact that the wagering tax returns in Mackey's case may have contained incriminatory material leading to his conviction for filing fraudulent income tax returns did not mean that he was punished, as were the defendants in *Marchetti* and *Grosso*, for failure to comply with certain statutory requirements when compliance itself is incriminating.

The *Mackey* Court, however, did not distinguish *Mackey* and *United States Coin*. Instead, the Court observed that the defendant did not attack the veracity of the challenged evidence. *Id.* at 674-75. Because neither the veracity of the wagering tax return nor the resulting verdict were challenged in *Mackey*, the Court was able to return to its preoccupation with the truth-seeking function of trial. The minimal contribution of *Marchetti* and *Grosso* "to the accuracy of the results of past trials, the purposes of those decisions are adequately served by prospective application." *Id.* at 675.

153. 408 U.S. 845 (1972).

154. 408 U.S. 786, 800 (1972).

155. 408 U.S. 238, 240-41 (1972).

156. 409 U.S. 505 (1973).

157. *Id.* at 511.

158. 397 U.S. 387 (1970). The Court previously held that the eighth amendment prohibition against double jeopardy applied to the states through the due process clause of the fourteenth amendment. *See* Benton v. Maryland, 355 U.S. 784, 794 (1969). *Benton* provides the constitutional foundation for both *Waller*, a direct review case, and *Robinson*, a collateral review case. Therefore, *Waller* and *Robinson* make clear that *Benton* was fully retroactive.

159. *Waller*, 397 U.S. at 395.

kletter direct-collateral dichotomy for determining retroactivity was superseded by an analysis that looks only to the role of a criminal right or implementing rule in facilitating the truth-seeking function of trial and ensuring the validity of its verdict. If truth-seeking is enhanced, full retroactivity follows. If not, the Court turns to the second and third elements of the *Linkletter* test: legitimacy of law enforcement reliance on prior law and the likely impact of retroactivity on the operation of criminal justice systems.[160] The resulting balance almost invariably favors the quasi-prospective application of the right or rule at issue.[161] By making the truth-seeking function of trial the critical line of demarcation between retroactivity and prospectivity, the Court had isolated a factor that, regardless of its narrowness,[162] focuses the inquiry on a

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160. *See* Linkletter v. Walker, 381 U.S. 618, 637-38 (1964). Witherspoon v. Illinois, 391 U.S. 510 (1968), is the only case of which the authors are aware in which the Court applied *Linkletter*'s purpose, reliance, and effect test to accord full retroactive effect to a holding, even though the issue decided did not implicate the truth-seeking function of trial. In *Witherspoon*, the Court held that the right to trail by a fairly constituted jury is violated when the state excludes from capital juries all prospective jurors expressing conscientious or religious scruples regarding imposition of the death penalty. *Id.* at 522-23. The *Witherspoon* Court concluded:

> [T]he jury-selection standards employed here necessarily undermined "the very integrity of the . . . process" that decided petitioner's fate, and we have concluded that neither reliance of law enforcement officials, nor the impact of a retroactive holding on the administration of justice warrants a decision against the fully retroactive application of the holding we announce today.

Id. at 523 n.22 (citations omitted).

161. Justice Marshall pointedly recognized this impossibility in his dissenting opinion in Michigan v. Payne, 412 U.S. 47 (1973). He observed that

> [there is] little point in forcing lower courts to flounder without substantial guidance in the morass of our cases, by informing them that they are to apply a balancing test, *when in fact it invariably occurs that the balancing test results in holdings of nonretroactivity. Furthermore, it demeans this Court to pretend to consider a variety of factors if, no matter how those factors are arrayed, the result is predetermined.*

Id. at 62 (Marshall, J., dissenting) (emphasis added).

162. The Court's preoccupation with the truth-seeking function of trial deflects attention from other values equally significant in dispensing justice. As a result, the retroactive-prospective decision is seldom made in terms of whether or not it will advance other desirable interests. On occasion, however, the Court has made its retroactive-prospective choice in terms of other values. For example, enhancing the integrity of capital sentencing served as the basis for the Court's fully retroactive decisions in *Witherspoon* and *Furman*. In *Witherspoon*, the Court held that, in selecting jurors who would impose sentence on a defendant convicted of a capital offense, the state could not dismiss for cause a juror who expresses reservations about the death penalty. *Witherspoon*, 391 U.S. at 522. In giving full retroactive effect to its decision, the *Witherspoon* Court firmly indicated that the choice between life and death is inherently suspect when made by a jury predisposed to its imposition. *See id.* at 523. In Furman v. Georgia, 408 U.S. 238 (1972), the Court concluded that arbitrary imposition of the death penalty is fundamentally at odds with the value accorded to life. *Id.* at 257-58 (Douglas, J., concurring); *id.* at 310 (Stewart, J., concurring); *id.* at 311-14 (White,

central legal value of American justice. This focus appeared to reject implicitly *Linkletter*'s use of the defendant's position in the lengthy process of direct and collateral appellate review as determinative of the retroactivity-prospectivity issue. *Linkletter*'s direct-collateral dichotomy, however, was alive and well, as became clear in *United States v. Johnson*.[163]

Johnson addressed the retroactive reach of *Payton v. New York*[164] to a defendant whose case was pending on direct review when *Payton* was decided.[165] In *Payton*, the Court held that the fourth amendment prohibits the warrantless, nonconsensual entry into a suspect's home to effectuate a routine felony arrest.[166]

The *Johnson* Court began its analysis by acknowledging the full retroactivity of all decisions that enhance the criminal trial as a truth-seeking forum.[167] The *Johnson* Court, however, noted that its cases suggested a presumption of retroactivity with respect to direct review cases even when the right or implementing rule at issue did not implicate the truth-seeking function of trial.[168] The Court appeared to recognize that many of its decisions interpreting the Constitution's criminal rights amendments or crafting implementing rules were not unexpected or unforeshadowed. Therefore, their application would not be unduly burdensome to law enforcement officials or to criminal justice systems.[169] Under *Johnson*, this presumption of direct review retroactivity can be rebutted if the decision established a right or fashioned a rule that was so unanticipated it constituted a "clear break" with past holdings of the

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J., concurring). According full retroactivity to its holding, the *Furman* Court made clear that no person's life can be sacrificed on the basis of caprice alone. Fairness required that the death penalty be imposed, if at all, only as a consequence of weighing legally permissible factors.

The authors contend that the value placed on fair, principled, nonarbitrary treatment should not be limited to capital sentencing. It should be a primary value guiding the Court's choice between the retrospective-prospective reach of its criminal law holdings.

This is not to say that fairness should displace concern for the truth-seeking function of trial. It is to say that fairness requires either pure prospectivity or full retroactivity, even where truth is not implicated. This conclusion was recognized consistently, although in dissent, by Justices Black and Douglas. *See supra* note 53. The authors agree and argue for full retroactivity of the Court's criminal law decisions to both direct review and collateral review defendants. *See infra* notes 293-311 and accompanying text.

163. 457 U.S. 537 (1982).

164. 445 U.S. 573 (1980).

165. *See Johnson*, 457 U.S. at 537, 562.

166. *See Payton*, 445 U.S. at 587-89.

167. *See Johnson*, 457 U.S. at 544.

168. *Id.* at 549-54.

169. *See id.*

Court.[170] In such a situation, the holding would apply quasi-prospectively; that is, to the defendant before the Court and prospectively to all others.[171]

The notion of "clear break" is a shorthand designation for the *Johnson* Court's belief that those who enforce the law cannot be responsible for sudden and dramatic changes in the meaning of the criminal rights provisions or for the creation of rules implementing those rights.[172] Where old law is overruled unexpectedly or fundamentally new law created, the sole beneficiary is the defendant whose arguments compelled the change because, until those arguments were articulated, no constitutional errors were thought to exist. In such a circumstance, any form of retroactivity would exact too great a price from law enforcement and the administration of justice.[173]

The *Johnson* Court came close to establishing a rebuttable presumption of direct review retroactivity,[174] even though the right or rule in issue may not effectuate the truth-seeking purpose of trial.[175] In fashioning this presumption, the *Johnson* Court provided the rationale for *Linkletter*'s implied rule of automatic, direct review retroactivity. Where the holding is a "clear break" with the past, the presumption is rebutted; otherwise, direct review is automatic.

It remained unclear after *Johnson* whether the "clear break" formulation extended beyond the fourth amendment. That question was answered in *Solem v. Stumes*[176] and *Shea v. Louisiana*.[177] Both *Stumes*[178] and *Shea*[179] considered the retroactive reach of *Edwards v. Arizona*,[180] a fifth amendment case. *Edwards* held that police cannot reinitiate questioning of a custodial suspect who has invoked the right to counsel.[181] Only when the suspect undertakes

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170. *Id.* at 549-50.

171. *Id.*

172. *See id.* at 558-59.

173. *Id.* at 549-50.

174. *Id.* at 554-55. The presumption is rebutted when the clear break analysis applies. *Id.* at 558. The *Johnson* Court limited its rebuttable presumption of direct review retroactivity to the fourth amendment context. *Id.* at 562. The presumption, however, was extended to the fifth amendment context in Shea v. Louisiana, 470 U.S. 51, 56-59 (1985).

175. *Johnson*, 457 U.S. at 544, 562 n.21.

176. 465 U.S. 638 (1984).

177. 470 U.S. at 51 (1985).

178. *See Stumes*, 465 U.S. at 650.

179. *See Shea*, 470 U.S. at 59.

180. 451 U.S. 477 (1981).

181. *Id.* at 485; *see id.* at 487-88 (Burger, C.J., concurring).

conversation with the police may questioning resume.[182]

In *Stumes*, the petitioner unsuccessfully sought the retroactive application of *Edwards* to collateral review defendants. In holding that *Edwards* was not retroactive to collateral review defendants, the *Stumes* Court returned to *Linkletter*'s direct-collateral review distinction and reiterated that *Linkletter*'s three-part test determined the issue of retroactivity in all collateral review cases.[183] In applying the *Linkletter* test, the *Stumes* Court also returned to its preoccupation with the truth-seeking function of trial.[184] The Court concluded that the retroactive extension of the *Edwards* rule had nothing to do with accurately ascertaining a defendant's guilt or innocence[185] and that *Edwards* was not "clearly" or "distinctly" foreshadowed by its prior cases.[186] The *Stumes* Court also noted the burden that would be occasioned by retrying defendants, many of whose cases were more than a little stale.[187] Because each *Linkletter* factor weighed heavily against retroactivity, the *Stumes* Court's holding was preordained and virtually automatic.

Shea raised the retroactive application of *Edwards* in the context of direct review.[188] The *Shea* Court employed the *Johnson* analysis that direct review retroactivity was presumed, absent a showing that the right or implementing rule was a clear break with the past.[189] Finding that *Edwards* was not a clear break, the *Shea* Court extended *Edwards* to all nonfinal cases.[190]

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182. *Id.* at 486 n.9 (majority opinion); *see id.* at 487-88 (Burger, C.J., concurring).

183. *See Stumes*, 465 U.S. at 642-43.

184. *Id.* at 643-44.

185. *Id.* at 650.

186. *Id.* at 647. The *Stumes* Court acknowledged that *Edwards* was not a clear break with precedent, but at the same time declined to fault police for not anticipating its result. *Id.*

The reader is reminded that the "clear break" designation implicates the legitimacy of law enforcement reliance on prior case law. *See supra* text accompanying notes 170-73. If a law changing decision constitutes a clear break, the decision is applied either purely prospectively or quasi-prospectively. United States v. Johnson, 457 U.S. 537, 545, 549-50 (1982).

Stumes seems to suggest that there is another point at which reliance becomes sufficiently reasonable to tip the balance against retroactivity. Reliance is reasonable and retroactivity correspondingly disfavored when the decision in question announces a new rule, even though the new rule is not a "clear break" because it does "not overrule any prior decision or transform standard practice." *Stumes*, 465 U.S. at 647. Perhaps such parsing of meaning is one reason why the Court ultimately abandoned its "clear break" analysis, at least with respect to direct review retroactivity. *See* Griffith v. Kentucky, 479 U.S. 314, 328 (1987).

187. *See Stumes*, 465 U.S. at 650.

188. *See* Shea v. Louisiana, 470 U.S. 51, 55 (1984).

189. *Id.* at 58-59 & n.5.

190. *Id.* at 59 n.5; *see supra* note 186.

Reading *Johnson, Stumes,* and *Shea* together, it is apparent that after twenty years and a score of cases addressing direct and collateral retroactivity, the Court had reaffirmed both the result and implication of *Linkletter*. When a newly announced right or implementing rule is deemed to advance the truth-seeking purpose of trial and enhance the validity of its verdict, it is per se fully retroactive to all cases, final and nonfinal. When truth is at stake, there can be no constitutional distinction between direct review and collateral review defendants. When truth enhancement is not implicated, defendants can be and are treated differently.

Direct review defendants generally receive the benefit of all new rights and implementing rules, regardless of the purpose they serve. *Johnson*, however, added a proviso to *Linkletter* on this point. The presumption of retroactivity could be rebutted when the right or rule constitutes a clear break with precedent by either overruling prior law or creating a right or rule that was not foreshadowed. *Stumes* and *Shea* reaffirmed *Linkletter*'s fundamental result. Collateral review defendants are required to satisfy each element of the *Linkletter* test in order to secure the benefit of a newly established right or implementing rule.[191] This was the state of the law until the Court considered the retroactive reach of *Batson v. Kentucky*,[192] a decision in which the Court overruled *Swain v. Alabama*[193] and fundamentally altered the means by which a defendant could establish racial bias in the prosecution's use of peremptory challenges.

V. The Retroactive Reach of an Overruling Decision

A. Swain v. Alabama

Peremptory challenges constitute the final stage of the jury selection process.[194] During voir dire, each potential juror is ques-

191. *Compare* Solem v. Stumes, 465 U.S. 638, 642-50 (1984) *with* Linkletter v. Walker, 381 U.S. 618, 636-40 (1965). For collateral review defendants, satisfying each element of the *Linkletter* test is a difficult task. Not only must a purpose that would be furthered by full retroactivity be identified, but it also must be a truly significant and valued purpose sufficient to overcome law enforcement reliance and the effect of release or retrials on the administration of justice. In general, the more valued the purpose, the easier it is to overcome even strong law enforcement reliance on prior law and substantial costs to the administration of justice. The less valued the purpose, the harder it is to overcome even weak reliance and effect.

192. 476 U.S. 79 (1986).

193. 380 U.S. 202 (1965).

194. For a detailed discussion of the jury selection process, see J. Van Dyke, Jury

tioned concerning issues related to the case in an effort to ascertain the juror's impartiality. A biased prospective juror is subject to removal for cause.[195] A juror may also be excused by means of a peremptory challenge.[196] Unlike challenges for cause, a prospective juror may be removed by peremptory challenge solely on the basis of perceived bias without a showing of actual bias.[197] Prior to *Batson v. Kentucky*,[198] it was unnecessary to articulate any reason for exercising a peremptory challenge, because "[t]he essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."[199]

Protecting a defendant's right to equal protection under the law is compromised, however, when peremptory challenges are used to exclude specific minority groups from the jury.[200] Such exclusions create a conflict between the historical insulation of peremptory challenges from judicial scrutiny, on the one hand, and a defendant's equal protection rights on the other.[201]

The Court first addressed this conflict in *Swain v. Alabama*, a capital case involving a nineteen-year-old black male convicted of rape by an all white jury.[202] The panel from which Swain's jury was drawn included eight blacks, all of whom were removed by the prosecutor.[203] Two were found to be exempt and six were peremptorily struck.[204] Swain claimed that his equal protection rights were violated by the prosecutor's use of peremptory challenges to me-

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SELECTION PROCEDURES (1977).

195. Challenges for "good cause shown" may be made by either party or by the court. "A challenge for cause is either 'general'—the juror is legally incompetent to serve in any case—or 'particular'—the juror is actually or impliedly biased in the specific matter on trial." People v. Wheeler, 22 Cal. 3d 258, 273, 583 P.2d 748, 759, 148 Cal. Rptr. 890, 901 (1978).

196. *See Swain*, 380 U.S. at 212-22.

197. *Id.* at 220. "While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable." *Id.*

198. 476 U.S. 79 (1986).

199. *Swain*, 380 U.S. at 220.

200. *See* J. VAN DYKE, *supra* note 194, at 152-69.

201. For the text of the relevant portion of the fourteenth amendment, see *supra* note 1. The Supreme Court has applied equal protection jurisprudence to state jury selection statutes. *See* Strauder v. West Virginia, 100 U.S. 303 (1879).

202. *See Swain*, 380 U.S. at 202-03.

203. *Id.* at 205.

204. *Id.* The Court did not explain why the two potential jurors were exempt, but stated that only the other six were available for jury service.

thodically eliminate all blacks from his jury.[205]

The *Swain* Court acknowledged that racial discrimination in jury selection is unconstitutional,[206] yet concluded that the critical issue was not discrimination but the "quantum of proof necessary" to establish it.[207] The *Swain* Court then articulated the defendant's burden of proof when he alleges racially motivated use of peremptory challenges. Such a claim is established only by a showing that

> the prosecutor in a county, *in case after case*, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that *no Negroes ever serve* on petit juries.[208]

The Court concluded that Swain had not presented sufficient evidence to prove that the prosecutor was responsible for a repeated practice of racial exclusion.[209] It rapidly became clear that the *Swain* burden-of-proof standard was virtually insurmountable.[210]

Most courts followed *Swain*, holding that the standard it articulated afforded adequate protection against racial discrimination in the jury selection process.[211] Over the years, however, the *Swain* standard came under increasing attack. More than once, the Court was asked to reconsider it.[212] The Court refused, stating that "further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date. There is presently no conflict of decision within the federal system."[213] A minority of the Court vig-

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205. *Id.* at 203.

206. *Id.* at 204-05.

207. *Id.* at 205 ("It is not the soundness of these principles, which is unquestioned, but their scope and application to the issues in this case that concern us here.").

208. *Id.* at 223 (emphasis added).

209. *Id.* at 224. The record in *Swain* did not include evidence as to which or how many blacks had been excluded from jury service in prior cases by this prosecutor. *Id.* at 224-27.

210. In only two cases have defendants successfully met the *Swain* burden-of-proof standard. *See* State v. Washington, 375 So. 2d 1162, 1164 (La. 1979); State v. Brown, 371 So. 2d 751, 754 (La. 1979). Both cases involved the same prosecutor who admitted that he used peremptory challenges in a racially discriminatory manner. *See Washington*, 375 So. 2d at 1163; *Brown*, 371 So. 2d at 752 n.1.

211. *See, e.g.*, People v. Jones, 119 Ill. App. 3d 615, 627, 456 N.E.2d 926, 936 (1983).

212. *See, e.g.*, Williams v. Illinois, 466 U.S. 981 (1984) (denying certiorari); Thompson v. United States, 469 U.S. 1024, 1024 (1984) (Brennan, J., dissenting from denial of certiorari); McCray v. New York, 461 U.S. 961 (1983) (denying certiorari).

213. *McCray*, 461 U.S. at 962.

orously opposed the Court's reluctance to reexamine *Swain*, arguing that it was long past time to do so.[214]

B. *Overruling* Swain: *Why* Batson?

James Batson was indicted and charged with second degree burglary and receipt of stolen property.[215] During jury selection, the prosecutor exercised four of his six peremptory challenges to exclude all four black jurors on the panel.[216] The defense attorney objected unsuccessfully to swearing the all white jury on grounds that Batson's equal protection rights had been violated.[217] Batson was convicted on both charges and Kentucky's highest court affirmed, relying on the traditional burden-of-proof test set forth in *Swain*.[218] The United States Supreme Court granted Batson's petition for certiorari. Finally, *Swain* would be reexamined.[219]

Why *Batson* was chosen as the vehicle for reconsidering *Swain* is not readily apparent. *Batson* was no more important than its predecessors that were repeatedly denied certiorari. Indeed, because *Batson* was not a capital case, it was arguably less important. Moreover, jury selection in *Batson* was similar to, but no more egregious than, the process in prior cases. In fact, *Batson* is virtually indistinguishable from the scores of other cases in which black defendants were convicted by juries composed of few, if any, blacks or other minorities because of an apparently discriminatory exercise of peremptory challenges.

Batson was not selected because of its procedural posture or for reasons of substance. Instead, it was the fortuity of case selection that explains the Court's choice of *Batson*. *Batson* was in the right place at the right time. The Court appeared ready to review the *Swain* test because of conflicting decisions among lower courts, its numerous denials of certiorari, and a plethora of protests, dissents, and unorthodox approaches to the *Swain* standard. Notwithstanding this air of crisis, any one of an unknown number of defendants would have sufficed for the Court's purpose. It was sim-

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214. *See id.* at 970 (Brennan & Marshall, JJ., dissenting from denial of certiorari).

215. *See* Batson v. Kentucky, 476 U.S. 79 (1986).

216. *Id.* at 83.

217. *Id.* The defense also claimed Batson's sixth amendment right to a fair and impartial jury had been violated. For the text of the sixth amendment, see *supra* note 1.

218. *Id.* at 83-84. The Supreme Court of Kentucky held that Batson must establish a systematic exclusion of blacks from the venire in order to prevail on an equal protection claim. The court also declined to adopt the sixth amendment argument. *See* Commonwealth v. McFerron, 680 S.W.2d 924, 927-28 (Ky. 1984).

219. *See Batson*, 476 U.S. at 84.

ply Batson's good fortune that his travels through the appellate system corresponded to the Court's increasing interest in the issue and to the availability of a slot on the Court's docket. Happenstance established *Batson* as a landmark case; nothing more, nothing less.

The *Batson* Court reversed the lower court's decision and held that the prosecutor's use of peremptory challenges violated Batson's equal protection rights.[220] The Court reaffirmed the basic principle that a black defendant is denied equal protection when he stands trial before a jury from which black jurors have been purposefully excluded.[221] So long as peremptory challenges remain central to the jury selection process, the *Batson* Court concluded that their use must comport with equal protection. "[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."[222] The Court then overruled *Swain*'s burden-of-proof standard, concluding that it undermined jury selection in accordance with equal protection.[223] In its place, the Court enunciated a process under which a defendant could establish racial bias solely on the facts of his case.[224]

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220. *Id.* at 100. Although Batson specifically avoided seeking review on the issue of equal protection, the Court found that the resolution of Batson's claim was dependent on an equal protection analysis. *Id.* at 84 n.4. In reaching this conclusion, the Court chose not to review the merits of Batson's sixth amendment claim. *Id.* Recently, the Court considered the sixth amendment implications of the discriminatory use of peremptory challenges. Teague v. Lane, 57 U.S.L.W. 4233 (U.S. Feb. 22, 1989). In *Teague*, the Court held that *Batson* could not be applied retroactively on collateral review. *Id.*

221. *See Batson*, 476 U.S. at 84. The Court relied on Strauder v. West Virginia, 100 U.S. 303 (1879), to reach this conclusion. In *Strauder*, a state statute was challenged and struck down as violating equal protection because it permitted only white men to serve as jurors. *Id.* at 310.

222. *Batson*, 476 U.S. at 89. The fourteenth amendment protects a defendant throughout the entirety of judicial proceedings. Therefore, racial discrimination occurring during petit jury selection cannot be cured by a prior neutral selection of jury pools from which petit jurors are selected.

223. *Id.* at 92-93.

224. *Id.* at 95. Under *Batson*, a defendant must allege and prove that he is a member of a cognizable racial group and that venire members of that race have been removed by the prosecutor's use of peremptory challenges. The defendant must then show other relevant circumstances in his case that tend to indicate that these venire members were excluded on the basis of race. After a defendant establishes a prima facie showing of purposeful discrimination, the burden shifts to the state to "come forward with a neutral explanation" of the suspect peremptory challenges. Never explaining what constituted a neutral explanation, the Court instead chose to describe an unacceptable explanation. A prosecutor would not be allowed to justify his use of a peremptory challenge solely on an assumption or intuition that a potential juror would be biased because he was of the same race as the defendant. To

The *Batson* Court was not concerned with the truth-seeking function of the jury, and in fact totally ignored the role its decision might play in enhancing the integrity of the guilt determination process.[225] Instead, the Court was concerned with ensuring fair treatment of black defendants who were denied the participation of blacks on their juries and of black citizens who were excluded systematically from jury service.[226] It was essential, therefore, to reevaluate the historical privilege of exercising peremptory challenges free of judicial control and to reconcile the use of these challenges with the constitutional prohibition against racial discrimination. Recognizing that the abuse of peremptory challenges fostered an impermissible inequality of treatment, the *Batson* Court abolished the *Swain* standard. In doing so, the Court's reasoning centered on equal participation in the guilt determination process rather than on the validity of that process.

The *Batson* majority did not address whether its decision should be applied retroactively. Four justices, however, expressed the view that the decision should operate quasi-prospectively—to Batson himself, and otherwise only to those cases in which trial commenced after *Batson* was decided.[227]

C. *Dichotomizing Retroactivity*

The Court acted promptly to resolve the question of *Batson*'s retroactive application to collateral review defendants by granting certiorari in *Allen v. Hardy*.[228] In *Allen*, a black defendant, Earl Allen, was charged in connection with a double murder.[229] During jury selection, the prosecutor eliminated seven black and two Hispanic veniremen by employing nine of the state's seventeen peremptory challenges.[230] The subsequently empaneled jury con-

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allow this as a valid explanation would render meaningless the equal protection mandate against discrimination on the basis of race.

225. The relationship of *Batson* to the truth-seeking function of trial was discussed in Allen v. Hardy, 478 U.S. 255 (1986). "By serving a criminal defendant's interest in neutral jury selection procedures, the rule in *Batson* may have some bearing on the truthfinding function of a criminal trial . . . . The rule in *Batson* . . . was designed 'to serve multiple ends,' only the first of which may have some impact on truthfinding." *Id.* at 259.

226. *See Batson*, 476 U.S. at 87-88.

227. *Id.* at 102 (White, J., concurring); *id.* at 111 (O'Connor, J., concurring); *id.* at 132-33 (Burger, C.J., & Rehnquist, J., dissenting).

228. 478 U.S. 255 (1986). *Allen* was decided summarily solely on the petition for certiorari and without briefs or oral argument. *Id.* at 261-62 (Marshall & Stevens, JJ., dissenting).

229. *Id.* at 256.

230. *Id.*

tained no black or Hispanic members. "Defense counsel moved to discharge the jury on the ground that the '[s]tate's use of peremptory challenges undercut [petitioner's] right to an impartial jury' . . . ."[231] The motion was denied and Allen was convicted on both counts.[232] He appealed, urging that the prosecution had misused its peremptory challenges. The appellate court affirmed, concluding that Allen could not establish the systematic exclusion required by *Swain*.[233] Allen unsuccessfully reasserted this claim in a petition for federal habeas corpus relief.[234] *Batson* was then decided. Allen responded by filing a petition for certiorari that was granted on the narrow issue of whether the rule in *Batson* should be applied retroactively to convictions already final[235] before the date *Batson* was decided.

The *Allen* Court declined to order briefing on the merits, and in a per curiam opinion held that the rule in *Batson* should not be available to a defendant petitioning for federal habeas corpus review of his conviction.[236] In so holding, the Court relied on *Linkletter* and its progeny. Collateral review defendants such as Allen are subject to the purpose, reliance, and effect test.[237]

The *Allen* Court concluded that *Batson* relates only tangentially to the truth-seeking purpose of trial.[238] It then moved on to consider reliance and effect in relation to the purposes of *Batson*.[239] Here, the *Allen* Court noted that *Batson* was a clear break with *Swain*.[240] Because *Batson* was a clear break, law enforcement reliance on *Swain*, by definition, was reasonable. As already noted, "clear break" is a shorthand designation for the conclusion that reliance on precedent is reasonable.[241] Where reliance is warranted, it is unreasonable to burden the nation's criminal justice systems with the cost of retrials and to require society to bear the risk occasioned by the possible release or retrial of large numbers of convicted criminals. With truth-seeking only minimally involved and

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231. *Id.* at 256 (majority opinion) (quoting People v. Allen, 96 Ill. App. 3d 871, 875, 422 N.E.2d 100, 104 (1981)) (brackets in original).

232. *Id.*

233. *Id.*

234. *Id.* at 257.

235. *Id.* at 257-58.

236. *Id.* at 261.

237. *Id.*; *see supra* note 191.

238. *Allen*, 478 U.S. at 259; *see supra* note 225.

239. *Allen*, 478 U.S. at 260.

240. *Id.*

241. *See supra* notes 170-73, 191.

the clear break designation firmly affixed, it is preordained that no collateral review defendant could satisfy the *Linkletter* test. The defendant in *Allen* did not. *Allen* thus reinforced *Linkletter* by engrafting the "clear break" rationale onto the three-part test for determining the retroactive application of the Court's criminal rights holdings to collateral review defendants.

The analysis of *Batson* presented in *Allen*, however, created an unforeseen problem. It was possible to apply the *Allen* analysis with equal cogency to direct review defendants seeking the benefit of *Batson*. After all, truth-seeking was not implicated sufficiently to trigger per se full retroactivity. Further, *Allen* established that *Batson* was a "clear break" case that, under *United States v. Johnson*,[242] would rebut the presumption of retroactivity to direct review defendants where truth enhancement is not implicated.[243] It thus appeared that the *Allen* Court had gone far beyond anything *Linkletter* and its progeny envisioned, at least as to direct review defendants. Not only had the Court abandoned the common law rule according full retroactivity to its constitutional decisions, in *Allen* it had tacitly established a very different rule: apparently the Court's constitutional decisions would apply to the defendant before it, but otherwise only prospectively to both direct review and collateral review defendants. In *Griffith v. Kentucky*,[244] a case seeking the retroactive extension of *Batson* to all cases not yet final at the time it was decided,[245] the Court made clear that this result was more than it had envisioned.

Randall Griffith, a black man, was convicted of first degree robbery by a jury from which blacks had been peremptorily struck by the prosecution.[246] At trial, defense counsel expressed concern over the make-up of the jury and requested that the court require the prosecution to explain its apparent discriminatory use of peremptory challenges.[247] The court refused. Defense counsel then moved unsuccessfully to discharge the panel, contending that its method of selection violated the sixth and fourteenth

242. 457 U.S. 537 (1982).

243. *Id.* at 549-50.

244. 479 U.S. 314 (1987).

245. *Id.* at 316.

246. *Id.* at 317.

247. *Id.* During jury selection, the prosecutor, who also prosecuted Batson, used peremptory challenges to strike four black jurors. The remaining black juror was removed by random selection, leaving an all-white jury to try the case involving white complainants and a black defendant.

amendments.[248]

Griffith sought review in the Supreme Court of Kentucky, claiming a violation of his equal protection rights. Following *Swain*, the court denied relief.[249] Griffith petitioned for certiorari while *Batson* was pending before the United States Supreme Court. *Batson* was decided in April 1986; Griffith's petition was granted in June.[250]

The *Griffith* Court resolved the dilemma created in *Allen* by abandoning the "clear break" exception to the presumption that its constitutional criminal rights decisions, regardless of their contribution to truth, were retroactive to all direct review defendants.[251] As a result, the *Griffith* Court elevated direct review retroactivity from a rebuttable to an irrebuttable presumption. Under *Griffith*, there is a rule of automatic, exceptionless retroactivity to direct review defendants.[252] In reaching this result, the Court indicated that it had finally rethought retroactivity as the late Justice Harlan and others had urged and, as a result of its rethinking, adopted Justice Harlan's analysis of the issue and his conclusions.[253]

The *Griffith* Court accepted Justice Harlan's conclusion that it was logically and legally proper to treat direct review defendants differently from collateral review defendants.[254] The Court also agreed that, with respect to direct review defendants, it was logically and legally unsound to accord the benefit of a holding to the defendant before it while denying the benefit to all other similarly situated defendants because only sheer fortuity determined which of many cases raising the same issue the Court would choose to

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248. *Id.*

249. *Id.* at 318.

250. *See* Brown v. United States, 476 U.S. 1157 (1986) (granting certiorari).

251. *See Griffith*, 479 U.S. at 326. Technically, the Court abandoned its "clear break" reasoning only in the context of direct review. Therefore, it is possible that the Court might continue to apply "clear break" reasoning in the collateral review context when evaluating law enforcement reliance on prior law. If clear break reasoning survives in the collateral review context, and *Allan* suggests that it does, it will function as an additional impediment to collateral review retroactivity.

252. *Id.* at 328.

253. *Id.* at 321-22.

254. *Compare Griffith*, 479 U.S. at 322-23 (new rule governing conduct of criminal trial applies retroactively to all federal and state cases not yet final at the time new rule is announced, even if new rule is a "clear break" with prior law) *with* Allen v. Hardy, 478 U.S. 255, 258 (1986) (as to collateral review defendants, the purpose, reliance, and effect test continues to govern retroactive application of Supreme Court decisions establishing constitutional rights or their implementing rules).

hear.[255]

It is the arbitrary and capricious role that chance plays in the jurisprudence of retroactivity that is its Achilles heel, for chance controls more than just the determination of which case the Court takes.[256] Chance also controls which defendants are on direct review and which are on collateral review when the Court announces a new right or implementing rule in the area of constitutional criminal law. When fortuity alone distinguishes defendants for purposes of ascertaining the reach of such critical rights and rules, the bedrock of fundamental fairness supporting America's system of criminal justice is eroded. In the area of retroactivity, as it currently stands, fairness is accorded only to direct review defendants. This result is insupportable by logic or legal theory.

VI. A Critique of Retroactive Dualism

Linkletter implicitly established a rule of retroactive dualism. It did so, however, with no supporting rationale. Perhaps the Court perceived little need to articulate a reasoned basis for this dualism so long as the rule was applied consistently; that is, so long as all direct review defendants, not simply the defendant before the Court, received the benefit of a particular criminal law decision. Of course, as shown above, it took the Court more than twenty years to apply *Linkletter*'s retroactive dualism in this manner. For example, in *Johnson v. New Jersey*,[257] announced just one year after *Linkletter*, the Court abandoned retroactive dualism and gave *Escobedo*[258] and *Miranda*[259] only quasi-prospective effect.[260] The

255. *See Griffith*, 479 U.S. at 323.

256. *Id.* at 327 ("It was solely the fortuities of the judicial process that determined the case this Court chose initially to hear on plenary review.").

257. 384 U.S. 719 (1966).

258. 378 U.S. 478 (1964).

259. 384 U.S. 436 (1966).

260. *See Johnson*, 384 U.S. at 733-34. For the definition of quasi-prospective effect, see *supra* note 4.

The Court also opted for quasi-prospective effect in the following cases: Daniel v. Louisiana, 420 U.S. 31, 32 (1975) (quasi-prospective operation of Taylor v. Louisiana, 419 U.S. 522 (1975), which held that the sixth amendment right to trial by jury required that juries be drawn from a fair cross-section of the community); Gosa v. Mayden, 413 U.S. 665, 685 (1973) (quasi-prospective effect accorded to O'Callahan v. Parker, 395 U.S. 258, 272-74 (1969), since overruled, *see supra* note 121, which held that military personnel accused of crimes occurring off military premises and unrelated to military business are entitled to indictment by a grand jury and trial by a jury in a civilian court); Mackey v. United States, 401 U.S. 667, 674-75 (1971) (quasi-prospective effect accorded to Marchetti v. United States, 390 U.S. 39, 41, 60-61 (1969), and Grosso v. United States, 390 U.S. 62, 66-67 (1968), insofar as these cases held that the fifth amendment privilege against self-incrimination is a com-

holdings of *Miranda* and *Escobedo* extended only to the particular defendants before the Court.[261] In all other cases, *Escobedo* and *Miranda* applied prospectively to defendants whose trials began after those decisions were announced. The defendants in *Johnson* did not benefit from *Escobedo* and *Miranda*.

Johnson led quickly to a rather public dispute within the Court over the logically and legally proper course to take with respect to the retroactive effect of the Court's constitutionally based criminal law holdings. Justice Harlan became the primary advocate of *Linkletter*'s retroactive dualism, which ultimately prevailed in *Allen* and *Griffith*.

Justice Harlan argued that *Linkletter*'s retroactive dualism was proper because direct review and collateral review defendants were not situated similarly, and thus need not be treated similarly.[262] In support of this view, he argued that collateral review defendants have only one fundamental constitutional right: to be tried in accordance with constitutional principles as they stood at the time of trial.[263] Of course, this view would appear to apply with

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plete defense to a prosecution for failing to comply with federal law requiring gamblers to register and pay certain specified taxes); Williams v. United States, 401 U.S. 646, 656 (1971) (quasi-prospective effect given to Chimel v. California, 395 U.S. 752 (1969), which established new standards governing a search incident to arrest); Desist v. United States, 394 U.S. 244, 254 (1969) (quasi-prospective application of Katz v. United States, 389 U.S. 347 (1967), which held that electronic surveillance is a search under the fourth amendment); DeStefano v. Woods, 392 U.S. 631, 635 (1968) (quasi-prospective operation of Duncan v. Louisiana, 391 U.S. 145 (1968), and Bloom v. Illinois, 391 U.S. 194 (1968), holding that the sixth amendment right to trial by jury extends to all serious criminal cases and criminal contempt cases, respectively); Stovall v. Denno, 388 U.S. 293, 300-01 (1967) (prospective application of United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), both of which held that out-of-court identifications in the absence of counsel violate the sixth amendment right to counsel).

261. *See* Johnson v. New Jersey, 384 U.S. 719, 734-35 (1966).

262. *See Mackey*, 401 U.S. at 679-82, 689-91, 701-02 (Harlan, J., dissenting and concurring); *Desist*, 394 U.S. at 258-60 (Harlan, J., dissenting).

263. *Mackey*, 401 U.S. at 691-92 (Harlan, J., dissenting and concurring); *Desist*, 394 U.S. at 263, 268 (Harlan, J., dissenting). Taken literally, the Court would never apply a new constitutional right or implementing rule on collateral review, including the collateral review defendant before it whose argument was persuasive enough to change the law. If this were the case, Clarence Earl Gideon, whose case was before the Court on denial of federal habeas corpus relief, would not have benefited from the Court's holding that the fourteenth amendment embraced the sixth amendment right to counsel. *See* Gideon v. Wainwright, 372 U.S. 335, 349 (1963). In addition, of course, that holding would not have extended to any other collateral review defendant who had been denied counsel at trial.

Justice Harlan was unwilling to take such an extreme position in *Mackey*. Instead, he articulated two exceptions to his rule. First, the Court's decisions regarding substantive due process would be given retroactive effect to all defendants, direct and collateral. That is, when the Court later holds that certain conduct is protected, for example protected by the first amendment or the right of privacy, that decision would be given full retroactive effect

equal cogency to direct review defendants.[264]

Justice Harlan, however, deflected this criticism by asserting that the Court had a constitutional duty, when sitting in direct review, to apply the law as it stands at the time of direct review rather than as it stood at the time of trial.[265] Fairness required that, once a law changing decision is announced, those direct review defendants not before the Court, but who preserved the same constitutional error, are entitled to have the error adjudicated on the basis of the new decision.[266] But while Justice Harlan provided

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to invalidate convictions for that conduct. *See Mackey*, 401 U.S. at 692-93 (Harlan, J., dissenting and concurring); *see also supra* notes 152-59 and accompanying text. Second, rather than invoking *Linkletter*'s purpose, reliance, and effect test to determine collateral review retroactivity, Justice Harlan would accord full retroactive effect to any decision announcing a constitutional right or implementing rule " 'implicit in the concept of ordered liberty.' " *Mackey*, 401 U.S. at 693 (Harlan, J., dissenting and concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Finally, Justice Harlan acknowledged the possibility of other exceptions to his general rule that collateral review defendants were entitled only to the correct application of federal law as it was understood at the time of trial. *Id.* at 693-94.

Justice Harlan's ideas on collateral review retroactivity certainly were more complex than those of the *Mackey* Court's majority. Nonetheless, both positions made it substantially more arduous for collateral review defendants to secure the benefit of a later favorable decision of the Court. Justice Harlan, however, appeared to create more opportunities for collateral review defendants to secure retroactive relief than did the majority through the purpose, reliance, and effect test. *See id.* at 673-74.

The authors are critical of both views. Aside from elevating an arbitrary distinction to the status of law, both approaches are too unwieldy to yield consistently satisfactory results. This is particularly true of the exceptions to the rule outlined by Justice Harlan. *See id.* at 692-94.

264. Trials, as a practical matter, are held with little regard to the future direct review or collateral review status of defendants. Moreover, trial judges are obligated to conduct all trials in terms of their understanding of relevant constitutional provisions as established by the Court. Each and every defendant has a constitutional right to a trial so conducted. Thus, at a constitutional minimum, defendants, tried as they are in the present, have a right to the law as it presently stands. What the future holds, for good or for ill, as to the shape of constitutionally based criminal law, is irrelevant to the defendants' rights at trial.

Failure to separate the present from the future is a major flaw in analyses of criminal law retroactivity. Retroactivity is not concerned with what happened at trial; instead, the issue is what to do with a later change in the law that is favorable to all defendants regardless of their appellate status.

265. This view has its genesis in the Constitution's case or controversy limitation on the Court's jurisdiction. *See* U.S. CONST. art. III, § 2, cl. 2; *supra* note 4.

266. *Mackey*, 401 U.S. at 678-79 (Harlan, J., dissenting and concurring). Justice Harlan explained:

> We announce new constitutional rules, then, only as a correlative of our dual duty to decide those cases over which we have jurisdiction and to apply the Federal Constitution as one source of the matrix of governing legal rules. We cannot release criminals from jail merely because we think one case is a particularly appropriate one in which to apply what reads like a general rule of law in order to avoid making new legal norms through promulgation of dicta. This serious interference with the corrective process is justified only by necessity, as part of our task of applying the Constitution

a reasoned basis for his belief in per se direct review retroactivity, he was not able to do the same for its underlying premise. He could marshal neither precedent[267] nor argument for his claim that the Court was obligated by the Constitution to apply current law when adjudicating a case before it on direct review but not when adjudicating a collateral review case.[268]

Supreme Court precedent was utterly silent on this point. Its pre-*Linkletter* retroactivity cases simply did not address the backward reach of its holdings construing the Constitution, let alone support the concept of retroactive dualism. The one case that appeared to support a direct-collateral review dualism was *United States v. Schooner Peggy*.[269] Upon close examination of the specific facts of *Schooner Peggy*, however, it is clear that the case does not support such a conclusion.

Schooner Peggy concerned the condemnation and forfeiture of a French vessel. The case was heard by the Court on direct review.[270] Before the case was decided, however, Congress entered into a treaty with France that voided the condemnation at issue.[271] The *Schooner Peggy* Court held that, when Congress changes governing law while a case is pending, the law, as modified, applies.[272]

The *Schooner Peggy* Court did not consider the retroactive reach of a prior decision of the Court interpreting the Constitution. It addressed, instead, the retroactive reach of an action by Congress. It is for this reason that *Schooner Peggy* stands only for the

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to cases before us. *Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute[s] an indefensible departure from this model of judicial review.*

Id. at 679 (emphasis added).

267. Indeed, instead of supporting his position with logic or precedent, Justice Harlan advanced reasons of policy. For example, he noted:

Refusal to apply new constitutional rules to all cases arising on direct review may well substantially deter those whose financial resources are barely sufficient to withstand the costs of litigating to this Court, or attorneys who are willing to make sacrifices to perform their professional obligation in its broadest sense, from asserting rights bottomed on constitutional interpretations different from those currently prevailing in this Court.

Id. at 680-81. No reason is given as to why these same considerations would not apply with equal force to collateral review defendants and their attorneys.

268. A majority of the Court was already on record as rejecting this view. "[W]e believe that the Constitution neither prohibits nor requires retrospective effect." Linkletter v. Walker, 381 U.S. 618, 629 (1964).

269. 5 U.S. (1 Cranch) 103 (1801).

270. *Id.* at 107, 110.

271. *Id.* at 107-08.

272. *Id.* at 110.

proposition that, absent an express and constitutionally valid declaration to the contrary, courts apply the most recently enacted criminal or quasi-criminal statute to cases pending on direct review when the legislature acted.[273] While this principle might establish a direct-collateral review dualism in the context of enacted law, it neither creates nor requires such dualism in the context of constitutional construction.

The Court's other pre-*Linkletter* retroactivity decisions provide no support for Justice Harlan's view. First, they addressed civil, not criminal, law.[274] Second, they did not concern the retroactive reach of the Court's interpretation of the Constitution.[275] Finally, they were decided without reference to the direct-collateral review posture of the case.[276] For example, in *Chicot County Drainage District v. Baxter State Bank*,[277] the Court declined to give retroactive effect to a prior decision that declared a congressional enactment unconstitutional. In so holding, the *Chicot County* Court acted expressly to preserve legitimate property interests arising under a presumptively valid statute before it was

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273. *See* United States Coin & Currency v. United States, 401 U.S. 715 (1971) (White, Stewart, Blackmun, JJ., and Burger, C.J., dissenting). The dissenters noted that, in modifying or repealing a criminal or quasi-criminal statute, Congress or any legislature can preclude retroactive application of the repeal by providing that ongoing proceedings shall not be abated. *Id.* at 735-39.

Legislative actions creating, modifying, or repealing civil law usually apply prospectively measured from the date of enactment or some specified date after enactment. *Id.* at 740-43. When expressly provided, however, legislative law changing actions can be applied retroactively assuming that such retroactive operation is not prohibited by the Constitution. For example, legislative law changing actions will not be afforded retroactive effect if to do so would impair pre-existing contractual obligations, *see* U.S. CONST. art. I, § 10, cl. 1, or would amount to a taking of property without just compensation under the fifth amendment, *see* U.S. CONST. amend. V.

274. *See, e.g.*, Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940) (refusing to accord retroactive effect to a prior decision under which a Depression-era act of Congress was declared unconstitutional); Great Northern Ry. v. Sunburst Oil & Refining Co., 287 U.S. 358, 363-65 (1932) (the due process clause of the fourteenth amendment does not compel a state supreme court to give retroactive effect to its decision overruling a prior case); Kuhn v. Fairmont Coal Co., 215 U.S. 349, 369-70 (1910) (Court not required to give retroactive effect to a state supreme court decision in a factually identical case and in favor of Fairmont Coal—the defendant in *Kuhn*—where the decision was rendered after the *Kuhn* case was initiated, but before it was adjudicated); Gelpke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1863) (refusing to give retroactive effect to a decision of the Supreme Court of Iowa overruling several prior cases because to do so would impair valid contractual obligations entered into in reliance on previous pronouncements by the state supreme court).

275. *See supra* note 274.

276. *Id.*

277. 308 U.S. 371, 373-74 (1940).

declared invalid.[278] In other cases, the Court addressed the retroactive or prospective effect to be accorded to state supreme court decisions either overruling earlier cases or invalidating state statutes, where those decisions affected legitimate property interests created in reliance on prior law.[279] In those cases, the Court approved the purely prospective effect of the state court holdings at issue because, by so doing, it protected the reasonable reliance of individuals on the law as it was understood when certain financial arrangements were undertaken.[280]

The purely prospective reach of the civil law decisions preserved the advantage of personal and business arrangements that were legal when entered into. Today, civil law prospectivity retains this emphasis on protecting reasonable reliance on prior law.[281] Thus, in the civil law context, pure prospectivity operates to achieve the same beneficial effect as full retroactivity achieves in the criminal law context. On the one hand, civil law prospectivity bestows a benefit by not taking something of value even though, under newly articulated law, no one is entitled to retain such benefits. On the other hand, full retroactivity of criminal law holdings confers a benefit, not because of reliance, but because neither life nor liberty should be taken without the full effect of constitutional rights as construed at the time the deprivation is being reviewed.

The value placed on reasonable reliance with respect to property interests is certainly no greater than the value to be placed on life and liberty. Reasonable reliance with respect to property interests is protected fully only by pure prospectivity. Life and liberty are protected fully only by complete retroactivity. In preferring the pure prospective application of civil law decisions, the Court in no way fashioned a rule that would tie its hands when considering the interpretation of the Constitution. Those cases certainly do not

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278. *Id.*

279. *See* Great Northern Ry. v. Sunburst Oil & Refining Co., 287 U.S. 358, 361 (1932); Kuhn v. Fairmont Coal Co., 215 U.S. 349, 355-56, 369-70 (1910); Gelpke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 206 (1863).

280. *See, e.g.*, Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (plurality opinion). In *Marathon Pipe Line*, the Court accorded pure prospective effect to its holding that Congress violated article III when it expanded the jurisdiction of bankruptcy judges. "It is . . . plain that retroactive application would not further the operation of our holding, and would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts. We hold, therefore, that our decision today shall apply only prospectively." *Id.* at 87-89; *see* Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971); Cipriano v. City of Houma, 395 U.S. 701, 706 (1969); Allen v. State Bd. of Elections, 393 U.S. 554, 571-72 (1969).

281. *See supra* notes 274, 278-80 and accompanying text.

support Justice Harlan's argument that direct review and collateral review defendants are not situated similarly because, somehow, the Court has a constitutional obligation to apply the law as it stood at the time of direct review, while it is not obligated to do so at the time of collateral review.

The absence of precedential support for Justice Harlan's position is made even clearer by the Court's post-*Linkletter* retroactivity decisions. In giving quasi-prospective effect to many of its landmark criminal law decisions, the Court eschewed any notion that it was bound to extend the advantage of a change in law to defendants whose cases were not yet final.[282] Thus the Court's own retroactivity decisions dispose of Justice Harlan's argument that direct review defendants are treated more favorably than collateral review defendants because, constitutionally, the Court must treat them so.

Justice Harlan also argued that, under principles of federalism and comity, direct review and collateral review defendants were situated differently and should be treated differently.[283] Here, he pointed out that collateral review pursuant to federal habeas corpus was an intrusion into the business of the states in a most sensitive area—the administration of the criminal law, an area of law generally left to the states.[284] According to Justice Harlan, the Court utilized federal habeas corpus review as a means of ensuring that state courts "toe[d] the constitutional mark."[285] This managerial, if not corrective, purpose of habeas corpus review is made even clearer when it is remembered that federal courts are the ultimate arbiters in determining if a state law conviction is valid as a matter of federal law.[286]

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282. *See* Linkletter v. Walker, 381 U.S. 618, 629 (1965); *see also supra* text accompanying notes 91-129; cases cited *supra* note 260.

283. *See* Mackey v. United States, 401 U.S. 667, 680, 685-87 (1971) (Harlan, J., concurring and dissenting); Fay v. Noia, 372 U.S. 391, 469-76 (1963) (Harlan, J., dissenting).

284. *See Mackey*, 401 U.S. at 685, 687 (Harlan, J., concurring and dissenting) ("The primary justification given by the Court for extending the scope of habeas to all alleged constitutional errors is that it provides a quasi-appellate review function, forcing trial and appellate courts in both the federal and state system to toe the constitutional mark."); *Noia*, 373 U.S. at 466-67, 469-76 (Harlan, J., dissenting).

285. *Mackey*, 401 U.S. at 687 (Harlan, J., concurring and dissenting).

286. *See* Brown v. Allen, 344 U.S. 443, 458 (1953) ("In other circumstances the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues. *It is not res judicata.*" (emphasis added)); *id.* at 506 (opinion of Frankfurter, J.) (*"State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding.* It is precisely these questions that the federal judge is commanded to decide." (emphasis added)); *see also* Sanders v. United States, 373 U.S. 1, 7-8 (1963); *Noia*, 372 U.S. at 422. *But see* Stone v.

Justice Harlan believed that, as to collateral review defendants, federalism and comity required that states be held only to enforcing federal law as it existed at the time of trial.[287] Therefore, a collateral review defendant who was tried in accordance with federal law should not benefit from subsequent changes in that law.

There are several problems with this argument. First, it places federalism and comity over life and liberty. Second, federalism and comity would be advanced more fully if direct review defendants and collateral review defendants were guaranteed only the right to be tried in accordance with the Constitution as understood at the time of trial.[288] The Court's own cases establish that it is under no constitutional obligation to apply the law as changed to cases pending on direct review.[289] Thus there is no barrier to giving full effect to the values of federalism and comity at the expense of individual life and liberty for direct review defendants and collateral review defendants. At least under this construction, all classes of defendants would be treated equally, even if harshly.

That Justice Harlan and the Court were unwilling to go this far with respect to direct review defendants does not rationalize the balance struck between federalism and comity, on the one hand, and life and liberty, on the other, with respect to collateral review defendants. It is as if Justice Harlan and the Court believed that some sacrifice must be made at the altar of federalism and

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Powell, 428 U.S. 465, 481-82, 494 (1976) (state court adjudication of fourth amendment claims are binding on federal courts sitting in federal habeas corpus review).

The principle of res judicata has two prongs. First, legal issues fully and fairly adjudicated in one proceeding cannot be relitigated in a later proceeding involving the same parties or their privies. Second, aspects of a single legal issue not raised in the initial proceeding cannot be introduced in a subsequent proceeding.

The first prong does not apply in the context of collateral review retroactivity. As observed, federal courts hearing federal habeas corpus petitions are not bound by a state court's determination, made before the Supreme Court announced a law changing decision, that a particular constitutionally based right or implementing rule is not available to a particular defendant. *See Brown*, 344 U.S. at 489; Wainwright v. Sykes, 433 U.S. 72, 79, 87 (1977). Similarly, federal courts are not bound by a state court determination, made after the Supreme Court announces a law changing decision but without addressing its retroactive reach, that the decision does not apply retroactively.

The second prong of res judicata does apply to federal habeas corpus review. Failure to preserve a claim of constitutional error and failure to raise that error at each step of the direct review process precludes their presentation in a petition for federal habeas corpus relief. *See infra* notes 307-09 and accompanying text.

287. *See Mackey*, 401 U.S. at 683, 687-89, 692 (Harlan, J., concurring and dissenting); Desist v. United States, 394 U.S. 244, 260, 262-63 (1969) (Harlan, J., dissenting).

288. *See supra* note 264 and accompanying text.

289. *See* Linkletter v. Walker, 381 U.S. 618, 629 (1965); *see also* text accompanying notes 91-129; cases cited *supra* note 260.

comity and that their task was to select the least offensive form of sacrifice. Ultimately, *Allen* and *Griffith* established that the life and liberty of collateral review defendants was the least offensive sacrifice, despite the obvious fact that the only difference between the two classes of defendants is created by factors unrelated to the validity of their constitutional claims.

Justice Harlan cited the finality of conviction as another reason for affording differential treatment to direct review and collateral review defendants.[290] According to Justice Harlan, it is to the advantage of society, as well as to defendants, that criminal cases come to an end. Society has an interest in the relatively prompt punishment of criminals; criminals have an interest in accepting their punishment and turning their energies to rehabilitation.[291]

This reasoning, of course, extends equally to direct review and collateral review defendants, and would be furthered by evaluating the constitutionality of convictions solely in terms of the law as it existed at the time of conviction. As demonstrated, the Court's retroactivity cases establish that it has the constitutional authority to adopt this approach. Furthermore, Justice Harlan's recourse to finality does no more than elevate a tautology to the status of an explanation. Finality is advanced by according retroactive effect to criminal rights and their implementing rules only to defendants whose cases are not yet final and by denying retroactive effect to defendants whose cases are final. Under the guise of argument, Justice Harlan merely articulated the obvious—finality is furthered by making something final and by not reopening something already final. Of course, this truism is silent as to why the line of finality should be drawn at collateral review.

A truism is not a reasoned distinction; it is a distinction by definition. Such definitional differentiation is not per se illogical, but it is not an argument in support of a position. Moreover, when a difference created solely by definition is the basis for deciding whose interest in life and liberty will receive maximal protection, principle has yielded to capriciousness.

The Court itself has avoided this unpalatable result. As demonstrated, where a new right or rule is construed as advancing the truth-seeking function of trial, it is given full retroactive effect regardless of finality.[292] Just as finality yields to the fairness of

290. *See Mackey*, 401 U.S. at 682-83, 690-92 (Harlan, J., concurring and dissenting); *Desist*, 394 U.S. at 260-61 (Harlan, J., dissenting).

291. *See Mackey*, 401 U.S. at 690-92 (Harlan, J., concurring and dissenting).

292. *See supra* notes 130-51 and accompanying text.

trial and to the search for the accurate determination of guilt or innocence, it should yield to the fair, nonarbitrary treatment of persons denied the same constitutional right, but who, solely for fortuitous reasons, find themselves at different stages of appellate review.

VII. Fairness Over Fortuity: The Case for Full Retroactivity

It was unnecessary in pre-*Linkletter* days to ponder the significance of fairness as a fundamental value in the context of retroactivity or to consider how best to secure it. Because retroactivity was the rule, no distinction was made between the defendant fortunate enough to have the Court accept his case for review and all other defendants who unsuccessfully raised the same issue in their petitions for discretionary review.[293] Obviously, the Court did not hear every case raising the identical issue under one or more of the Constitution's criminal rights amendments. It is equally obvious that factors beyond the control of defendants or their counsel and unrelated to the merits of their position determined which cases the Court selected from the ongoing stream of cases pressing identical issues.[294]

What factors prompt the Court ultimately to address repeatedly presented issues are known, if at all, only to the Court itself. It is apparent, however, that these factors are unrelated to the legal question presented, to the case chosen, or to the defendant who will benefit directly from the Court's decision. In fact, many members of the Court have observed that the vagaries of chance determine the case before the Court and the particular defendant who will be the immediate beneficiary of any newly articulated criminal

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293. *But see supra* note 8 (discussing the common law rule of full judicial retroactivity).

294. *See, e.g.*, Griffith v. Kentucky, 479 U.S. 314, 330 (1987) (White, O'Connor, JJ., and Rehnquist, C.J., dissenting); *Mackey*, 401 U.S. at 678-79 (Harlan, J., concurring and dissenting); *Desist*, 394 U.S. at 255 (Douglas, J., dissenting). Justice Douglas noted:

> I would understand today's ruling if . . . we had announced a new constitutional search-and-seizure rule to be applied prospectively in all cases. But we did not do that; nor did we do it in other recent cases announcing variations of old constitutional doctrine. The most notorious example is Miranda v. Arizona, where, as I recall, some 80 cases were presented raising the same question. We took four of them and held the rest and then disposed of each of the four, applying the new procedural rule retroactively. But as respects the rest of the pending cases we denied any relief. *Yet it was sheer coincidence that those precise four were chosen. Any other single case in the group or any other four would have been sufficient for our purposes.*

Id. at 255 (emphasis added; citations omitted).

law right or implementing rule.[295] But while fortuity controls the case selected for decision, it need not control the reach of its effect. Under pre-*Linkletter* law, if the Court resolved an issue in favor of the defendant before it, all other defendants raising the same issue also benefited. Thus both direct review and collateral review defendants could claim the benefit of the Court's decision assuming that the issue actually was raised and thereby preserved for review.[296]

Pre-*Linkletter* retroactivity avoided the impact of simple fortuity, eliminating it from the law's calculus by according equal treatment to defendants claiming and preserving the same constitutional error.[297] Because only chance divided the one immediate beneficiary from all those who might have been in his position, fairness required that chance could not be the basis for maintaining such a false and groundless division.

The pre-*Linkletter* reasoning is compelling, and the Court has re-embraced it at least as to direct review defendants.[298] In *Griffith v. Kentucky*,[299] the Court returned to its pre-*Linkletter* posture with regard to direct review defendants. After twenty-two years of considering retroactivity on a case-by-case basis, the *Griffith* Court acknowledged that fortune, not reason, separated the direct review defendant before it from all other direct review defendants pressing the identical claim of error.[300] The Court concluded that, in a system that defines justice in terms of fairness, such an irrational

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295. *See, e.g., Griffith*, 479 U.S. at 327 ("It was *solely the fortuities of the judicial process* that determined the case this Court chose initially to hear on plenary review." (emphasis added)); Hankerson v. North Carolina, 432 U.S. 233, 247 (1977) (Powell, J., concurring) ("When the Court declines to hold a new constitutional rule retroactive, one *chance beneficiary*—the *lucky* individual whose case was chosen as the occasion for announcing the new principle—enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine." (emphasis added)); *Mackey*, 401 U.S. at 714 (Douglas & Black, JJ., dissenting) ("[W]hen the defendants in most cases are given the benefit of a new constitutional rule forged by the Court, it is not comprehensible, if *justice rather than fortuitous circumstances of the time of the trial is the standard*, why all victims of the old unconstitutional rule should not be treated equally." (emphasis added)); Jenkins v. Delaware, 395 U.S. 213, 217-18 (1969); *Desist*, 394 U.S. at 272 (Fortas, J., dissenting); Stovall v. Denno, 388 U.S. 293, 301 (1967).

296. *But see supra* note 8 (discussing common law rule of full judicial retroactivity). Regarding preservation of errors, see *infra* notes 307-09.

297. *But see supra* note 8 (discussing common law rule of full judicial retroactivity).

298. The Court also treats both direct review and collateral review defendants fairly when the right or rule at issue enhances the truth-seeking purpose of trial. In that case, the right or rule is fully retroactive.

299. 479 U.S. 314 (1987).

300. *Id.* at 327.

distinction was untenable and could not stand.[301] It could stand, however, with respect to collateral review defendants, even though fortuity plays an even greater role in determining which defendants will have their cases pending on direct review and which will have completed direct review at the time a right or implementing rule is announced.[302]

What really distinguishes direct review from collateral review defendants? The size of the trial and direct appellate dockets in each jurisdiction is one distinguishing factor. In general, the larger the trial and direct appellate dockets, the slower the progress of a case through trial and direct review. As a result, the case is more likely to be pending on direct review when new or changed law is announced. Similarly, the smaller the trial and direct appellate dockets, the quicker the progress of a case through trial and direct

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301. *Id.* at 327-28.

302. *See* Shea v. Louisiana, 470 U.S. 51, 63-64 (1985) (White, Rehnquist, O'Connor, JJ., and Burger, C.J., dissenting). The dissent noted:

> Although the majority finds it intolerable to apply a new rule to one case on direct appeal but not to another, it is *perfectly willing to tolerate disparate treatment of defendants seeking direct review of their convictions and prisoners attacking their convictions in collateral proceedings.* As I have stated before, it seems to me that the attempt to distinguish between direct and collateral challenges for purposes of retroactivity is misguided. Under the majority's rule, otherwise identically situated defendants may be subject to different constitutional rules, *depending on just how long ago now-constitutional conduct occurred and how quickly cases proceed through the criminal justice system.* The disparity is no different in kind from that which occurs when the benefit of a new constitutional rule is retroactively afforded to the defendant in whose case it is announced but to no others; the *Court's new approach equalizes nothing except the number of defendants within the disparately treated classes.*

Id. (emphasis added; citations omitted). The dissent continued:

> The distinction between direct review and collateral attack may bear some relationship to the recency of the crime; thus, to the extent that the difficulties presented by a new trial may be more severe when the underlying offense is more remote in time, it may be that new trials would tend to be somewhat more burdensome in habeas cases than in cases involving reversals on direct appeal. However, this relationship is by no means direct, for the speed with which cases progress through the criminal justice system may vary widely. Thus, *if the Court is truly concerned with treating like cases alike, it could accomplish its purpose far more precisely by applying new constitutional rules only to conduct of appropriately recent vintage. I assume, however, that no one would argue for an explicit "5-year rule"* . . . .

Id. at 64 n.1 (emphasis added). One commentator also noted:

> When a court is itself changing the law by an overruling decision, its determination of prospectivity or retroactivity should not depend upon the stage in the judicial process that a particular case has reached when the change is made. *Too many irrelevant considerations, including the common cold, bear upon the rate of progress of a case through the judicial system.*

Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U. L. REV. 631, 645 (1967) (emphasis added); *see* United States v. Johnson, 457 U.S. 537, 556, 556-57 n.17 (1982).

appeal. Therefore, it is more likely that the case will be closed or, if open, will be pending on collateral review when the Court enunciates new or changed law.

The size of the trial docket is influenced, in turn, by such factors as the number of crimes committed; the number of arrests made; the type of offense, particularly whether or not it is a capital offense; the number of prosecutors available; the number of public defenders available to defend indigent defendants; the number of criminal law judges available; the length of time needed by prosecutors and defense counsel to prepare their cases; the role of plea bargaining; the number of cases that go to trial, particularly to trial before a jury; and the number of cases that end in mistrials, but that are retried.

A jurisdiction's criminal appellate docket is influenced by many of the factors just mentioned, such as the number of crimes committed; the number of attorneys available to represent the state and the defendant on appeal; the number of appellate judges available; and the length of time necessary to prepare a case for appeal. Also of significance at the appellate level is the number of tiers of review available. All states provide one level of review as a matter of right for defendants convicted of serious crimes;[303] some states provide a second level of review. Moreover, the willingness of a court of discretionary review to accept criminal cases is an important factor. Some courts may hear large numbers of criminal cases, thereby slowing down the pace of direct review; others may hear few such cases, thereby accelerating the completion of the direct review process.

Underlying these factors is the amount of money allocated to trial and appellate court systems. Financial resources, combined with the aforementioned factors, function to create criminal justice systems in which defendants' cases either proceed expeditiously or at a snail's pace from arrest, charging, and trial through final state court appeal.[304] As a consequence, it is not the defendant, the crime, or the allegations of reversible constitutional error that determine if the defendant's case will be pending on direct review when the Supreme Court announces a decision that bears on the case. It is the operation of circumstances beyond a defendant's control, in conjunction with the Court's decision to resolve an issue

303. *See* Griffin v. Illinois, 351 U.S. 12, 18 (1956).

304. A petition for writ of certiorari after completion of direct review by state courts is part of the direct review process. *See* Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987); Linkletter v. Walker, 381 U.S. 618, 622 n.5 (1965).

affecting him, that determine his location in the appellate system when a controlling decision is announced. By sheer happenstance, his case may be pending on direct review, in which case, and for no other reason, *Griffith* accords him the advantage of a new right or implementing rule. By the same sheer happenstance, another defendant's case has been completed. Although that defendant, too, sustained the same error and preserved the error as an appellate issue,[305] *Allen* consigns him to punishment predicated in part on an error of constitutional dimension, solely because a constellation of factors beyond his control ushered him through trial and the direct appellate process more expeditiously than his direct review counterpart.[306] The errors asserted by each defendant are identical, and yet the direct review defendant is the beneficiary not of a reasoned distinction, but of the vagaries of timing.

Vagaries of timing, of course, are no more rational than the vagaries of selecting which one of hundreds of direct review defendants with the same constitutional claim will come before the Court and receive the immediate benefit of a favorable ruling. The Court in *Griffith* properly decided to abandon the vagaries of selection, but in *Allen* refused to extricate itself from the vagaries of timing. As to collateral review defendants, fortuity again controls over fairness and reason in allocating the benefit of the Court's holdings articulating the criminal rights of defendants and the rules effectuating those rights.

It is not some constitutional limit on the Court's authority, not federalism and comity, not finality, and not reason that differentiates direct review from collateral review defendants. It is happenstance, pure and simple. Having rejected happenstance as unfair in differentiating between the direct review defendant before the Court and all other direct review defendants, it remains for the Court to reject happenstance as unfair in the context of direct review and collateral review. In so doing, it can vindicate nonarbitrary treatment as a central tenet of our system of justice.

VIII. Conclusion: Per Se Full Retroactivity in Practice

Per se full retroactivity means that collateral review defendants can avail themselves of a newly articulated right or implementing rule under the current principles governing federal habeas

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305. See *infra* notes 307-09 and accompanying text regarding the requirement that constitutional errors be preserved.

306. *See supra* note 302.

corpus relief. The collateral review defendant must have preserved the constitutional error for review as required by state law procedural rules.[307] Failure to preserve the error precludes retroactivity in any one defendant's particular case.[308] In addition, the collateral review defendants who have preserved the constitutional error ordinarily must have sought relief from that error in all state law forums.[309] Further, the collateral review defendants must demonstrate, on the facts of their individual case, that the claimed error was in fact error.[310] Once the procedural prerequisites are met for collateral review, the federal district court has the discretion to decide the constitutional question on the record presented or to con-

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307. The Court has restricted the expansive availability of federal habeas corpus relief established by Fay v. Noia, 372 U.S. 391 (1963). "It is the sweeping language of *Fay v. Noia*, going far beyond the facts of the case eliciting it, which we today reject." Wainwright v. Sykes, 433 U.S. 72, 86-88 (1977). In limiting *Noia*, the Court has returned to the understanding of federal habeas corpus review set forth by Justice Frankfurter's opinion in Brown v. Allen, 344 U.S. 443, 502-10 (1953). There Justice Frankfurter set forth the following prerequisites to federal habeas corpus relief: (a) Pleading a prima facie case of error; (b) exhaustion of state law remedies; and (c) preservation of errors as required by state law procedural rules. *Id.* at 502-03.

Current law makes clear that federal habeas corpus is not available unless the collateral review defendant has preserved alleged constitutional errors in the manner prescribed by state rules of criminal procedure. *Sykes*, 433 U.S. at 85-87. Failure to do so constitutes a procedural default under state law and precludes habeas corpus review. Defendants can avoid the preclusive effect of state law procedural rules if they are able to establish both a legitimate reason for failing to preserve an alleged error and that they were prejudiced by the error. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 110, 128-29 (1982); *Sykes*, 433 U.S. at 85-87; Francis v. Henderson, 425 U.S. 536, 542 (1976).

State law procedural default rules also apply to the appellate process. Failure to raise alleged errors on appeal constitutes a waiver of those errors and bars the defendant from raising them in a petition for federal habeas corpus relief. *See* Smith v. Murray, 477 U.S. 527, 533 (1986); Murray v. Carrier, 477 U.S. 478, 492-93 (1986). Failure to press an allegation of constitutional error on appeal, however, may be excused under the cause and prejudice standard when "a constitutional claim is so novel that its legal basis is not reasonably available to counsel." Reed v. Ross, 468 U.S. 1, 16 (1984).

Preservation also extends to direct review defendants. It is a fundamental principle of criminal procedure that errors not raised at trial and on appeal are waived subject to the plain error doctrine. *See, e.g.*, Tacon v. Arizona, 410 U.S. 351, 352 (1973); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969).

308. *See, e.g.*, Virgin Islands v. Forte, 806 F.2d 73, 75-77 (3d Cir. 1986) (alleged *Batson* error waived if not raised until defendant's sentencing hearing); Arizona v. Holder, 155 Ariz. 83, 85, 745 P.2d 141, 143 (1987) (absent plain or fundamental error, alleged *Batson* error waived if raised for the first time on appeal).

309. A defendant is required to exhaust all available remedies under state law. *See* 28 U.S.C. § 2254(b) (1982).

310. Habeas corpus relief cannot be granted unless the claimed error actually occurred. *See Brown*, 344 U.S. at 502 ("Just as in all other litigation, a prima facie case must be made out by the petitioner. The application should be dismissed when it fails to state a federal question, or fails to set forth facts which, if accepted at face value, would entitle the applicant to relief."). Of course, this requirement also applies to direct review defendants.

duct a de novo review.[311]

It is clear, therefore, that per se full retroactivity does not mean that all defendants will benefit from the right or rule at issue. For both direct review and collateral review defendants, the alleged error must be preserved and a determination made that the error, in fact, occurred. In addition, collateral review defendants must exhaust their state law remedies. Given these prerequisites, per se full retroactivity will ensure fairness in the retroactive application of new decisions without descending the slippery slope of release or the expensive retrial of large numbers of convicted criminals.

311. This discretion, however, must be exercised in strict compliance with 28 U.S.C. § 2254(d)-(f) (1982).

Innovate, Integrate, and Cooperate: Antitrust Changes and Challenges in the United States and the European Economic Community

*Sara G. Zwart**

In the early 1980s, several large American electronics companies reluctantly formed the Microelectronics and Computer Technology Corporation ("MCC") to develop a supercomputer.[1] MCC is a joint venture initially composed of twenty computer companies, with an annual budget of about $75 million and a staff of over four hundred. MCC runs several programs, the most ambitious of which is a ten-year program aimed at breakthroughs in computer architectures, software, and artificial intelligence.[2] MCC will own the licenses and patents of the developed technologies. Individual computer companies sponsoring MCC will hold exclusive manufacturing and marketing rights for three years before the research is published. After that time other companies will be permitted to

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* Assistant Professor of Business Law, Stern School of Business, New York University. Master of Laws 1961, Free University of Amsterdam; J.D. 1972, University of Utah; LL.M. 1983, New York University. The author thanks Mr. Jean-Francois Verstrynge, Cabinet of the Commissioner for Competition, E.C. Commission, for his kind introduction at the several EEC offices. The author also thanks Ms. Barrie Fay O'Donnell for her research assistance on this Article.

1. *See* MCC: MICROELECTRONICS AND COMPUTER TECHNOLOGY (1982) (copy on file with the *Utah Law Review*).

2. MCC conducts research in advanced computer architectures, the development of processes for high density packaging of semiconductors, the improvement of software quality and productivity, and Very Large Scale Integration /Computer Aided Design ("VLSI/CAD"). Notice, 50 Fed. Reg. 15,989 (1985). Current participants include: Advanced Micro Devices, Allied-Signal, Bell Communications Research, Boeing, Control Data, Digital Equipment ("DEC"), Eastman Kodak, General Electric, Harris, Hewlett-Packard, Honeywell, Lockheed, Martin Marietta, Minnesota Mining & Manufacturing ("3M"), Motorola, National Cash Register ("NCR"), National Semiconductor, Unisys, and Westinghouse. Allied-Signal, Unisys, and Lockheed resigned at the end of 1987. Each member pays a $250,000 one-time fee and shares the annual budget for as many of the four specific research programs as it joins. The average member pays about $3 million annually. *See* Reed, *MCC Makes Itself Known*, Sacramento Bee, Aug. 24, 1987, at C1, col. 1. Early successful research was conducted by NCR, which, through its participation in MCC, developed the NCR Design Advisor, a software system that simplifies the process of designing customized computer chips by allowing engineers tap into a reservoir of expert information on chip design. *See NCR Unveils Product Made With MCC Aid*, Austin-American Statesman, June 24, 1987, at C8, col. 4.

purchase licenses.[3]

MCC almost failed for fear of antitrust violations.[4] The antitrust laws expose companies that unreasonably restrain trade to treble damage actions. MCC was concerned that, should it succeed in developing a supercomputer, competitors excluded from MCC could argue that an illegal boycott existed, thereby entitling such competitors to treble damages.[5] More serious, however, was the concern that American companies would lose competitiveness—a particularly ominous threat in the computer industry—because a backlog in one generation of computers creates a double backlog in the next.

MCC was formed in response to competition, particularly from Japanese "targeting."[6] Targeting may take the form of subsidies, tax breaks, antitrust immunity, or other governmental assistance

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3. *Fifth Generation Computers in the U.S.*, HIGH TECHNOLOGY, June 1983, at 69; *see* RESEARCH & DEVELOPMENT JOINT VENTURE ACT OF 1983, H.R. REP. No. 571, 98th Cong., 1st Sess. 9 (1983). Another recent joint venture project is the Semiconductor Research Corporation ("SRC"). Unlike MCC, SRC does not conduct its own research, but instead sponsors research at various universities. As with MCC, the sponsoring companies benefit from exclusive access to the results. *See Administration Pushes R&D Pooling to Maintain U.S. Lead in High Tech*, NAT'L J., Oct. 1, 1983, at 1992; Fischette, *A Review of Progress at MCC*, IEEE SPECTRUM, Mar. 1986, at 76; Marbach, *The Race to Build a Supercomputer*, NEWSWEEK, July 4, 1983, at 58; *MCC: An Industry Response to the Japanese Challenge*, IEEE SPECTRUM, Nov. 1983, at 55.

4. There has been only one relatively ancient Justice Department prosecution of a research joint venture. In that case, car manufacturers joined to research pollution control equipment. The prosecution resulted in a consent decree. United States v. Automobile Mfrs. Ass'n, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd sub nom.* City of New York v. United States, 397 U.S. 248 (1970) (per curiam). Still, the fear was real enough to be taken seriously by Congress.

> Properly interpreted, the antitrust laws prohibit only anticompetitive joint R&D. There is a perception, however, that the antitrust laws discourage all joint R&D efforts, regardless of their benefits. That the courts have had little occasion to consider R&D arrangements in the antitrust context may have contributed to the disparity between business perceptions and the antitrust enforcement record and policy of the past two decades.

JOINT RESEARCH & DEVELOPMENT ACT OF 1984, H.R. REP. No. 656, 98th Cong., 2d Sess. 4 (1984).

5. Shortly after its creation, MCC was threatened with antitrust action by a nonparticipating competitor.

6. *Japanese Technological Advances and Possible United States Responses Using Research Joint Ventures: Hearings before the Subcomm. on Science, Research and Technology of the House Comm. on Science and Technology*, 98th Cong., 1st Sess. 191 (1983) [hereinafter *Senate Hearings*] (statement of D. Bruce Merrifield, Ass't Sec'y of Commerce). " 'If the Japanese play by one set of rules and we play by another, we are not going to win,' says Gordon R. Brown, president of Peripheral Products Co., a subsidiary of Control Data Corp., . . . one of the leading supporters of MCC." *Suddenly U.S. Companies are Teaming Up*, BUSINESS WEEK, July 11, 1983, at 72.

to private industry or major research projects. In 1982, for example, the Japanese targeted the information industry, announcing two projects designed to develop advanced computer technologies. The first of these projects is the well publicized $100 million, eight-year National Superspeed Computer Project, which aims to produce machines moving information 1000 times faster than any machines currently in existence. The second is the $500 million, ten-year Fifth Generation Computer Project that focuses on the development of artificial intelligence.[7]

In the European Economic Community ("EEC"), the government also actively promotes the creation of information technology.[8] Because the EEC must import most of its data-processing hardware, and more than three-quarters of its electronics products, it created the European Strategic Program for Research in Information Technology ("Esprit") in 1984.[9] Esprit calls for cooperation among industries, universities, and research centers of several nations[10] in developing information technologies (micro electronics, advanced information processing, and software technology) and hardware technologies (office systems and computer integrated manufacturing). Esprit's cost, $1500 million European Economic Units of Account ("ECU") over the first five years, is divided equally between the EEC budget and participating contractors.[11] To date, few European research programs have extended beyond

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7. Boffey, *U.S. Maintains Strength Despite Japanese Effort*, N.Y. Times, Oct. 23, 1984, at col. 5; Marbach, *The Race to Build a Supercomputer*, NEWSWEEK, July 4, 1983, at 58.

8. Europe is falling behind its United States and Japanese competitors. *See How Europe Has Failed*, ECONOMIST, Nov. 24, 1984, at 13.

9. COMMISSION OF THE EUR. COMMUNITIES, ESPRIT FOR EUROPE'S FUTURE (undated pamphlet); *See European Community to Spend $600 Million on Electronics Research in Next Five Years*, 9 Int'l Trade Rep. (BNA) No. 21, at 710 (Feb. 29, 1984). "The fundamental aim of the program," according to the Commission, "is to mount a technological push across the Community to achieve parity with, if not superiority over, the American and Japanese competitors within the next 10 years." *Id.*

10. Despite the objections, the United States has become part of the Esprit group through the participation of IBM. *Foreign Affiliates of Four U.S. Companies to Participate in EEC Technology R&D Program*, 2 Int'l Trade Rep. (BNA) No. 39, at 1247 (Oct. 2, 1985). The MCC bylaws explicitly exclude foreign members. Nevertheless, to enlarge the group, "allowing European or Japanese firms may be worthwhile looking at." *See High-Tech Center Reshaping U.S. Business*, Atlanta Constitution, Jan. 11, 1987.

11. *See* Carpentier, *Toward a New Kind of Community: Esprit Program on Information Technology Represents Europe-wide Industrial Policy*, EUROPE, May-June 1984, at 28; COMMISSION OF THE EUR. COMMUNITIES, DRAFT COUNCIL DECISION, ADOPTING THE 1985 WORK PROGRAMME FOR THE EUROPEAN STRATEGIC PROGRAMME FOR RESEARCH AND DEVELOPMENT IN INFORMATION TECHNOLOGIES (ESPRIT), Com (84) 608 (Nov. 8, 1984).

the boundaries of a single nation.[12] Consistent with the overall goal of the EEC, it is hoped that Esprit will not only spur innovation, but will acquaint companies of different member nations with each other through their joint activities.[13]

Many in government and industry believe that the "high-tech innovation" of the 1980s requires large scale cooperation.[14] Modern technological development has become complex and expensive. Rarely does a single company possess all the skills, knowledge, expertise, or financial resources required to research and develop new products.[15] While some blame existing antitrust cooperation,[16]

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12. Other recent EEC cross-border research programs include RACE and EUREKA. RACE, a $15-million pilot research and development joint venture in communications technology, aims at helping Europe's telecommunications industry compete with United States and Japanese manufacturers. *EEC Set to Approve Plan to Aid Establishment of Telecommunications Network for Members*, 2 Int'l Trade Rep. (BNA) No. 19, at 660 (May 8, 1985). The $4.5-billion EUREKA venture, launched in 1985, explores "high frontier," high technology, nonmilitary research. *Consensus is Japanese Fare Well at Summit, But Reaction to Trade Talks Progress Mixed*, 2 Int'l Trade Rep. (BNA) No. 20, at 670 (May 15, 1985). EUREKA is funded by private funds and public funds of 19 European governments. It now involves more than 600 companies and research organizations working on 165 projects. *Basking in Europhoria*, TIME, Oct. 19, 1987, at 48.

13. Wall St. J., Jan. 25, 1985, at col. 1 ("Esprit 'has already proved its worth by getting companies developing the projects' to sit around the table and realize the other folks in the other countries aren't such ogres or fools.' " (quoting remarks by Brian Oakley, director of Britain's Alven Directorate, a program to foster high technology research)); *see* Jacquemin & Spinoit, *Economic and Legal Aspects of Cooperative Research: A European View*, 1985 FORDHAM CORP. L. INST. 487 (B. Hawk ed. 1986).

14. High technology has been defined as technology for new or advanced processes in key industries requiring above average R&D. *See* Overbury, *EEC Competition Law and High Technology*, 1985 FORDHAM CORP. L. INST. 465, 466 (B. Hawk ed. 1986).

15. *See U.S. International Competitiveness Receiving Attention Again as New Congress Approaches*, 3 Int'l Trade Rep. (BNA) No. 52, at 1561 (Dec. 24, 1986).

16. *E.g.*, W. OUCHI, THE M-FORM SOCIETY: HOW AMERICAN TEAMWORK CAN RECAPTURE THE COMPETITIVE EDGE 34 (1984); PRESIDENT'S COMM'N ON INDUSTRIAL COMPETITIVENESS, GLOBAL COMPETITION, THE NEW REALITY (1985). William F. Baxter, former Assistant Attorney General, also remarked on the possible chilling effects of antitrust laws on international competition in a speech before the National Association of Manufacturers in Washington, D.C. on May 10, 1983. *Joint Research Ventures—Intellectual Property Law*, 5 Trade Reg. Rep. (CCH) ¶ 50,447 (May 23, 1983). In a January 18, 1984, speech before the National Chamber Litigation Center, J. Paul McGrath, then Assistant Attorney General, noted that joint R&D ventures are essential to the development of new technologies. He expressed concern that the antitrust laws may have slowed down technological developments. *Administration's Legislative Program Will Help Rationalize Antitrust Laws*, 46 Antitrust & Trade Reg. Rep. (BNA) No. 1148, at 127 (Jan. 19, 1984). President Francois Mitterand of France, Acting President of the European Council, also urged the EEC countries to cooperate in sharing the resources and research results in the high technology sectors in order to develop their economies and catch up to the United States and Japan. Stressing the "Third World Revolution" theme, he called on governments to work together in creating a climate for European cooperation. *Mitterand Urges EEC Cooperation in R&D for High-Technology Ventures*, 46 Antitrust & Trade Reg. Rep. (BNA) No. 1168, at 1108 (June 7, 1984).

others deny that antitrust laws deter cooperation, or that cooperation will provide the prophesied stimulus to technological development.[17] With this controversy in mind, the United States and the EEC have softened the application of the antitrust laws to research and development ("R&D") joint ventures. In the United States, the new legislation is entitled the National Cooperative Research Act of 1984 ("Act").[18] The EEC analog is the "Commission Regulation (EEC) No. 418/85 of 19 December 1984 on the application of Article 85(3) of the Treaty to categories of research and development agreements" ("Regulation").[19]

II. PURPOSE OF THE ARTICLE

This Article analyzes and compares the United States and EEC antitrust legislation. First it discusses the nature and scope of research and development joint ventures. Next, the Article highlights and compares the United States and EEC antitrust laws as they affect such ventures. After describing early efforts to facilitate

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17. *See Most Witnesses Find Antitrust Law to be No Block to High Tech Industries*, 52 Antitrust & Trade Reg. Rep. (BNA) No. 1315, at 891 (May 14, 1987); *The National Productivity and Innovation Act and Related Legislation: Hearings Before the Comm. on the Judiciary of the United States Senate*, 98th Cong., 1st & 2d Sess. 206, 302-03 (1984) [hereinafter *1984 Senate hearings*] (statement of Eleanor M. Fox, Prof. of Law at N.Y.U., blaming trade barriers and the "lax monopoly law" for decline of United States inventiveness); *Antitrust, All Pull Together*, ECONOMIST, Sept. 24, 1983, at 26 (evidence is "scanty and mixed" that American firms would be more inclined to get together, like the Japanese, to carry out expensive research if the antitrust laws were less fierce). Two commentators, Ordover & Willig, conclude:

> [An R&D venture] almost certainly both speeds innovation and enhances product market competition if the primary R&D competition the venture candidates face is from others rather than from each other. On the other hand, if the prospective joint venturers . . . have more to lose from each other's unilateral advances then they do from together falling behind the rest of the market or from failing together to jump ahead of the rest of the market, then the R[esearch] J[oint] V[enture] may slow the pace of innovation.

Ordover & Willig, *Antitrust for High-Technology Industries: Assessing Research Joint Ventures and Mergers*, 28 J.L. & ECON. 311, 313 (1985).

18. National Cooperative Research Act of 1984, 15 U.S.C. §§ 4301-4305 (Supp. III 1985).

19. *Commission Regulation (EEC) No. 418/85 of 19 December 1984 on the Application of Article 85(3) of the Treaty to Categories of Research and Development Agreements*, O.J. EUR. COMM. (No. L 53) 5 (Feb. 22, 1985) [hereinafter *Regulation*]. Upon enactment, the Commission also adopted a block exemption for specialization agreements, *see Regulation No. 417/85 of 19 December 1984, replacing Regulation No. 3604/82 as of 1 March 1985*, O.J. EUR. COMM. (No. L 53) 1 (Feb. 22, 1985). The block exemption applies when joint turnover of the firms taking part in the agreement does not exceed ECU 500 mill. (formerly 300 mill.), provided their market share does not exceed 20% (formerly 15%) in any substantial part of the Common Market.

R&D joint ventures in the United States and EEC, the Article summarizes the new legislation and the obstacles encountered in each. Finally, the Article compares the new laws and speculates on their impact.

The Article reaches several tentative conclusions. Both the United States Act and the EEC Regulation create a legal climate favorable to joint research, and both have been well received by the business community.[20] Each accomplishes its intended result, but in different ways. The United States Act encourages cooperative research by discouraging private litigation through the elimination of treble damages, a remedy not even available in the EEC. To benefit from the detrebling provision of the United States Act, a research joint venture must notify the government of its creation. The EEC Regulation, on the other hand, creates a safe harbor for R&D joint ventures. A research joint venture in the EEC is no longer required to notify the Commission as long as the joint venture complies with the Regulation.

The goal of the EEC Regulation is broader than that of the United States Act. In addition to preserving competition in research, the EEC Regulation seeks to promote a true common market by encouraging cross-boundary cooperation.[21] The Regulation permits the venturers to engage in joint production using the R&D results. In contrast, United States venturers engaging in joint production are denied the benefits of the Act. Furthermore, the Regu-

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20. In the United States, approximately 150 notices have been filed under the Act, 61 of which are for new R&D joint ventures. *NCR Unveils Product Made With MCC Aid*, Austin American-Statesman, June 24, 1987, at C8, col. 4. In the EEC, the Commission applied the Regulation twice in 1985. In the United Kingdom National Coal Board Case, the Commission held that the notified agreement complied with the Regulation. *See EEC Commission Reviews Enforcement Activities*, 51 Antitrust & Trade Reg. Rep. (BNA) No. 1273, at 76 (July 10, 1986). In *BP/Kellog*, the Commission held the notified agreement too restrictive under the Regulation, noting that an individual exemption could be granted. *Id.; see also* Korah, *Critical Comments on the Commission's Recent Decisions Exempting Joint Ventures to Exploit Research That Needs Further Development*, 12 EUR. L. REV. 18 (1987) (discussion of *BP/Kellog* exemption); Maciver, *EEC Competition Policy in High Technology Industries*, 1985 FORDHAM CORP. L. INST. 521 (B. Hawk ed. 1986) (taking the position that the Commission should take a more flexible approach towards article 85(1) analysis and further clarify its policies on article 85(3) exemptions, especially in the high-tech field).

21. *See* Venit, *Slouching Towards Bethlehem: The Role of Reason and Notification in EEC Antitrust Law*, 10 B.C. INT'L & COMP. L. REV. 17-18 (1987).

> The importance for EEC antitrust law of the goal of market integration in the absence of political unity cannot be overemphasized and the attempt to achieve this integration is the source of the most significant disparities in the approach to, and implementation of, antitrust law in the United States and the EEC.

Id. at 18.

lation does not promulgate rules that are markedly different from those applied by the Commission in individual exemption procedures, even though its primary purpose is to change the perception of the law. The detrebling provision of the United States Act, on the other hand, represents a clear break from past procedures.[22] Detrebling remains controversial, however, and its application, at least for now, is limited to exclude joint production of research results.[23]

The United States Act is a manifestation of a broader movement from a per se rule toward a rule of reason analysis in which the distinction between the two has become blurred. At the same time, the rule of reason analysis is becoming more streamlined, limiting the courts in their discretion. In the EEC the opposite trend is apparent. Individual balancing by the Commission is being replaced by black, white, or gray lists of block exemptions—an approach similar to a per se analysis.

In fusing the rule of reason and per se analyses, the Act exemplifies the "new antitrust" that grew out of major reform of enforcement procedures in the seventies, guided by economic models of efficiency.[24] In the EEC, antitrust laws increasingly are seen as indispensable to achieving a true common market.[25] Because the

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22. An earlier statute, the Export Trading Company Act of 1982, 15 U.S.C. §§ 4001-4021 (1982), detrebled damages for activities of certain certified export joint ventures. See the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (Supp. 1988), which reduces treble damages in certain situations. Like the Research Act, these two acts also extend counsel fees to prevailing defendants and make certification or notification conditional to benefitting from the reduced damages provision. *See ABA House Favors Paring of Civil RICO Enforcement*, 51 Antitrust & Trade Reg. Rep. (BNA) No. 1279, at 275 (Aug. 21, 1986); Shipping Act of 1984, 46 U.S.C. §§ 1701-1706, 1715 (West Supp. 1986) (broadening shipping's antitrust immunity and eliminating certain private rights of action).

23. For a careful analysis of the detrebling issue, see Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777 (1987); Nijenhuis, *Antitrust Suits Involving Foreign Commerce: Suggestions for Procedural Reform*, 139 U. PA. L. REV. 1003 (1987).

24. *See, e.g.*, R. BORK, THE ANTITRUST PARADOX (1978).

25. A Commission report stated:

> The purpose of the European Community is to foster economic and social progress in its member countries by breaking down the barriers dividing them and creating a genuine common market . . . . Subject to the maintenance of an adequate level of competition, it allows scope for cooperation between firms likely to further technical and economic progress, especially in research and development and the transfer of technology. Hence, the Commission can take favorable decisions on inter-company cooperation or government intervention that is in the wider Community interest and not just the interest of the firms or countries concerned. This is especially evident in the case of measures that stimulate R&D and innovation, as well as boosting dynamic growth, or which help realize the growth potential of underdeveloped areas.

COMMISSION'S SIXTEENTH REPORT ON COMPETITION POLICY 13-14 (1986) [hereinafter SIX-

EEC Regulation's principal goal is to integrate the market, the Regulation seeks to strengthen antitrust rather than to disarm it.

III. JOINT VENTURES, RESEARCH AND DEVELOPMENT DEFINED

A joint venture is a joint business undertaken by otherwise independent entities to carry out a particular objective. It is best viewed as a form of cooperation falling between a contract and a merger. Contracts are typically detailed and specific, seeking to provide solutions to most any controversy likely to arise between the parties during the life of the contract. By contrast, joint ventures have a much more flexible format, leaving many companies to combine total assets and to seek lasting cooperation in all aspects of business. A joint venture constitutes only a partial integration and therefore is usually less rigid and easier to unravel than a merger.

Joint ventures may take diverse legal forms. Companies may enter into a contract allocating the work among themselves or subcontracting it to third parties. They may enter into a partnership with each party allocating similar or different resources to the joint project. Or they may form a corporation to function as the organizing body in which each member holds shares of stock.[26]

Generally, companies cooperate to avoid risks, to achieve results more quickly, or to reach otherwise unattainable goals.[27] For instance, companies may work together to facilitate entry into new

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TEENTH REPORT].

26. A well known scholar on joint ventures, Joseph Brodley, defines joint ventures as an integration of operations between two or more separate firms, in which the following are present: (1) the enterprise is under the joint control of the parent firms, which are not under related control; (2) each parent makes a substantial contribution to the joint enterprise; (3) the enterprise exists as a business entity separate from its parents; and (4) the joint venture creates significant new enterprise capability in terms of new productive capacity, new technology, a new product, or entry into a new market. Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1523, 1526 (1982); *see* Brodley, *The Legal Status of Joint Ventures Under the Antitrust Laws: A Summary Assessment*, 21 ANTITRUST BULL. 453 (1976); Brodley, *Joint Ventures and the Justice Department's Antitrust Guide for International Operations*, 24 ANTITRUST BULL. 337 (1979). In the EEC, "joint venture" is defined more narrowly as an undertaking that is jointly controlled by two or more separate entities and that has a separate legal identity. *See* Caspari, *Joint Ventures—The Intersection of Antitrust Industrial Policy in the EEC*, 1985 FORDHAM CORP. L. INST. 449, 457 (B. Hawk ed. 1986).

27. *See* Wright, *The National Cooperative Research Act of 1984: A New Antitrust Regime for Joint Research and Development Ventures*, 1 HIGH TECH. L.J. 133, 145 (1986) ("The primary incentives for participation in joint ventures . . . include (1) risk avoidance, (2) technology acquisition, (3) utilization of the assets and attributes belonging to partners, and (4) organizational superiority.").

markets, particularly foreign markets. Many countries do not allow entry by foreign corporations unless those corporations align themselves with local business. Joint ventures have been used to set up new manufacturing and marketing outlets. Companies also may join forces to retard progress or otherwise to hamper competition.[28] More recently, companies have formed joint ventures to cooperate in researching new technologies, products, or services. Joint ventures are particularly well suited to R&D because research requires an ongoing relationship between the researchers.

Research can be divided into three distinct categories: basic (or fundamental), applied, and developmental.[29] Basic research, conducted mainly in universities, is haphazard and its results are unsure. Industry tends to shy away from basic research because it considers the rewards too speculative and long range. Even if realized, such rewards may turn out to be more beneficial to others than to the actual inventor.[30] In applied research, attempts are made to refine or improve the application of existing discoveries. Applied research often is more costly than basic research, and both universities and industry are involved. The last, and often most expensive, phase of research is developmental research, in which seminal discoveries are further developed for actual commercial application. Industry puts most of its effort into developmental research because it can more clearly forecast and reap immediate rewards.[31]

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28. *See* Blechman, *Use of Joint Ventures to Foster U.S. Competitiveness in International Markets*, 53 ANTITRUST L.J. 65 (1984).

29. *See generally* F. SCHERER, INDUSTRIAL MARKET SECURITIES AND MARKET PERFORMANCE (2d ed. 1980).

30. This is the "public good" element in basic research. *See* Baxter, *The Definition and Measurement of Market Power in Industries Characterized by Rapidly Developing and Changing Technologies*, 53 ANTITRUST L.J. 717 (1984); *see also* Jacquemin & Spinoit, *supra* note 13, at 494-95 ("[S]cientific knowledge has many aspects of a *public good* and hence will tend to be undersupplied. . . . By 'internalizing' technology markets, through R&D cooperation contracts, firms can more easily capture the rents from research so that the tendency towards underinvestment can be reduced.").

31. This theory is sometimes called the "innovation pipeline" because it takes 7 to 10 years to move a significant new product or procedure through the process. *1984 Senate Hearings*, *supra* note 17, at 264 (statement by D. Bruce Merrifield); *see also* STAFF OF THE HOUSE COMM. ON THE JUDICIARY, 98TH CONG., 2D SESS., STUDY OF THE ANTITRUST TREBLE DAMAGE REMEDY (Comm. Print 1984) (prepared by George E. Garvey, Associate Professor of Law, the Catholic University of America) [hereinafter G. GARVEY]; D. GINSBURG, ANTITRUST, UNCERTAINTY, AND TECHNOLOGICAL INNOVATION (1980). In the EEC, see COMMITTEE ON INDUSTRIAL RESEARCH & DEVELOPMENT, WORKING PARTY 6, COMMUNICATIONS FROM THE ADVISORY COMMITTEE ON INDUSTRIAL RESEARCH AND DEVELOPMENT (CORDI) TO THE COMMISSION OF THE EUROPEAN COMMUNITIES, PRINCIPAL OBSTACLES WHICH IMPEDE COOPERATION IN R&D BETWEEN FIRMS AND/OR RESEARCH CENTRES IN DIFFERENT MEMBER STATES OF THE COMMU-

Joint research and development ventures are formed for various reasons. In addition to speeding up the process of innovation, pooling and combining of skills, assets, capital, and labor helps to spread the high risks involved. Joint R&D ventures also avoid or reduce costly duplication. Because the result of research is information, a second inventor may waste most of its investment gathering information already acquired by others. When research involves the use of a patented invention, the researcher may have to pay for its use. Through joint research, resources that might have been wasted on duplicate research can be invested in other areas of research, benefitting not only the inventors but society as well.

For small firms, which are often very inventive,[32] and in projects exceeding the financial capacity of even large individual firms, joint research provides economies of scale.[33] This seems to be particularly true for "high tech" industries. Joint research ventures also may stimulate new investment. According to some studies, R&D ventures increase the market value of participating firms, reflecting investor expectations of efficiency gains from such ventures.[34]

Nevertheless, joint research ventures have disadvantages. Partners must share new inventions with each other. Not only do the participants give up the opportunity of being alone at the forefront but, by creating the joint venture, they create competitors as well. Joint ventures also are organizationally complex and the partners may lose a sense of separate identity. Conflicts may arise over expected work contribution, ownership of inventions, new learning internalization, and reward distribution among unequal participants. Joint researchers must devise ways of separating unrelated

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NITY, CORDI/39/83 rev. 1 (1983) [hereinafter CORDI REPORT].

32. "[S]mall firms appear to be the most vigorous innovators in relation to their spending on research and development." *Metzenbaum Blasts Bar's Apathy in Efforts to Protect Antitrust Law*, 52 Antitrust & Trade Reg. Rep. (BNA) No. 1309, at 641, 644 (Apr. 2, 1987) (reporting remarks of Professor F.M. Scherer to the Antitrust Policy Institute in March 1987).

33. D. GINSBURG, *supra* note 31, at 12. Federal Trade Commission Chairman James C. Miller, III, speaking before the Berlin Cartel Conference on July 2, 1984, noted efficiencies due to the capturing of synergies, the sharing of fixed costs, the spreading of risks, and two unique advantages: the knowledge gained from the venture and the reduction of social costs of excessive duplication of research efforts. He also warned that the research agreements could become a cover for price fixing and allocation schemes, or create monopoly power in the research market. *Research Joint Ventures Have Advantages But Pose Possible Anticompetitive Effects*, 47 Antitrust & Trade Reg. Rep. 83 (BNA) No. 1173, at 83 (July 12, 1984).

34. *See* Weston & Ornstein, *Efficiency Considerations in Joint Ventures*, 53 ANTITRUST L.J. 85, 92 (1984).

business and of guarding against inter-partner espionage on new or unrelated projects.[35]

In the EEC, member countries must overcome not only differences in language, tax systems, and business styles, but also problems arising from government protection of certain pet industries, low mobility of employees, and high costs of communication.[36] Because no European corporation exists as yet, joint venturers also face difficulties in choosing the proper legal form.[37]

A societal risk of joint research ventures is that they may become so overinclusive that too few companies remain capable of conducting competitive research. Without the threat of competition the incentive to invent may dwindle, leading eventually to "collusive underinvestment" in R&D.[38] The reverse problem is "underinclusiveness." When economies of scale require that the majority of competitors participate in the venture, those entities left out may miss an important competitive opportunity. Denying access to competitors eager to participate may result in an unacceptable boycott. Under such circumstances, perhaps an all-inclusive venture would be preferable.

In addition to creating entry barriers, a research joint venture may "spill over" into other aspects of a participant's business. It may eliminate or interrupt independent research in the same or unrelated fields. Worse still, the venture facilitates sharing of sensitive information and might encourage covert agreements regarding outputs, prices, markets, or customers with respect to the research results or other business. A further concern may be whether the joint venture stifles innovation by controlling or slowing down the inventive process or suppressing its results.[39] The basic tenets of existing antitrust laws in both the United States and the EEC attempt to deal with these and other questions arising in the area of joint R&D ventures.

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35. *See generally* Baxter, *supra* note 30; Brodley, *Analyzing Joint Ventures With Foreign Partners*, 53 ANTITRUST L.J. 73 (1984); D. GINSBURG, *supra* note 31.

36. *See* CORDI REPORT, *supra* note 31.

37. Lindemann, *A Practical Critique of the EEC Joint Research Rules and Proposed Joint Ventures Guidelines*, 1986 FORDHAM CORP. L. INST. 341 (B. Hawk ed. 1987). The European Economic Interest Group, organized June 30, 1980, may bring unification among European corporations.

38. Baxter, *supra* note 30, at 720.

39. For instance, an industry-wide joint venture of car manufacturers stifled joint research on emissions control technology because such controls would have made cars more costly. United States v. Automobile Mfrs. Ass'n, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd sub nom.* City of New York v. United States, 397 U.S. 248 (1970).

IV. UNITED STATES AND EEC ANTITRUST LAWS AFFECTING R&D JOINT VENTURES

A. United States Antitrust Laws

The principal provision affecting R&D joint ventures in the United States is section 1 of the Sherman Act, which prohibits agreements that unreasonably restrain trade.[40] A research joint venture entered into by a monopolist also may be illegal under section 2 of the Sherman Act.[41] In addition, an R&D joint venture may be declared illegal both by the Federal Trade Commission under section 5 of the FTC Act[42] and, if it is a corporate joint venture, by the merger provision in section 7 of the Clayton Act.[43]

Generally, application of section 1 of the Sherman Act is characterized by a fundamental distinction between a per se and a rule of reason analysis.[44] The rule of reason requires a detailed analysis of the industry involved and a balancing of the procompetitive and anticompetitive effects of a particular agreement on the relevant market. For example, to prove that a venture exercised undue power, the plaintiff attacking an R&D venture must establish the size and structure of the relevant market, including the type of research involved, its costs, the existence of other parties capable of engaging in similar research, and the disincentives for conducting similar research created by the venture. The case could easily be dismissed if the plaintiff fails to prove the presence and exercise of market power. Additionally, under a rule of reason test, the plaintiff could be required to prove (1) that the venture included either too many or too few participants, (2) that the research spilled over into manufacturing or distribution of the research results or into aspects unrelated to the venture's business, or (3) that the venture

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40. 15 U.S.C. § 1 (1982). Antitrust R&D joint venture cases are uncommon, but have occurred. *See, e.g.*, Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); United States Automobile Mfrs. Ass'n, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd sub nom.* City of New York v. United States, 397 U.S. 248 (1970).

41. 15 U.S.C. § 2 (1982).

42. *Id.* § 45. The FTC has not brought any section 5 cases on R&D joint ventures.

43. *Id.* § 18. This section was applied to manufacturing joint ventures such as United States v. Penn-Olin Chemical Co., 378 U.S. 159 (1964) (analyzing a horizontal agreement to divide the sodium chlorate market), and Yamaha Motor Co., Ltd. v. FTC, 657 F.2d 971 (8th Cir. 1981) (considering whether Yamaha could have entered the market independently), *cert. denied*, 456 U.S. 915 (1982).

44. For example, in National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978), the Supreme Court held that antitrust cases should be analyzed under one of two methods: a rule of reason or a per se analysis.

inhibited rather than facilitated the process of innovation.

In only one case, *Berkey Photo, Inc. v. Eastman Kodak Co.*,[45] has the court rejected a joint development project under the rule of reason. In *Berkey*, Kodak had agreed with Sylvania and General Electric—two potential competitors—to slow down development and postpone the introduction of improved flashcubes until Kodak began marketing a matching camera.[46] The project was funded in large part by Kodak. As a result of the agreement, consumers had to wait longer and pay more for the product. Acknowledging the anticompetitive potential of joint ventures, especially when one of the parties is a monopolist like Kodak, the court considered the following indicia to measure legality: The size of each joint venture; their respective share of the market; the contributions of each party to the venture and the benefits derived by each; the likelihood that, in the absence of the joint effort, one or both parties would have undertaken a similar project either alone or with a smaller firm; and the nature and purpose of the venture.[47] As is evident, the rule of reason analysis presents a complex, costly, and difficult task for the plaintiff, creates uncertainty for the defendant, and burdens the court system.

To avoid the difficulties of applying the rule of reason, courts have adopted a per se rule applicable in certain circumstances.[48]

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45. 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

46. Respectively, Sylvania's magicube and General Electric's flipflash.

47. *Berkey Photo, Inc.*, 603 F.2d at 302. When innovation and product development were found to be the company's ultimate goal, antitrust treatment has been lenient. The *Berkey* case also involved a section 2 monopolization claim. Eastman Kodak, holding over 60% of the camera market and 80% of the film market, was accused of hiding improvements in the 110 Instamatic camera and film from its competitor, Berkey Photo. Ruling for Kodak, the court held that predisclosure of technological breakthroughs ran counter to normal business behavior and was therefore not a violation of section 2 of the Sherman Act. *Id.* at 281. Neither was Kodak's simultaneous introduction of the new camera and new film a violation because a nonmonopolist with the same integrative abilities could have produced the same result. *Id.* at 285.

48. For example, in Jefferson Parish Hosp. v. Hyde, 466 U.S. 2 (1984), Justice O'Connor stated:

> Under the usual logic of the *per se* rule, a restraint on trade that rarely serves any purposes other than to restrain competition is illegal without proof of market power or anticompetitive effect. In deciding whether an economic restraint should be declared illegal *per se*, "the probability that anticompetitive consequences will result from a practice and the severity of those consequences is balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them." Only when there is very little loss to society from banning a restraint altogether is an inquiry into its costs in the individual case considered to be unnecessary.

Concluding that some agreements almost always have a negative effect on competition, courts began to single out particular practices as illegal "per se." Agreements to fix prices,[49] share markets horizontally,[50] limit production,[51] boycott,[52] or tie[53] have been considered unreasonable. Under a per se rule, plaintiff must show only that one of the prohibited practices occurred and the extent of its damages. The per se rule saves court time and defines more precisely the kind of conduct that may constitute an illegal practice. Applying a per se rule is obviously much simpler for plaintiff than sustaining a rule of reason analysis. Defendants, on the other hand, may lose the opportunity to justify their actions by arguing the intricacies of the business or the special requirements of the industry. The practical result has been that plaintiffs stand a good chance of winning—and often do win—per se cases, while defendants tend to hold the winning hand in rule of reason cases.[54]

By the late seventies, courts became reluctant to pigeonhole as per se illegal such practices as price or output fixing, market sharing, group boycotting, or tying.[55] Per se treatment was confined to practices "which almost always decrease output rather than in-

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Id. at 32 (O'Connor, J., concurring) (quoting Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 n.16 (1977)).

49. *See* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982) (cost containment agreement among physicians for maximum fees illegal per se); United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940) (agreement between major oil companies to buy up "distressed" oil at fixed prices from independent refiners illegal per se); United States v. Trenton Potteries, 273 U.S. 392 (1927) (declaring an agreement among the manufacturers of 82% of all bathroom fixtures to maintain uniform prices illegal per se).

50. *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

51. *See* National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984) (limitation on television broadcasting of college football games held to constitute fixing price and output of product).

52. *See* Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941).

53. *See* Jefferson Parish Hosp. v. Hyde, 466 U.S. 2 (1984) (tying of doctors' services to use of surgery rooms); Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958) (tying of railroad services to land); International Salt Co. v. United States, 332 U.S. 392 (1947) (tying of salt to machine).

54. *See* Cavanagh, *supra* note 23, at 825-29; G. GARVEY, *supra* note 31, at 15.

55. "The per se rule is a valid and useful tool of antitrust policy and enforcement . . . . It does not denigrate the per se approach to suggest care in application." Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co., 472 U.S. 284, 298 (1985) (not illegal per se when wholesale purchasing cooperative expelled one of its members after member engaged in independent wholesale operations in competition with the cooperative); *see* Areeda, *The Changing Contours of the Per Se Rule*, 54 ANTITRUST L.J. 27 (1985). A bill is currently pending before Congress that would eliminate the per se illegality rule in cases of intellectual property licensing. *House Panel Ponders Bill to Apply Rule of Reason to Patent Licensing*, 52 Antitrust & Trade Reg. Rep. (BNA) No. 1315, at 899 (May 14, 1987).

crease efficiencies."[56] Thus, "where the economic impact of certain practices is not immediately obvious," the per se rule may no longer apply.[57]

At the same time, courts began to streamline the rule of reason analysis.[58] Instead of requiring a full-fledged analysis, the courts began taking a "mini" look to determine whether the apparent purpose and actual operation of the agreement was intended to reduce competition and whether it actually did so.[59] Indicative is whether defendant has sufficient market power to accomplish an anticompetitive result.[60] When the defendant has market power and the conduct resembles a per se offense, the court may declare the conduct illegal without further analyzing market effect.[61] A more in-depth analysis is triggered only when defendant lacks market power or when the conduct is not traditionally per se illegal.

Another characteristic of United States antitrust law is the mandatory reimbursement of attorney's fees to winning plaintiffs.[62] The provision is contrary to the general American rule by which

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56. Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986) (Atlas' refusal to use as an agent any van line that also competed with it was held not to violate section 1 of the Sherman Act), *cert. denied*, 479 U.S. 1033 (1987).

57. FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 459 (1986). In *Indiana Dentists*, a federation of about 100 dentists collectively refused to submit copies of patients' x-rays that were requested by insurers to double check their treatment. Declining to pigeonhole this practice as a per se group boycott, the court held the refusal unreasonable under section 1 of the Sherman Act. *Id.*

58. *See* Areeda, *Stalking the Rule of Reason*, 41 REC. A.B. CITY N.Y. 309 (1986); Scherer, *Making the Rule of Reason Analysis More Manageable*, 56 ANTITRUST L.J. 229 (1987).

59. *See* National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984); Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979) (court applied the rule of reason to an arrangement among copyright holders to market blanket performance licenses, even though "the blanket license involved 'price fixing' in the literal sense"). For a general discussion of the trend toward abbreviating the rule of reason analysis, see 7 P. AREEDA, ANTITRUST LAW §§ 1510-1511 (1986).

60. Commentators have noted:

> [I]f present trends continue, many Section 1 cases may well turn on a threshold adjudication of the defendant's market power. In vertical restraint cases, the restraint will be presumed to be legal with the burden on the plaintiff to establish that the defendant has sufficient market power to injure competition. And, in many horizontal restraint cases, the restraint will be presumed to be illegal unless the defendant demonstrates that it lacks the requisite market power.

Popofsky & Goodwin, *The "Hard-Boiled" Rule of Reason Revisited*, 56 ANTITRUST L.J. 195-97 (1987).

61. *See Indiana Dentists*, 476 U.S. at 460-61; *NCAA*, 468 U.S. at 109-10; Popofsky & Goodwin, *supra* note 60, at 197.

62. *See* 15 U.S.C. § 4 (1982).

plaintiff and defendant each pay their own counsel.

A third controversial characteristic of United States antitrust law is the private treble damage action.[63] Adopted in 1914, the treble damage action was created to encourage scrutiny by the private sector so that more offenders would be punished, more illegal action deterred, and more victims compensated.[64] After a slow start, the private action became a powerful enforcement tool in the 1960s. It remains so today.

With the decline of the per se rule and the simplification of the rule of reason, however, the rationale of treble damages has become questionable.[65] Critics of treble damage actions argue that trebling is often unfair, that it overdeters, encourages baseless suits and inefficient behavior, and that it impairs the ability to compete internationally.[66] There are many proposals for change. One would grant judges the discretion to award treble damages. Another would allow trebling only in the event of criminal follow-ons to civil suits, per se cases, or overcharges and underpayments.[67] Another would detreble in class actions and also when a defendant has no reason to believe its conduct is illegal.[68] An additional proposal would allow plaintiff the option to seek treble or actual damages. When plaintiff sues for treble damages and loses, it must pay defendant's attorney's fees—a requirement not imposed in an action for single damages.

A final characteristic of United States antitrust law results from the combination of the first three characteristics. The relative

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63. *See* 52 U.S.C. § 15 (1982). Enforcement of the antitrust laws is carried out by the government through both civil and criminal actions and by private parties through civil claims in which a prevailing plaintiff is entitled to treble damages. *Id.*

64. *See* Cavanagh, *supra* note 23, at 777; G. GARVEY, *supra* note 31, at 26.

65. *See* Cavanagh, *supra* note 23; Salop & White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001 (1986) (reporting a major empirical study on antitrust enforcement); White, *The Georgetown Study of Private Antitrust Litigation*, 54 ANTITRUST L.J. 59 (1985) (same).

66. *See* Cavanagh, *supra* note 23, at 777; G. GARVEY, *supra* note 31, at 26.

67. Antitrust Remedies Improvements Act of 1987, H.R. 1155, 100th Cong., 1st Sess. (1987); S. 539, 100th Cong., 1st Sess. (1987); S. 635, 100th Cong., 1st Sess. (1987) (President Reagan's Package for Revision of the Federal Antitrust Laws, included as part of the Trade Employment & Productivity Act of 1987). The 1986 version is discussed in Cavanagh, *supra* note 23, at 833, and in Brodley, *Rewriting the Merger Laws—Global Versus Incremental Approaches—The Proposed "Merger Modernization Act of 1986" and "Antitrust Improvement Act of 1986": Testimony Before the Senate Judiciary Comm., Apr. 9, 1986*, 38 HASTINGS L.J. 547 (1987).

68. *See New York State Bar Group Urges Reduction in § 1 Liability for Unpredictable Violations*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1068, at 1218-19 (June 10, 1982).

ease of winning per se cases, coupled with a chance for large awards and attorney's fees, has given rise to baseless suits and out-of-court settlements, even when the defendant believed that plaintiff's claims lacked merit.[69] The United States antitrust laws have created an environment in which business, rightly or wrongly, feels threatened by the possibility of antitrust actions. In addition to suggestions regarding detrebling provisions, proposals for changes in the antitrust law include (1) fine tuning of substantive antitrust law, (2) eliminating substantive antitrust law, and (3) decoupling of defendant's payments and plaintiff's receipts. In the last proposal, plaintiff would receive one-third of the damage award with the rest going to the state.[70]

B. EEC Antitrust Law

In the European Economic Community, article 85(1) of the Treaty of Rome, like section 1 of the Sherman Act, prohibits agreements that have as their object or effect the prevention, distortion, or restriction of competition within the EEC and that affect trade between member states.[71] Price fixing, market sharing,

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69. *See* Cavanagh, *supra* note 23, at 809-10.

> Given these substantial defense costs and the uncertainties of litigation, settlement may prove to be the cheaper alternative, wholly apart from the merits of the claims . . . . Closely related to the problem of baseless suits is the use of treble damage actions where no anticompetitive harm has occurred in order to bolster what are essentially tort or contract claims. The treble damage remedy, thus, is used as a level to extract a more favorable settlement of the underlying claim.

Id.

70. A discussion of pros and cons of each proposal is beyond the scope of this Article. For a discussion of the various proposals, see Cavanagh, *supra* note 23 (favoring judicial discretion); and Werden & Simon, *An Economic Assessment of the Administration's Detrebling Proposal*, 31 ANTITRUST BULL. 935 (1986) (favoring the Administration's proposal dealing with undercharges and overcharges).

71. Article 85 of the Treaty of Rome reads:

> 1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
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> (b) limit or control production, markets, technical development, or investment;
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> (c) share markets or sources of supply;
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> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

and controlling and limiting technological advancement are prohibited by article 85(1). Article 86, like section 2 of the Sherman Act, prohibits monopolistic abuses.[72]

Any agreement that falls within the article 85(1) ban is automatically considered null and void under article 85(2).[73] The Commission, as executive arm of the EEC, may levy a fine against the parties to the agreement.[74] To avoid the article 85(2) ban, the parties may notify the Commission of the agreement and request a negative clearance[75] or an exemption under article 85(3).[76] Notification requesting an exemption (not a negative clearance) immunizes the parties from fines until further action is taken by the

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Treaty of Rome, Mar. 25, 1957, art. 85, 298 U.N.T.S. 11, 47.

72. Article 86 reads:

> Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.
>
> Such abuse may, in particular, consist of:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Id. art. 86.

73. Article 85(2) provides: "Any agreements or decisions prohibited pursuant to this Article shall be automatically void." *Id.* art. 85(2).

74. Issued by the Council in 1962, *Regulation 17*, O.J. EUR. COMM. (No. 13) 204 (Feb. 21, 1962) [hereinafter *Regulation 17*], was the first regulation to implement articles 85 and 86. Article 15(2) of Regulation 17 empowers the Commission to impose fines on each undertaking that violates, either deliberately or negligently, article 85(1) of the EEC Treaty. The fines may range from 1000 to 1,000,000 ECU or a sum in excess thereof but may not exceed 10% of turnover in the preceding business year. *See* Lang, *Community Antitrust Law—Compliance and Enforcement*, 18 COMMON MKT. L. REV. 335 (1981).

75. *Regulation 17, supra* note 74, art. 2. Upon application by the parties concerned, the Commission may certify that, on the basis of the facts in its possession, there are no grounds under article 85(1) or article 86 for action on its part in respect of an agreement, decision, or practice.

76. *Regulation 17, supra* note 74, art. 4(1). The Commission must be notified of agreements, decisions, and concerted practices described in article 85(1) that come into existence after the effective date of the Regulation and in respect of which the parties seek application of article 85(3). Until the Commission has been notified, no decision in application of article 85(3) may be taken. It is common practice to request both a negative clearance and an exemption on standardized form A/B, in case either request fails. Recently, the Commission improved form A/B. It also has issued a Complementary Note explaining competition rules in order to enable the Commission to act swiftly in the new opposition procedures. *See* Reynolds, *Practical Aspects of Notifying Agreements and the New Form A/B*, 1985 FORDHAM CORP. L. INST. 705 (B. Hawk ed. 1986).

Commission.[77] The notification, however, does not prevent any national court from declaring the agreement invalid under article 85(1), and thus void under article 85(2), as long as the Commission has not acted. National courts lack the power to grant exemptions.[78]

To qualify for an article 85(3) exemption, which only the Commission may grant, the procompetitive aspects of the agreement must outweigh its anticompetitive features. The applicants must show that (1) the agreement contributes to economic progress in research, production, or distribution, (2) consumers receive a fair share of such progress, (3) the restrictions are not indispensable to attain the results, and (4) there is no threat the agreement will eliminate competition in a substantial part of the common market.[79]

Although over time the Commission has more strictly applied the antitrust laws, R&D agreements in the EEC, as in the United States, have received favorable treatment. In a 1968 Notice, for example, the Commission stated that agreements directed solely at joint R&D were outside the reach of article 85(1) so long as the parties did not restrict their own research and each had access to

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77. *Regulation 17, supra* note 74, art. 15(5).

78. *Id.* Art. 9(1) provides: "The Commission shall have sole power to declare Article 85(1) inapplicable pursuant to Article 85(3) of the Treaty." *Id.* For a discussion of this provision, see Venit, *supra* note 21, at 26-27.

79. Article 85(3) reads:

> The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
>
> — any agreement or category of agreements between undertakings
>
> — any decision or category of decisions by associations of undertakings
>
> — any concerted practice or category of concerted practices;
>
> which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
>
> (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
>
> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Treaty of Rome, *supra* note 71, art. 85(3). For a thoughtful discussion of the Commission's exemption powers, see B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE (2d ed. 1985); Note, *Emerging International Antitrust Perspectives on Research and Development Joint Ventures*, 16 L. & POL'Y INT'L BUS. 1181, 1200-04 (1984). Because the Commission lacks the time to respond promptly to exemption requests, the bulk remain unanswered. A negative clearance application may take two years and an exemption from 10 months to 10 years. Of the roughly 4000 requests since 1962, fewer than 100 have received a response. *See* Augustyn, *An Antitrust Analysis of Joint Research and Development Agreements in the European Economic Community and the United States*, 16 GA. J. INT'L & COMP. L. 45, 51-60 (1986); Venit, *supra* note 21, at 22 n.17.

the results in proportion to the level of participation.[80] In more complex agreements not limited to pure research, including agreements involving high technology, nuclear energy, and the development of less "strategic" products, the Commission allowed several article 85(3) exemptions.[81]

In the 1973 case of *Henkel/Colgate*,[82] the Commission approved a venture to develop a new detergent between the second and fourth largest soap manufacturers in an oligopolistic market. Under the terms of the agreement, Henkel and Colgate had equal access to the research results with no future restrictions on production and distribution. Similarly, in *Beecham/Parke Davis*,[83] the Commission granted an article 85(3) exemption for an agreement to develop a new drug to combat heart disease and high blood pressure. In 1973 the parties had agreed to carry on the research jointly, to exchange results, and to allocate tasks among themselves. In 1978, on entering the developmental stage, the parties

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80. 1968 *Communication Concerning Agreements, Decisions and Concerted Practices in the Field of Cooperation Between Enterprises*, O.J. EUR. COMM. (No. C 75) (July 27, 1968), *corrected by* O.J. EUR. COMM. (No. C 84) (Aug. 28, 1968). The 1968 Notice had been affirmed at the time the Regulation was adopted and thus remains in effect. The Commission's Fourteenth Report on Competition Policy states: "The new regulation leaves intact the 1968 Notice on Cooperation between Enterprises, which states that cooperation agreements relating only to R&D normally do not fall under Article 85(1), but extends this favourable treatment to R&D agreements which also provide for joint exploitation of the results." COMMISSION'S FOURTEENTH REPORT ON COMPETITION POLICY 38 (1984) [hereinafter FOURTEENTH REPORT] (Point 29). The Notice, however, lacks the force of law.

81. *E.g.*, GEC/Weir Sodium Circulators, O.J. EUR. COMM. (No. L 327/26), [1977-1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,000 (1977) (joint venture for joint development, production (work allocation), and sale of sodium circulators). Earlier cases include: Rank/Sopelem, O.J. EUR. COMM. (No. L 29/20), [1973-1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 9707 (1974) (British-French venture to research, manufacture, and distribute camera lenses); ACEC/Berliet, O.J. EUR. COMM. (No. L 201/7), [1967-1968 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 9251 (1968) (Belgian-French venture for specialized research, production, and marketing in the area of electrical equipment for buses and trucks).

The Commission recently approved a venture including an agreement between the 10 largest European synthetic fiber manufacturers to close 18% of their production for six types of synthetic textiles. FOURTEENTH REPORT, *supra* note 80, at 70 (Point 81); *see also* British Petroleum Chemicals /Imperial Chemical Industries, *id.* at 71 (Point 83) (approval of agreement involving capacity cutbacks and specialization of production of certain chemicals); Shell/AKZO, *id.* at 72 (Point 85) (approval of Dutch venture cutting back in petrochemical production). In approving the ventures the Commission stressed that by reducing overcapacity these ventures helped solve structural problems. *Id.* at 69 (Point 80); *see EEC Commission Grants Exemption For Joint R&D Venture in Ammonia Market (Between BP International of U.K. and M.W. Kellogg of Houston)*, 50 Antitrust & Trade Reg. Rep. (BNA) No. 1249, at 163 (Jan. 23, 1986).

82. O.J. EUR. COMM. (No. L 14/32), [1970-1972 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 9491 (1972).

83. O.J. EUR. COMM. (No. L 70/11), 29 Common Mkt. Rep. (CCH) ¶ 10,121 (1979).

further agreed to grant nonexclusive reciprocal licenses with the right to sublicense.

Traditionally, the Commission has limited the duration of the exemption and imposed certain restrictions. The *Henkel/Colgate* exemption was limited to five years with the condition that the Commission be notified (1) of any licensing resulting from R&D (to alert the Commission of the danger of market sharing between the parties); (2) of acquisitions; and (3) of interlocking directorates. During the five-year period, the parties failed to set up separate facilities as agreed. They also failed to develop a new detergent. Thus, when the parties sought to have the exemption renewed in 1978, the Commission objected, claiming that neither party was permitted to license without the other's consent. The agreement was terminated, however, before the Commission reached a final decision.[84] In *Beecham/Parke Davis*, the exemption was for ten years. To encourage independent manufacture and marketing of the drug by each party, the Commission prohibited the parties from charging each other royalties on licensing.[85]

The exclusive right to grant article 85(3) exemptions has given the Commission enormous power in antitrust enforcement. By granting to a single authority such extensive powers, the EEC sought to establish uniform interpretation of the antitrust laws within its boundaries. It was believed that leaving interpretation exclusively to national courts would result in great disparity because some member countries had no prior experience with antitrust laws and others were actually hostile towards such laws.[86] The notification procedure alone has magnified the Commission's power over business arrangements within the EEC. For example, the Commission may order objectionable clauses removed from agreements.[87] More indirectly, because the Commission may review contracts, many firms have elected to exclude the sort of clauses

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84. COMMISSION'S EIGHTH REPORT ON COMPETITION POLICY 78-79 (1978) (Points 89-91).

85. *See* Beecham/Parke Davis, O.J. EUR. COMM. (No. L 70/11) 19, 29 Common Mkt. Rep. (CCH) ¶ 10,121 (1979).

86. Although the Commission has exclusive power to grant exemptions under article 85(3), articles 85 and 86 may be applied directly by national courts. Under article 177, national courts can refer specific questions to the Court of Justice in Luxembourg. Once these questions have been decided, the case is remitted to the appropriate national court for a decision in light of the court's ruling.

87. *See Regulation 17, supra* note 74, art. 15. The new Commissioner on Competition, P. Sutherland, has announced his intention to increase fines to "a sufficiently high level to ensure effective deterrence." *EC Competition Commissioner Exchanges Views With U.S. Colleagues*, 48 Antitrust & Trade Reg. Rep. (BNA) No. 1216, at 895, 896 (May 23, 1985).

that habitually are condemned. Consequently, clauses relating to prices, market shares, boycotts, and most important of all, insulation of national markets rarely appear in present day contracts. Thus, in contrast to the United States' experience, in which challenges to questionable agreements may arise years after their inception, the power and presence of the Commission in the EEC operates as a prophylactic. Parties are hesitant to test the waters knowing that the Commission will review contracts soon after their creation.[88]

With the growth of the Commission's power and authority, a subtle change occurred in the application of article 85(1). Following notification, the Commission must determine whether the "object or effect" of the agreement violates article 85(1).[89] The Commission, however, chose to exercise its exemption powers under article 85(3) rather than to conduct a full market analysis under article 85(1) that might reveal practices falling outside article 85 and thus out of the Commission's reach. To counterbalance this trend, the Commission adopted the 1968 Notice, placing pure research ventures outside the scope of article 85(1).[90] Moreover, because it was concerned with facilitating cooperation between small and medium-sized firms, the Commission issued a De Minimis Notice in 1970. Under this Notice only agreements with an "appreciable" effect on competition, regardless of subject matter, are covered by article 85(1).[91]

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88. The EEC Reports on Competition Policy, the first of which appeared in 1972, function as an update on the Commission's activities in the preceding years. These reports, which contain an overview of penalty claims brought and collected by the Commission, serve to identify prohibited practices.

89. It is not clear whether there must be a showing of "effect" in addition to "object." Two cases seem to hold that object alone is sufficient. *See* Consten & Grundig v. Commission, [1961-1966 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8046 (EEC C.J. 1966); Societe Technique Miniere v. Maschinenbau Ulm GmbH, [1961-1966 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8047 (EEC C.J. 1966). A third case seems to require "effect" as well. *See* Volk v. Ets. J. Vervaecke s.p.r.l., [1967-1970 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8074 (EEC C.J. 1969).

90. Despite the 1968 Notice, in Beecham/Parke Davis, O.J. EUR. COMM. (No. L. 70/11), 29 Common Mkt. Rep. (CCH) ¶ 10,121 (1979), the Commission held that the parties' pure research came within the reach of article 85(1) because it prohibited the parties "from gaining a competitive advantage" over one another. *Id.* at 10,414 (Point 32).

91. *Notice Concerning Agreements of Minor Importance*, O.J. COMM. EUR. (No. C 64) (June 2, 1970), 1 Common Mkt. Rep. (CCH) ¶ 2699 (May 27, 1970), *as amended by* O.J. COMM. EUR. (No. C 313) (Dec. 12, 1977), and O.J. COMM. EUR. (No. C 231/2) (Sept. 12, 1986). The 1986 Notice extended the scope to include services and increased the turnover limit from 50 mill. ECU to 200 mill. ECU. *See* SIXTEENTH REPORT, *supra* note 25, at 37-38 (Point 24).

The Commission's reluctance to apply article 85(1) resulted in increased criticism. Detractors argued that a rule of reason analysis is inherent in article 85(1). They argued further that the overall beneficial effect of agreements on the competitive structure of markets should be scrutinized by courts under a rule of reason analysis rather than exclusively through the Commission's article 85(3) exemption powers.[92]

Generally the Commission favors increased participation by the national courts in enforcing the antitrust laws. It is actively pursuing avenues to accomplish this objective.[93] At the same time, it strongly opposes erosion of its powers, claiming that the need for centralized control of the antitrust laws is as urgent now as it was at the time of EEC's inception twenty-five years ago.[94]

Besides bestowing power, the article 85(3) exemption procedure has increased the Commission's caseload. Rather than operating under a potentially unenforceable contract or being subject to fines, parties tend to petition the Commission for exemptions. As a result, the sparsely staffed Commission is overburdened with noti-

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92. *E.g.*, Forrester & Norall, *The Laicization of Community Law—Self-Help and the Rule of Reason: How Competition Law Is and Could Be Applied*, 21 COMMON MKT. L. REV. 11 (1984); Kon, *Article 85, Para. 3: A Case for Application by National Courts*, 19 COMMON MKT. L. REV. 541 (1982); Korah, *The Rise and Fall of Provisional Validity—The Need for a Rule of Reason in EEC Antitrust*, 3 NW. J. INT'L L. & BUS. 320 (1981); Korah, *Exclusive Licenses of Patent and Plant Breeders' Rights in EEC Law After* Maize Seed, 28 ANTITRUST BULL. 699 (1983); Korah, *Franchising: The Marriage of Reason and the EEC Competition Rules*, 4 EIPR 99 (1986); van Bael, *Comment on the EEC Commission's Antitrust Settlement Practice: The Shortcutting of Regulation 17?*, 22 SWISS REV. INT'L COMPETITION L. 67 (1984). For an early study, see R. JOLIET, THE RULE OF REASON IN ANTITRUST LAW: AMERICAN, GERMAN AND COMMON MARKET LAWS IN COMPARATIVE PERSPECTIVE (1967).

93. *See* Andriessen, *Antitrust Policy: The Example of the European Community*, Remarks at Matsushita School of Government & Management, Japan (Oct. 20, 1983) (copy on file with the *Utah Law Review*). Mr. Andriessen formerly was the Commissioner in charge of antitrust. To improve enforcement, the Commission is now actively promoting private damage claims before national courts and is evaluating a common standard for damages. *EC Competition Commissioner Exchanges Views with U.S. Colleagues*, 48 Antitrust & Trade Reg. Rep. (BNA) No. 1216, at 895 (May 23, 1985); FOURTEENTH REPORT, *supra* note 80, at 56 (Point 47 (iii)). The Commission also seeks to improve public knowledge of EEC law and policies through large scale distribution of informational material. COMMISSION'S FIFTEENTH REPORT ON COMPETITION POLICY 16 (1986). The current Competition Commissioner, Sutherland, also has declared that his policy is "a positive means of directing European industry which can make Europe competitive in world markets, promote new technology, and encourage greater cohesion in the community." *EEC Commission Reviews Enforcement Activities*, 51 Antitrust & Trade Reg. Rep. (BNA) No. 1273, at 76 (July 10, 1986). Also under discussion is a special EEC court for antitrust matters. *Id.*

94. *See* Verstrynge, *Current Antitrust Policy Issues in the EEC: Some Reflections on the Second Generation of Competition Policy*, 1984 FORDHAM CORP. L. INST. 673 (B. Hawk ed. 1985).

fications and responds slowly, thereby creating an uncertain business climate.[95] Business people, doubting the enforceability of their contracts, may have avoided otherwise sound business arrangements.[96]

To attain the goal of involving the national courts while maintaining the Commission's power and avoiding a barrage of notifications, the Commission, under authorization of the EEC Council, adopted a policy of granting group or block exemptions to replace individual exemptions.[97] A block exemption essentially is legislation that lays down guidelines for drafting agreements that comply with relevant antitrust statutes. Usually, a block exemption will consist of a black list, a white list, and a grey list. The black list contains the provisions to which companies may never agree. The white list contains the conditions that parties must adopt. The grey list enumerates permissible restrictions or conditions. Notification is unnecessary for agreements falling within the boundaries of a block exemption.

Block exemptions have two advantages. First, they provide certainty of contract. Second, they avoid the need to disclose potentially sensitive information. For the Commission, block exemptions reduce paper work, thereby freeing time for more essential

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95. The Eighteenth General Report on the Activities of the European Communities stated that, in 1984, 4194 cases were pending involving competition. Of these, 3708 were applications and notifications, 314 were complaints by private companies, and 72 were proceedings initiated by the Commission. Of the notifications, 63% concerned licensing, 24% distribution, and 13% were concerned with horizontal agreements. *EEC Commission's 1984 Activities Involved Increased Cartel Surveillance*, 48 Antitrust & Trade Reg. Rep. (BNA) No. 1204, at 405 (Feb. 28, 1985).

96. *See* CORDI REPORT, *supra* note 31, at 10; *see also* Lindemann, *supra* note 37, at 345.

97. During 1983 and 1984, six block exemption regulations were adopted. *See* O.J. EUR. COMM. (No. L 173) (June 30, 1983) (two exemptions on distribution); O.J. EUR. COMM. (No. L 219/15) (Aug. 16, 1984) (exemption on patent licensing); O.J. EUR. COMM. (No. L 53) (Jan. 22, 1985) (exemption on specialization); O.J. EUR. COMM. (No. L 15/16) (Jan. 18, 1985) (exemption on automobile distribution); O.J. EUR. COMM. (No. L 53/7) (Feb. 22, 1985) (exemption on R&D); *see* FOURTEENTH REPORT, *supra* note 80, at 37-45 (Points 27-42). A Council Regulation, (EEC) No. 2821/71, adopted Dec. 20, 1971, on the application of article 85(3) to categories of agreements, decisions and concerted practices, authorized group exemption for R&D agreements. *See* O.J. EUR. COMM. (No. L 285/46) (Dec. 29, 1971). The Commission also is considering an exemption on know-how agreements. SIXTEENTH REPORT, *supra* note 25, at 45 (Point 35). Over the last few years, in cases that at first sight raise no competition problems and do not require formal notification, the Commission has adopted the practice of issuing "comfort letters" in lieu of formal decisions. A comfort letter is an administrative letter, signed by an official of the Commission's Directorate General, stating that no action will be taken with respect to a particular agreement. *See* FOURTEENTH REPORT, *supra* note 80, at 50 (Point 47 (ii)).

tasks. Moreover, they perpetuate the Commission's control of the system. Even if national courts become more involved in article 85(1) cases, it is believed that they will abide by the Commission's guidelines for group exemptions.[98]

V. The New United States and EEC Legislation

A. *The United States Act and Its History*

Despite favorable antitrust treatment of R&D joint ventures, the United States business sector continued to feel threatened by possible litigation. To provide more certainty, the Antitrust Division of the Justice Department initiated a business review procedure through which business participants can submit their plans for approval prior to commencement.[99] A reply by the government usually takes the form of an opinion letter. If the plans are approved, the letter states that, under the facts presented, the Justice Department has no present intention to sue.[100] But the business review procedure has proven inadequate. The procedure is not only complex and public, but the Attorney General often has taken a conservative stand. Additionally, the Justice Department's statement of intention not to sue is not binding.[101] More important still, the right of private parties to bring claims remains unaffected. Thus, if a formerly "unremarkable" venture should have a major breakthrough, leaving its competitors behind, a treble damage action might still be brought.[102]

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98. The German Cartel Office, however, claims that group exemption regulations do not prevail over German antitrust law. *See* Lindemann, *supra* note 37, at 350-51.

99. *See* Antitrust Division Business Review Procedure, 28 C.F.R. § 50.6 (1983).

100. Other action is also possible. The government may require the venture to limit its membership if the industry can support competing R&D joint ventures, or if it cannot, to make membership in the venture available to nonmember domestic competitors on reasonable terms. *Cf.* United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980) (discussing the legality of multiple listing services).

101. For instance, the Justice Department reviewed MCC twice: once in 1982, in a United States Department of Justice Press Release, and again on reconsideration in 1985. *Justice Department Determines MCC's Joint R&D Programs Will Not Threaten Competition*, 48 Antitrust & Trade Reg. Rep. (BNA) No. 1205, at 424 (Mar. 7, 1985).

102. Private claimants may examine the review letters and their supporting data, which are available to the public on request. The Division has compiled an index of all business review letters. *See* Antitrust & Trade Reg. Rep. (BNA) No. 1124, Spec. Supp. (July 21, 1983). Since 1975, over 90% of all antitrust actions have been private cases. *See* 26th Annual Antitrust Law Institute 919 (Practising Law Institute No. 486, W. Lifland ed. 1985) [hereinafter PLI Antitrust]. *See generally* Crane, *Research Joint Ventures*, 21 Harv. J. Legis. 405, 427 (1984); D. Ginsburg, *supra* note 31, at 28-29. Compare the review letters

A 1975 government study found that fear of antitrust violations seriously strained cooperation between companies, even in the area of pure research.[103] Two later studies, conducted under the Carter Administration, again urgently emphasized the need to clarify policy concerning the formation of joint ventures in order to encourage cooperation.[104]

In 1980 the Antitrust Division responded by introducing the *Antitrust Guide Concerning Research Joint Ventures* ("*Guide*").[105] It cited as its main objective the promotion of competition through the encouragement of innovation. By establishing guidelines clarified with examples, the *Guide* seeks to provide certainty regarding the legality of research agreements under the antitrust laws. In line with antitrust policy, the *Guide* focuses on three aspects of the joint agreement: (1) "overinclusiveness"—the effect of the venture in lessening existing and potential competition between the participating firms; (2) "spillovers"—whether restrictions are reasonably ancillary to the main purpose of the agreement or whether they are excessive; and (3) "underinclusiveness"—dealing with the limitations on a nonparticipant's access to the venture or its results. Unfortunately, the *Guide* did not earn the trust of joint venturers. Because they fail to take proper account of the risks involved in joint venturing, the guidelines have been criticized as conservative and the examples as ambiguous.[106] In response to such criticism, the law and policy regarding research joint ventures have become even less intrusive.[107]

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with comfort letters in the EEC, which also fail to bind national courts, competition authorities, or private parties.

103. INDUSTRIAL RESEARCH INST. FOR THE COMMERCE TECHNICAL ADVISORY BD., INSTITUTIONAL AND LEGAL CONSTRAINTS TO COOPERATIVE ENERGY RESEARCH AND DEVELOPMENT (1975).

104. *See generally* HOUSE COMM'N ON SCIENCE AND TECHNOLOGY, SUBCOMM. ON SCIENCE, RESEARCH AND TECHNOLOGY, ANALYSIS OF PRESIDENT CARTER'S INITIATIVES IN INDUSTRIAL INNOVATION AND ECONOMIC REVITALIZATION, 96th Cong., 2d Sess. (comm. Print 1980) (an analysis of President Carter's October 1979 Industrial Innovation Initiatives and his August 1980 Economic Program for the 1980s).

105. ANTITRUST DIV., U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE CONCERNING RESEARCH JOINT VENTURES (1980), *reprinted in* Trade Reg. Rep. (CCH) No. 466, at 7. For an earlier guide dealing partly with joint ventures, see ANTITRUST DIV., U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977) (cases C, D, & M), *reprinted in* Antitrust & Trade Reg. Rep. (BNA) No. 799, at E-1. The *Guides* are presently under review. *See* Rule, *The Administration's Views on Joint Ventures*, 54 ANTITRUST L.J. 1121, 1128-34 (1985).

106. *See* Crane, *supra* note 102, at 427-34; *Senate Hearings*, *supra* note 6, at 11.

107. *See, e.g.*, U.S. DEP'T OF JUSTICE MERGER GUIDELINES (1984), *reprinted in* 2 Trade Reg. Rep. (CCH) ¶¶ 4490-95 (Dec. 17, 1984) (replacing U.S. DEP'T OF JUSTICE MERGER

Nevertheless, to deter those ventures that are actually anticompetitive, the law remains concerned with size and collusion.

It was in this climate, perceived as antagonistic to business, that MCC was organized. Simultaneous with its request for business review, MCC initiated a campaign to change antitrust laws as they related to R&D joint ventures. The congressional response was overwhelmingly in favor of promoting America's international competitiveness. In 1983 Democrats, Republicans, and the Administration sponsored a total of ten bills, culminating in the passage of the National Cooperative Research Act of 1984.[108]

The stated purpose of the Act is "to promote research and development, . . . encourage innovation . . . and stimulate trade."[109] Section 2 defines research and development as the activities up to and including the testing of prototypes. Thus, all activities necessary to bring an idea close to commercial application are covered. Such activities would include exchanging data, setting up facilities, and applying for patents. Joint production and marketing, however, are excluded from the definition.[110] Even joint research for the sole purpose of preparing a product for the commercial marketplace is outside the Act's scope.[111] To encourage joint cooperation, the Act allows venturers to license the research results jointly.[112] Unless reasonably necessary to accomplish the objectives, the venturers are prohibited from discussing costs, sales, profitability, and prices of the research and other products.[113] Moreover, they are prohibited from requiring participants to sell, license, or share nonventure inventions or developments. They also are forbidden to require the participation of any of the venturers

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GUIDELINES (1982), *reprinted in* 2 Trade Reg. Rep. (CCH) ¶¶ 4500-05 (Oct. 4, 1984)). Hands-off antitrust policy is also advocated in U.S. DEP'T OF JUSTICE VERTICAL RESTRAINTS GUIDELINES (1985), *reprinted in* 48 Antitrust & Trade Reg. Rep. (BNA) No. 1199, Spec. Supp. (Jan. 24, 1985).

108. *See supra* note 18.

109. CONFERENCE REPORT ON S. 1841, H.R. REP. No. 1044, 98th Cong., 2d Sess. 1 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3105-3131 [hereinafter CONFERENCE REPORT]. The main issues for the conferees involved (1) the definition of joint ventures, (2) the contents of notification, and (3) the propriety of attorneys' fees.

110. 15 U.S.C. § 4301(b)(2) (Supp. III 1985); CONFERENCE REPORT, *supra* note 109, at 1-3. President Reagan's superconductivity initiative, designed to get new technological breakthroughs to the market more quickly, includes a proposal to amend the National Cooperative Research Act by allowing certain joint production ventures. *President's Superconductivity Initiative Would Accelerate Commercial Applications*, 53 Antitrust & Trade Reg. Rep. (BNA) No. 1326, at 175-76 (July 30, 1987).

111. CONFERENCE REPORT, *supra* note 109, at 2.

112. 15 U.S.C. § 4301(a) (Supp. III 1985).

113. *Id.* § 4301(b)(1).

in any nonventure R&D.[114]

Section 3 declares that R&D joint ventures shall not be deemed illegal per se, but shall be judged by the rule of reason. Determinative is the effect of the venture on the relevant research market.[115] Courts are expected to refer to the Conference Report for guidance in applying the rule.[116] To avoid loopholes, the rule of reason standard also applies to antitrust actions brought under state law.[117]

Section 4 reduces the sting of antitrust legislation by declaring that violators of federal or state antitrust laws are responsible only for "actual" damages. The government must be notified of the venture and the claim must result from conduct within the scope of the notification. The notification must be in writing and directed to the Attorney General and the Federal Trade Commission ("FTC") not later than ninety days after execution of a written agreement to form the venture. To compensate for loss of damages, section 4 further provides for prejudgment interest.[118]

Section 5 presents another device to discourage antitrust suits. It allows joint ventures that prevail as defendants in federal or state antitrust actions to recover attorney's fees whenever the claim, or plaintiff's conduct during the litigation, was "frivolous, unreasonable, without foundation, or in bad faith."[119] The court, however, on a finding that defendants acted unreasonably during the course of litigation, may offset this award.[120]

Finally, section 6 states that the notification must be published in the Federal Register. On publication, protection vests and treble damages become unavailable.[121] The Act also provides some protection against disclosure of information that is submitted as part of the notification, obtained during any antitrust investigation by the Attorney General or the FTC, or revealed in any proceeding relative to the notified venture.[122]

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114. *Id.* § 4301(b)(3).

115. *Id.* § 4302.

116. CONFERENCE REPORT, *supra* note 109, at 8-12.

117. 15 U.S.C. § 4302 (Supp. III 1985).

118. *Id.* § 4303.

119. *Id.* § 4304.

120. *Id.*

121. *Id.* § 4305. Protection begins 30 days from the date the Attorney General or the Commission receives the applicable information. Admission of a new member into the venture invalidates the statutory protection unless a new notification is filed within 90 days of the new member's admission. *Id.*

122. *Id.* § 4305(d).

B. *The EEC Regulation and Its History*

As in the United States, the EEC business sector was unsure about antitrust treatment of R&D joint ventures. In 1981 the Advisory Committee on Industrial Research and Development ("CORDI"), the research arm of the Commission, appointed a working party to inquire into the principal obstacles to R&D joint ventures between firms and research centers in member states of the Common Market.[123] A March 1983 report concluded that European business people, like their American counterparts, viewed the antitrust laws as a major stumbling block to joint venturing. The CORDI Report noted that the individual notification procedure, with all its uncertainties and delays, acted as a definite deterrent to cooperative research. The report further noted the reluctance, even aversion, of business people to disclose sensitive research information. It was thought that revealing the nature of their research might be a signal to competitors to enter the field, thus reducing the lead time so important to the researcher. The CORDI Report concluded that, with the exception of a dynamic few, industrialists within the EEC were reluctant to enter into joint research if they were not permitted to manufacture jointly as well.[124]

In response to the CORDI Report, the Commission began work on a block exemption in October 1983. Fourteen months later, after extensive discussion with member states and interested parties, the Regulation was adopted.[125]

The Regulation grants an automatic exemption to R&D joint venture agreements that fall within its confines. It consists of substantive articles and preambles that provide background and reasons for the exemption. Preamble 4 states:

> Cooperation in research and development and in exploitation of the results generally promotes technical and economic progress by in-

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123. *See* CORDI REPORT, *supra* note 31, at 2.

124. *Id.* at 17.

125. The consultation procedure of Council Regulation No. 2871/71 was initiated in 1983. The first consultation of the Advisory Committee on Restrictive Practices and Dominant Positions took place in November and December 1983. A draft published in January 1984 invited all interested parties to submit comments by March 8, 1984. *See* O.J. EUR. COMM. (No. C 16) (Jan. 21, 1984) [hereinafter First Draft]. This was followed by a second draft in June 1984. *See* O.J. EUR. COMM. (No. C 20634) (June 8, 1984) [hereinafter Second Draft]. After further consultation with member states, the European Parliament, the Economic and Social Committee, and interested persons and organizations, the Commission adopted the R&D Regulation on December 19, 1984. *See* COMMISSION'S THIRTEENTH REPORT ON COMPETITION POLICY 43 (1984) (Point 40); FOURTEENTH REPORT, *supra* note 80, at 37-38 (Points 27-30).

> creasing the dissemination of technical knowledge between the parties and avoiding duplication of research and development work, by stimulating new advances through the exchange of complementary technical knowledge, and by rationalizing the manufacture of the products or application of the processes arising out of the research and development.[126]

According to article 1, the Regulation covers three types of agreements: (1) joint R&D of products or processes with joint exploitation of the results; (2) joint exploitation of the results of prior R&D agreements between the same companies; and (3) joint R&D without joint exploitation of the results insofar as such agreements fall within the scope of article 85(1).[127] Joint exploitation is defined as joint manufacturing and joint licensing, but not joint distribution and selling.[128]

Article 2 lists those conditions that are absolute requirements for exemption, effectively creating a "white list" of those elements that must be present for an agreement to benefit from the exemption.[129] Under article 2, joint R&D must be carried out within the framework of a clearly defined program.[130] All parties must have access to the results.[131] In the absence of an agreement for joint exploitation, each party must be free to exploit the results as it sees fit.[132] When the parties do agree to joint exploitation, such exploitation relates only to results that are protected by patents or copyrights, or constitute know-how that "substantially contributes to technical or economic progress."[133] The research results must be ripe for manufacture.[134] Moreover, any jointly appointed manufacturer must supply the R&D products to all parties,[135] and in case of specialization, specialized manufacturers must fill orders from all parties.[136]

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126. *Regulation, supra* note 19, at 5, cl. 4.

127. *Id.* art. 1.1(a)-(c). As stated in the 1968 Notice, pure research ventures could fall within the scope of article 85(1) in certain circumstances, for example, when they preclude comparable independent research by the parties. *Id.* cl. 2.

128. *Id.* art. 1.2(d).

129. *Id.* art. 2.

130. *Id.* art. 2(a).

131. *Id.* art. 2(b).

132. *Id.* art. 2(c).

133. This broad language appears to refer to the requirement of article 85(3) that consumers receive "a fair share of the resulting benefit." For the full text of Article 85(3), see *supra* note 79.

134. *Regulation, supra* note 19, art. 2(d).

135. *Id.* art. 2(e).

136. *Id.* art. 2(f). In specialization contracts, parties divide the work among themselves

Article 3 limits the duration and market power of the venture. The exemption applies for the duration of the venture plus five years, regardless of market share, as long as the parties do not compete in the relevant product market. The product market is defined as those products capable of being improved or replaced by the contract products.[137] The geographic market is defined as the common market or a substantial part thereof.[138] If the venturers do compete, the exemption also applies for the duration of the venture plus five years, but only as long as the venturers' combined share does not exceed twenty percent of the relevant market.[139] If the combined share exceeds twenty percent, the Regulation is inapplicable and the parties may then request an individual exemption under article 85(3). At the end of the five-year period, which begins when the product is first placed on the market, the exemption continues as long as the venture's product does not exceed twenty percent of the relevant market.[140]

Articles 4 and 5 together form the "grey list." They provide for restrictions and obligations the parties may undertake at their discretion. Article 4 restrictions include the following: The parties may curtail similar research whether undertaken independently or with outsiders;[141] they may force each other to buy the joint venture product only from the venture;[142] and they may arrange for limited territorial protection. Not only may they set exclusive manufacturing territories,[143] they also may agree not to market in reserved territories, either by way of advertising or distribution, for a period of five years after the products are first placed on the

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according to each party's expertise.

137. *Id.* art. 3(1). Contract products are defined in article 1(2)(c) as products or services arising out of the R&D or products manufactured or provided through the contract processes. Contract processes means processes arising out of the R&D. *Id.* art. 1(2)(b).

138. Although there is some doubt, a partial common market probably comes into play when the product is not distributed in the whole common market. *See* Lindemann, *supra* note 37, at 347-48.

139. *Regulation, supra* note 19, art. 3(2).

140. Adjustment periods are provided for in article 3(4), which states that "the exemption provided for in Article 1 shall continue to apply where the market share referred to in paragraph 3 is exceeded during any period of two consecutive financial years by not more than one-tenth," *id.* art. 3(4), and article 3(5), which states that "when market shares referred to in paragraphs 3 and 4 are exceeded, the exemption . . . shall continue to apply for a period of six months following the end of the financial year during which it was exceeded," *id.* art. 3(5).

141. *Id.* art. 4(a)-(b). Preventing conflicts of interest serves as a stimulus to cooperation.

142. *Id.* art. 4(c).

143. *Id.* art. 4(d).

market.[144] Finally, they may agree on field-of-use restrictions[145] and may grant each other reciprocal nonexclusive licenses for inventions relating to improvements or new applications.[146]

Under article 5, the venturers may agree to share pre-existing patents and know-how required for the program, to refrain from using such knowledge outside the project, to obtain and maintain patents in order to protect the venture's inventions, to keep know-how secret, to compensate for unequal contributions or to share royalties, and to make arrangements for supplying the venture's products to partners.[147]

Article 6 blacklists elements of joint venture agreements that are absolutely prohibited. Under no circumstances may the parties (1) restrict independent, unrelated research, (2) agree not to challenge patents on R&D results on termination of cooperative efforts, (3) restrict output, prices, or customers of the R&D results, or (4) restrict manufacture in the absence of an agreement to jointly manufacture.[148] Furthermore, the parties may not unreasonably refuse or inhibit exporters from obtaining the R&D products.[149]

Article 7 provides a delayed exemption procedure for doubtful agreements that, although containing conditions not covered by the grey list, adhere to the white list and do not violate the black list. Such agreements are deemed exempt unless the Commission takes opposition within six months of receiving notification.[150]

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144. *Id.* art. 4(f).

145. *Id.* art. 4(e).

146. *Id.* art. 4(g).

147. *Id.* art. 5(1).

148. *See id.* art. 6(g). Article 6(g) reads in part: "The exemption provided for . . . shall not apply where the parties by agreement . . . are prohibited from allowing third parties to manufacture the contract products . . . in the absence of joint manufacture." *Id.* Because under article 1(d) exploitation includes manufacturing and licensing, the issue has been raised whether, in the absence of joint manufacture, the parties may prevent each other from licensing or whether such a practice would fall within the black list. *See* Lindemann, *supra* note 37, at 348-49.

149. *Regulation, supra* note 19, art. 6.

150. *Id.* art. 7. The opposition procedure, which serves to simplify the application of article 85(3), has been praised as providing flexibility and certainty, even though the six-month gestation period may be too long. *See* Lindemann, *supra* note 37, at 350. Should the procedure become popular, the Commission might be unable to review each case properly and therefore might try to buy time by requesting more information, effectively undoing the procedure's benefits. An opposition procedure was first adopted in a Council Regulation applying the rules of competition to transport by rail, road, and inland waterway. *See Council Regulation (EEC) No. 1017/68*, O.J. EUR. COMM. (No. L 175) art. 12 (July 23, 1968). More recently, opposition procedures were adopted in article 4 of Commission Regulation (EEC) No. 2349/84, on the application of article 85(3) of the Treaty of Rome to certain categories of patent licensing agreements, *see* O.J. EUR. COMM. (No. L 219/15) (Aug. 16, 1984), and in

Other relevant provisions include articles 8 through 11. Article 8 requires that information received through notification be used only for purposes of the Regulation.[151] Article 9 requires inclusion of the market shares of "connected undertakings" in the calculation of total market share.[152] According to article 10, the Commission may withdraw the benefit of the exemption when the existence of the agreement eliminates competitive pools of research, or restricts third parties from access to the R&D results, and when the R&D results are unused or not subject to substantial competition. Articles 11 and 12 apply the Regulation retroactively in some circumstances and declare it applicable to decisions of associations or undertakings.[153] Effective since March 1, 1985, the Regulation will last until December 31, 1997.[154]

VI. Points of Contention in the United States and the EEC

A. *Issues in the United States*

Despite a general consensus to tame antitrust laws for R&D joint ventures, several details of the Act raised concern. Major issues in the United States revolved around (1) the conditions of conferring the benefits of the Act, (2) the nature and content of the notification, (3) the propriety of awarding attorney's fees to defendants under certain circumstances, and (4) the need for jury instructions on the rule of reason.

Several approaches were considered in determining the conditions necessary for obtaining the benefits of the Act. One approach required the joint venturers to be "certified" by the Justice Department by obtaining a binding review on the legality of the proposed research joint venture.[155] The certification procedure was

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article 4 of Commission Regulation (EEC) No. 417/85 of December 19, 1984, on the application of article 85(3) of the Treaty to categories of specialization agreements, *see* O.J. Eur. Comm. (No. L 53) (Jan. 22, 1985).

151. *Regulation, supra* note 19, art. 8.

152. *Id.* art. 9. A connected undertaking is defined as an entity owning more than half of the capital or assets, exercising more than half of the voting rights, having the power to appoint more than half of the members of the Board, or having the right to manage the business. *Id.*

153. *Id.* arts. 11-12.

154. *Id.* art. 13.

155. *See, e.g.*, H.R. 108, 98th Cong., 1st Sess., 129 Cong. Rec. 42 (1983) (introduced by Rep. Edwards (D-Cal.)); S. 1393, 98th Cong., 1st Sess., 129 Cong. Rec. 7555 (1983) (a companion bill introduced by Sen. Glenn (D-Ohio) and Sen. Kennedy (D-Mass.)); S. 568, 98th Cong., 1st Sess., 129 Cong. Rec. 1532 (1983) (introduced by Sen. Tsongas (D-Mass.)).

criticized for vesting too much authority in a single executive department and for prescribing an improper role for the Justice Department. Critics feared that the Justice Department would apply its own conservative rules that had been set forth in the *Guide* only a few years earlier. A second approach provided a "safe harbor" for joint ventures meeting certain organizational standards.[156] The safe harbor bills were similarly criticized for closely following existing antitrust rules.[157] A third approach extended protection when the venturers notified the government of their plans, but it did not require them to wait for approval or to comply with pre-set rules.[158] A fourth approach eliminated the notification requirement altogether.[159]

On balance, the notification approach gathered the most supporters because it did not require a new bureaucracy as did the certification bills. It also preserved flexibility that would have been put in jeopardy by the safe harbor bills. Still, the act of notification itself drew much criticism. As in the EEC, some expressed concern that registration of joint venture agreements and subsequent publication in the Federal Register would deter cooperation because of the venturers' reluctance to divulge sensitive information.[160] Others, however, were more fearful of abuses resulting from nonnotification.[161] By way of compromise, the Act provided that the venturers may review the notice to be made in the Federal Register prior to publication. The publication need contain only the identities of the parties, and a general, unspecific description

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156. *See, e.g.*, H.R. 1952, 98th Cong., 1st Sess., 129 CONG. REC. 887 (1983) (introduced by Rep. Synar (D-Okla.)); S. 737, 98th Cong., 1st Sess., 129 CONG. REC. 2436 (1983) (identical Senate version introduced by Sen. Mathias (R-Md.) and Sen. Hart (D-Colo.)); H.R. 4043, 98th Cong., 1st Sess., 129 CONG. REC. 7432 (1983) (introduced by Rep. Lungren (R-Cal.)).

157. *See R&D Joint Venture Bills Address Antitrust Concerns*, Legal Times, Nov. 28, 1983, at 11, col. 1; *1984 Senate Hearings*, *supra* note 17, at 302-03 (responses by Adm. Inman, then president of MCC, to written questions raised by Sen. Hatch); *id.* at 261-66 (statement by D. Bruce Merrifield, Ass't Sec'y of Commerce).

158. *See, e.g.*, H.R. 3878, 98th Cong., 1st Sess., 129 CONG. REC. 6815 (1983) (sponsored by the Reagan Administration); S. 1841, 98th Cong., 2d Sess., 129 CONG. REC. 5330 (1984) (introduced by Sen. Thurmond (R-S.C.)).

159. Yet another approach was to alleviate antitrust risks only to R&D ventures in "essential" industries.

160. *See, e.g.*, SENATE COMM. ON THE JUDICIARY, THE NATIONAL PRODUCTIVITY AND INNOVATION ACT: REPORT OF THE COMMITTEE OF THE SENATE JUDICIARY, S. REP. No. 427, 98th Cong., 2d Sess. 35-37 (1984) (remarks of Sen. Patrick Leahy).

161. The Conferees concluded that private parties should have some notice of R&D ventures seeking the protective umbrella of the Act, because it was their right that the Act curtailed. *See* CONFERENCE REPORT, *supra* note 109, at 16.

of the area of planned activity.[162]

Another issue that provoked debate was the matter of attorney's fees. To discourage nuisance claims, several of the proposed R&D bills granted attorney's fees to a winning defendant. The rule that each party pays its own counsel has taken firm hold in the United States, even though it is contrary to the English rule that allows a winning party, plaintiff or defendant, to collect from the loser.[163] Several United States statutes, notably the antitrust laws, permit reimbursement of attorney's fees to a winning plaintiff.[164] The final version of the Act allowed reimbursement of attorney's fees to winning defendants only if plaintiff's conduct during the litigation was "frivolous, unreasonable, without foundation or in bad faith."[165] The award may be offset in whole or in part when

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162. *See Justice Examines Filings Needed for Protection Under Joint R&D Act*, 47 Antitrust & Trade Reg. Rep. (BNA) No. 1194, at 1067 (Dec. 13, 1984). According to an earlier draft of the bill, parties were required to specify the nature and objectives of the program. This requirement was modified by an amendment by Senator Patrick Leahy (D-Vt.). *See Senate Passes R&D Bill With Rule of Reason, Single Damages in Most Cases*, 47 Antitrust & Trade Reg. Rep. (BNA) No. 1176, at 206 (Aug. 2, 1984). A recent notice by MCC reads as follows:

> Notice is hereby given that, pursuant to section 6(a) of the National Cooperative Research Act of 1984, Pub. L. 98-462 (the "Act"), Microelectronics and Computer Technology Corporation ("MCC") has filed an additional written notification simultaneously with the Attorney General and the Federal Trade Commission on November 7, 1986, disclosing a change in the membership of MCC and a change of ownership of a present party to MCC. The additional written notification was filed for the purpose of extending the protections of section 4 of the Act limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. The notification identifying the original parties to the project, and describing the nature and objectives of that project, is published at 50 FR 2633 (Jan. 17, 1985).
>
> Prior to September 3, 1986, RCA Corporation ("RCA"), a subsidiary of General Electric Company ("GE"), was an MCC shareholder. On September 3, 1986, MCC's Board of Directors approved the transfer of RCA's share to GE. Accordingly, as of September 3, 1986, GE and each of its subsidiaries, including RCA, became parties to MCC.
>
> On September 16, 1986, Sperry Corporation, a party to MCC, became a subsidiary of Burroughs Corporation.
>
> (signed) Joseph H. Widmar, Director of Operations, Antitrust Division

Change in Membership & Ownership Notice, 51 Fed. Reg. 44,132 (1986).

163. *See* Figa, *The "American Rule" Has Outlived Its Usefulness; Adopt the "English Rule,"* Nat'l L.J., Oct. 20, 1986, at 13, col. 1.

164. There are over 100 fee-shifting statutes. For a listing, see Marek v. Chesny, 473 U.S. 1, 44-51 (1985).

165. 15 U.S.C. § 4304(a)(2) (Supp. III 1985). Actually the courts already have this power under Rule 11 of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 11. To prevent frivolous claims, Rule 11 requires attorneys to certify that they have read the pleadings, that the claim seems well founded in law and fact, and is not brought to harass or cause delays. *Id.* When this rule is violated, the judge may order the offending party to pay its opponent's attorney's fees. Other sanctions include a published or unpublished repri-

the plaintiff shows that the defendant acted in a similar manner.[166]

The rule of reason produced another major storm. The issue was whether the Act should require the courts to apply the rule of reason on a case-by-case basis, as was the usual procedure, or whether to assist courts in the analysis. A compromise was reached here also. Legality of the joint venture, states the Act, "shall be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition, including but not limited to, effect on competition in properly defined, relevant research and development markets."[167] The relevant markets are difficult to define, however. Thus, the Conference Report provides that when the venture is in the business of acquiring new knowledge, the product market is "knowledge," and the geographic market is global. Because knowledge unobstructedly crosses national boundaries, domestic and foreign firms must have the ability and incentive, measured objectively, to undertake similar R&D to be included in the market. Relevant factors may include the firm's business objectives, its facilities, technologies, and other available assets.[168]

The Act's mandate that the venture be judged on the basis of its reasonableness first involves an inquiry into the anticompetitive effects of the particular venture on the market. Positive competitive effects become relevant only when anticompetitive effects have already been demonstrated. Does the venture reduce R&D competition and thus deter innovation? Is it overly inclusive? Does it stall innovation or conceal its fruits? Are there spillovers? For example, are the parties colluding on price and output of goods sold outside the R&D venture, or on other strategic business decisions? Does the venture conduct basic research in which collusion is less

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mand, temporarily or permanently barring a lawyer from appearing in court, and notices of a lawyer's bad conduct to colleagues within the lawyer's firm. *Id.* Rule 11 set off a spate of litigation, resulting in over 1000 rulings since 1983, many of which ordered attorney's fees to be paid by the frivolous litigant. *See, e.g.*, Eastway Construction Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985). In *Eastway*, a supplier convicted of fraud in dealing with the city, frivolously charged that a city regulation prohibiting anyone convicted of fraud from dealing with the city violated his civil rights and the antitrust laws. On remand, the court found mitigating circumstances and awarded only $1000 attorney's fees as a sanction. Eastway Construction Corp. v. City of New York, 637 F. Supp. 558 (E.D.N.Y. 1986), *aff'd in part, rev'd in part*, 762 F.2d 243 (2d Cir. 1985); *see ABA Annual Meeting Emphasizes Competitiveness, International Trade*, 53 Antitrust & Trade Reg. Rep. (BNA) No. 1329, at 311, 327-29 (Aug. 8, 1987); Cavanagh, *supra* note 23, at 822 n.248, 837 n.340; Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630 (1987); Bates, *The Rule 11 Debate, 4 Years Later*, Nat'l L.J., Oct. 12, 1987, at 3, col. 1.

166. 15 U.S.C. § 4304(b) (Supp. III 1985).

167. *Id.* § 4302.

168. *See* CONFERENCE REPORT, *supra* note 109, at 9-10.

likely to occur or does it operate near commercial application?[169] In balancing the procompetitive and anticompetitive effects of the venture, the Conference Report also suggested that costs and economies of scale be weighed. The higher the costs relative to those a single firm can bear and the higher the benefits received from economies of scale, the more likely it is that the venture is procompetitive.[170]

Another aspect of the rule of reason debate concerned the weight that "efficiency" should carry in cancelling out the negative effects of a joint venture. Since the mid-1970s, the argument that a practice or contract, such as a merger, improved efficiency had gained credence.[171] Consequently, the Senate version of the bill provided that a court should take into account the "effects in promoting competition through innovation or enhancement of efficiency."[172] This language was deleted from the final version of the Act. The Conference Committee did not deny that R&D joint ventures could enhance efficiency. To the contrary, the Conference Report gave examples of such efficiencies. For instance, when resources are pooled, savings may result from intensive use of sophisticated scientific machinery, from synergies derived from combining complimentary skills, or from a combination of small firms, individually lacking the necessary resources, that together may comprise a competitive force.[173] Measuring efficiency, however, is complicated and proof is hard to obtain.[174] The conferees also were concerned that an overly detailed enumeration might be considered exhaustive, preventing courts from looking at other competitive factors.[175] Therefore, rather than forcing on the courts a structured efficiency analysis, the Conference Report states simply that courts must weigh the procompetitive effects of the joint venture

169. *See id.*

170. *See id.*

171. In the 1984 merger guidelines, the Justice Department devoted a special section to efficiencies. In evaluating mergers the Department will consider achieving economies of scale, better integration of production facilities, plant specialization, lower transportation costs, and even efficiencies resulting from reductions in general selling, administrative, and overhead expenses. *See* PLI ANTITRUST, *supra* note 102, at 224. The Federal Trade Commission, on the other hand, is interested in "real technical efficiencies" such as increases in productivity, economies of scale and technology transfers, but not tax benefits. *Enactment of Statutory Protections Improve Climate for Joint Ventures*, 47 Antitrust & Trade Reg. Rep. (BNA) No. 1188, at 800 (Nov. 1, 1984).

172. See CONFERENCE REPORT, *supra* note 109, at 11.

173. *Id.*

174. *See* P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 955 (1980).

175. CONFERENCE REPORT, *supra* note 109, at 11-12.

against possible anticompetitive effects. Courts are reminded to consider these procompetitive effects by the express application of the rule of reason of section 3 in all cases involving R&D joint ventures.[176]

B. Issues in the EEC

During the debate in the EEC over block exemptions, the Commission and industry disagreed on several issues. The main controversies concerned (1) the scope of the Regulation, (2) the definition of "relevant market," (3) permissible restraints on distribution, (4) the continued validity of the 1968 Notice, and (5) the reach of article 85(1).

The January 1984 draft of the Regulation acknowledged two automatic exemptions based on market structure and annual turnover. First, individual notification was not required for agreements that did not involve joint manufacturing and to which "not more than one of the three actually or potentially leading undertakings" was a party.[177] Second, agreements between companies whose aggregate annual turnover did not exceed 500 million ECU were exempted from article 85(3) regardless of whether such agreements included provisions to engage in joint manufacturing.[178] The market structure test was criticized as ambiguous, vague, and discriminatory because it would produce very different results according to the structure of the industry. The distinction between manufacturing and nonmanufacturing ventures was considered unwarranted in light of the findings of the CORDI Report,[179] and the turnover threshold was found to be too low. In the final version of the Regulation, the Commission eliminated the criteria on market structure and turnover and adopted instead a market share test. All ventures satisfying the market share test were permitted to jointly manufacture the R&D results.

Under the June 1984 draft, the automatic exemption applied to companies whose combined market share within the Common Market did not exceed fifteen percent.[180] The draft included an ac-

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176. 15 U.S.C. § 4304 (Supp. III 1985).

177. *See* First Draft, *supra* note 125, art. 1(3)(a).

178. *Id.* art. 1(3)(b).

179. *See The Community's Competition Policy and the Competitive Situation of European Enterprises*, UNICE Report (Nov. 24, 1982); *Proposal for a Regulation Exempting Certain Categories of Patent Licensing Agreements, UNICE Position*, UNICE Report (May 14, 1984).

180. *See* Second Draft, *supra* note 125, art. 4.

celerated approval procedure when the combined share fell between fifteen and twenty-five percent.[181] Industry again objected that the fifteen percent threshold was unreasonably low. The Commission and industry reached a compromise that applied the block exemption to all agreements, whether or not they involve manufacturing, as long as the venturers' combined market share does not exceed twenty percent of the Common Market.[182]

The Commission and industry also disagreed on grey list restrictions concerning the parties' right to agree not to manufacture or market the new products in reserved territories.[183] The Commission viewed the practice of reserving territories as blatantly opposed to the EEC's primary goal of establishing a common market. Industry argued that the right to build a market for new products, unfettered by competition, was necessary to provide incentive for investment in cooperative agreements. By way of compromise, the Regulation provided that the parties may reserve territories for exclusive manufacture of the new product or process.[184] The venturers may agree on exclusive marketing territories for a period of five years after the product is first placed on the market.[185] After five years, prohibitions against marketing, branching, or advertising are blacklisted.[186]

A further concern of industry was whether the 1968 Notice excluding pure research ventures from the reach of article 85(1) re-

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181. *Id.* art. 5.

182. *Regulation, supra* note 19, art. 6(f).

183. *Id.* art. 4(1)(f).

184. *Id.* art. 4(1). Article 4(1) states: "The exemption provided for in Article 1 shall also apply to the following restrictions of competition imposed on the parties: . . . (d) an obligation not to manufacture the contract products or apply the contract processes in territories reserved for other parties." *Id.*

185. *Id.* art. 4(1)(f). Article 4(1)(f) states:

> [The venturers have] an obligation not to pursue, for a period of five years from the time the contract products are first put on the market within the common market, an active policy of putting the products on the market in territories reserved for other parties, and in particular not to engage in advertising specifically aimed at such territories or to establish any branch or maintain any distribution depot there for the distribution of the products, provided that users and intermediaries can obtain the contract products from other suppliers and the parties do not render it difficult for intermediaries and users to thus obtain the products.

Id.

186. *Id.* art. 6(f). Article 6(f) provides:

> The exemption provided for in Article 1 shall not apply where the parties by agreement . . . are prohibited from putting the contract products on the market or pursuing an active sales policy for them in territories within the common market that are reserved for other parties after the end of the period referred to in Article 1(f).

Id.

mained in force. To remove doubt about the article's continuing validity, preamble 2 states that cooperation agreements, up to the stage of industrial application, "generally do not fall within the scope of Article 85(1)."[187] On the other hand, agreements not to compete continue to violate article 85(1). Preamble 2 states: "[W]here the parties agree not to carry out other research and development in the same field, thereby foregoing the opportunity of gaining competitive advantages over the other parties, such agreements may fall within Article 85(1) and should therefore not be excluded from this Regulation."[188]

A final and important area of conflict between the Commission and the private sector concerned the relationship between article 85(1) and article 85(3). As caretaker of the antitrust laws, the Commission would prefer to subject all controversies that require a market analysis to an article 85(3) examination. The Commission is the sole arbiter of all article 85(3) controversies. Others would like to shift some of this power to national courts under article 85(1).[189] Two recent decisions by the Court of Justice seem to favor this latter approach. For instance, joint ventures that involve a high investment risk, or that produce important new technology, could be held to fall outside article 85(1).[190] At the same time, such agreements need not be exempted under article 85(3). In light of these decisions, the Commission, as subordinate to the Court of Justice, has been careful not to overstep its authority. The grey list may serve as an illustration. It is divided into two sections. The first section, article 4, permits clauses that always restrict competition, including the obligation not to carry out the same research independently or with others. Under the second section, article 5, parties may exchange information necessary for the joint venture. They may agree to keep new knowledge secret and they may assist in applying for and holding patents. These article 5 restrictions generally fall outside article 85(1). But the Regulation states that "in the event that, because of particular circumstances" such re-

187. *Id.* preamble 2.

188. *Id.*

189. *See generally* sources cited *supra* note 92.

190. *See* Nungesser v. Commission, 1982 E.R.C. 2015, [1981-1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8805 (1982) (*Maize Seed* case); Coditel v. Ciné Vog Films, 1982 E.C.R. 3381, [1981-1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8865 (1982); Hawk, *Patents Under EEC Competition Law*, 53 ANTITRUST L.J. 737, 749-55 (1984). One recent franchising case also may be read as a broadening of the scope of article 85(1). *See* Pronuptia de Paris GmbH v. Firma Pronuptia de Paris Irmgard Shillgallis (Case No. 161/84) (1986).

strictions do fall within article 85(1), "they shall also be covered by the exemption."[191]

VII. The United States Act and the EEC Regulation Compared

A. *Notification and Rule of Reason*

The first distinction between the two statutes concerns the issue of notification. The United States Act introduced the concept of notification as a condition for favorable treatment. Once the government has been notified of the joint venture, a plaintiff may not seek treble damages—a remedy unavailable within the EEC. The EEC Regulation, on the other hand, discontinued the practice of individual notification. While the United States Act requires a first hand look at R&D ventures, the Commission has loosened its reins for ventures within the scope of the Regulation.

A second distinction concerns the rule of reason analysis. In the EEC, detailed guidelines for block exemptions are contained in the Regulation, supplanting the Commission's individual balancing test. In the United States the courts have continued to apply the rule of reason to research joint ventures, although the analysis may be limited by the terms of the Report.[192] Other major differences concern the scope of "research" and of "market." Minor differences apply in the area of spillovers.

B. *Research and Market*

The concept of research is broader in the EEC than in the United States. Given the controversy surrounding the detrebling provision,[193] Congress considered it crucial to define narrowly and to distinguish clearly those ventures intended to be covered by the Act from those to be excluded. The closer to the marketplace the venture operated, the less willing Congress was to grant the benefit of single damages. Thus, under section 1 of the Act, a "joint research and development venture" may engage in "theoretical anal-

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191. *Regulation, supra* note 19, art. 5(2).

192. Conference Report, *supra* note 109, at 17.

193. One of the strongest opponents of detrebling, Senator Howard J. Metzenbaum (D-Ohio), sponsored an amendment allowing for treble damages in cases in which the venture is in violation of any order or decree by federal or state antitrust authorities. The amendment was adopted as part of the final compromise. *See* 15 U.S.C. § 4303(e) (Supp. III 1985).

ysis, experimentation, or systematic study of phenomena or observable facts, . . . development or testing of basic engineering techniques [and in] experimental production and testing of models and prototypes."[194] The venturers also may collect and exchange research information and set up facilities to administer the venture, conduct research, and apply for patents.[195] Most importantly, they may jointly license the results and realize profit on their joint efforts.[196]

As soon as the venturers "enter into any agreement . . . involving the production or marketing" of the research results, "other than the production or marketing of proprietary information developed through such venture, such as patents and trade secrets", however, the benefits of the Act are forfeited.[197] The purpose of the Act is to stimulate fundamental engineering, but not at the expense of competition in manufacturing. The Report states that parties should not rely on the Act "for activities at the other end of the engineering spectrum."[198] When "the sole purpose of the joint activity is to prepare a product for the marketplace," the protections of the Act are no longer available, even though the activity excludes manufacturing.

Obviously, manufacturing joint ventures may exist under the antitrust laws.[199] In 1983, for example, General Motors and Toyota gained governmental approval to jointly produce a new compact car.[200] The Act, however, denies such ventures the benefit of single damages should they violate the antitrust laws.

In contrast, the EEC grants the benefit of block exemptions to joint R&D programs that also manufacture products or processes. Although a prior draft allowed only small and medium-sized companies to jointly manufacture, the final version of the Regulation permitted joint production by companies of any size. Because inte-

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194. *Id.* § 4301(a)(6)(A)-(C).

195. *Id.* § 4301(a)(6)(B)-(D).

196. *Id.* § 4301(a) (joint R&D may include "the prosecuting of applications for patents and the granting of licenses for the results of such ventures").

197. *Id.* § 4301(b)(2). A pending antitrust reform proposal seeks to expand exemptions in the Act beyond "basic research." *See Efforts to Reform Antitrust Law Will Come From Different Directions*, 52 Antitrust & Trade Reg. Rep. (BNA) No. 1297, at 43 (Jan. 8, 1987).

198. CONFERENCE REPORT, *supra* note 109, at 8.

199. "Joint ventures in production and marketing are not, of course, necessarily anticompetitive; indeed they may have significant procompetitive aspects." S. REP. No. 427, 98th Cong., 2d Sess. 15 (1984).

200. In General Motors/Toyota, a limited purpose venture, the efficiencies were thought to have outweighed any potential anticompetitive effects. General Motors Corp. & Toyota Motor Corp., 49 Fed. Reg. 18,289 (1984) (consent order).

gration was seen as a higher goal than pure innovation, the general consensus was that research joint ventures needed a freer hand in exploitation, which many considered to be a natural extension of joint research. In addition, collusion from joint production is feared less in the EEC than in the United States because European companies tend to market their products relatively independently and in response to the customs of the particular country in which they operate. Article 1 of the block exemption lifts the article 85(1) ban from joint R&D programs even when the parties jointly exploit the results of the research. Although the danger of price collusion still exists, it is mitigated by the Regulation's five-year limit on joint marketing.

By including joint production, the EEC exemption clearly applies to a greater number of joint ventures than the United States Act, which is limited to pure research ventures. The "relevant market" of the EEC Regulation, however, is far smaller than that of the United States Act. Obviously, the Commission, whose purpose is to uphold the antitrust laws, could not relinquish all control over R&D joint ventures. To preserve the Commission's supervision over larger ventures, the Regulation contained threshold provisions. They provide that when the venture's market share exceeds certain limits, the block exemption is no longer applicable and the venturers must revert to the individual exemption procedure of article 85(3) over which the Commission continues to retain full control.

To implement these provisions, the relevant market must be identified. Because it is uncertain whether any product will result from research, the first difficulty was to define "product market." On the basis of individual notifications, the Commission ascertained that most venturers have a specific product in mind at the outset of the venture.[201] The Regulation, therefore, defines the product market of the research venture as those "products capable of being improved or replaced" by the R&D results.[202]

If the venturers are competitors in the product market, their combined geographic market share at the time they enter into the agreement may not exceed twenty percent of the market for such products in all or part of the Common Market.[203] The "geographic market," therefore, may not exceed the boundaries of the Common

201. For instance, in the *Beecham/Parke Davis* joint venture the product was a new heart drug, and in *Henkel/Colgate* a new detergent.

202. *See Regulation, supra* note 19, art. 3(1).

203. *Id.* art. 3(2).

Market, but may be smaller. If the venturers operate in different, possibly complementary fields, and are not yet competitors, the block exemption applies from the venture's inception and continues until five years from the time the research results are first placed on the market.[204] The exemption may continue beyond the five-year period for as long as the parties' combined geographic market share for these products does not exceed twenty percent.[205]

In the United States, the market share is analyzed for a different purpose. Unlike the EEC, market share is not used to identify those ventures that require notification prior to commencement. Instead, the market share is part of the "reasonableness" test applied by the courts in hindsight. It is a factor in determining whether the venture has reduced research competition or abused its market power by including, for example, too many or too few competitors.

Given the difference in function, the relevant product market in the United States is not "products to be improved or replaced" as in the EEC, but the much broader concept of "knowledge," which is considered the basic element of research.[206] Products resulting from knowledge may face legal or economic barriers on importation into the United States. Knowledge may enter freely.[207]

The United States and the EEC also view the relevant geographic market differently and hence reach different conclusions as to the overinclusiveness of the joint venture. The Regulation's block exemption limits the geographic market to the boundaries of the Common Market or to some part thereof. Under the United States Act, such a market may encompass the world, in which any foreign R&D competitor might be a significant factor and should be taken into account by the courts in measuring overinclusiveness.[208] The Conference Report suggests that inclusion of as many as four competitors may be acceptable and, when economies of scale require, larger numbers may be included.[209]

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204. *Id.* art. 3(1).

205. *Id.* art. 3(3).

206. *See* CONFERENCE REPORT, *supra* note 109, at 9-10.

207. *Id.* at 10.

208. *Id.*

209. *Id.; see also* 5 Trade Reg. Rep. (CCH) ¶ 350,469 (Nov. 2, 1984) (remarks of J. Paul McGrath, then Assistant Attorney General of the Antitrust Division before the New England Antitrust Conference). Because the Regulation limits the size of a venture to 20% of the Common Market, "overinclusiveness" issues will arise in the EEC primarily in individual exemptions under article 85(3). The only mention in the Regulation of these types of problems is in the withdrawal section. For example, the Commission may withdraw the ben-

The Report underplays the importance of underinclusiveness. According to the Report, denying access to some applicants usually will not give rise to antitrust concerns because excluded competitors could form their own ventures. Additionally, if rejected applicants could complain about being boycotted, comparable research centers might not be established. Exclusion of one or more competitors may violate United States antitrust laws only when the type or cost of the research dictates that all or almost all capable applicants be included.[210]

Determining the relevant research market under the EEC Regulation will be relatively simple compared to determining the market under the United States Act. In the EEC, the product market consists of a tangible product and the geographic market may not extend beyond EEC borders. In the United States, delineating the market is fraught with problems. The more basic the research and the newer the technology, the harder it will be to define "knowledge." It also is doubtful whether joint ventures in the United States that are involved in applied and developmental research are seeking to produce knowledge rather than a new product. Furthermore, it is unrealistic to believe that competitors even could be identified in a global market. The purer the research, the more secretive the competitors are likely to be. Even if foreign competitors can be located, they cannot be expected to reveal their research plans.

Is either system better? The solutions to antitrust problems must be viewed against their proper backgrounds. Defining an amorphous concept such as "knowledge" raises sticky questions

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efits of the Regulation when the very existence of the agreement prevents the creation of comparable research centers or restricts access of third parties in the market to the R&D results. *See Regulation, supra* note 19, art. 10(a)-(b).

210. In its 1984 Merger Guidelines, the Justice Department adopted yet another approach to defining markets. As for the relevant product market, the Department will determine for each of the products of each of the merging firms whether the merged firm could profitably impose a "small but significant and nontransitory" increase in price. If so, the merger could be deemed to create an undesirable monopoly. In defining the geographic market, the Department will determine, in the areas in which each of the merging firms sell their products, whether the merged firm could profitably impose a "small but significant and nontransitory" increase in price. When buyers might respond to price increases by purchasing from sellers outside the geographic area or by purchasing other products, the geographic area may be expanded. Depending on the nature of the product and the competitive circumstances, the geographic market may be as small as part of a city or as large as the entire world. *See* U.S. Dep't of Justice Merger Guidelines, June 14, 1984, *reprinted in* PLI ANTITRUST 1985, *supra* note 102, at 187. For a discussion of relevant markets, see Baker, *Market Definition in Transnational Joint Ventures, Mergers and Monopolization*, 1984 FORDHAM CORP. L. INST. 115 (B. Hawk ed. 1985).

and produces inconsistent answers in the courts. Moreover, locating a venture's potential competitors worldwide is a difficult task. Nevertheless, United States courts have broad experience in establishing guidelines and, after all, the Act's main purpose is to change the law's perception and not just to simplify it. The Act encourages pure cooperative research in a competitive environment by eliminating treble damages and thus indirectly discouraging lawsuits. Notification has been used as a device to curb abuses.

The purpose of the EEC Regulations is broader than the purpose of the Act. Above all else, the Regulation aims to create a true common market. In addition, EEC antitrust law has developed only partly through court decisions. Because it is the Commission that lays down the law in the first instance, the Regulation seeks to preserve the Commission's control over the antitrust laws. Therefore, block exemptions must be sufficiently liberal to encourage cooperation, sufficiently specific to provide certainty, and sufficiently narrow to prevent abuse.

The consequences of falling outside the legislation differ in both jurisdictions. In the EEC, larger ventures still have the opportunity to request an individual exemption. In the United States, failure to qualify for the exemption at its inception means that the benefit of single damages is lost forever. Viewed in this light, the "market" approaches of both the EEC Regulation and the United States Act seem to respond to the unique needs of each system.

C. Spillovers

Apart from joint manufacturing, the United States and the EEC differ only slightly in their treatment of spillovers. In a joint venture, scientists and managers of different organizations work together on a confidential, noncompetitive basis, creating the kind of environment conducive to collusion. In the EEC, however, the fear of collusion is overshadowed by the desire to create a climate nurturing cooperation.

In an attempt to curtail spillovers, the United States Act expressly excludes three groups of practices from the definition of "joint research and development venture." First, when the parties exchange information on costs, sales, profitability, or prices of any product, and when such information is not "reasonably required" to conduct the joint research program, the benefits of the United

States Act are forfeited.[211] In determining reasonableness, the Conference Report suggests that courts examine the type of information being exchanged and the manner in which the exchange takes place. To prevent even the impression of collusion, parties are advised to employ independent intermediaries.[212] Parties also are encouraged to erect a "Chinese wall" between key employees of the venture and the parties.[213] The EEC, on the other hand, is primarily concerned with the success of the venture. Under the terms of the grey list, parties may exchange information relating to experiences gained in manufacturing and grant each other nonexclusive licenses for improvement or new uses.[214] They also may exchange all technical knowledge necessary to conduct effectively the joint research.[215] Both the United States and the EEC outlaw cartel agreements on output, prices, or customers.

Second, the benefit of the United States Act is lost if the parties engage in joint manufacturing and distribution of the research results.[216] As stated earlier, joint manufacturing of R&D results is covered by the EEC Regulation. To get a head start in their own country and thus to improve the venture's chance of success, the Regulation also allows the venturers to manufacture exclusively and to divide marketing territories for the first five years after the product enters the market.[217] After that time, agreements not to market, advertise, or set up warehouses in each other's territories are blacklisted.[218] Also blacklisted are agreements to refuse to sell or to inhibit access without sound business reasons to users or dealers who are suspected of parallel import practices.[219]

The third group of violations resulting in loss of the Act's benefits are agreements to restrict the sale, licensing, or sharing of in-

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211. 15 U.S.C. § 4301(b)(1) (Supp. III 1985).

212. *See* CONFERENCE REPORT, *supra* note 109, at 8 (adopting by reference S. REP. No. 427, 98th Cong., 2d Sess. 15-16 (1984)).

213. *See* 2 B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST 241 (2d ed. 1986).

214. *Regulation, supra* note 19, art. 4(g).

215. *Id.* art. 5(b).

216. *See* 15 U.S.C. § 4301(b)(2) (Supp. III 1985). Section 4301(b)(2) excludes from

> joint research and development . . . entering into any agreement or engaging in any other conduct restricting, requiring, or otherwise involving the production or marketing by any person who is a party to such venture of any product, process, or service, other than the production or marketing of proprietary information developed through such venture, such as patents and trade secrets.

Id.

217. *Regulation, supra* note 19, art. 4(e)-(f).

218. *Id.* art. 6(f).

219. *Id.* art. 6(h).

ventions not developed through the venture, and agreements that impinge on the venturers' freedom to conduct independent or comparable research outside the joint venture.[220] To prevent disputes over ownership of R&D, the EEC Regulation permits agreements that restrict independent or comparable joint research.[221] The EEC, in order to encourage the success of the venture, blacklists only restrictions on unrelated independent research.[222]

In the United States, treble damages are available to defendants in actions alleging restrictions on independent research. Congress apparently feared that such restrictions would tie together all research in a certain field, thus stifling competition. The EEC's white list discourages stifling by requiring that all parties have access to the venture's research results.[223] In addition, the Regulation allows parties to enter into royalty sharing agreements to compensate for unequal distributions to the parties and to divide royalties to reflect each party's participation.[224] By encouraging fair play among the venturers, the Regulation attempts to ensure that consumers will benefit from the increased volume and quality of new or improved products.

As with the provisions on "market and research," the spillover rules must be viewed in context. Fear of collusion should not lead to complete disregard of practical considerations. It is impractical, for example, to expect total dedication by venturers who, alone or with others, are free to duplicate the same research. Under such conditions and without killing the venture, the Chinese wall between United States venturers should be strong enough to ensure that the venture functions as a conduit to new technology rather than as an organization to facilitate eavesdropping on competitors.

VIII. CONCLUSION

The United States National Cooperative Research Act and the EEC Regulation on R&D joint ventures clearly encourage research and development joint ventures. Several questions remain, however. Under the United States Act, it is unclear exactly how far product development may progress before a venture is denied the benefit of the Act. It also is unclear whether agreements that are

220. *See* 15 U.S.C. § 4301(b)(2)-(3) (Supp. III 1985).
221. *Regulation, supra* note 19, art. 4(1)(a).
222. *Id.* art. 6(a).
223. *Id.* art. 2(b).
224. *Id.* art. 5(f)-(g).

generally considered per se illegal may be analyzed under the rule of reason when they occur in the context of an R&D joint venture. For instance, should tying agreements or price fixing agreements be subject to the rule of reason when such agreements are made pursuant to licensing the venture's results? Parties undoubtedly will argue the point.[225]

Difficulties also may arise in establishing the relevant research market. It might not be feasible to define "knowledge" and to locate all present and potential competitors worldwide. It is questionable whether knowledge represents the relevant product market in many types of research ventures. Moreover, the evidentiary problems in proving "knowledge" as a product market may be extremely complex. What sort of evidence is needed?

The notification procedure raises still more questions. In the United States, it is not clear whether the Attorney General or the Federal Trade Commission will review the notifications,[226] or how closely the reviewing entity will scrutinize the notifications for possible antitrust regulations. The effect of the notification procedure on venturers and potential competitors also is unknown. Venturers may grow conservative in the face of registration and publication. Competitors aware of the publication may elect to duplicate the registered venture's research, especially when the real invention is in the idea itself.

Notification problems in the EEC are of a different nature. Elimination of the notification requirement in certain circumstances might cause a deterioration of the Commission's enforcement powers. Companies might abuse the market share rules, and fail to give proper notice, either (1) by including joint research as an afterthought to an otherwise pure production venture or (2) by designating an old product as a new research product in order to avoid the market threshold.[227]

In addition to difficulties created by the legislation itself, the United States Act and the EEC Regulation could produce more extensive problems. In the United States, the future of antitrust in general, and of treble damages in particular, is already in question.

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225. *See, e.g.*, Halverson, *Transnational Joint Ventures and Mergers Under United States Antitrust Law*, 1984 FORDHAM CORP. L. INST. 143, 187 (B. Hawk ed. 1985) ("Collateral agreements to research and development joint ventures may therefore still be subject to per se liability and, unless they are in some way notified, treble damages.").

226. The Justice Department advises joint ventures to apply for a business review in cases of doubt. Many take this to heart. *See* Wright, *supra* note 27, at 175-76.

227. *See* Jacquemin & Spinoit, *supra* note 13, at 513-14.

Carving out an exemption in a single statute might further undermine the effectiveness of antitrust enforcement. Unworthy venturers, for example, may succeed at attempts to qualify for the Act's protection. The Act could provide a precedent for repealing treble damages provisions in other antitrust legislation.

In the United States it is uncertain whether the legislative guidelines will stultify the rule of reason or make it more manageable. In the EEC, a similar question arises but from a different angle. For all practical purposes the block exemption encapsulates the rule of reason. Block exemptions might result in rigid application of the antitrust laws or might hamstring business procedures. Or the exemptions might unduly perpetuate the Commission's power over the antitrust laws.

Viewed in this broad light, are the statutes worth the price? It seems that the EEC Regulation is a definite step forward on the road to integration, if not innovation.[228] The Regulation increases certainty and reduces the risks involved with research joint venturing. Its procedures will free up time for more urgent tasks. Because the Regulation is limited in duration, the abuse that is likely to occur at least will be temporary. Finally, if the Regulation is flexibly applied, rigidity need not be the necessary result of legislated exemptions. Such flexibility is increased by the Regulation's opposition procedure that allows business people to individualize their contracts without immediately being subjected to a full fledged article 85(3) exemption request.

In light of the many filings since its enactment, the Act seems to have increased research cooperation in the United States, at least to some extent.[229] Whether increased cooperation will translate into innovation remains to be seen.[230] Nevertheless, in addition to an effect it might have on cooperation and innovation, the Act may reach further than originally intended. Although enacted to stimulate cooperation between joint venturers, the Act also may stimulate review of all antitrust laws. Many already have suggested

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228. In the first two years since its enactment the Regulation does not seem to have increased joint cooperation substantially in the EEC. *See* Lindemann, *supra* note 37, at 351.

229. According to one commentator, and a study of the filings, the increased research is mainly by "a small number of companies cooperating in a single development project or technical area and guided by a well-defined business plan." Wright, *supra* note 27, at 184 nn. 258-59

230. "Contrary to popular belief, new scientific knowledge is among the least reliable and least predictable sources of successful innovations. Furthermore, knowledge-based innovation has the longest lead-time of all innovation, nearing twenty-five to thirty years." *Id.* at 192.

that the treble damage remedy be discarded and the rule of reason tamed when these rules burden society more than benefit it.[231] Times have changed since 1890—the birth year of the Sherman Act. Business has become internationalized and markets globalized. Perhaps the time has come to reconsider the per se rule and the treble damage remedy. To that end the Act has made an important contribution. On the other hand, carving out a minor area such as R&D joint ventures might be thought by some to be too drastic a revision, especially because new law does not necessarily generate new products.[232]

231. *Compare* Export Trading Company Act of 1982, 15 U.S.C. §§ 4001-4021 (1982) *with* Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (Supp. III 1988). This subject is discussed further in the 1987 Administration Proposals, cited *supra* note 67.

232. Although the jury is still out, until now the Act has not produced the desired result. *See House Panel Ponders Bill to Apply Rule of Reason to Patent Licensing*, 52 Antitrust & Trade Reg. Rep. (BNA) No. 1315, at 899 (May 14, 1987).

The Unwed Father and Adoption in Utah: A Proposal for Statutory Reform

I. INTRODUCTION

The number of illegitimate children born each year in the United States continues to increase,[1] and with this increase there has been a corresponding rise in the number of judicial decisions regarding the rights of unwed fathers.[2] This Comment compares the United States Supreme Court's four major pronouncements regarding the rights of unwed fathers with Utah Supreme Court decisions in this area. The Comment also addresses some of the problems evinced by these decisions and concludes that Utah should adopt the Uniform Parentage Act[3] to alleviate difficulties with present statutory provisions.

II. THE HISTORICAL DEVELOPMENT OF THE RIGHTS OF UNWED FATHERS

A. The Development of the Law Pertaining to Illegitimate Children

At English common law, a child born outside of the marital relationship was known as "filius nullius," meaning the son of no one.[4] A tremendous social stigma was attached to illegitimacy,

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1. *See* U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-20 No. 380, MARITAL STATUS AND LIVING ARRANGEMENTS—(1982) 5 (1982). Between 1970 and 1982, the number of children living with a mother who had never married increased over five-fold, from 530,000 to 2.8 million. *Id.*

2. *See* Comment, Caban v. Mohammed: *Extending the Rights of Unwed Fathers*, 46 BROOKLYN L. REV. 95, 95 n.7 (1979); *see also* Note, *Unwed Fathers and the Adoption Process*, 22 WM. & MARY L. REV. 85, 85-87 (1980) (discussing three major Supreme Court pronouncements regarding the parental rights of unwed fathers).

3. UNIF. PARENTAGE ACT, 9B U.L.A. 287 (1987). The Uniform Parentage Act was authored by the National Commissioners on Uniform State Laws. It was approved by the Conference of Commissioners in 1973 and has been adopted in 16 states. *Id.* In a prefatory note, the Commissioners divide the Act into key segments. The first two sections of the Act extend equal rights to all children and all parents, irrespective of the parents' marital status. The remainder of the Act is directed toward the crucial process of parental identification. *Id.* at 289.

4. H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 3 (1971).

often producing punitive laws and harsh judicial treatment.[5] For example, the illegitimate child had no right to inherit property, and parents could not legally alter the child's status.[6] Eventually, however, the law came to recognize the existence of a legal relationship between an illegitimate child and the maternal parent, and accorded the mother custody rights and support obligations vis-à-vis her illegitimate child.[7]

In the United States, many jurisdictions originally adopted the English common law pertaining to the treatment of the illegitimate.[8] Beginning in 1968, however, the United States Supreme Court acted to abolish some of the legal inequities suffered by those born out of wedlock.[9] These decisions signalled a movement to treat legitimate and illegitimate children equally. The Court has made it clear that statutes that discriminate against illegitimate children will be subject to a heightened or intermediate standard of judicial review.[10] The Uniform Parentage Act goes beyond the Supreme Court decisions in this area and advocates a more effective solution: substantive legal parity for all children, regardless of their parents' marital status.[11]

B. The Rise of an Unwed Father's Parental Rights Through Decisions of the United States Supreme Court

In the 1920s, the United States Supreme Court began extending significant constitutional protection to parental interests.[12]

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5. *Id.* at 1-6.

6. *Id.* at 3-5.

7. *See* Note, *supra* note 2, at 131; *see also* Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 495-500 (1967) (discussing, historically, the legal relationship between the parents and their illegitimate child).

8. *See* H. KRAUSE, *supra* note 4, at 6.

9. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968) (statute that allowed legitimate children, but not illegitimate children, to bring a wrongful death action on the death of a parent held to violate fourteenth amendment equal protection guarantees); Glona v. American Guarantee & Liability Ins. Co., 391 U.S. 73 (1968) (statute that precluded mother of illegitimate child from recovering for wrongful death held unconstitutional); *see also* Stenger, *Expanding Constitutional Rights of Illegitimate Children 1968-1980*, 19 J. FAM. L. 407, 440-44 (1980-81) (analysis of United States Supreme Court cases involving disparate statutory treatment of illegitimate as opposed to legitimate children, underscoring the Court's consistent use of an "intermediate" standard of judicial review); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1553-58 (2d ed. 1988).

10. *See* L. TRIBE, *supra* note 9, at 1553-58.

11. UNIF. PARENTAGE ACT, 9B U.L.A. 287 (1987). Section 2 of the Act mandates that all children and all parents enjoy equal rights with respect to one another. *Id.* § 2, 9B U.L.A. 296 (1987).

12. *See, e.g.*, Meyer v. Nebraska, 261 U.S. 390, 399 (1923) (" '[L]iberty' guaranteed by

These protections usually were limited to the marital family.[13] In 1972, however, the Court decided the landmark case of *Stanley v. Illinois*,[14] in which the Court for the first time recognized and gave constitutional protection to the parental rights of unwed fathers.[15]

Peter Stanley, the plaintiff, had lived intermittently with Joan Stanley for ten years.[16] Although they had never married, the couple had three children. An Illinois dependency statute provided that illegitimate children automatically became wards of the state on the death of their mother; therefore, when Joan Stanley died, the three children were removed from the home without notice to Peter Stanley.

Stanley challenged the Illinois statute, which created an automatic irrebuttable presumption that an unwed father is an unfit parent without first granting notice and a hearing to determine the competency of the unwed father to raise his child. The statute afforded all other Illinois parents the right to notice and an opportunity for a hearing prior to termination of their parental rights, and required the state to prove that such parents were unfit to raise their children. In contrast, the state was not required to provide the same procedural protections to an unwed father prior to removing his children from his de facto custody. Stanley claimed that the Illinois statute violated equal protection guarantees because it did not afford him the same rights as those given unwed mothers, and married and divorced fathers.

The Court held the statute unconstitutional based on principles of due process and equal protection. The Court characterized Stanley's interest in retaining custody of his children as being "cognizable and substantial,"[17] and held that his interest was not diminished solely because he was an unwed father. The Court mandated that notice and an opportunity for a hearing be extended to all parents in order to allow them to rebut charges of unfitness prior to termination of their parental rights.[18] The Court

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the fourteenth amendment includes the 'liberty' . . . to establish a home and bring up children."); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." (citation omitted)).

13. *See* cases cited *supra* note 12.
14. 405 U.S. 645 (1972).
15. *See id.* at 654, 658.
16. The facts are from the Court's opinion in *Stanley*. *See id.* at 646-50.
17. *Id.* at 652.
18. *Id.* at 658.

acknowledged that granting unwed fathers these protections might hinder the efficiency of the state's adoption process, but it stated that "the Constitution recognizes higher values than speed and efficiency,"[19] and that the state's interest in caring for children is de minimis if the father is a fit parent.[20]

The second time the Court addressed the rights of unwed fathers was in *Quilloin v. Walcott*.[21] In *Quilloin*, an unwed father challenged a Georgia adoption statute that allowed an unwed mother, but not an unwed father, to veto the adoption of an illegitimate child. The trial court found that adoption would be in the child's "best interests"[22] and granted the petition. The United States Supreme Court, in a unanimous decision, rejected the unwed father's due process and equal protection challenges and upheld the Georgia statute.[23]

In *Quilloin*, the illegitimate child's stepfather had filed a petition to adopt the child with the mother's consent and approval.[24] The child was eleven when the adoption petition was filed and had lived with his stepfather, mother, and sibling as a family unit for nine years. The unwed father had visited his son on an irregular basis and provided only sporadic financial support.

The Court, as in *Stanley*, recognized that an unwed father has important substantive parental rights; however, the Court found that the unwed father had "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."[25] The Court, therefore, held that the disparate statutory treatment of the unwed father, as compared

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19. *Id.* at 656 (footnote omitted).

20. *Id.* at 657-58; *see* Weinhaus, *Substantive Rights of the Unwed Father: The Boundaries Are Defined*, 19 J. FAM. L. 445, 449-52 (1980-81) (discussing various interpretations of *Stanley* as to the level of constitutional protection that must be extended to unwed fathers in relation to their illegitimate children); *see also* Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581 (1972) (analysis of Court's decision in *Stanley*).

21. 434 U.S. 246 (1978).

22. *Id.* at 255; *see also* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD (1979) (discussion of factors that constitute the "best interests of the child" standard); J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973) (same). *See generally* Buchanan, *The Constitutional Rights of Unwed Fathers Before and After* Lehr v. Robertson, 45 OHIO ST. L.J. 313, 344-50 (1984) (analysis of why a "best interests of the child" standard usually results in a decision unfavorable to the unwed father, arguing convincingly that a "fitness" standard should be utilized before severing an unwed father's parental rights).

23. *Quilloin*, 434 U.S. at 256.

24. The facts are from the Court's opinion in *Quilloin*. *See id.* at 247-53.

25. *Id.* at 256.

with the unwed mother, and married or divorced fathers, met the constitutional burden "under any standard of review."[26] The Court reasoned that the state's interests were "more substantial" than in *Stanley* because the state's role in caring for children whose fathers do not assume parental responsibilities is often significant.[27]

In *Caban v. Mohammed*,[28] decided shortly after *Quilloin*, the Court invalidated a statute similar to the one upheld in *Quilloin*.[29] In *Caban*, the unwed father, Mohammed Caban, had lived with Maria Mohammed for approximately five years, during which time the couple parented and jointly provided support for their two children.[30] The couple separated, and the children, then ages two and four, remained with Ms. Mohammed, who married another man several months later. Following the separation, Caban saw the children weekly during the children's visits to their grandmother's home.

When the children's mother and her new husband sought to adopt the children, Caban and his new spouse answered with a cross-petition for adoption. The New York family court granted the mother's petition and terminated Caban's parental rights, finding this course of action to be in the best interests of the children. Although Caban was given notice and an opportunity to be heard regarding the adoption of his children, a New York statute afforded him no authority to veto the adoption, even though the statute did confer that power on the unwed mother.[31]

Caban appealed to the United States Supreme Court, contending that the New York statute violated both the equal protection and due process guarantees of the fourteenth amendment.[32] In a five-to-four decision, the Court held that the statute violated the

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26. *Id.*

27. *Id.* at 248. It is important to note that the unwed father in *Quilloin* was given notice and an opportunity to be heard regarding the adoption proceeding; therefore, he was afforded procedural due process protections. *Id.* at 253. The Court grounded its decision on the existence or nonexistence of a substantive parent-child relationship, and not on the father's failure to legitimate his child, because apparently he did not know that such a procedure existed. *Id.* at 254, 256.

The Georgia statute at issue in *Quilloin* was amended following the Court's decision to require, in most instances, the consent of any parent whose parental rights have not been terminated. *See* GA. CODE ANN. § 19-8-3(a) (1982). The Georgia Code also provides inclusive categories of putative fathers who are to receive notice of adoption proceedings. *Id.* § 19-8-7.

28. 441 U.S. 380 (1979).

29. *Id.* at 394.

30. The facts are from the Court's opinion in *Caban*. *See id.* at 382-88.

31. N.Y. DOM. REL. LAW § 111(1) (McKinney 1979).

32. *Caban*, 441 U.S. at 385.

equal protection clause of the fourteenth amendment.[33] The Court found that the gender-based distinction drawn between unwed mothers and unwed fathers was not substantially related to the state's interest in the promotion of adoptions of illegitimate children.[34] The Court reasoned that the state's interest in the children, albeit legitimate, had no application in this case because of Caban's close relationship with his children.[35] This relationship, the Court noted, was "fully comparable" to the relationship between the mother and the children.[36] The Court, however, took pains to distinguish Caban's situation from that of unwed fathers who had not acknowledged paternity or assumed parental responsibilities, and concluded that a state could constitutionally withhold the veto privilege from irresponsible unwed fathers.[37] Different statutory treatment of unwed fathers in the case of adoptions involving newborns might also be permissible.[38]

The strength of the parent-child relationship appeared to be a significant factor in the Court's finding for Caban.[39] Once again, however, the Court refused to find that the unwed father has a constitutionally protected fundamental interest in his child and applied an intermediate level of judicial scrutiny.[40]

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33. *Id.* at 394. Given its conclusion that the challenged statute was unconstitutional because of an impermissible gender-based distinction, the Court did not reach Caban's claim as to the constitutionality of the statutory distinction between married and unmarried fathers. *See id.* at 394 n.16.

34. *Id.* at 393.

35. *Id.* at 389-91.

36. *Id.* at 389.

37. *Id.* at 392.

38. *Id.*

39. *See id.* at 393 n.14.

40. *Id.* at 394; *see* Comment, *supra* note 2, at 104-11 (addressing the *Caban* Court's treatment of the challenged statute as drawing an impermissible gender-based distinction, which did not survive judicial scrutiny under an intermediate standard of review).

Alleged violations of the fourteenth amendment guarantees are subject to differing standards of judicial review. Legislation that impairs "fundamental interests," such as voting, or impinges on "suspect classifications," such as race or national origin, must withstand the test of "strict" judicial scrutiny; that is, the legislative means must be necessary to further a compelling governmental interest in order to meet constitutional requirements. "Strict" scrutiny has been characterized as "strict in theory, fatal in fact." G. GUNTHER, CONSTITUTIONAL LAW 588-89 (11th ed. 1985). "Quasi-suspect" classifications such as gender and illegitimacy trigger an "intermediate" or "heightened" level of judicial review; that is, the legislative means must be substantially related to important government interests. Finally, economic and social welfare legislation is subject to the highly deferential "mere rationality" standard of judicial review. This standard requires only a rational relationship between the legislative means and the government objective. *See id.* at 586-687; *see also* Note, *Constitutional Law—the Law's Strongest Presumption Collides With Mankind's Strongest Bond: A Putative Father's Right to Establish His Relationship to His Child*, 8

The fourth and most recent United States Supreme Court decision dealing with the rights of unwed fathers is *Lehr v. Robertson.*[41] In *Lehr*, the Court held that "when an unwed father demonstrates a full commitment to the responsibilities of parenthood . . . his interest in personal contact with his child acquires substantial protection under the Due Process Clause."[42]

Jonathan Lehr's illegitimate daughter, Jessica, was born on November 9, 1976.[43] Eight months later the child's mother, Lorraine Robertson, married Richard Robertson. Lehr had infrequent contact with his daughter, in part because of the mother's concealment of the child's residence and her refusal to allow visitation. Lehr hired a private detective to locate the mother and child and learned of the family's residence in August 1978. At that time, Lehr contacted the child's mother to seek visitation and offer financial support, but the mother refused this request.

In December 1978 Lehr retained an attorney who wrote to the child's mother requesting visitation. The mother and her husband filed an adoption petition in the family court of Ulster County, New York, on December 21, 1978. The adoption hearing was held January 15, 1979, without notice to Lehr. Lehr initiated an independent paternity proceeding in the family court of Westchester County, New York, on January 30, 1979. He was not informed of the adoption petition until March 3, 1979, when he was served with an order from the Ulster County judge staying his paternity action. On March 7, 1979, Lehr's attorney contacted the Ulster County judge only to find that the judge had already signed the adoption order earlier that same day.

In denying the petition to vacate the adoption order, the Ulster County judge acknowledged that he had actual notice of Lehr's paternity suit since February 26, 1979.[44] The court reasoned that because Lehr did not come within the eight statutory classifications of those putative fathers entitled to notice of adoption proceedings,[45] the court fulfilled its statutory obligation even though it

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W. NEW ENG. L. REV. 229, 248-60 (1986) (a putative father's right to establish paternity should be elevated to a fundamental interest for fourteenth amendment equal protection purposes).

41. 463 U.S. 248 (1983).

42. *Id.* at 261 (quoting *Caban*, 441 U.S. at 389 n.7).

43. The facts are taken from the Court's decision in *Lehr*. *See id.* at 250-53, 269.

44. *Id.* at 253.

45. The putative fathers entitled to notice of an adoption proceeding include any person: (1) adjudicated by a New York court to be the child's father; (2) adjudicated by the court of another state or territory, if a certified copy of the court record had been filed with

possessed the discretionary power to give Lehr notice.[46] The family court decision was affirmed by both the Appellate Division of the New York Supreme Court and the New York Court of Appeals.[47]

On appeal, the United States Supreme Court rejected Lehr's due process and equal protection challenges to the New York adoption statute.[48] Writing for the majority, Justice Stevens examined the nature of the "liberty" interest for which Lehr sought due process protection.[49] He characterized the biological tie between an unwed father and his child as giving rise to an inchoate opportunity interest on the part of the father.[50] If the father does not seize this "opportunity" interest, his relationship with his child will not be extended constitutional protection.[51] The Court stated:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development.[52]

The Court also rejected Lehr's equal protection challenge to the statutory treatment of unwed fathers as compared with unwed mothers.[53] The statute in question gave all mothers veto rights vis-à-vis adoption of their illegitimate children and notice prior to the adoption proceeding.[54] In contrast, these same statutory protec-

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New York's putative father registry; (3) whose unrevoked notice of intent to claim paternity had been timely filed with the registry; (4) recorded on the birth certificate as the child's father; (5) openly living with the child and the child's mother at the time the adoption proceeding was initiated and holding himself out to be the child's father; (6) identified as the child's father in a written sworn statement by the mother; (7) married to the mother within six months of the child's birth; or (8) who has filed an instrument with the putative father registry acknowledging paternity pursuant to § 4-1.2 of Estates, Powers, and Trusts Law. N.Y. DOM. REL. LAW § 111-a(1), (2) (McKinney 1979) (amended 1980).

46. *See In re* Adoption of Martz, 102 Misc. 2d 102, 423 N.Y.S.2d 378 (Family Ct. 1979), *aff'd sub nom. In re* Adoption of Jessica "XX," 77 A.D. 381, 434 N.Y.S.2d 772 (App. Div. 1980), *aff'd*, 54 N.Y.2d 417, 430 N.E.2d 896, 446 N.Y.S.2d 20 (1981), *aff'd sub nom.* Lehr v. Robertson, 463 U.S. 238 (1983).

47. *See In re* Adoption of Jessica "XX," 77 A.D. 381, 434 N.Y.S.2d 772 (App. Div. 1980), *aff'd*, 54 N.Y.2d 417, 430 N.E.2d 896, 446 N.Y.S.2d 20 (1981), *aff'd sub nom.* Lehr v. Robertson, 463 U.S. 238 (1983).

48. 463 U.S. at 265, 268.

49. *Id.* at 256.

50. *Id.* at 262-63.

51. *Id.* at 262.

52. *Id.* (footnote omitted).

53. *Id.* at 265-68.

54. *Id.* at 266.

tions were extended only to certain classes of fathers in relation to their illegitimate children.[55] The Court found this statutory distinction permissible in the absence of a significant parent-child relationship.[56] "Because appellant . . . has never established a substantial relationship with his daughter . . . the . . . statutes at issue in this case did not operate to deny appellant equal protection."[57] The Court emphasized the legitimate state interest in securing the efficient adoption of young children, and held that this interest justified the family court's requirement of strict compliance with the notice provisions of the challenged statute.[58]

In his dissent, Justice White argued that the " 'biological' connection is itself a relationship that creates a protected interest."[59] He rejected the majority's holding that the biological link creates only an opportunity interest in the unwed father.[60] Justice White also noted that "but for" the mother of the child preventing a significant relationship to develop, Lehr would have enjoyed the type of parental status that the majority recognized as entitled to due process protection.[61]

Justice White found the New York statutory notice provisions unreasonable because Lehr had come forward in a judicial proceeding to assert his paternity and assume his parental responsibilities.[62] The state's interest in furthering the finality of adoptions had not been served by the family court's failure to give notice to Lehr because the ensuing litigation cast doubts on the finality of that order until the 1983 decision.[63]

In summary, the four United States Supreme Court decisions construing the rights of unwed fathers yield the following stan-

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55. *Id.*
56. *Id.* at 266-68.
57. *Id.* at 267.
58. *Id.* at 265.
59. *Id.* at 272 (White, J., dissenting).
60. *Id.* at 271.
61. *Id.*
62. *Id.* at 275. Justice White noted that "[Lehr] effectively made himself known by other means, and it is the sheerest formalism to deny him a hearing because he informed the state in the wrong manner." *Id.* (footnote omitted). Further, Justice White characterized the state's treatment of Lehr as representing "a grudging and crabbed approach to due process." *Id.*
63. *Id.* at 275-76. In addition, the dissent emphasized that Lehr was never afforded an evidentiary hearing, so that the only facts utilized by the Court were from affidavits and briefs. *Id.* at 271. The majority and dissenting opinions emphasized a dramatically different set of events that preceded the litigation. *See id.* at 270-71; Note, *The Grudging and Crabbed Approach to Due Process for the Unwed Father:* Lehr v. Robertson, 16 CONN. L. REV. 571, 583-607 (1983).

dard: Significant father-child relationships, such as those portrayed in *Stanley* and *Caban*, will enjoy substantial constitutional protection. Constitutional protection will not be extended, however, in the absence of a significant "custodial, personal, or financial relationship."[64] Thus the unwed fathers in *Quilloin* and *Lehr* were denied such protections because they "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."[65]

In *Lehr*, the United States Supreme Court established federal constitutional standards for statutory provisions that govern notice to unwed fathers of adoption proceedings involving their illegitimate children. In order to pass constitutional muster, such statutes must not be "likely to omit any responsible fathers," and qualification for notification must be within the control of the unwed father.[66] The *Lehr* analysis has important implications for Utah because the Utah statute[67] is very similar to the New York statute challenged by the unwed father in *Lehr*.[68]

III. The Competing Interests to be Considered Vis-à-Vis an Unwed Father's Interest in the Adoption of an Illegitimate Child

In order to appreciate the substantial deficiencies in current Utah law, it is first necessary to examine the competing interests involved in the adoption of an illegitimate child. These competing interests include the interests of the unwed father, the unwed mother, the infant, and the state.

A. The Interest of the Unwed Father

The unwed father's interest in the adoption of his illegitimate child is the "liberty" interest of parents in their offspring.[69] The Utah Supreme Court has recognized this parental interest as "fundamental" for due process purposes in the context of a developed

64. *Lehr*, 463 U.S. at 267.

65. *Id.* (quoting Quilloin v. Walcott, 434 U.S. 246, 256 (1978)).

66. *Id.* at 263-64.

67. Utah Code Ann. § 78-30-4(3) (1987).

68. N.Y. Dom. Rel. Law § 111(d)-(e) (McKinney Supp. 1983). This statute was amended, following *Lehr*, to make provision for the circumstance wherein the custodial parent or guardian of the child prevents the unwed father from establishing a "significant" relationship with his child.

69. *See Lehr*, 463 U.S. at 256.

parent-child relationship or a mother-child relationship.[70] The United States Supreme Court has characterized this paternal interest as "cognizable and substantial."[71] It follows that an unwed father's interest in his child should command such minimal procedural protections as actual notice and the opportunity to be heard before his child is relinquished for adoption.

Utah's paternity registration statute, however, provides notice of adoption proceedings to an unwed father only if the father has registered a notice of claim of paternity by the statutory registration deadline.[72] Not only is the registry's existence relatively unknown,[73] but the statutory time limitations imposed may not adequately protect an unwed father's opportunity interest in his child. The statute may operate to cut off concerned unwed fathers from their children—an unacceptable and unintended result.[74] Although some unwed fathers may not desire the care and custody of their children, given the nature of the liberty interest at stake it is necessary to implement additional procedural safeguards to protect those fathers who are interested in assuming parental rights and responsibilities.

Section 25 of the Uniform Parentage Act ("UPA") affords an unwed father actual notice and an opportunity to be heard when his child is relinquished for adoption.[75] If the father fails to respond to such notice, his parental rights are terminated.[76] In contrast to Utah's paternity registry, section 25 of the UPA provides the unwed father a realistic opportunity to secure his parental interest in his child.[77]

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70. *See In re* J.P., 648 P.2d 1364, 1372-75 (Utah 1982).

71. *See* Stanley v. Illinois, 405 U.S. 645, 652 (1972).

72. UTAH CODE ANN. § 78-30-4(3)(c) (1987).

73. *See* Sanchez v. L.D.S. Social Servs., 680 P.2d 753, 755 (Utah 1984) (unwed father who had no actual knowledge of registration statute but who was resident of state was "presumed to know the law"); *see also* Note, *Putative Father's Right to Notice of Adoption Proceedings Involving His Child*, 49 MO. L. REV. 650, 662 (1984) ("[T]he [putative father] registry is based, at least in part, on the *fiction* that persons have constructive notice of laws that affect their interests. Unless well-publicized, it is doubtful that many putative fathers would become aware . . . of such a registry." (emphasis added)).

74. *See Sanchez*, 680 P.2d at 757 (Durham, J., dissenting) ("[T]he statute appears to have been designed to cut off the rights of unknown, uncaring and uncommitted unwed fathers . . . . [T]he rights afforded unwed fathers who comply with the statute appear to be coextensive with those of unwed mothers, thus belying any punitive intent by the Legislature.").

75. UNIF. PARENTAGE ACT § 25(c), 9B U.L.A. 340 (1987).

76. *Id.*, 9B U.L.A. 340 (1987).

77. *Compare* UTAH CODE ANN. § 78-30-4(3) (1987) *with* UNIF. PARENTAGE ACT § 25, 9B U.L.A. 339 (1987).

B. The Interest of the Unwed Mother

The privacy interest of the unwed mother in an adoption proceeding is a commanding one, and the emotional anguish she may experience is great.[78] When an unwed mother relinquishes her child for adoption, however, she is severing her parental interest in her child and surrendering some of her privacy as well.[79] At this point in an adoption, the child's interest in a secure, loving relationship with either the biological father or the adoptive parents becomes paramount and the unwed mother's privacy interest should become secondary.[80]

Unlike the unwed mother, the unwed father can assert his parental interest in his child only if he has notice of the child's relinquishment for adoption. Utah's registration statute does not guarantee an unwed father such notice. As stated above, section 25 of the UPA remedies this defect by requiring that the father receive notice of the child's relinquishment for adoption.[81] In order to give such notice, the unwed mother must provide the court with the unwed father's identity and location.[82] The notice given to the unwed father should be as discrete as possible to spare the unwed mother any unnecessary embarrassment.[83]

Although this inquiry may invade the unwed mother's privacy, it is no more invasive than existing statutes.[84] If an unwed mother elects to rear her child and subsequently applies for certain welfare benefits, current statutes require that she cooperate with the state in its efforts to recover support payments from the child's father.[85] The state's need to economize in the administration of welfare programs has been found to be sufficient justification for compelling

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78. *See* Note, *supra* note 2, at 127-28.

79. *See* Poulin, *Illegitimacy and Family Privacy: A Note on Maternal Cooperation in Paternity Suits*, 70 NW. U.L. REV. 910, 926-27 (1976).

80. *Id.* at 926-27.

81. UNIF. PARENTAGE ACT § 25(c), 9B U.L.A. 340 (1987).

82. *See* Note, *supra* note 2, at 129 ("[T]he unwed mother should be required to identify the unwed father or possible unwed fathers if she knows who they are." (footnote omitted)); *see also* Poulin, *supra* note 79, at 926-27 (the child's interest in a relationship with the biological father becomes paramount to the unwed mother's privacy when she relinquishes the child for adoption); Buchanan, *supra* note 22, at 380 n.510 ("[T]he mother's right to control the destiny of her child does not prevail or even continue after she relinquishes her responsibilities and when a fit father wants to undertake them.").

83. *See* Note, *supra* note 2, at 127-31 (recommendations regarding notice to be provided unwed fathers).

84. *See* Poulin, *supra* note 79, at 920-22.

85. *Id.*

the mother to identify the child's father.[86] In considering the privacy of the unwed mother, a Connecticut federal district court stated:

> [The] inquiry focuses on the identity of the father, not on the mother's misconduct. The question asked of the unwed mother is, "Who is the father of your child?" The object of the inquiry is to enforce a familial monetary obligation, not to interfere with personal privacy. There is no intrusion into the home nor any participation in interpersonal decisions among its occupants . . . . The only restriction it imposes upon either the unwed mother or the biological father to do as they please or make any decisions they wish in whatever relationship they desire to maintain is that the father satisfy his legal obligation to support his own child and that the mother provide what information she possesses useful toward that end.[87]

If the state's interest in recovering support payments is an adequate basis for invasion of the unwed mother's privacy, certainly a child's interest in a custodial relationship with the natural father justifies a limited invasion of the mother's privacy.[88]

C. The Child's Interest in the Adoption Proceeding

The child's interest in a secure and stable environment must be balanced delicately against the unwed father's parental interest in his child. A child's developmental needs for physical and emotional nurturing by a primary caretaker are well documented.[89] When the unwed father comes forward to assume his custodial rights and obligations, however, and is found to be a fit parent, the child's needs are substantially met.[90] The unwed father, therefore, must be guaranteed the opportunity to assume his parental right and responsibilities vis-à-vis his illegitimate child.

Utah's registration statute, however, fails to ensure that an unwed father will receive notice of his child's relinquishment for

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86. *Id.* at 920-26.

87. Roe v. Norton, 365 F. Supp. 65, 77-78 (D. Conn. 1973) (footnote omitted), *vacated sub nom.* Doe v. Norton, 422 U.S. 391 (1975).

88. *See* Poulin, *supra* note 79, at 920. In addition to the potential parental relationship with the natural father, the child has important financial interests that are also served by maternal identification of the unwed father, including support payments, insurance benefits, and inheritance rights.

89. *See, e.g.*, J. BOWLBY, ATTACHMENT AND LOSS (1969); J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 22; M. MAHLER, F. PINE & A. BERGMAN, PSYCHOLOGICAL BIRTH OF THE HUMAN INFANT: SYMBIOSIS AND INDIVIDUATION (1976).

90. *See In re* J.P., 648 P.2d 1364, 1367 (Utah 1982) (it is generally in child's best interest to be raised by natural parents).

adoption. Providing notice equitably balances the unwed father's interest in his child with the child's need for an immediate and secure placement with either the natural father or the adoptive parents.

D. The State's Interest in Facilitating Adoptions of Illegitimate Children

The essential role of the family as the "custodian of vital social interests" has long been recognized in Anglo-American law.[91] The United States Supreme Court in *Prince v. Massachusetts*[92] declared that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[93] If the parents are unable or unwilling to fulfill this primary function, however, the state in its role as *parens patriae* sanctions the termination of parental rights and the subsequent adoption of the affected child.[94] The adoptive family then assumes this primary function.[95] Because the state's alternative to adoption frequently is foster care placement—often an unsatisfactory alternative—it has a substantial interest in facilitating adoptions.[96] This significant state interest has been recognized in numerous judicial decisions.[97]

New procedures requiring identification and notification of the

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91. *See* Poulin, *supra* note 79, at 910.

92. 321 U.S. 158 (1944).

93. *Id.* at 166.

94. *In re J.P.*, 648 P.2d at 1367. The Utah Supreme Court recognized the state's interest as *parens patriae* in children "whose parents abuse them or do not adequately provide for their welfare." *Id.*

> "While ordinarily the parents have a right to the custody of their children, the State has an interest in the welfare of the children which is paramount thereto. It goes beyond the natural right and authority of the parent to the child's custody and so children may be taken away from parents in proper instances."

Id. (quoting State *in re* Jennings, 20 Utah 2d 50, 52, 432 P.2d 879, 880 (1967)).

95. *Prince*, 321 U.S. at 166.

96. *See* Doskow, *The Constitution, Notice, and the Sins of the Fathers*, 8 J. JUV. L. 12, 21 (1984); *see also* Note, *"The Strange Boundaries" of* Stanley: *Providing Notice of Adoption to the Unknown Putative Father*, 59 VA. L. REV. 517, 523-24 (1973) (children may suffer psychological, emotional trauma from multiple interim foster homes or institutional placements, and failure to secure adoptive placements results in financial and other burdens for adoption agencies).

97. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380, 391 (1979) (recognizing importance of state interest in providing for well being of child through adoption); Wells v. Children's Aid Soc'y, 681 P.2d 99 (Utah 1984) (state has interest in quickly determining whether natural mothers or fathers will assert their rights and in substituting adoptive parents when appropriate).

unwed father undoubtedly will cause delay in the adoption process[98] and increase administrative burdens to state adoption agencies.[99] As recognized by the United States Supreme Court in *Stanley v. Illinois*,[100] however, the Constitution recognizes higher values than speed and efficiency.[101] Certainly a father's parental interest in his offspring is such a higher value. Additionally, the state's interest in securing an immediate adoption becomes nonexistent if a competent unwed father comes forward to assume custody of his child.[102]

IV. Utah Statutory Law Regarding Unwed Fathers' Rights

Section 78-30-4(3)(a) of the Utah Code creates a putative father registry; the putative father registers a notice acknowledging paternity of his illegitimate child and his intent to support the child.[103] Section 3(b) of the statute requires the father to file this notice prior to the child being relinquished or placed with an adoption agency or prior to the filing of an adoption petition.[104] This notice also may be filed prior to the child's birth.[105] Section (3)(c) of the statute forever bars the father of an illegitimate child from bringing an action to establish paternity if he fails to file notice in a timely manner.[106] Failure to file this notice also constitutes a statutory presumption of abandonment of the child and a waiver of any right to notice of an adoption proceeding involving the child.[107] If there is no showing made as to the father's consent to the adoption of the illegitimate child, section (3)(d) of the statute directs the court to order a search of the putative father registry.[108] A certificate from the Director of the Department of Health is required to verify that no claim of paternity has been filed.[109]

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98. *See* Note, *supra* note 2, at 116-17 ("These procedures are by far the worst offenders of expediency.").

99. *See* Note, *supra* note 96, at 526.

100. 405 U.S. 645 (1972).

101. *Id.* at 656-57 (footnote omitted).

102. *Id.* at 652-53. "We observe that the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family." *Id.*

103. Utah Code Ann. § 78-30-4(3) (1987).

104. *Id.* § 78-30-4(3)(b).

105. *Id.*

106. *Id.* § 78-30-4(3)(c).

107. *Id.*

108. *Id.* § 78-30-4(3)(d).

109. *Id.*

There have been four recent Utah Supreme Court decisions addressing the constitutionality of the registration statute.[110] These decisions have construed the statute narrowly and afforded unwed fathers relatively few rights vis-à-vis their illegitimate children.

In *Ellis v. Social Services Department*,[111] the plaintiff, an unwed father, appealed a dismissal of his complaint for a writ of habeas corpus in which he claimed that his illegitimate child was illegally restrained by the defendant adoption agency.[112] He also sought custody of the child. The unwed father and the child's mother, both California residents, had been engaged to be married; however, the child's mother broke off the engagement two weeks before the planned wedding. Both the father and the mother knew she was pregnant at that time. Shortly before the child's birth, the mother traveled to Utah without contacting the child's father. The child was born on December 15, 1979, and the mother listed the father as "unknown" with the Bureau of Vital Statistics. She relinquished custody of the child to the defendant adoption agency on December 19, 1979, four days after the child's birth.

Immediately on learning of the child's birth, the father retained an attorney. On December 21, 1979, six days after the child's birth and only two days after the child had been relinquished, the plaintiff notified the defendant adoption agency of the father's intent to assert his parental rights. The father filed a notice of claim of paternity with the Bureau of Vital Statistics on January 2, 1980. The defendant adoption agency refused to relinquish custody of the child and on January 22, 1980, the plaintiff filed a petition for a writ of habeas corpus.

The Utah Supreme Court upheld the constitutionality of the Utah paternity registration statute against the father's claim that it violated federal and state constitutional guarantees of equal protection and due process.[113] The court, however, ruled that the statute, although facially fair, was "void and unenforceable" as applied.[114] The court noted it may have been impossible for the unwed father to file the statutorily required notice within the pre-

110. *See In re* Adoption of Baby Boy Doe, 717 P.2d 686 (Utah 1986); Wells v. Children's Aid Soc'y, 681 P.2d 199 (Utah 1984); Sanchez v. L.D.S. Social Servs., 680 P.2d 753 (Utah 1984); Ellis v. Social Servs. Dept., 615 P.2d 1250 (Utah 1980).

111. 615 P.2d 1250 (Utah 1980).

112. The facts are from the court's opinion in *Ellis*. *See id.* at 1250, 1252-53.

113. *Id.* at 1255-56.

114. *Id.*

scribed time limits through no fault of his own.[115] The court reasoned that due process required that the plaintiff be afforded a hearing in order to offer proof that he "came forward within a reasonable time" after his child's birth.[116] Subject to such a showing, the court held that the father should be deemed to have complied with the registration statute.[117]

In *Wells v. Children's Aid Society of Utah*,[118] the unwed father and unwed mother were both high school students at the time the unwed mother became pregnant.[119] On learning of the pregnancy, the father did not communicate with the mother, but he informed his family that she was pregnant. The father's family contacted the mother to offer her financial assistance and help in raising the child. At that time, the mother stated her intent to place the child for adoption. The father's family then contacted an attorney who informed the father of the statutory procedure for filing a notice of claim of paternity with the putative father registry in order to secure his parental rights. The child was born in Ogden, Utah, on September 23, 1981, and the unwed father learned of the birth on the same day. The mother relinquished custody of the child to a private adoption agency on September 24, 1981. The father signed the notice of paternity form on September 18, and mailed it from Moab, Utah, on September 23, the same day the child was born and the day before the mother relinquished custody. The notice, however, did not reach the Health Department in Salt Lake until September 30, six days after the child had been relinquished. The adoption agency did not alter the adoptive placement of the child when informed that the paternity notice had been received by the Health Department.

The father filed a custody action on October 6, 1981. The trial court awarded custody of the child to the unwed father, finding that, despite his failure to file the notice of paternity within the time set by statute, he was denied a "reasonable opportunity to file his acknowledgment" before the child was placed by the adoption agency. The unwed mother, the adoption agency, and the adoptive parents appealed from the trial court's judgment. The child's placement with the adoptive parents was not altered pending the outcome of the appeal.

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115. *Id.* at 1256.
116. *Id.*
117. *Id.*
118. 681 P.2d 199 (Utah 1984).
119. The facts are from the court's opinion in *Wells*. *See id.* at 199, 201-02.

The Utah Supreme Court reversed, holding that the defendant adoption agency correctly applied the paternity registration statute, in effect, to terminate the father's parental rights vis-à-vis his illegitimate child.[120] The court held the statute valid on its face and as applied under the due process clause of the federal and state constitutions.[121] The court relied heavily on the United States Supreme Court decision in *Lehr*, finding that the state's "strong" interest in facilitating secure adoptions of illegitimate newborns mandated a "final as well as immediate" determination that a child can be adopted.[122]

The court also noted that the unwed father in *Wells*, in contrast to the unwed father in *Ellis*, had failed to show that it was impossible for him to file the required notice through no fault of his own.[123] Here the unwed father knew of the mother's intent to relinquish the child for adoption and had been advised by counsel as to the statutory procedure to secure his parental rights, yet he failed to file the required notice with the putative father registry in a timely manner.[124]

In *Sanchez v. L.D.S. Social Services*,[125] the Utah Supreme Court affirmed a decision terminating an unwed father's parental rights even though the father had attempted to register his notice of claim of paternity on the day the mother relinquished custody of the child to an adoption agency.[126]

The parents lived together for several months during 1979 and 1980. During this period the mother became pregnant.[127] The father repeatedly asked the mother to marry him, and he also told her that he hoped they could live together as a family following the child's birth.[128] The father publicly acknowledged his paternity

120. *Id.* at 208.

121. *Id.* at 207-08.

122. *Id.* at 203.

123. *Id.* at 207-08.

124. *Id.* The court in *Wells* applied a seemingly strict level of judicial scrutiny to the challenged statute, and described an unwed father's parental rights as provisional in relationship to his newborn infant. *Id.* at 206. "We measure the statutory specifications for the termination of that provisional right against the tests of compelling state interest and narrowly tailored means." *Id.* The court contrasted this provisional right with the vested right of a parent who has an established relationship with his child, the latter right being fundamental for due process purposes. *Id.*

125. 680 P.2d 753 (Utah 1984).

126. *Id.* at 755.

127. *Id.* at 754.

128. *Id.*

during the pregnancy.[129] When the father and mother met the defendant adoption agency's social worker, the social worker was apprised of the father's desire to raise his child; however, the social worker failed to inform the father of the statutory filing requirement.[130]

The mother gave birth to a son on October 24, 1980.[131] The mother relinquished the child for adoption on the morning of October 27, 1980, and told the father that if he wanted to see the child one last time, he should come to the hospital.[132] The father went to the hospital and attempted to sign the child's birth certificate but was prevented from doing so without the mother's consent.[133]

During this visit, hospital personnel informed the father of the filing procedure whereby he could secure his parental rights vis-à-vis his child.[134] Prior to this time, the father had no knowledge of the existence of the putative father registry. The father attempted to file the notice on October 27, 1980, the same afternoon, and only hours after the child had been relinquished for adoption.[135] The father, however, was not allowed to register until the following day, October 28, 1980.[136]

The father's petition for a writ of habeas corpus was dismissed by the trial court, which found he had abandoned his child pursuant to the paternity registration statute.[137] The Utah Supreme Court rejected the father's appeal that the statute denied him due

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129. *Id.* at 756 (Durham, J., dissenting).

130. *Id.* at 756 n.1. The majority disputed the dissent's assertion that the adoption agency social worker deprived the unwed father of his parental rights by failing to inform him of statutory procedures. *Id.* at 755 n.2 (majority opinion). The court did not establish whether the social worker was under a duty to inform the unwed father; however, even had the social worker been under a duty, the majority contended that the unwed father's constitutional rights were not violated. *Id.*; *see* UTAH CODE ANN. § 55-8a-1, -6 (1986) (setting out the duties of child placing agencies); *see also* UTAH DEP'T OF SOCIAL SERVS., DIVISION OF FAMILY SERVS., STANDARDS FOR CHILD PLACING AGENCIES (1985) (services that shall be provided include "discussion of birth parent's right, including legal rights of the father.").

131. *Sanchez*, 680 P.2d at 755.

132. *Id.*

133. *Id.* at 756 (Durham, J., dissenting).

134. Brief for Appellant at 3, 4, Sanchez v. L.D.S. Social Servs., 680 P.2d 753 (Utah 1984) (No. 17698).

135. *Id.*

136. *Sanchez*, 680 P.2d at 755. On the father's first visit to the Department of Vital Statistics in Ogden, Utah, the Department's worker was unaware of the paternity registry and therefore did not allow the father to register his notice. *See* Brief for Appellant at 4-5, *Sanchez* (No. 17698).

137. *Sanchez*, 680 P.2d at 754.

process of law because it did not provide for actual notice.[138] The court held it was of no constitutional importance that the unwed father missed the statutory filing deadline by a few hours, analogizing Sanchez's challenge to that of the unwed father in *Wells*.[139] The state's interest in facilitating immediate and final adoptions of illegitimate children was the determining factor in the court's decision.[140]

Justice Durham wrote a cogent dissent, observing that the application of the statutory presumption of abandonment to a father who missed the filing deadline by a few hours failed to meet the constitutional test of fundamental fairness.[141] The father in *Sanchez*, unlike the father in *Wells*, did not have the benefit of prior knowledge of the statutory procedure required to secure his parental rights, and on learning of the statutory procedure he took immediate action to file the required notice.[142]

Justice Durham also emphasized that, although the avowed statutory purpose was the speedy adoption of newborn infants whose unwed fathers fail to claim paternity,[143] the statute was "not created to encourage a 'race' for placement to cut off the rights of fathers who are identified and present."[144]

In re Adoption of Baby Boy Doe[145] is the most recent challenge to the validity of Utah's paternity registration statute. The Utah Supreme Court again upheld the facial constitutionality of the registration statute; however, the court held the statute unconstitutional as applied on due process grounds.[146]

The father in *Baby Boy Doe*, a California resident, had lived with the child's mother in California for three and one-half

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138. *Id.* at 755.

139. *Id.*

140. *Id.* The court's reference to the fact that the child was three years old at the time of the decision is troublesome if it implies that the passage of time is determinative, even though the unwed father was in no way responsible for the delay. *See, e.g.*, Note, *supra* note 63:

> The stability interest, however, should not have been dispositive . . . . Parent-child cases will never arrive at the Supreme Court without a passage of years. If the built-in delay is permitted to be decisive, there will be no incentive to challenge unconstitutional parent-child laws. That cannot be in the best interests of children.

Id. at 604.

141. *Sanchez*, 680 P.2d at 756 (Durham, J., dissenting).

142. *Id.*

143. *Id.*

144. *Id.* The dissent characterized the majority's rendering of the statute as almost punitive. *Id.* at 757.

145. 717 P.2d 686 (Utah 1986).

146. *Id.* at 687.

years.[147] The mother moved to Utah in June 1984 to live with her brother and sister-in-law. She was pregnant at the time she moved to Utah. The father communicated regularly with the mother during the entire time she lived in Utah, and he traveled to Utah to visit her in August 1986. During this visit the mother informed the father that her relatives had discussed placing the child for adoption. At that time, the father told the mother that he opposed adoption and expressed his desire to raise the child. The father and mother made plans to move together to Arizona prior to the child's birth. He telephoned the mother on August 24, 1986, to tell her he had found employment and a place to live in Arizona.

The mother gave birth to Baby Boy Doe on August 25, 1986, one or more weeks earlier than expected. The mother's sister-in-law had arranged with a co-worker, Ms. "Burn,"[148] to have Ms. Burn's relatives, the "Oregons,"[149] adopt the child. On August 27, 1986, the mother relinquished her parental rights to the child and consented to his adoption. The Oregons, however, could not be reached on August 27, and the Burns, therefore, filed a petition to adopt the child and were granted temporary custody. After the Oregons were contacted, they traveled to Utah and took physical custody of Baby Boy Doe on August 28, returning home with the child three days later. The adoption arrangements were made and carried out even though all parties to the adoption proceedings knew of the unwed father's opposition to adoption and his desire to raise the child.

The unwed father tried to reach the mother by telephone on August 27; however, "each time [he] called, [the mother's] relatives answered the phone and told him she was not available."[150] He first learned of the child's birth and adoption on August 28 and immediately sought legal counsel. He then traveled to Utah and filed a notice of paternity on August 29, two days after the child had been relinquished for adoption.

In an effort to gain custody of his child, the father filed a motion to set aside the termination of his parental rights and to vacate the adoption petition. The trial court denied the motion. The father appealed to the Utah Supreme Court, challenging the termination of his parental rights under Utah's paternity registration

147. The facts are from the court's opinion in *Baby Boy Doe*. *See id.* at 687-90.

148. Burn is a fictitious name used by the court to protect the anonymity of the parties.

149. Oregon is a fictitious name; the parties were residents of Oregon.

150. *Baby Boy Doe*, 717 P.2d at 688.

statute.[151] In considering the operation of the registration statute, the court looked to its decision in *Ellis v. Social Services Department*.[152] In *Ellis*, the court interpreted the statute to allow for an exception to the registration requirement if the unwed father shows that it was "impossible" for him to timely file the notice of paternity, "through no fault of his own."[153] If the father is successful in making this showing, the *Ellis* court held that "due process requires that he be permitted to show that he was not afforded a reasonable opportunity to comply with the statute."[154]

The court in *Baby Boy Doe* considered the factual circumstances surrounding the adoption to determine if the unwed father met the *Ellis* exception.[155] The court found the following factors determinative: (1) The unwed father was not a Utah resident; (2) he and the child's mother had planned to move to Arizona to live together *prior* to the child's birth, thereby removing concern on the father's part that the child might be placed for adoption; (3) the child's premature birth; (4) the father's absence at the time of the child's birth; and (5) the obstructionist role played by the mother's family.[156]

Given these circumstances, the court concluded that the unwed father met the requirements of the *Ellis* exception and had not been afforded a "reasonable opportunity" to assert or protect his parental rights.[157] The court also found that the operation of the registry statute would negate the "need to balance the competing interests in this type of case: the significant state interest in speedily placing infants for adoption and the constitutionally protected rights of putative fathers."[158]

A strident dissent accused the majority of overruling *Sanchez* sub silentio. Justice Stewart argued that the majority's decision would require that actual notice be afforded unwed fathers prior to the termination of their parental rights.[159]

In summary, Utah's paternity registration statute permits ter-

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151. *Id.* at 688-89. On appeal the father also argued that the adoption was fraudulently procured. The court rejected this claim, relying on the trial court's exploration of the circumstances surrounding the Burns' filing of the adoption petition.

152. 615 P.2d 1250 (Utah 1980).

153. *Id.* at 1256.

154. *Id.*

155. *Baby Boy Doe*, 717 P.2d at 690-91.

156. *Id.*

157. *Id.* at 691.

158. *Id.* (citations omitted).

159. *Id.* at 691-92 (Stewart, J., dissenting).

mination of an unwed father's parental rights without notice of hearing if he has not filed a claim of paternity, despite the fact that the father may be present, willing, and able to assume custody of his child. The due process concerns articulated by the Utah Supreme Court in *Ellis* and in *Baby Boy Doe* provide some protection for unwed fathers who, through no fault of their own, fail to file claims of paternity. As *Sanchez* indicates, however, lack of knowledge of the paternity registration statute alone is not sufficient to bar the operation of the statutory filing requirement.[160] Thus, a father may lose forever the right to adopt his child by failing to apprise himself of obscure filing regulations rather than being adjudged an unfit parent.

V. Proposal for Statutory Reform

An unwed father's concern and affection for his child may be as deep and abiding as that of any other parent. The parental right to raise one's child has been described by the Utah Supreme Court as "transcend[ing] all property and economic rights. It is rooted not in state or federal statutory or constitutional law, to which it is logically and chronologically prior, but in nature and human instinct."[161] Surely such a natural, intrinsic, and inherent right, even in the context of an unwed father and his illegitimate child, should not be foreclosed without prior notice and an opportunity to be heard. Yet Utah's present statutory scheme, in contrast to the statutory treatment afforded married fathers and all mothers, does not guarantee the unwed father such minimal procedural protection.[162]

One need only look to the facts of *Ellis* to see how an unwed mother may attempt to thwart an unwed father from asserting his interest in his child under the present Utah statute.[163] The tie between parent and child compels implementation of additional safeguards for unwed fathers, like those provided for married fathers and all mothers, when their children are relinquished for adoption. The bond between father and child should be regarded as sacro-

160. Sanchez v. L.D.S. Social Servs., 680 P.2d 753, 755-56 (Utah 1984).

161. *In re* J.P., 648 P.2d 1364, 1373 (Utah 1982).

162. *Id.* at 1374-75. "Parental rights are at their apex for parents who are married. Some variation exists among unwed fathers." *Id.* "In contrast, no similar variation exists among mothers who are unwed . . . ; all unwed mothers are entitled to a showing of unfitness before being involuntarily deprived of their parental rights." *Id.* at 1375 (footnote omitted).

163. *See* Ellis v. Social Servs. Dept., 615 P.2d 1250 (Utah 1980); *see also In re* K.B.E., 740 P.2d 292, 296 (Utah Ct. App. 1987) (unwed mother filed adoption petition, possibly to thwart unwed father from asserting his parental interest in his child).

sanct and subject to severance only if the father is unwilling or unable to competently care for his child. Utah's present registration statute fails to offer an unwed father substantive protection of this vital parental interest.

In all four Utah cases discussed previously, the unwed mother or other parties to the adoption had knowledge of the unwed father's interest in raising the child, and all four unwed fathers sought custody of their children within days of their children's births.[164] A few days should not be deemed an unreasonable period of time to allow the unwed father who desires custody to assert his interest in the child.

A father's interest in his offspring should not hinge on a race to the Department of Health. As indicated by the Utah cases discussed above, however, Utah's present statutory scheme yields this result.[165] Utah's paternity registration statute, standing alone, is an ineffective procedural safeguard of such an important interest—the interest of a father in his offspring.

The stereotypical perception of unwed fathers as unfit and uncaring, rejected by the United States Supreme Court in *Stanley v. Illinois*,[166] should be eliminated by: (1) repeal of section 78-30-4(3)(c) of the Utah Code,[167] and (2) introduction of additional procedural safeguards. Legislative adoption of the Uniform Parentage Act would remedy the problems with Utah's paternity registration statute.

Section 25 of the Uniform Parentage Act[168] provides the key procedural protection to safeguard adequately the unwed father's parental interest in his child. Section 25 requires that a hearing be held when a child is relinquished for adoption to attempt to ascertain the identity of the natural father.[169] This hearing is required only if the child has no "presumed" father, as statutorily defined.[170]

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164. *See In re* Adoption of Baby Boy Doe, 717 P.2d 686 (Utah 1986); Wells v. Children's Aid Soc'y of Utah, 681 P.2d 199 (Utah 1984); Sanchez v. L.D.S. Social Servs., 680 P.2d 753 (Utah 1984); Ellis v. Social Servs. Dept., 615 P.2d 1250 (Utah 1980).

165. *See Sanchez*, 680 P.2d at 756 (Durham, J., dissenting).

166. 405 U.S. 645, 654-55 (1972); *see also* Note, *supra* note 2, at 131-32 n.190 (rejection of the "stereotype" of the unwed father as presumptively unfit may be due in part to the "redefinition" of sex roles; that is, both men and women are recognized as capable, nurturing parents).

167. UTAH CODE ANN. § 78-30-4(3)(c) (1987) (father's failure to timely register a notice of paternity results in a presumption that he has abandoned his child).

168. UNIF. PARENTAGE ACT § 25, 9B U.L.A. 339 (1987).

169. *Id.* § 25(b), 9B U.L.A. 340 (1987).

170. *See id.* § 4, 9B U.L.A. 298-99 (1987).

The goal of the hearing is to identify the natural father and serve him with notice of the adoption proceedings.[171] This identification and notice procedure would have helped prevent the problems illustrated by the Utah cases discussed previously.[172] For example, under the current Utah statute, an unwed father who desires to assume custody of his child may be prevented from doing so by the unwed mother's actions,[173] or by his failure to timely file an acknowledgment of paternity due to lack of knowledge of the procedure.[174] The solemnity of a judicial hearing should impress on all concerned parties the significance of the relinquishment proceeding, and clarify the unwed father's right to the care and custody of his child if he comes forward and is found to be a fit parent.[175]

Although this hearing will invade the unwed mother's privacy to some extent, the Act requires that any related hearing be in closed court and that only those persons necessary to the action be admitted.[176] Such a requirement would help spare the unwed mother any undue embarrassment.

If the father fails to respond to the notice, the court must immediately proceed to terminate his parental rights.[177] After the court enters its order terminating the father's parental rights, this order cannot be challenged by any person on any ground after six

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171. *See id.* § 25(c), 9B U.L.A. 340 (1987); *see also id.* committee comment, 9B U.L.A. 409-10 (1987) (committee concerned that an "indiscriminate publication requirement" might result in discouraging some mothers from placing their children for adoption; therefore the UPA gives the court discretion "to determine whether in the circumstances of each case, publication would be likely to lead to the identification of the father").

172. *See supra* text accompanying notes 110-61.

173. *See, e.g., In re* Adoption of Baby Boy Doe, 717 P.2d 686, 690 (Utah 1986) (unwed mother agreed to move to Arizona with unwed father prior to child's birth, so unwed father had no reason to believe an adoption would be attempted); Ellis v. Social Servs. Dept., 615 P.2d 1250, 1252 (Utah 1980) (unwed mother left California to have child in Utah without unwed father's knowledge and listed the child's father as "unknown" on the birth certificate).

174. *See, e.g., Ellis*, 615 P.2d at 1256 (unwed father, a California resident, had no knowledge of unwed mother's plans to have child in Utah and relinquish child for adoption in Utah); Sanchez v. L.D.S. Social Servs., 680 P.2d 753, 766 (Utah 1984) (Durham, J., dissenting) ("[A]ppellant had no knowledge of his statutory obligation, nor was he advised of its existence.").

175. UNIF. PARENTAGE ACT § 25(c), 9B U.L.A. 340 (1987), provides in part: "If any [father] fails to appear or, if appearing, fails to claim custodial rights, his parental rights with reference to the child shall be terminated. If the natural father or man representing himself to be the natural father, claims custodial rights, the court shall proceed to determine custodial rights." *Id.*

176. *Id.* § 20, 9B U.L.A. 333 (1987).

177. *Id.* § 25(c), 9B U.L.A. 340 (1987).

months' time.[178] Limiting the time for appeal accommodates the needs and interests of the child and adoptive parents in the finality of the adoption.[179]

In three of the four Utah cases discussed earlier, the unwed father had no knowledge of Utah's registration statute at the time the child was relinquished.[180] In two of the four cases, the unwed father, who was not a Utah resident, was unaware of the unwed mother's relinquishment of the child for adoption in Utah.[181] The circumstances of these cases indicate the difficulties a committed unwed father may encounter when he desires to assume custody of his child. While actual notice may not be constitutionally required,[182] it would eliminate the problems with Utah's registration statute. Undoubtedly, giving the unwed father actual notice will result in some delay in the child's placement, but the interest in securing an expedient adoption is removed if the unwed father comes forward and is adjudged a fit parent.

VI. CONCLUSION

Society, as it should, condemns the unwed father who fails to assume responsibility for his child or who is forced through a paternity adjudication to acknowledge and support his illegitimate child. Yet little accommodation is made for the unwed father who comes forward to assume his parental obligations. As the stigma of

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178. *Id.* § 25(d), 9B U.L.A. 340 (1987). This order, of course, is subject to the disposition of an appeal.

179. *See supra* notes 90-91 and accompanying text.

180. *See supra* note 173 (none of the fathers cited in note 173 had knowledge of their statutory obligations).

181. *See In re* Adoption of Baby Boy Doe, 717 P.2d 686, 690 (Utah 1986); Ellis v. Social Servs. Dept., 615 P.2d 1250, 1256 (Utah 1980).

182. *See* Lehr v. Robertson, 463 U.S. 248, 264 (1983) (Supreme Court established two constitutional requirements for statutory notice provisions: (1) the statute "must not be likely to omit many responsible fathers," and (2) "qualification for notice" must be within the "control of the putative father"); *see also* Sanchez v. L.D.S. Social Servs., 680 P.2d 751, 755 (Utah 1984) (Utah's paternity registration statute, which does not require actual notice to unwed fathers, held constitutional). The Uniform Parentage Act provides unwed fathers with actual notice of relinquishment proceedings, and permits speedy termination of parental rights if the unwed father fails to appear to claim custody after receiving notice. UNIF. PARENTAGE ACT § 25, 9B U.L.A. 339 (1987). This provision would remedy one of the problems with Utah's present statute, identified by the majority in *Sanchez*: "[T]he courts undertake to make a decision based on criteria . . . which would no doubt involve the degree of the father's diligence and sincerity in trying to establish his parental rights, factors which are foreign to the statutory provisions." *Sanchez*, 680 P.2d at 755. Section 25 of the Uniform Parentage Act eliminates the need for such problematic decisions without sacrificing the parental interests of unwed fathers like Sanchez who are identified and present, but merely hours late in registering their acknowledgment of paternity. *Id.* at 756.

illegitimacy continues to decrease and more unwed mothers decide to raise their illegitimate children, the parental rights of the unwed father will continue to be a frequent subject of litigation. The Uniform Parentage Act is superior to the Utah paternity registration statute in that it strikes a more equitable balance among the competing interests involved in the adoption of an illegitimate child. The UPA is also superior in that it mandates that the court provide the unwed father with actual notice of adoption proceedings, thereby guaranteeing the responsible, concerned father a realistic opportunity to secure his parental interest in his child.

CLAIRE GAVIN ZANOLLI

RECENT DEVELOPMENTS IN UTAH LAW

TABLE OF CONTENTS

Legislative Enactments

Introduction

The *Recent Developments in Utah Law* section consists of brief expositions of selected noteworthy cases decided recently by the Utah Supreme Court and the Utah Court of Appeals, and selected statutes enacted by the 1988 Utah Legislature. Each development is essentially self-contained.

1987 Statistical Survey*

The following six tables objectively summarize the published decisions of the Utah Supreme Court between January 1, 1987, and December 31, 1987.[1] The court decided a total of 220 cases during 1987, of which 211 were published in the state's official reporter, the *Pacific Reporter, Second Series*. Although the Utah Court of Appeals came into existence in 1987, the Utah Supreme Court did not decide any appeals from the Court of Appeals during that year. The members of the court during 1987 were Gordon R. Hall (Chief Justice), I. Daniel Stewart, Richard C. Howe, Christine M. Durham and Michael D. Zimmerman.

This statistical survey is not a subjective analysis of the decisions of the court or of the opinions of the individual Justices. This survey, however, may facilitate a subjective analysis by others.

Tables One and Two show the number of majority, concurring, and dissenting opinions written or joined by each Justice. These tables indicate that Justice Durham wrote the most majority opinions and the most dissenting opinions, and that Justice Howe wrote the most concurring opinions.

Table Three shows how often each Justice agreed in the same opinion and in the same result with each of the other four Justices. This table indicates that Chief Justice Hall and Justice Howe agreed in the same result 96.1% of the time, and that Justices Durham and Zimmerman agreed in the result 95% of the time.

Table Four records the voting alignments of the Justices' dissenting opinions.

Table Five records the disposition of the court in various categories of law. The totals of Table Five indicate that 58.8% of the cases were affirmed, and that the court was unanimous in its result 84.4% of the time. Table Five also shows that the greatest percent-

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* James D. Gilson, Development Editor, *Utah Law Review*.

1. For statistical surveys of previous Utah Supreme Court opinions, see 1983 UTAH L. REV. 165 (1982 cases), 1980 UTAH L. REV. 649 (1979 cases), 1979 UTAH L. REV. 347 (1978 cases), and 1978 UTAH L. REV. 390 (1977 cases).

age of cases decided by the 1987 court centered on criminal law, 34.1%, followed by 17.1% in administrative law and 14.2% in civil procedure.

Table Six shows the number of majority, concurring, and dissenting opinions that each Justice wrote in the various categories of law. The court wrote forty-three per curiam decisions in 1987, of which twenty-one were in the criminal law category.

TABLE 1

DECISIONS OF INDIVIDUAL JUSTICES
(Published Decisions)

Justice	Number of Decisions in Which the Justice Participated	Opinions of the Court[2]					Concurring Opinions[3]			
	(N)	W	C	CR	Total	% of N	W	C	Total	% of N
Hall	210	40	159	0	199	94.8	0	3	3	1.4
Stewart	200	24	131	28	183	91.5	4	2	6	3.0
Howe	208	32	145	4	181	87.0	15	2	17	8.2
Durham	205	43	138	0	181	88.3	6	3	9	4.4
Zimmerman	205	26	153	2	181	88.3	11	3	14	6.8
Other[4]	21	3	17	0	20	95.2	1	0	1	4.8
Total[5]	1049	168	743	34	945	90.1	37	13	50	4.8
Average[6]	209.8	33.6	148.6	6.8	189.0	18.0	7.4	2.6	10.0	1.0

2. The symbols in this category have the following meaning: N = The total *number* of decisions in which the justice participated; W = The justice *wrote* the opinion of the court; C = The justice *concurred* in the opinion of the court written by another justice; CR = The justice *concurred* in the result of the opinion of the court, but did not write a concurring opinion; Total = The sum of W, C and CR; % of N = The total divided by N.

3. The symbols in this category have the following meaning: W = The justice *wrote* a concurring opinion; C = The justice *concurred* in a concurring opinion written by another justice; Total = The sum of W and C; % of N = The total divided by N.

4. "Other" includes court of appeals judges and district court judges who sat with the supreme court by designation.

5. The court published a total of 211 opinions during 1987. There were 43 per curiam opinions

6. The average in Table 1 indicates the number of opinions in which the "average justice" participated in each category. This average was computed by dividing the total in each category by five, which is the number of justices that normally sit on the court for each appeal.

TABLE 2

DECISIONS OF INDIVIDUAL JUSTICES
(Published Decisions)

Justice	Number of Decisions in Which the Justice Participated	Dissents[7]					Concurring & Dissenting Opinions[8]		Disqualifications
	(N)	W	C	DWO	Total	% of N	Total	% of N	Total
Hall	210	1	6	0	7	3.33	1	.48	1
Stewart	200	2	2	6	10	5.00	1	.50	2
Howe	208	5	1	2	8	3.85	2	.96	3
Durham	205	7	2	0	9	4.39	6	2.93	6
Zimmerman	205	6	2	0	8	3.90	2	.98	5
Other[9]	21	0	0	0	0	0	0	0	0
Total	1049	21	13	8	42	4.00	12	1.14	17
Average[10]	209.8	4.2	2.6	1.6	8.4	.80	2.4	.23	3.4

7. The symbols in this category have the following meaning: W = The justice *wrote* a dissenting opinion; C = The justice *concurred in a dissenting opinion* written by another justice; DWO = The justice *dissented without writing or concurring* in a written dissenting opinion; Total = The sum of W, C and DWO, which sum represents the total number of times that the justice did not agree with the result reached by the court; % of N = The total divided by N.

8. This category records the number and percentage of opinions in which the justice both concurred in part and dissented from part of the opinion of the court.

9. See *supra* note 4.

10. See *supra* note 6.

TABLE 3

VOTING ALIGNMENTS[11]
(Published Decisions)

		Zimmerman	Durham	Howe	Stewart
Hall	O	177	170	182	177
	S	14	12	17	7
	T	191	182	199	184
	N	204	204	207	199
	P	93.6%	89.2%	96.1%	92.5%
Stewart	O	160	163	161	
	S	15	12	15	
	T	175	175	176	
	N	195	195	197	
	P	89.7%	89.7%	89.3%	
Howe	O	161	162		
	S	24	20		
	T	185	182		
	N	203	204		
	P	91.1%	89.2%		
Durham	O	181			
	S	10			
	T	191			
	N	201			
	P	95.0%			

11. The symbols used in Table 3 have the following meaning: O = The number of times that the two justices agreed in the *same* majority, concurring, or dissenting opinion. This includes those instances where one justice concurred only in the result of an opinion written by another justice, but failed to state in a separate written opinion how his or her reasoning differed from the opinion written by the other justice; S = The number of times that the two justices agreed in the *same result*, but wrote or concurred in *different* written opinions that reached the result for different reasons; T = The *total* of O and S. This number represents the number of times that the two justices agreed at least in the same result; N = The total number of decisions in which the two justices participated together. This number represents the total number of *opportunities* that the two justices had for agreement; P = The *percentage* of agreement between the two justices, calculated as T divided by N.

TABLE 4

VOTING ALIGNMENTS OF DISSENTING OPINIONS[12]
(Published Decisions)

	Dissenting Opinions(s)			3:2 Decisions: Dissenting Opinions Joined by Another Justice[13]						3:2 Decisions: Separate Dissenting Opinions Written[14]					
	Dissenting Opinions Written	Dissent Without Opinion	Decision Lone Dissent	Joining Justice[15]						Other Dissenting Justice[16]					
	W*	NW*	L*	Hall	S	Howe	D	Z	Total	Hall	S	Howe	S	Z	Total
Hall	2	0	0	-	0	1	0	0	1	-	0	1	0	0	1
Stewart	3	6	7	1	-	0	0	0	1	0	-	0	1	0	1
Howe	7	2	2	2	0	-	1	0	3	2	0	-	0	0	2
Durham	12	0	3	0	2	0	-	2	4	0	1	0	-	4	5
Zimmerman	7	0	0	2	0	0	1	-	3	0	0	0	4	-	4
Total	31	8	12	5	2	1	2	2	12	2	1	1	5	4	13

[12] A concurring and dissenting opinion is counted as a dissenting opinion for this table.

[13] "3:2 Decisions: Dissenting Opinions Joined by Another Justice." This category indicates how often a dissenting justice was able to persuade another justice to join in the same dissenting opinion.

[14] "3:2 Decisions: Separate Dissenting Opinions Written." This category indicates how often the two dissenting justice were *unable* to concur in the same dissenting opinion.

[15] "Joining Justice." The symbols used in this category are the first letters of each joining justice's last name, such as "S" for Justice Stewart.

[16] "Other Dissenting Justice." The symbols used in this category are the first letters of the last names of other dissenting justices, such as "S" for Justice Stewart.

TABLE 5

COURT ACTION BY CATEGORY OF LAW
(Published Decisions)

	Disposition[17]					Agreement on Result[18]			
Category[19]	A	R	A/R	Other	Total	U	4:1	3:2	Total
Criminal Law (34.1%)	51 70.8%	10 13.9%	5 6.9%	6 8.3%	72	61 84.7%	2 2.8%	9 12.5%	72
Admin. Law (17.1%)	19 52.8%	9 25.0%	0 0%	8 22.2%	36	29 80.6%	4 11.1%	3 8.3%	36
Civil Procedure (14.2%)	11 36.7%	5 16.7%	4 13.3%	10 33.3%	30	27 90.0%	2 6.7%	1 3.3%	30
Contracts (10.4%)	11 50.0%	8 36.4%	1 4.5%	2 9.1%	22	19 86.4%	1 4.5%	2 9.1%	22
Family Law (8.5%)	12 66.7%	4 22.2%	1 5.55%	1 5.55%	18	14 77.8%	2 11.1%	2 11.1%	18
Property (7.1%)	8 53.3%	3 20.0%	3 20.0%	1 6.7%	15	14 93.3%	1 6.7%	0 0%	15
Torts (5.7%)	8 66.7%	1 8.3%	2 16.7%	1 8.3%	12	8 66.7%	2 16.7%	2 16.7%	12
Other (2.8%)	4 66.7%	1 16.7%	0 0%	1 16.7%	6	6 100%	0 0%	0 0%	6
Total (100%)	124	41	16	30	211	178	14	19	211
Percent of Total	58.8%	19.4%	7.6%	14.2%	100%	84.4%	6.6%	9.0%	100%

17. "Disposition" refers to the action that the court took in a given case. Four possible actions are listed: A = *Affirmed*—Includes those decisions affirmed, but remanded, *e.g.*, remanded for a determination of damages; R = *Reversed*—Includes those decisions that are reversed and remanded; A/R = *Affirmed* in part and *reversed* in part; Other = Residual category for decisions in which the court neither expressly affirmed nor reversed, but vacated, remanded, issued a new order, denied or granted a writ, or dismissed the appeal. The percentage shown below each number represents that portion of the decisions within a given category that were disposed of by one of the four listed methods.

18. "Agreement" refers to the voting alignment of the court with respect to a given case. *Cf.* Table 3 (voting alignments of the specific justices). Three possible situations are included: U = Unanimous, in the sense that no justice dissented from the result of the majority; 4:1 = One justice dissented from the result of the majority (a concurring and dissenting opinion is counted as a dissent for this category); 3:2 = Two justices dissented from the result of the majority (a concurring and dissenting opinion is counted as a dissent for this category). The percentages shown below each number were calculated by dividing the number of cases in each "agreement" category by the total number of cases in each subject matter category. For example, of 72 criminal law cases, 61 resulted in unanimous agreement as to the disposition; 84.7% of the criminal law cases, therefore, were decided by a unanimous court.

19. Each 1987 case published by the Utah Supreme Court is categorized by its principal subject matter. The categories are defined in the following manner:

(1) *Criminal Law*—narrowly defined. This category includes only those cases involving a violation of the criminal code, issues of criminal procedure, or violations of certain statutes involving controlled substances.

(2) *Contracts*—broadly defined. This category includes traditional contract cases, and cases involving insurance law, mortgages, commercial sales, and secured transactions.

(3) *Property*—traditionally defined. This category includes actions involving real property, such as easements, eminent domain, landlord-tenant law, water law, and wills and trusts. For the purpose of Table 5, only leases of real property are included. Leases of personal property are included in the *Contracts* category.

(4) *Family Law*—broadly defined. This category includes all aspects of divorce, child custody and termination of parental rights.

(5) *Torts*—traditionally defined. This category includes cases involving intentional torts and negligence. Cases involving civil rights violations of government entities are also included.

(6) *Administrative Law*—broadly defined. This category includes challenges to and challenges by any governmental agency or commission, such as challenges to orders of the Industrial Commission and the Public Service Commission.

(7) *Civil Procedure*—traditionally defined. This category includes those cases in which an issue of civil procedure or appellate review was the predominant issue in the case.

(8) *Other*—Residual category. This category includes any case that does not fit one of the above categories, such as cases involving constitutional law, labor law, juvenile law, municipal ordinances, and partnerships and corporations.

The numbers shown in parentheses below each category name are the percentages of the total published opinions that each category contains. For example, *Criminal Law* cases, as defined above, constitute 34.1% of the total decisions published in 1987.

TABLE 6

WRITTEN OPINIONS OF INDIVIDUAL JUSTICES BY CATEGORY OF LAW[20]
(Published Decisions)

Category	Kind	Hall	Stewart	Howe	Durham	Zimmerman	Other	Per Curiam	Total	Dissents Without Opinion
Crim. Law	O	12	9	8	14	8	0	21	72	-
(34.1%)	C	0	2	2	2	3	0	-	9	-
	D	2	1	1	5	5	0	-	14	2
Admin. Law	O	6	2	8	5	5	1	9	36	-
(17.1%)	C	0	0	1	2	1	0	-	4	-
	D	0	1	0	1	1	0	-	3	3
Civil Proc.	O	9	1	5	7	4	1	3	30	-
(14.2%)	C	0	1	5	0	3	0	-	9	-
	D	0	0	2	0	0	0	-	2	1
Contracts	O	4	3	3	7	0	0	5	22	-
(10.4%)	C	0	0	1	1	1	1	-	4	-
	D	0	0	2	1	0	0	-	3	0
Family Law	O	4	4	2	2	5	0	1	18	-
(8.5%)	C	0	1	3	1	1	0	-	6	-
	D	0	0	1	2	0	0	-	3	1
Property	O	3	3	2	2	2	0	3	15	-
(7.1%)	C	0	0	1	0	0	0	-	1	-
	D	0	0	1	0	0	0	-	1	0
Torts	O	1	0	3	4	2	1	1	12	-
(5.7%)	C	0	0	2	0	1	0	-	3	-
	D	0	1	0	3	0	0	-	4	1
Other	O	1	2	1	2	0	0	0	6	-
(2.8%)	C	0	0	0	0	1	0	-	1	-
	D	0	0	0	0	0	0	-	0	0
Total	O	40	24	32	43	26	3	43	211	-
(100%)	C	0	4	15	6	11	1	-	37	-
	D	2	3	7	12	6	0	-	30	8
Percent	O	19.0	11.4	15.2	20.4	12.3	1.4	20.4	100.0	-
of Total[21]	C	0.0	1.9	7.1	2.8	5.2	.5	-	17.5	-
	D	.95	1.4	3.3	5.7	2.8	0.0	-	14.2	3.8

20. "Opinions of Individual Justices" refers to the opinions that each justice *wrote* in each subject matter category. Three kinds of opinions are listed: O = An opinion of the court; C = A concurring opinion; D = A dissenting opinion (a concurring and dissenting opinion is counted as a dissent for this category). For example, in the criminal law category, Justice Durham wrote 14 majority opinions, two concurring opinions and five dissenting opinions.

21. "Percent of Total" represents the percentage of the total number (211) of published decisions during 1987 constituted by each category of law.

Judicial Decisions

I. ANTITRUST

*Group Boycotts Under the Utah Antitrust Statute's Criminal Provisions**

In *State v. Thompson*,[1] the Utah Court of Appeals held that commercial bribery to obtain a noncompetitively bid, exclusive contract violates Utah's antitrust statute.[2] *Thompson* presented the first criminal prosecution under the 1979 state antitrust statute. In affirming the conviction, the court provided broad definitions for the elements of the criminal offense, and departed from federal court decisions interpreting comparable provisions in the federal antitrust laws.[3] The *Thompson* decision allows far-reaching applications of the Utah antitrust statute.

1. The Case—Defendant Thompson operated a security guard company, Michael Thompson Associates ("MTA"), that had a contract to provide full-time security guard service for Utah Power and Light Company ("UP&L").[4] MTA received a noncompetitively bid, exclusive contract on the recommendation of L. Brent Fletcher,[5] UP&L's security officer. Shortly after receiving the contract in 1979, MTA made payments totalling $23,000 to a company controlled by Fletcher. Defendant Ziemski took over control of MTA, which he later transferred to defendant Conklin. The UP&L contract was renewed in 1982, and in 1983 another Fletcher company received $25,000 in seven payments.

The State of Utah charged Thompson, Ziemski, and Conklin with seven counts of commercial bribery, one count of antitrust group boycott, and one count of racketeering. Thompson also was charged with a second count of racketeering for the 1979 bribery incident. The defendants were convicted on five bribery counts and on all the racketeering and antitrust counts.[6] On appeal the de-

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* K. Harsha Krishnan, Junior Staff Member, *Utah Law Review*.

1. 751 P.2d 805 (Utah Ct. App. 1988) (opinion by Judge Bench).

2. UTAH CODE ANN. §§ 76-10-911 to -926 (Supp. 1988).

3. *See* The Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1982 & Supp. IV 1986).

4. The facts are taken from the court's opinion in *Thompson*, 751 P.2d at 807-08.

5. Fletcher was tried and convicted along with the *Thompson* defendants. His appeal was decided in a companion case to *Thompson*, State v. Fletcher, 751 P.2d 822 (Utah Ct. App. 1988).

6. The case in the district court was State v. Fletcher, No. 84-1115 (3d Dist. Ct. Utah Mar. 11, 1985). The memorandum decision is reprinted at 1 B.Y.U. J. PUB. L. 251-55 (1986).

fendants challenged the trial court's jurisdiction,[7] the admissibility of evidence obtained under a subpoena issued in a mini-grand jury investigation,[8] the jury instructions on the commercial bribery charges,[9] the racketeering charges,[10] and the antitrust violations. This Development discusses only the antitrust violations.

The Court of Appeals affirmed the convictions. Agreeing on the disposition of the procedural and racketeering issues, the court divided[11] on treatment of the antitrust convictions. The *Thompson* court unanimously agreed on the three elements of the offense: (1) a contract, combination, or conspiracy in restraint of trade; (2) in

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7. The *Thompson* court followed State v. Schreuder, 712 P.2d 264 (Utah 1985), and held that failure to meet the probable cause requirement for arrest warrants does not void a subsequent conviction. *See Thompson*, 751 P.2d at 808.

8. The prosecution gathered much of the evidence presented at trial through the use of subpoenas duces tecum under the authority of an investigation conducted under the Utah Subpoena Powers Act, UTAH CODE ANN. §§ 77-22-1 to -3 (1982 & Supp. 1988). The district court judge supervising the investigation later declared the Subpoena Powers Act unconstitutional. The defendants moved to suppress evidence gathered pursuant to the subpoenas because the exclusionary rule prohibits the use of illegally obtained evidence. Citing Illinois v. Krull, 480 U.S. 340 (1987) (allowing searches authorized by a statute later held unconstitutional), the *Thompson* court affirmed the trial court's denial. *See Thompson*, 751 P.2d at 808-10.

9. The defendants claimed that the jury instruction failed to inform the jury that they must find a criminal intent to pay an illegal bribe. The court held that the instruction implicitly required a criminal intent, and thus sufficiently advised the jury on the law. *See Thompson*, 751 P.2d at 818.

10. The defendants made several arguments against applying the Utah Racketeering Influences and Criminal Enterprise Act, UTAH CODE ANN. §§ 76-10-1601 to -1609 (1981 & Supp. 1988) (now called the Pattern of Unlawful Activity Act) [hereinafter RICE], to their commercial bribery activities. *See Thompson*, 751 P.2d at 814-17.

First, the Court of Appeals rejected the defendants' claim that RICE applies only to the activities of organized crime. RICE applies to any person engaging in the proscribed conduct because the statute does not require a nexus to organized crime as an element of the offense. The United States Supreme Court similarly interpreted the federal Racketeering Influence and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1984), in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985).

Second, the Court of Appeals found that the definitions included in the RICE statute give sufficient notice as to the nature of conduct prohibited by RICE. Thus, the statutory definitions save RICE from the defendants' claim of vagueness.

Third, the court dismissed the disproportionality challenge by noting that RICE punishes a pattern of racketeering activity, which constitutes a separate offense from the individual predicate offenses—in this case commercial bribery. Because RICE punishes a different offense, the statute does not disproportionately punish the predicate offenses, nor does it punish multiple violations of statutes.

Finally, the court found a pattern of racketeering activity from the seven separate 1983 bribe payments. The court held that the jury could find that each payment had a distinct and separate purpose related to the overall goal of maintaining the contract rather than viewing them as a series of payments on a single bribe. *See Thompson*, 751 P.2d at 814-17.

11. Judges Bench and Davidson formed the majority, while Judge Orme dissented in part. *See Thompson*, 751 P.2d at 818-19 (Orme, J., dissenting in part).

the form of a group boycott; and (3) with the specific intent to eliminate competition.[12] The judges disagreed, however, over the presence of those elements in *Thompson*.

The majority found all three elements present. The defendants' commercial bribery satisfied the first element. While acknowledging that commercial bribery, by itself, does not violate federal antitrust laws,[13] the majority cited several federal cases holding that commercial bribery, coupled with other acts in restraint of trade, constitutes a conspiracy in restraint of trade.[14] In exchange for the bribes, the defendants procured renewal of an exclusive contract with UP&L, and Fletcher[15] refused to entertain proposals from other security guard services. The majority pointed to Fletcher's refusal as providing the additional trade restraint to make the defendants' activity violative of the antitrust law. Fletcher's refusal directly affected competition for the UP&L contract, and combined with the bribery to form a conspiracy in restraint of trade.[16]

Next the court determined that the defendants and Fletcher met the second element of forming a group boycott. The court explained that the Utah antitrust statute criminalizes only "per se" violations of the federal antitrust laws. The court, however, refused to adopt the federal definition of a per se illegal group boycott. The Utah statute added a specific intent element to the definition of criminal group boycotts. Because federal antitrust law does not require a specific intent, the Court of Appeals concluded that the Utah Legislature meant to use the general definition of group boycott rather than the more technical definition used by federal law. A group boycott, under the definition adopted by the court, pressures the competitors by enlisting others to withhold patronage from the competitors[17]—just as the defendants convinced Fletcher to do. The anticompetitive intent of the participants, rather than

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12. *Id.* at 810, 818 (majority opinion).

13. The majority opinion ignored the trial court's contention that commercial bribery claims could be brought under the Utah statute because the Utah statute does not contain an analogue to the Robinson-Patman Act, 15 U.S.C. § 13(c) (1982). The dissent, however, noted that Utah already had a commercial bribery statute, *see* UTAH CODE ANN. § 76-6-508 (1978). According to the dissent, the legislature's failure to adopt Robinson-Patman demonstrates an intent to have commercial bribery brought under § 76-6-508 rather than the antitrust statute. *See Thompson*, 751 P.2d at 819 (Orme, J., dissenting in part).

14. *See infra* notes 32-36 and accompanying text.

15. L. Brent Fletcher was the UP&L security officer.

16. *Thompson*, 751 P.2d at 810-11.

17. *Id.* at 813.

the form of the conspiracy, was the key factor in determining the conspiracy's criminal illegality.

Finally, the court inferred the defendants' specific intent to eliminate competition, which satisfied the third element. Fletcher prevented other firms from submitting bids for the UP&L contract. The trial testimony indicated that companies normally use open bidding when selecting a security guard service. Thus the conspiracy prevented other companies from using the competitive bidding process and created an inference that the defendants intended to eliminate competition for the UP&L contract. Having found a conspiracy in restraint of trade in the form of a group boycott with the specific intent to eliminate competition, the majority affirmed the antitrust convictions.

2. Background—

(a) Utah's Antitrust Statute. In 1979 the Utah Legislature replaced the moribund 1896 antitrust law[18] with the new Utah Antitrust Act.[19] Federal encouragement of state involvement in antitrust matters, along with financial assistance for state antitrust enforcement efforts, prompted passage of the new statute.[20] The Utah statute makes illegal any contracts, combinations, and conspiracies in restraint of trade, in language similar to that of the federal Sherman Act.[21] In addition, the Utah Antitrust Act criminalizes certain anticompetitive conduct.[22]

This criminal provision proscribes only four specific types of anticompetitive conduct: price fixing, bid rigging, dividing markets, and engaging in a group boycott with a specific intent to eliminate competition.[23] These four activities are generally regarded as clearly anticompetitive. Federal law also views these four activities

18. Act of Mar. 9, 1896, ch. XXXIX, 1896 Utah Laws 125 (repealed 1979).

19. The Utah Antitrust Act of 1979, ch. 79, §§ 1-17, 1979 Utah Laws 448 (codified at UTAH CODE ANN. §§ 76-10-911 to -926 (Supp. 1988)).

20. For a detailed analysis of the Utah statute, see Dibble & Jardine, *The Utah Antitrust Act of 1979: Getting Into the State Antitrust Business*, 1980 UTAH L. REV. 73.

21. *Compare* UTAH CODE ANN. § 76-10-914 (Supp. 1988) ("Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is declared to be illegal.") *with* 15 U.S.C. §§ 1-2 (1982) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .").

22. The Act's criminal provision states: "Any person who violates Section 76-10-914 by price fixing, bid rigging, agreeing among competitors to divide customers or territories, or by engaging in a group boycott with specific intent of eliminating competition shall be punished . . . ." UTAH CODE ANN. § 76-10-920(1) (Supp. 1988).

23. *Id.*

as per se antitrust violations and allows no legal justification for such activities.[24] Inclusion of only per se violations in the Utah statute demonstrates a legislative intent to criminalize only conduct generally regarded as blatantly anticompetitive.[25] The addition of a specific intent requirement to the group boycott violation appears to restrict further the scope of criminal antitrust liability.

Interestingly, the Utah statute specifically directs Utah courts, when construing the statute, to follow federal court interpretations of the comparable federal statutory provision.[26] This statutory directive ensures continuing consistency with federal law and allows Utah courts to draw on the extensive antitrust experience of the federal courts. Such experience could prove quite valuable, especially in a case of first impression like *Thompson*. Given these considerations, federal law naturally provides the legal framework for the substantive antitrust issues.

(b) Decisions of Federal Courts. Repeatedly, federal courts have held that commercial bribery alone does not constitute a contract, combination, or conspiracy in restraint of trade.[27] Although comercial bribery is an illegal business practice,[28] it does not fall within the purview of the antitrust statutes.[29] Some federal courts reject Sherman Act claims based on commercial bribery because the Robinson-Patman Act specifically covers such claims.[30] The *Thompson* majority accepted the general proposition that

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24. Federal law, unlike Utah law, does not impose a specific intent requirement on group boycotts. In practice, however, only clearly purposeful violations are prosecuted criminally. *See* ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 350 & n.43 (2d ed. 1984); Dibble & Jardine, *supra* note 20, at 83 n.70

25. *See* Dibble & Jardine, *supra* note 20, at 83.

26. The Utah provision specifically states: "The legislature intends that the courts, in construing this act, will be guided by interpretations given by the federal courts to comparable federal antitrust statutes and by other state courts to comparable state antitrust statutes." UTAH CODE ANN. § 76-10-926 (Supp. 1988).

27. *See, e.g.*, United States v. Boston & Maine R.R., 380 U.S. 157 (1965); Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976); Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633, 645 (D. Alaska 1982).

28. The federal antitrust laws prohibit commercial bribery as an illegal business practice under the Robinson-Patman Act, 15 U.S.C. § 13(c) (1982). The Utah antitrust statute, however, does not incorporate the Robinson-Patman provisions. See *supra* note 13 for the trial court's and dissent's views on the significance of this omission.

29. *See Boston & Maine R.R.*, 380 U.S. at 162.

30. *See* Sterling Nelson & Sons, Inc. v. Rangen, Inc., 235 F. Supp. 393 (D. Idaho 1964), *aff'd on other grounds*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966); *see also Thompson*, 751 P.2d at 819 (Orme, J., dissenting in part).

commercial bribery by itself is not an antitrust violation.[31] The *Thompson* court, however, pointed to a few cases in which federal courts stated that commercial bribery can violate the Sherman Act when coupled with other acts in restraint of trade.[32] For example, in *Associated Radio Service Co. v. Page Airways, Inc.*,[33] commercial bribery, in conjunction with several other illegal business practices, constituted an attempt to monopolize trade in violation of the Sherman Act.[34] In arriving at its holding, the *Page Airways* court considered the extensive number of different illegal practices, the severity of the anticompetitive effects resulting from those practices, and the market share and influence of the defendant corporation. This combination of factors convinced the court to find a Sherman Act violation. The court, however, cautioned against invoking the Sherman Act for every illegal business practice. The holding "[r]ests on a narrow foundation, and only those cases coming within the ambit of these particular facts should be considered."[35]

Another case cited by the *Thompson* majority, *Municipality of Anchorage v. Hitachi Cable, Ltd.*,[36] also involved commercial bribery. The *Hitachi* defendant made bribes in exchange for services, which included a payment for help in obtaining a contract. Although the court held that commercial bribery plus additional anticompetitive acts would serve as the basis for an antitrust violation, the court did not see the level of anticompetitive activity as rising to the level necessary to constitute an antitrust violation. Thus, once having found commercial bribery plus other anticompetitive behavior, *Hitachi* also would require a court to analyze the anticompetitive effect of the activities before finding an antitrust violation.

The State of Utah charged the *Thompson* defendants with forming a group boycott.[37] Because the Utah statute only criminal-

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31. *See Thompson*, 751 P.2d at 810. The trial court concluded that the omission of Robinson-Patman provisions from the Utah Antitrust Act allows commercial bribery actions under the Act. *See id.* at 819 (Orme, J., dissenting in part). By adopting the federal case law on this point, the majority implicitly rejected the trial court's ruling.

32. *See id.* at 810-11 (majority opinion) (citing Associated Radio Serv. Co. v. Page Airways, Inc., 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981), and Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633, 645 (D. Alaska 1982)).

33. 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981).

34. *See id.* at 1353-58.

35. *Id.* at 1358.

36. 547 F. Supp. 633 (D. Alaska 1982).

37. Group boycotts have been criminalized because "certain kinds of restraints are so inherently unreasonable and anticompetitive in nature that they are illegal *per se*. Included

izes four per se violations of the federal antitrust laws,[38] the defendants' liability turns on whether federal law treats the defendants' boycott as a per se violation. Generally, courts classify group boycotts as horizontal[39] or vertical.[40] Usually the treatment of a boycott under the Sherman Act depends on its classification.

The classic group boycott involves an agreement between horizontal competitors not to deal with a target competitor.[41] In *Gough v. Rossmoor Corp.*,[42] the Ninth Circuit noted that "[i]n all cases so far holding such restraints to be *per se* unreasonable, there has been some horizontal concert of action taken against the victims of the restraint."[43] The Eleventh Circuit, in *Construction Aggregate Transportation, Inc. v. Florida Rock Industries, Inc.*,[44] demonstrated the centrality of the horizontal aspect of the agreement by imposing a "numerosity" requirement.[45] Numerosity requires a horizontal boycott to have two or more conspirators horizontally arranged at the same market level.[46]

Some courts and commentators, however, noting that vertical

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in the *per se* category are group boycotts which generally arise when one party convinces or coerces another party to refrain from dealing with a third party." United States Trotting Ass'n v. Chicago Downs Ass'n, Inc., 487 F. Supp. 1008, 1014 (N.D. Ill. 1980), *rev'd on other grounds*, 665 F.2d 781 (7th Cir. 1981).

38. *See supra* notes 22-23 and accompanying text.

39. Horizontal boycotts involve agreements between competitors at the same market level to eliminate another competitor. Horizontal boycotts, in addition to being extremely anticompetitive, lack any probable competitive benefits to justify them. Therefore, the courts view horizontal boycotts as per se violations of the Sherman Act. This treatment creates an irrebuttable presumption that the boycott violates the Sherman Act. No justification by the participants will validate such a boycott. *See, e.g.*, Board of Trade of Chicago v. United States, 246 U.S. 231 (1918).

40. Vertical boycotts are combinations of entities at different levels of the market structure. Vertical boycotts are analyzed under the "rule of reason." The rule of reason invalidates anticompetitive activities only when the anticompetitive effects outweigh the beneficial effects, in contrast to the absolute ban imposed by per se treatment. Although vertical boycotts can cause the same anticompetitive effects as horizontal boycotts, courts justify the difference in treatment by pointing to the efficiency-creating possibilities of vertical boycotts. *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

41. Construction Aggregate Transp., Inc. v. Florida Rock Indus., Inc., 710 F.2d 752, 773-74 (11th Cir. 1983).

42. 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979). In *Gough*, a carpet seller for residents of a retirement housing development conspired with the publisher of the retirement community's newspaper to prevent another carpet seller from advertising in the newspaper. The court refused to find a per se illegal group boycott despite the parties' clear anticompetitive intent.

43. *Id.* at 387 (emphasis in original).

44. 710 F.2d 752 (11th Cir. 1983).

45. *See id.* at 778.

46. *See* Decker, *The Numerosity Requirement for Group Boycotts: Toward a Horizontal Benefit Analysis*, 18 U.S.F. L. REV. 577, 579 (1984).

agreements can have a primarily horizontal effect, argue for relaxation of the numerosity requirement.[47] In *Com-Tel, Inc. v. DuKane Corp.*,[48] the court classified a conspiracy between a distributor and the manufacturer as a horizontal boycott when the court held the stifling of competition to be primarily horizontal. The per se rule should prohibit the exclusionary practices inherent in such a boycott. Furthermore, the rule applies even in situations where only one contract was involved. The market behavior, not the impact of the behavior on the entire market, warrants condemnation by the per se rule.[49]

In another case arguing against numerosity, *Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc.*,[50] the court noted that a per se group boycott generally requires a showing of concerted horizontal anticompetitive activity. The court stated, however, that sometimes a refusal to deal, instigated by a single horizontal competitor and a vertically *related* company, may form a per se boycott in appropriate circumstances.[51] The per se rule should apply only when the restraint has a pernicious effect on competition and lacks any redeeming virtue.[52] The critical inquiry is whether the "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output,"[53] and a violation requires a showing of "demonstrable economic effect."[54]

These federal cases suggest that the purpose and effect of the conspiracy, rather than numerosity, should form the key inquiry when determining the treatment of a particular boycott. The horizontal-vertical distinction does not provide adequate justification for the different treatment of group boycotts. Thus these authori-

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47. *See* Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc., 710 F.2d 1366 (9th Cir. 1983); Com-Tel, Inc. v. DuKane Corp., 669 F.2d 404 (6th Cir. 1982); Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 COLUM. L. REV. 685 (1979); Decker, *supra* note 46.

48. 669 F.2d 404 (6th Cir. 1982). A distributor competing for a school sound system installation contract urged the manufacturer to pressure other distributors into not selling the manufacturer's components to a competitor for the school contract. Although the agreement was vertical (distributor and manufacturer), the effect was a refusal to deal by the horizontal network of distributors.

49. *Id.* at 414.

50. 710 F.2d 1366 (9th Cir. 1983). In *Cascade*, a cabinet manufacturer persuaded another company (run by the brother of the manufacturer's president) not to lease its factory to the manufacturer's competitor. The competitor sued, claiming a group boycott. The court refused to find a per se group boycott because the competitor was able to lease other space.

51. *Id.* at 1371.

52. *Id.*

53. *Id.* (citations omitted).

54. *Id.* (citations omitted).

ties suggest that courts accord per se treatment to certain types of vertical boycotts, or reclassify boycotts using criteria other than the horizontal-vertical distinction.

3. Discussion—In making its first pronouncement on the Utah criminal antitrust provision, the Utah Court of Appeals gave the provision an expansive reading. In doing so, the *Thompson* court ignored federal court rulings on issues essential to the case despite the statutory directive to follow federal case law.[55] Thus the *Thompson* decision departs from federal law in some important respects.

The first troubling feature of the *Thompson* opinion is the court's refusal to examine the impact of the defendants' actions on the market. This refusal seems especially odd for an antitrust decision because antitrust law focuses on damage to the competitive market. Instead of performing any market analysis, the court pastes the "per se illegal boycott" label on the defendants' activities and then concludes that the per se label precludes performing any market analysis.[56] The court cites no cases suggesting that identification of some anticompetitive act negates the need for market analysis. The *Thompson* majority uses various labels, such as "per se illegal," as a means of avoiding market analysis.

Second, the majority's use of the per se label also reveals a misconception about the purpose of the per se analysis. The per se rules are evidentiary presumptions. "*Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct."[57] After determining that the acts have the form of a per se violation and an anticompetitive effect, the courts will not allow justifications based on the benefits from that anticompetitive behavior. The per se rule does not reject market analysis; in fact, the important consequences of the per se rule compel at least cursory examination of market conditions.

Third, the *Thompson* court stretches to find a restraint of trade resulting from the defendants' conduct. The defendants proffered the bribes in exchange for obtaining renewal of their contract with UP&L.[58] Having awarded the contract to MTA, Fletcher

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55. *See supra* note 26.

56. *See* State v. Thompson, 751 P.2d 805, 813 (Utah Ct. App. 1988).

57. National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 104 n.26 (1984) (emphasis in original).

58. The transactions resulting in the award of the original 1978 UP&L contract oc-

necessarily would refuse to accept bids from other companies. Any anticompeteitive restraint of trade would be an indirect consequence rather than the defendants' primary purpose. All exclusive dealing contracts[59] have negative effects on competition. Rather than invalidating all exclusive dealing contracts, courts subject them to the rule of reason.[60] The rule of reason treatment makes exclusive dealing contracts noncriminal because the Utah criminal provision only proscribes per se violations.[61]

Fourth, the court does not mention an older federal case, *Sterling Nelson & Sons, Inc. v. Rangen, Inc.*,[62] involving a commercial bribery claim under the Sherman Act. In *Sterling Nelson*, a fish food manufacturer bribed an Idaho state fish hatcheries employee. In exchange, the employee convinced state officials to purchase all its requirements of fish food from that manufacturer. Furthermore, the employee obstructed and impeded the testing of products from other manufacturers. After discovery of the bribes, another company brought an antitrust action against the manufacturer.

The *Sterling Nelson* court granted relief under the Robinson-Patman Act but dismissed the Sherman Act claims:

> The evidence here proves only bribery of an influential state employee which had a detrimental restraining effect upon interstate commerce. This is not the type of misconduct within the purview of the concepts of a combination in restraint of trade or monopoly as used in the Sherman Act . . . . This is a simple case of buying influence, sometimes called commercial bribery . . . .[63]

Similarly, *Thompson* only presents bribery of an influential company employee. Fletcher's refusal to entertain other proposals is part and parcel of the commercial bribery transaction, not a separate act in restraint of trade.

Fifth, *Thompson* ignores the *Cascade* court's admonition against broad application of the per se rule. The *Cascade* court

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curred before the 1979 passage of the Utah Antitrust Act; thus the ex post facto clauses of the United States and Utah Constitutions prohibit prosecution for those activities. The Act, therefore, only covers the transactions leading to the 1981 contract renewal.

59. Because UP&L would hire only one security guard service, the UP&L contract should be characterized as an exclusive dealing contract. *See* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 471 (1977).

60. *See Thompson*, 751 P.2d at 820 & n.4 (Orme, J., dissenting in part) (citing Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1304 n.9 (9th Cir. 1982)).

61. *See id.* at 812 (majority opinion).

62. 235 F. Supp. 393 (D. Idaho 1964), *aff'd on other grounds*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966).

63. *Id.* at 400.

stated that " '[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations.' "[64] Other courts have warned that "the rule of reason [is] the standard traditionally applied for the majority of anticompetitive practices challenged under [section] 1 of the [Sherman] Act,"[65] and a "particular course of conduct will generally be termed a *per se* violation of the Act only after courts have had considerable experience with the type of conduct challenged and application of the Rule of Reason has inevitably resulted in a finding of anticompetitive effects."[66] The *Thompson* opinion fails to identify cases applying the per se rule to a noncompetitive bidding situation, so its imposition of per se liability departs from settled federal practice.

4. Effect—The *Thompson* court adopted a completely new statutory definition of group boycott. This interpretation reaches beyond the limited federal court rulings to encompass virtually all boycotts, vertical as well as horizontal, within the court's definition of illegal group boycotts. The majority bases its new definition on the addition of the specific intent requirement to the group boycott offense. According to one commentator, the legislature added a specific intent requirement for cases involving group boycotts to avoid confusion over the standards governing group boycotts.[67] Some group boycotts have political or social, rather than economic, goals.[68] The specific intent requirement exempts such boycotts from criminal antitrust sanctions.

The *Thompson* court, however, views the addition of a specific intent requirement as a sign that the legislature did not intend to adopt the classic (per se) group boycott definition formulated by the federal courts.[69] The classic group boycott definition does not require proof of the defendant's intent because a classic group boy-

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64. Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc., 710 F.2d 1366, 1372 (9th Cir. 1983) (quoting Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1, 9 (1979)).

65. United States Trotting Ass'n v. Chicago Downs Ass'n, Inc., 665 F.2d 781, 787 (7th Cir. 1981); *see* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 59 (1977).

66. *United States Trotting Ass'n*, 665 F.2d at 788 (quoting Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549, 555 (7th Cir. 1980)).

67. Dibble & Jardine, *supra* note 20, at 83.

68. *See, e.g.*, NAACP v. Claiborne Hardware Co., 393 So. 2d 1290 (Miss. 1981) (antitrust claim against boycott organized by civil rights group dismissed), *rev'd on other grounds*, 458 U.S. 886 (1982).

69. *See* State v. Thompson, 751 P.2d 805, 813 (Utah Ct. App. 1988).

cott is conclusively presumed to be anticompetitive. Because an intent requirement is unnecessary under the classic definition, the court construes the statute as rejecting the classic definition.[70]

The court then reads the "general" definition of boycott into the statute: " 'a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target.' "[71] Thus two conspirators with anticompetitive motives constitute a criminal antitrust violation.[72] This definition of boycott greatly expands the class of prohibited conduct beyond that proscribed by federal law.

As the dissent notes, the majority's argument appears quite tenuous. Without the specific intent requirement, the statute would mandate the classic group boycott definition. The legislature, however, added the element of specific intent to the crime, which should further restrict the class of prohibited conduct. Instead, the court views the addition of specific intent as expanding the range of proscribed conduct, which seems counter-intuitive.

Furthermore, this redefinition proposes different treatment of vertical boycotts under Utah law than the treatment given under federal law. Federal courts apply the rule of reason when determining whether a vertical boycott violates the antitrust laws.[73] The *Thompson* majority rejects the rule of reason analysis when applying the Utah statute's criminal provisions.[74] Thus, with the expanded definition of boycotts, all intentional vertical boycotts[75] could be criminal, despite their possible legality under federal law. The court's strained argument for redefinition of group boycott does not support its disregard of settled federal case law, nor does the court offer any statutory or legislative support for this radical departure from federal law.[76]

The *Thompson* majority cites authority for its revised definition of group boycott, yet none of the cases or commentary cited

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70. *Id.*

71. *Id.* (quoting St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 541 (1978)). As the *Thompson* dissent notes, the quotation was the Supreme Court's explanation of the term in common parlance, not a legal definition. *Id.* at 820 n.3 (Orme, J., dissenting in part).

72. Excluding, of course, the dual distribution situations specifically exempted by UTAH CODE ANN. § 76-10-920(1) (Supp. 1988).

73. *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

74. *See Thompson*, 751 P.2d at 813.

75. *See supra* note 40.

76. This radical, unforeseen, judicial enlargement of the criminal statute raises due process and ex post facto law concerns. *See, e.g.*, Bouie v. City of Columbia, 378 U.S. 347, 353 (1964).

proposes *Thompson*'s expansive definition or rejects the classic definition of group boycott.[77] Most of the authority suggests that courts accord per se treatment to certain types of vertical boycotts, or reclassify boycotts using criteria other than the horizontal-vertical distinction.[78] Even under the cited cases, per se treatment of particular vertical boycotts requires an inquiry into intent and economic effect.[79] The majority does not conduct that inquiry; instead it conclusively presumes a criminal violation having found a conspiracy.[80] The majority mechanically applies holdings from cases that, ironically, argue against the rigid, mechanical application of the horizontal-vertical distinction.[81]

The cases and authorities arguing against the horizontal-vertical distinction would have the courts examine the motivation of the conspirators and the anticompetitive effect of the restraints.[82] Nowhere do those cases suggest that identification of some horizontal anticompetitive effect automatically turns a vertical conspiracy into a per se illegal boycott, and nowhere do they propose abandoning the treatment of vertical group boycotts by the rule of reason. In fact, the *Cascade* court specifically states that the per se rule should never automatically apply to vertical boycotts.[83]

In contrast, the *Thompson* majority classifies virtually all boycotts as per se illegal. *Thompson* rejects the classic definition of group boycott developed by the federal courts and substitutes a definition encompassing all boycotts. The court does not allow the participants to justify their actions under the rule of reason. Thus boycotts valid under federal law by application of the rule of reason become criminal under Utah law.

The specific intent to eliminate competition necessarily requires identification of the market in which the defendants are trying to eliminate competition. The *Thompson* majority does not identify that market, presumably accepting the trial court's defini-

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77. *See Thompson*, 751 P.2d at 814.

78. *See* cases cited *id.*

79. *See, e.g.*, Cascade Cabinet Co. v. Western Cabinet & Millwork, 710 F.2d 1366, 1371 (9th Cir. 1983).

80. According to the majority, the dissent would have the court adopt the classic per se definition but use the rule of reason in evaluating the elements of proof. *See Thompson*, 751 P.2d at 813. The majority, however, rejects the per se definition of group boycott, adopting instead the irrebuttable presumption created by the per se definition. *See id.*

81. *Cascade*, 710 F.2d at 1371; Com-Tel, Inc. v. DuKane Corp., 669 F.2d 404, 412 (6th Cir. 1982).

82. *See, e.g., Cascade*, 710 F.2d at 1371; *Com-Tel, Inc.*, 669 F.2d at 412; Bauer, *supra* note 47, at 717; Decker, *supra* note 46, at 595.

83. *Cascade*, 710 F.2d at 1371.

tion of the competition "among vendors of security guard services to Utah Power and Light."[84] As the dissent points out, there is no reason to define the market so narrowly.[85] The obvious market would be security guard services generally. Considering the size of that market, and the minor scope of the defendants' activities, "[i]t simply cannot be inferred that they intended to eliminate . . . competition in any meaningful marketplace, which is what the antitrust laws are designed to prevent."[86]

5. Conclusion—Thompson provided the Court of Appeals with its first opportunity to interpret the Utah antitrust statute's criminal provision. With that opportunity, the court went beyond federal law to encompass a wide range of behavior within the criminal prohibitions. Under *Thompson*, a criminal group boycott could include any agreement with anticompetitive effect. The decision departs from federal law by refusing to apply market impact analysis and by inappropriately applying the per se analysis. *Thompson* thus gives a surprisingly broad reach to a narrowly articulated criminal antitrust statute.

II. Civil Procedure

*A. Long-arm Jurisdiction in Paternity Actions**

In *Baldwin v. Easterling*,[1] the Utah Supreme Court held that, in the absence of other contacts with the state, a nonresident defendant does not subject himself to jurisdiction in a paternity case if sexual intercourse between the plaintiff and the alleged father took place outside the state.[2] *Baldwin* is the first case decided under section 78-27-24(7) of the Utah Code[3] that fully addresses

84. *Thompson*, 751 P.2d at 821 (Orme, J., dissenting in part) (quoting the trial court's jury instructions).

85. *Id.*

86. *Id.* at 822.

* Daniel S. Day, Junior Staff Member, *Utah Law Review*.

1. 754 P.2d 942 (Utah 1988) (opinion by Justice Howe).

2. *Id.* at 945.

3. Utah Code Ann. § 78-27-24 (1987). The statute states:

> Any person, notwithstanding section 16-10-102, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:
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> . . . .

the issue of obtaining jurisdiction through a long-arm statute over a nonresident defendant when impregnation takes place outside the state.[4] The court's decision significantly limits the reach of the state's long-arm statute in paternity actions.

1. The Case—Teresa Baldwin met Carl Easterling, the defendant, in December 1983.[5] In January 1984, she moved into Easterling's Pennsylvania home and shortly thereafter became pregnant. In May, Easterling convinced Baldwin that she should stay temporarily with her mother in Utah.[6] Easterling paid for Baldwin's flight to Utah and promised to provide return transportation after a short period of time. Easterling also promised that he would support Baldwin and their child. Despite his promises, Easterling did not provide return transportation, nor did he make any contribution toward the expenses of Baldwin's pregnancy.

Baldwin filed suit in Utah alleging that Easterling was the father of her unborn child and therefore was liable for the expenses of her pregnancy and for the education and support of the child.[7] Jurisdiction over Easterling was sought under section 78-27-24(3).[8] This section grants jurisdiction for claims arising from "the causing of any injury within this state whether tortious or by breach of warranty."[9]

The tortious injury that Baldwin alleged was that Easterling breached his promise to marry and support her in order to avoid his obligation to support the child. Baldwin argued that even

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> (3) The causing of any injury within this state whether tortious or by breach of warranty;
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> . . . .
>
> (7) The commission of sexual intercourse within this state which gives rise to a paternity suit under Chapter 45a, Title 78, to determine paternity for the purpose of establishing responsibility for child support.

Id.

4. *Id.* Subsection (7) was added in 1983.

5. The facts are taken from the court's opinion in *Baldwin*, 754 P.2d at 943-44.

6. *See* Brief of Respondent at 2, Baldwin v. Easterling, 754 P.2d 942 (Utah 1988) (No. 20361) (Baldwin alleged that Easterling had physically abused her and that the trip to Utah was a "cooling-off" period).

7. This claim was made pursuant to UTAH CODE ANN. § 78-45a-1 (1987), which states that "[t]he father of a child which is or may be born out of wedlock is liable to the same extent as the father of a child born in wedlock." *Id.*; *see also* Reciprocal Enforcement of Support Act, UTAH CODE ANN. §§ 77-31-1 to -39 (1982) (providing a remedy after paternity is established for enforcement of child support from nonresidents).

8. Utah could not exercise jurisdiction over Easterling under UTAH CODE ANN. § 78-27-24(7) (1987), which provides jurisdiction if sexual intercourse occurs within the state. Easterling had not been in Utah in ten years.

9. UTAH CODE ANN. § 78-27-24(3) (1987).

though this breach of promise occurred in Pennsylvania, Easterling's acts caused her injury in Utah. The trial court denied Easterling's motion to dismiss the complaint for lack of personal jurisdiction. In doing so, the trial court relied on *Poindexter v. Willis*,[10] an Illinois case, which held that "the word 'tortious' in the Illinois long-arm statute included a nonresident's breach of a duty owed to a resident which caused damage and that the failure to support an illegitimate child was such a breach."[11]

On appeal, the Utah Supreme Court examined the court's ruling in *Poindexter*, other supportive case law, and a competing line of authority. The court rejected the theory that sexual intercourse outside the state can be regarded as a tortious injury within the state.[12] The court also concluded that until paternity is established there is no duty to support a child.[13] Therefore, jurisdiction cannot be obtained over the father for tortious injury for failure to support within the meaning of section 78-27-24(3) of the Utah Code.[14] The legislature has expressly provided in section 78-27-24(7) that a court may assert jurisdiction over a nonresident defendant in paternity cases if sexual intercourse occurred within the state. Such an express provision precludes obtaining jurisdiction over the defendant by means of a tortious injury argument if sexual intercourse has taken place outside the state.[15]

2. *Background*—Prior to *Baldwin*, Utah case law involving jurisdiction over nonresident defendants in paternity cases was scant. Section 78-27-24(7), which was added to the Utah Code in 1983, grants jurisdiction in paternity actions over nonresident defendants if sexual intercourse occurred within the state.[16] Since the amendment was added, only one case has been tried under this section. In *Parker v. Conger*,[17] the trial court granted the nonresident defendant's motion to dismiss for lack of personal jurisdiction. The trial court granted the motion because "sexual intercourse between consenting adults is not a tort as that term has been traditionally defined"[18] in Utah. While the appeal was pend-

10. 87 Ill. App. 2d 213, 231 N.E.2d 1 (1967).
11. *Baldwin*, 754 P.2d at 944.
12. *Id.* at 945.
13. *Id.* at 944.
14. *Id.* at 945.
15. *Id.*
16. UTAH CODE ANN. § 78-27-24(7) (1987).
17. 692 P.2d 734 (Utah 1984).
18. *Id.* at 734 (quoting the trial court).

ing the legislature passed the 1983 amendment to section 78-27-24, adding subsection seven.[19] The supreme court remanded the case to allow the plaintiff to obtain jurisdiction over the nonresident defendant pursuant to the amended statute.[20]

Baldwin is the first case since *Parker* to address the issue of obtaining long-arm jurisdiction over a nonresident defendant in a paternity action. In *Baldwin*, the court surveyed two divergent lines of authority from other states.[21] *Poindexter*,[22] relied on by the trial court, involved a paternity action against a nonresident defendant.[23] The action was based on the theory that the defendant committed a tort within the state. The Illinois court held that failure to support an illegitimate child fits the definition of "tortious" injury under Illinois' long-arm statute.[24] In *Poindexter*, sexual intercourse occurred within the forum state.[25] Under Utah's statutory scheme, however, the fact that sexual intercourse occurred within the forum state would be sufficient to confer jurisdiction without reliance on a theory of "so-called tortious conduct of failure to support" relied on in *Poindexter*.[26]

A number of other cases cited in *Baldwin* support the proposition that failure to support an illegitimate child is a tort.[27] Two of these cases, *State v. Hartling*[28] and *Black v. Rasile*,[29] are representative of this line of cases.

In *Hartling*, the court held that the conduct at issue in a civil proceeding to establish paternity can be construed as tortious con-

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19. *Id.* at 735.

20. *Id.*

21. *See Baldwin*, 754 P.2d at 943 (discussing divergent lines of authority).

22. 87 Ill. App. 2d 213, 231 N.E.2d 1 (1967).

23. *Poindexter*, 231 N.E.2d at 2; *Baldwin*, 754 P.2d at 944.

24. *Poindexter*, 231 N.E.2d at 3.

25. *Id.*

26. *Baldwin*, 754 P.2d at 944. None of the jurisdictions cited by the court have long-arm statutes that resemble UTAH CODE ANN. § 78-27-24(7) (1987). *See* COLO. REV. STAT. § 13-1-124 (1987); FLA. STAT. ANN. § 48.193 (West Supp. 1988); ILL. REV. STAT. ch. 110, ¶ 2-209 (1988); MINN. STAT. ANN. § 543.19 (West 1988); N.M. STAT. ANN. § 38-1-16 (1987); TENN. CODE ANN. § 20-2-214 (Supp. 1987).

27. *See Baldwin*, 754 P.2d at 944 (citing Bell v. Tuffnell, 418 So. 2d 422, 423 (Fla. Dist. Ct. App. 1982) (overruled by Department of Health & Rehabilitative Servs. v. Wright, 522 So. 2d 838 (Fla. 1988))); Neill v. Ridner, 153 Ind. App. 149, 286 N.E.2d 427, 429 (1972); Black v. Rasile, 113 Mich. App. 601, 318 N.W.2d 475, 476 (1982); State v. Hartling, 360 N.W.2d 439, 441 (Minn. Ct. App. 1985); State *ex rel.* Nelson v. Nelson, 298 Minn. 438, 216 N.W.2d 140, 143 (1974); Gentry v. Davis, 512 S.W.2d 4, 6 (Tenn. 1974).

28. 360 N.W.2d 439 (Minn. Ct. App. 1985).

29. 318 N.W.2d 475 (Mich. Ct. App. 1982).

duct within the meaning of the long-arm statute.[30] After analyzing due process considerations, the court ultimately held that the defendant's "contacts were such that he could reasonably anticipate being haled into a Minnesota court for child support."[31] The court noted that "an evaluation of the sufficiency of contacts when a sexual relationship is involved is decidedly different than when a contract or tort is involved."[32] In *Hartling*, the defendant had intercourse with the plaintiff both within the forum state and outside the state. Although most of the relationship took place outside Minnesota, the defendant had sufficient contact with the state to justify asserting jurisdiction for the purposes of the paternity suit.[33] *Baldwin* cannot be compared with cases like *Hartling* because Easterling did not have any contact with the state other than the fact that Baldwin and her child were unilaterally present within the state.[34]

In the second case, *Black v. Rasile*,[35] the extent of the defendant's contacts with the forum state were not mentioned. The Michigan court determined that, even though the baby was conceived outside the state, a statutory cause of action is triggered by failure or refusal to pay costs of the pregnancy, birth, and subsequent support of the child.[36] Failure to pay these costs is a tortious act that occurs within the state even though the defendant is not present within the forum.[37] The court had jurisdiction because the child could not be supported anywhere else. The Utah Supreme Court did not follow this case in *Baldwin*, but chose instead to follow competing authority.[38]

The alternative point of view, which is equally well established, is that the failure to support an illegitimate child cannot be

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30. *Hartling*, 360 N.W.2d at 441.

31. *Id.*

32. *Id.*

33. *Id.* at 439. *But see* People v. Flieger, 125 Ill. App. 3d 604, 465 N.E.2d 1376 (1984) (due process considerations).

34. *See generally* Kulko v. Superior Court of California, 436 U.S. 84, 93-94 (1978).

> "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State . . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails [him]self of the privilege of conducting activities within the forum State . . . ."

Id. (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958) (personal jurisdiction cannot be obtained merely because mother and child are found within the state, absent contacts by the father with the forum state)).

35. 113 Mich. App. 601, 318 N.W.2d 475, 476 (1980).

36. *Black*, 318 N.W.2d at 476.

37. *Id.*

38. Baldwin v. Easterling, 754 P.2d 942, 945 (Utah 1988).

a tort until paternity is established, giving rise to a duty to support that child.[39] Furthermore, sexual intercourse within the state is not a tort as long as it involves two consenting adults.[40]

Many courts have held that paternity must be established before the issue of tortious nonsupport can be addressed.[41] In other words, failure to support is really an ancillary issue to the question of paternity.[42] A court must have jurisdiction over an alleged nonresident father in order to make such a determination.

3. Analysis—The Utah Supreme Court, after briefly reviewing the two divergent lines of authority, concluded that the legislature made the choice between the two points of view.[43] The court stated:

> [The legislature] has provided in section 78-27-24(7) that a nonresident submits himself to the jurisdiction of the courts of this state in a paternity suit under section 78-45a-1 for the purpose of establishing responsibility for child support when he has engaged in sexual intercourse within this state. By negative implication, it follows that when the intercourse occurs outside this state, as it did in the instant case, the legislature did not intend to subject the nonresident to our jurisdiction in the absence of other contacts by him with our state. A serious due process question would have arisen had there been any such attempt.[44]

The legislative debates of Senate Bill No. 19, amending section 78-27-24, reflect a desire to enhance the ability of the Department of Recovery Services to "go after" nonresident fathers of illegitimate children residing in the state.[45] Legislators, however, were more concerned about the cost-profit ratio of the department, the feasibility of obtaining child support from nonresidents, and the mechanics and procedure of establishing paternity. The legislature did not discuss the merits of the proposed amendment to the long-

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39. *See* A.R.B. v. G.L.P., 180 Colo. 439, 507 P.2d 468, 469 (1973); State *ex rel.* Carrington v. Schutts, 217 Kan. 175, 535 P.2d 982, 987 (1975); State *ex rel.* Larimore v. Snyder, 206 Neb. 64, 291 N.W.2d 241, 244 (1980); State *ex rel.* Garcia v. Dayton, 102 N.M. 327, 695 P.2d 477, 479 (1985); Barnhart v. Madvig, 526 S.W.2d 106, 108-09 (Tenn. 1975).

40. *Barnhart*, 526 S.W.2d at 108.

41. *Garcia*, 695 P.2d at 479.

42. *Snyder*, 291 N.W.2d at 244.

43. Baldwin v. Easterling, 754 P.2d 942, 945 (Utah 1988).

44. *Id.* (citation omitted).

45. Floor Debate, remarks by Sen. Flamm, 45th Utah Leg., Gen. Sess. (Jan. 19, 1983) (Sen. Recording No. 30, Side 1).

arm statute.[46]

A strong public interest exists in the need to ensure support of illegitimate children fathered by nonresidents. This interest demands that the state provide an effective means of redress. The long-arm statute is intended to provide a means of obtaining jurisdiction over nonresidents in situations such as this in which there is a compelling state interest.[47]

Section 78-27-24(7), however, is too narrow and therefore inadequate. Circumstances may arise in which sexual intercourse occurs outside the forum state and there are sufficient minimum contacts between the defendant and the state to warrant asserting jurisdiction. Utah's long-arm statute precludes the assertion of jurisdiction in such a case.[48]

In order to provide a long-arm statute with longer reach, the Utah state legislature should adopt California's approach to long-arm jurisdiction. The California statute states that "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."[49] The statute is broad enough that it does not exclude important instances when the state has a compelling interest to assert jurisdiction over a nonresident defendant. The courts need only ensure that the assertion of jurisdiction comports with the demands of due process.[50]

In *Baldwin* it was not necessary for the Utah Supreme Court

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46. *See, e.g., id.*

47. *See* UTAH CODE ANN. § 78-27-22 (1987). The statute provides:

> It is declared, as a matter of legislative determination, that the public interest demands the state provide its citizens with an effective means of redress against nonresident persons, who, through certain significant minimal contacts with this state, incur obligations to citizens entitled to the state's protection. This legislative action is deemed necessary because of technological progress which has substantially increased the flow of commerce between the several states resulting in increased interaction between persons of this state and persons of other states.
>
> The provisions of this act, to ensure maximum protection to citizens of this state, should be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution.

Id.

48. It is conceivable that a "transaction of business within the state" argument could encompass conduct at issue in a paternity case; the legislature has defined these words to mean activities of a nonresident person that affect persons within the state. *See* UTAH CODE ANN. § 78-27-23 (1987).

49. CAL. CIV. CODE § 410.10 (West 1973).

50. *See* Threlkeld v. Tucker, 496 F.2d 1101, 1103 n.2 (9th Cir.) ("The 'minimum contacts' test of *International Shoe Co. v. Washington* defines the boundaries of personal jurisdiction under § 410.10." (citations omitted)), *cert. denied*, 419 U.S. 1023 (1974).

to look at due process.[51] Due process concerns still haunt section 78-27-24(7), which provides jurisdiction if sexual intercourse occurs within the state. If the nonresident defendant's only contact with the state is a single act of intercourse, is this sufficient minimum contact to meet the requirements of *International Shoe Co. v. Washington*?[52]

The State of Washington has a similar statutory provision granting jurisdiction over nonresident defendants.[53] Subsequent cases in Washington have upheld the assertion of jurisdiction on that basis. In *Lake v. Butcher*,[54] a Washington appeals court stated that "it does not offend traditional notions of fair play or substantial justice to hold that a man who fathers a child in this state has established sufficient contacts with the state to support the assertion of personal jurisdiction over him in an action concerning that child."[55] This did not violate due process because the defendant was served and had knowledge of the action.[56] It is likely that Utah's statutory provision would be upheld by similar reasoning.

4. Conclusion—The Utah court's decision in *Baldwin* is correct. There are limits to the expansive nature of long-arm jurisdiction. In *Baldwin* the limits are immediately evident. A court cannot create personal jurisdiction where none exists.[57] Utah's statute granting jurisdiction over nonresident defendants only if sexual intercourse occurs in the state is simply too narrow. Yet no matter how broad the statute, instances will arise where there is not sufficient contact with the state and the assertion of jurisdiction is not possible.

*B. Procedural Due Process Requirements of Notice in Utah: A Balancing of Interests**

In *Guenther v. Guenther*,[1] the Utah Supreme Court held that substituted service of process by publication and mailing to the de-

51. Baldwin v. Easterling, 754 P.2d 942, 942 (Utah 1988).
52. 326 U.S. 310 (1945).
53. *See* WASH. REV. CODE ANN. § 26.26.080(2) (1986) (Uniform Parentage Act).
54. 37 Wash. App. 228, 679 P.2d 409, 411 (1984).
55. 679 P.2d at 412 (citations omitted).
56. *Id.*
57. State *ex rel.* Garcia v. Dayton, 102 N.M. 327, 695 P.2d 477, 480 (1985).

* Marva Hicken, Junior Staff Member, *Utah Law Review*.
1. 749 P.2d 628 (Utah 1988) (opinion by Justice Howe).

fendant's last known address, pursuant to Rule 4(f)(1) of the Utah Rules of Civil Procedure,[2] satisfies the constitutional requirement of notice.[3] The decision implicitly overrules *Graham v. Sawaya*,[4] which held that service by publication and mailing to the defendant's last known address did not "measure up to the constitutional standard for an *in personam* judgment."[5] *Guenther* makes clear that service of process in compliance with Rule 4(f)(1) satisfies procedural due process.

1. The Case—On August 5, 1982, Frances Guenther filed suit in Piute County against her former husband, Russell R. Guenther, to renew a 1974 judgment awarding her back child support in the amount of $11,426.10.[6] Mrs. Guenther's attorney furnished the Piute County Sheriff with a summons and a copy of the complaint and directed the sheriff to serve it on the defendant. Despite repeated attempts to serve the summons, the sheriff was unable to find the defendant within Piute County. When the sheriff tried to

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2. UTAH R. CIV. P. 4(f)(1); *see infra* note 7.

3. The court did not specify whether it was opining on the scope of the requirement of notice under the United States Constitution or under the Utah Constitution. The court based its reasoning largely on its earlier decision in Carlson v. Bos, 740 P.2d 1269 (Utah 1987), in which it analyzed the notice requirements under the due process clause of the federal constitution, but not under the Utah Constitution. *See id.* at 1271 nn.4-5. The due process provision of the Utah Constitution, article I, § 7, parallels the due process clause of the fourteenth amendment to the United States Constitution. It would not be surprising if the Utah court should hold that the requirements with respect to notice under the state's due process provision do not exceed the federal due process requirements. The court remains free to decide that the state standard is more (but not less) stringent than the federal standard. Nonetheless, the *Guenther* court did not indicate which constitution it was interpreting. It appears that service under Rule 4(f)(1) satisfies at least the federal notice requirements; whether this mode of service satisfies the state notice requirements as well remains uncertain.

4. 632 P.2d 851 (Utah 1981).

5. *Id.* at 854 (emphasis in original). In *Graham*, the court distinguished between "in personam," "in rem," and "quasi in rem" actions. The *Graham* court adopted a more exacting standard for assessing the constitutionality of the notice given in an "in personam" action than would be applied in "in rem" or "quasi in rem" actions. *See infra* text accompanying notes 19-26. The United States Supreme Court has stated, however, that whether an action is "in personam," "in rem," or "quasi in rem" is irrelevant for purposes of determining whether the requirement of notice has been satisfied. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312 (1950). *Graham*'s reliance on this distinction for purposes of its notice analysis recently was abandoned by the Utah court in *Carlson*. Despite *Carlson*'s abandonment of the distinction, the "in personam" label reappears, for unstated reasons, in the text of the *Guenther* court's opinion analyzing the constitutionality of service of process pursuant to Utah Rule of Civil Procedure 4(f)(1). *Guenther*, 740 P.2d at 630. In light of *Mullane* and *Carlson*, it is likely that the *Guenther* court did not intend to limit the holding of this case to in personam actions.

6. The facts are taken from the court's opinion in *Guenther*, 749 P.2d at 629-30.

serve the defendant at his mother's house, where the defendant had once resided, the defendant's mother refused to accept service for him. Furthermore, she told the sheriff that she did not know the defendant's address, nor where he could be located.

Having failed to effect personal service of process on the defendant, Frances Guenther's attorney obtained a court order authorizing service by publication and mailing to the defendant at his last known address pursuant to Utah Rule of Civil Procedure 4(f)(1).[7] A second summons was prepared and published once a week for four consecutive weeks in a local newspaper. A copy was mailed to the defendant at his last known address, which he received within a few days of mailing.

The defendant entered a special appearance to contest jurisdiction and moved to quash the substituted service of summons. Among other things, the defendant contended that, in order for the plaintiff to obtain an in personam judgment against him, he first must be served personally with process. He argued that the substituted service by publication and mailing was not sufficient to confer jurisdiction over him.[8] The trial court denied the motion and gave the defendant fifteen days to answer the plaintiff's complaint. The defendant failed to answer the complaint and did not appear at trial. A default judgment was entered against him for $15,000. The defendant then appealed the denial of his motion to quash.

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7. Rule 4(f)(1) provides as follows:

> Where the person upon whom service is sought resides outside of the state, or has departed from the state, or cannot after due diligence be found within the state, or conceals himself to avoid the service of process, . . . service of process may be made by publication, as follows:
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> The party desiring service of process by publication shall file a motion verified by the oath of such party or of someone in his behalf for an order of publication. It shall state the facts authorizing such service and shall show the efforts that have been made to obtain personal service within this state, and shall give the address, or last known address, of each person to be served or shall state that the same is unknown. The court shall hear the motion ex parte and, if satisfied that due diligence has been used to obtain personal service within this state, or that efforts to obtain the same would have been of no avail, shall order publication of the summons in a newspaper having general circulation in the county in which the action is pending. Such publication shall be made at least once a week for four successive weeks. Within ten days after the order is entered, the clerk shall mail a copy of the summons and complaint to each person whose address has been stated in the motion. Service shall be complete on the day of the last publication.

UTAH R. CIV. P. 4(f)(1).

8. The defendant based this argument on Graham v. Sawaya, 632 P.2d 851 (Utah 1981). For further discussion of *Graham*, see *infra* text accompanying notes 19-26.

The Utah Supreme Court upheld the trial court's denial of the defendant's motion to quash, relying on its recent decision in *Carlson v. Bos.*[9] In *Carlson*, the court recognized that the requirement of notice under the due process clause of the fourteenth amendment to the United States Constitution could be satisfied without personal service of process on the defendant.[10] Applying a balancing test derived from the United States Supreme Court's ruling in *Mullane v. Central Hanover Bank & Trust Co.*,[11] the *Guenther* court held that the state's interest in allowing plaintiffs such as Mrs. Guenther to maintain actions in its courts outweighed defendants' interest in being notified of actions against them by personal service.[12] The court, therefore, concluded that, pursuant to Utah Rule of Civil Procedure 4(f)(1), the plaintiff's notification of the defendant satisfied the requirements of due process.

2. Background—Due process requires, as a fundamental matter, that defendants in civil proceedings be given notice of actions pending against them and an opportunity to be heard. Ideally, notice should be given to the defendant by personal service of process. Situations often arise, however, in which a plaintiff lacks knowledge of the location of the defendant or is otherwise unable to effect personal service of process on the defendant within the limits of the jurisdiction in which suit has been filed. This problem was addressed by the United States Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*[13]

In *Mullane*, the Court considered the constitutional sufficiency of notice to the beneficiaries of a judicial settlement of the accounts of a common trust fund.[14] The Court stated that to satisfy procedural due process the form of notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[15] In determining the type of notice re-

9. 740 P.2d 1269 (Utah 1987). *Carlson* held that substituted service of process pursuant to Utah's nonresident and departed resident motorist statute, UTAH CODE ANN. § 41-12-8 (1981) (current version at UTAH CODE ANN. § 41-12a-505 (1988)), satisfied the federal procedural due process requirements of notice. For further discussion of *Carlson*, see *Recent Developments in Utah Law*, 1988 UTAH L. REV. 149, 163.

10. *Guenther*, 749 P.2d at 630.

11. 339 U.S. 306 (1950).

12. *Guenther*, 749 P.2d at 631.

13. 339 U.S. 306 (1950).

14. *Id.* at 307.

15. *Id.* at 314.

quired, the Court used a balancing test by which it weighed the interest of the state in the subject matter of the proceeding against the interest of the parties in being apprised of the action.[16] The Court concluded that substituted service of process was constitutionally acceptable when the state's interest in the subject matter of the proceeding outweighed the interests of the concerned parties in being personally served.[17]

To enable plaintiffs to proceed against defendants on whom they are unable to effect personal service of process, the Utah Legislature has enacted various procedural devices, such as the substitute service provisions of Utah Rule of Civil Procedure 4(f)(1) and Utah's nonresident and departed resident motorist statute.[18] These alternate methods of service of process were challenged on due process grounds in two Utah cases.

In *Graham v. Sawaya*,[19] the Utah Supreme Court held that a valid default judgment could not be entered in an in personam action in which the only notice given to the defendant was by publication and mailing to the defendant's last known address.[20] The court stated that the due process provisions of the United States and Utah Constitutions require that defendants be given notice of pending actions against them before a judgment affecting their rights can be entered.[21] When the plaintiff seeks to notify the defendant of a pending lawsuit, the court stated that due process requires that the method of service be " 'reasonably calculated to give [defendant] actual notice of the proceedings and an opportunity to be heard,' "[22] and " 'must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.' "[23] The court further stated that the federal and state constitutions "require reasonable assurance of actual notice for an *in personam* judgment,"[24] and noted that there is no basis for presuming that publication will give actual notice.[25] The court concluded that

16. *Id.* at 313-14.

17. *Id.* at 314.

18. UTAH CODE ANN. § 41-12-8 (1981) (current version at UTAH CODE ANN. § 41-12a-505 (1988)).

19. 632 P.2d 851 (Utah 1981).

20. *Id.* at 852.

21. *Id.* at 853.

22. *Id.* at 854 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)) (brackets in original).

23. *Id.* (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950)).

24. *Id.* (emphasis in original).

25. *Id.*

notice by means of publication, even when accompanied by mailing to the defendant's last known address, did not satisfy the requirements of due process under the federal or state constitutions.[26]

Graham was criticized and rejected by the court in its recent decision in *Carlson v. Bos.*[27] In *Carlson*, the court held that substitute service of process pursuant to the provisions of Utah's nonresident or departed resident motorist statute[28] satisfied the requirements of federal procedural due process, provided the plaintiff had made diligent efforts to locate the defendant prior to effecting service pursuant to the statute.[29] The court rejected *Graham*'s holding that publication, together with mailing to the defendant's last known address, can never satisfy the requirements of due process.[30]

The *Carlson* court criticized *Graham* as being based on an overly rigid interpretation of *Mullane*.[31] The court interpreted *Mullane* as permitting service pursuant to a procedure such as that established by section 41-12-8 if the state's interest in the subject matter of the litigation was deemed to outweigh the defendants' interest in receiving actual notice.[32] In making that determination for purposes of the case before it, the *Carlson* court balanced the state's interests in having safe highways and providing its residents with a means of settling their disputes with nonresidents through its legal system against the defendants' interest in being informed of the actions filed against them.[33] The court next considered the practical difficulties faced by a plaintiff when trying to notify a defendant who is difficult to find.[34] The court

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26. *Id.*

27. 740 P.2d 1269 (Utah 1987).

28. UTAH CODE ANN. § 41-12-8 (1981) (current version at UTAH CODE ANN. § 41-12a-505 (1988)). The statute provided that service of process could be made by serving a copy of the complaint on the Secretary of State and sending notice of the substituted service by registered mail to defendants' last known address. *Id.*

29. *See Carlson*, 740 P.2d at 1277.

30. *Id.* at 1271.

31. *Id.* at 1273.

32. *Id.*

33. *Id.* at 1274-75.

34. *Id.* at 1275. The court found weighing the practical difficulties faced by the plaintiff in giving the defendant notice to be the most difficult part of the *Mullane* analysis, but held it to be necessary in determining whether substitute service is " 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity' to participate in the action." *Id.* at 1275 (quoting *Mullane*, 339 U.S. at 314). The court concluded that the phrase "under all the circumstances," as used in the *Mullane* opinion, means that the plaintiff must use diligence in taking such steps as are reasonably practical to give the defendant actual notice. *Id.*

concluded that if, after a duly diligent effort, the plaintiff is still unable to ascertain the defendant's present address, due process may be satisfied by serving the defendant pursuant to the nonresident and departed resident motorist statute.[35]

3. Analysis—Guenther is the first case since *Graham* to uphold a judgment against a defendant who had been notified of the action only by publication and mailing pursuant to Rule 4(f)(1).[36] The *Guenther* court concluded that the trial court acted properly in ordering service pursuant to Rule 4(f)(1)[37] and upheld the trial court's denial of the motion to quash the summons.[38] Applying the balancing test set out in *Carlson* and *Mullane*, the court concluded that the defendant's interest in being notified of the pending action against him was outweighed by the state's interest in providing persons such as the plaintiff access to its courts and allowing them to maintain their actions.[39]

Although the *Guenther* court relied on the *Carlson* analysis in concluding that substituted service of process by publication and mailing, pursuant to Rule 4(f)(1), satisfies constitutional due process requirements, there are some significant differences between the two cases. In *Carlson*, the plaintiff attempted service under Utah's nonresident or departed resident motorist statute.[40] Under the *Carlson* analysis, one of the factors to be considered in determining what manner of service will satisfy due process is the state's interest in the subject matter of the proceedings. The *Carlson* court noted that the relatively short time period for completing service pursuant to the nonresident or departed resident motorist statute, as compared with the four-week period under Rule 4(f)(1), indicated that the state is more concerned that plaintiffs be able to proceed against defendants who are departed resident or

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35. *Id.* at 1277-78. To satisfy the due diligence requirement, the plaintiff must show the following: (1) That the facts of the case justify the use of the statute; and (2) that the plaintiff has made a diligent effort to obtain the defendant's current address. *Id.* at 1276-77.

36. Although *Carlson* provided a method for determining the constitutionality of the notice given, the case was remanded because there was insufficient information in the record for the court to determine whether the plaintiff had met the due diligence requirement that the court had imposed. *Id.* at 1278.

37. For the circumstances in which substituted service is permitted under Rule 4(f)(1), see *supra* note 7.

38. Guenther v. Guenther, 749 P.2d 628, 630-31 (Utah 1988).

39. *Id.* at 631.

40. UTAH CODE ANN. § 41-12-8 (1981) (current version at UTAH CODE ANN. § 41-12a-505 (1988)). The current statute does not differ from the 1981 version in a way relevant to this discussion.

nonresident motorists than it is in permitting plaintiffs to proceed against defendants who can be served under Rule 4(f)(1).[41] Following this line of reasoning, the state presumably had a lesser interest in the subject matter in *Guenther* than it had in *Carlson*, because service in *Guenther* was under Rule 4(f)(1). Therefore, in weighing the interest of the state against that of the defendant, more weight should have been given to the defendant's interest in *Guenther* than was given to the defendant's interest in *Carlson*. The court did not indicate how it applied the *Carlson* analysis to the facts in *Guenther*, nor did it explain the process it used to balance the respective interests and arrive at its conclusion.

In a case such as *Carlson*, in which the plaintiff attempts service under the nonresident or departed resident motorist statute, the individual's involvement in an automobile accident in the state forewarns of the possibility of being summoned into the courts of the state. The individual's interest in being notified of a pending lawsuit can be protected by keeping authorities advised of his current address. In a case such as *Guenther*, in which the defendant has been served under Rule 4(f)(1), the defendant is less likely to have anticipated being sued, and therefore may not learn of the pending lawsuit unless actual notice is received through other means. In *Guenther*, the defendant did receive actual notice by mail.[42] Whether the court would reach the same result if the defendant was a Utah resident who did not receive actual notice remains unanswered.

Guenther also provides some indication of what the court might consider sufficient to satisfy the due diligence requirement in attempting to obtain personal service on a defendant. Some factors that might be important in establishing due diligence include repeated attempts to serve the defendant personally, attempts to serve him at his residence, and efforts to ascertain the defendant's

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41. *See* Carlson v. Bos, 740 P.2d 1269, 1275 n.10 (Utah 1987). The current version of the nonresident or departed resident motorist statute provides as follows: "Service of process . . . is made by serving a copy upon the lieutenant governor or by filing a copy in his office . . . . The plaintiff shall, within ten days after service of process, send notice of the process . . . to the defendant by registered mail at his last known address." UTAH CODE ANN. § 41-12a-505 (1988). Apparently, service is complete under § 41-12a-505 when the plaintiff mails the notice of process to the defendant's last known address. This would allow for completion of service within a very short period of time, but in any case, no longer than ten days after service on the Lieutenant Governor. Under Rule 4(f)(1), service is not complete until the last date of publication, which is at least four weeks after the action is commenced. *See* UTAH R. CIV. P. 4(f)(1).

42. *See Guenther*, 749 P.2d at 630.

current address.

The *Guenther* case also furnishes some insight into objections to service pursuant to Rule 4(f)(1) that a court may consider if raised by the defendant. The defendant may be able to prevail on a motion to quash service if he can show that the plaintiff did not use due diligence in trying to effect personal service, that the defendant was not a resident of the county,[43] that the mode of service was not reasonably calculated to apprise the defendant of the action, or that the address to which notice was sent was not the defendant's last known address.[44]

4. Conclusion—Guenther establishes that a court may enter a valid default judgment in an action in which service of process was accomplished by publication and mailing to the defendant's last known address, pursuant to Utah Rule of Civil Procedure 4(f)(1), provided the plaintiff has used due diligence in trying to obtain personal service on the defendant. In determining whether the mode of service is sufficient to satisfy constitutional procedural due process, the court will weigh the interest of the defendant in being personally served against the interest of the state in allowing plaintiffs to maintain their actions in its courts.

Guenther is significant because it is the first case since *Graham* to actually hold that service of process pursuant to Rule 4(f)(1) is a constitutionally sufficient means of notifying the defendant of a pending action. After *Guenther*, it will be easier for plaintiffs in Utah to maintain their actions against defendants who are difficult to find.

III. CONSTITUTIONAL LAW

A. *The Constitutionality of the Sentencing Reform Act of 1984**

The case of the so-called Singer-Swapp family, a polygamous

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43. It is not clear why the court suggested that nonresidence in the county in which publication was made would offer a basis for challenging service of process pursuant to Rule 4(f)(1). If the fact that the defendant resided in another county could have been discovered easily, a trial court might infer that the plaintiff did not use due diligence in trying to locate the defendant. Alternatively, a trial court might conclude that the plaintiff's failure to publish notice in the defendant's county of residence indicates that the plaintiff's chosen means of service was not reasonably calculated to give the defendant actual notice.

44. *Guenther*, 749 P.2d at 630.

* Mary Catherine McAvoy, Junior Staff Member, *Utah Law Review*.

Editor's note: On January 18, 1989—just as this issue of the *Utah Law Review* was going

group of religious fundamentalists who attempted to bring about the resurrection of their martyred patriarch by provoking a confrontation with law enforcement officials, attracted national attention.[1] But the case is noteworthy aside from its notoriety and the sensationalism that characterized news reports associated with it. The case provided an occasion for the United States District Court for the District of Utah to rule that the Sentencing Reform Act of 1984[2] ("Act") is unconstitutional. In *Swapp v. United States*,[3] the court held that the Act has resulted in a violation of the doctrine of separation of powers, that it constitutes an unlawful delegation of legislative authority, and that it impermissibly sidesteps the procedural requirements of article I of the United States Constitution.[4]

The United States Supreme Court is scheduled to hear a case

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to press—the United States Supreme Court, in Mistretta v. United States, 57 U.S.L.W. 4102 (U.S. Jan. 18, 1989), upheld the constitutionality of the Sentencing Reform Act of 1984, thereby overturning the case that is the subject of this Development. The Court's holding was something of a surprise—not only to us, but also to a substantial majority of federal courts that have found the Act unconstitutional. *See infra* note 22.

In *Mistretta*, Justice Blackmun's majority opinion held that the Act, in calling for the participation of federal judges in the promulgation of sentencing guidelines for individuals convicted of federal crimes, does not amount to an unconstitutional delegation of congressional power. Delegation is appropriate, the Court reasoned, when the delegating entity specifically delineates the boundaries of discretion within which the entity exercising delegated power may act. The Sentencing Reform Act, according to the Court, represents such a situation. *Mistretta*, 57 U.S.L.W. at 4105. As to the argument that the Act effects a disruption of the federal system of separated powers, the Court held that, "[a]lthough the unique composition and responsibilities of the Sentencing Commission give rise to serious concerns about a disruption of the appropriate balance of governmental power among the coordinate Branches," the Act did not pose a serious enough threat to justify invalidation of "Congress' considered scheme for resolving the seemingly intractable dilemma of excessive disparity in criminal sentencing." *Id.* at 4108. The Court similarly disposed of the argument that, because Congress' guidelines promulgation scheme calls for Presidential appointment of judges to the Commission, the Act places judges under the control of the executive branch. According to the Court, "Were the impartiality of the Judicial Branch so easily subverted, our constitutional system would have failed long ago." *Id.* at 4115. The Court's lone dissenter, Justice Scalia, found no provision in the Constitution authorizing the existence of such a body as the Sentencing Commission. Justice Scalia characterized the Commission as a "new branch altogether, a sort of junior-varsity Congress." *Id.* at 4119 (Scalia, J., dissenting).

In sum, the Court wrote that, while the Act raises significant constitutional issues, in the case of the Sentencing Commission, such concerns amount to more smoke than fire. This Development presents the other perspective, albeit the losing side.

1. *See, e.g.*, Baker & Wilson, *Utah: "We Are Going Into Battle,"* NEWSWEEK, Feb. 1, 1988, at 29.

2. Pub. L. No. 98-473, tit. II, ch. 2, §§ 211-239, 98 Stat. 1987-2040.

3. 695 F. Supp. 1140 (D. Utah 1988). The defendants' convictions were not reported.

4. *Id.* at 1142.

involving the issue during its October 1988 term.[5] While it is by no means certain which way the Court will rule, recent precedent indicates that the Court will declare at least part of the statute invalid.

1. Statutory Requirements—The Sentencing Reform Act was incorporated into the Comprehensive Crime Control Act of 1984.[6] One of Congress' purposes in enacting the law was to eliminate what has been termed the "shameful disparity" in sentences that could be imposed on defendants who committed federal offenses.[7] The Act established the United States Sentencing Commission, designated by the statute as "an independent commission in the judicial branch of the United States."[8] The Commission's duty is to devise a set of sentencing guidelines,[9] which are to be applied in cases involving offenses committed after November 1, 1987.[10] The guidelines represent a significant change from the previous sentencing process, in which a judge was free to impose any sentence from probation up to the statutory maximum for the particular offense.[11] According to the Act:

> The court shall impose a sentence of the kind and within the range [established by the guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing

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5. *See* United States v. Johnson, 682 F. Supp. 1033 (W.D. Mo.), *cert. granted sub nom.* United States v. Mistretta, 108 S. Ct. 2818 (1988).

6. Pub. L. No. 98-473, tit. II, 98 Stat. 1976, 2199.

7. S. REP. No. 225, 98th Cong., 1st Sess. 65 (1983); *see* 28 U.S.C. § 991(b)(1)(B) (1982 & Supp. III 1985).

8. 28 U.S.C. § 991(a) (1982 & Supp. III 1985). The Commission is composed of seven voting members appointed by the President with the advice and consent of the Senate, and one nonvoting member, who is to be the Attorney General or his designee. *Id.* Three of the voting members must be federal judges, "selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States." *Id.* Members of the Commission are subject to removal by the President for neglect of duty, malfeasance, "or for other good cause shown." *Id.*

9. *See id.* § 994.

10. For purposes of application, the guidelines are set forth in a sentencing table of 43 rows and six columns. The rows correspond to "offense levels" and the columns to "criminal history categories." Categories in each axis are given numerical values. In essence, the sentencing judge determines the appropriate offense level and criminal history category for the defendant by taking into account factors deemed relevant according to the guidelines. The numerical values are adjusted up or down depending on whether aggravating or mitigating circumstances are present. The intersection point of the applicable row and column contains the appropriate sentence, expressed as a range of months. *See* United States v. Bermingham, 855 F.2d 925, 927-28 (2d Cir. 1988).

11. *See id.*

> Commission in formulating the guidelines that should result in a sentence different from that described.[12]

A judge must state in open court whether he has decided to impose the sentence specified in the applicable guideline, and must give the reasons for complying with or departing from the guideline.[13]

2. *Background*—The *Swapp* court's leading criticism of the Act was that it violates the doctrine of separation of powers. The notion that separation of powers is essential to a scheme of representative democracy goes back to the Founding Fathers and the political philosophers who inspired the writers of the Constitution.[14] Embodied in the idea is a recognition that the separate branches of government are distinct in purpose and function, and must remain so.[15] The United States Supreme Court has written that "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."[16]

According to *Morrison v. Olson*,[17] the Court's most recent pronouncement on the subject of separation of powers, federal judicial power is limited by article III of the Constitution to the deciding of cases and controversies.[18] In *Morrison*, the Court ruled that federal courts may not engage in executive or administrative duties.[19] This ensures that judges do not "encroach upon executive or legislative

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12. 18 U.S.C. § 3553(b) (Supp. IV 1986).

13. *Id.* § 3553(c).

14. "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined with the executive power, the judge might behave in all the violence of an oppressor." THE FEDERALIST No. 47, at 332 (J. Madison) (M. Dunne ed. 1908) (quoting Montesquieu).

15. This view is commonly accepted among federal courts, and conforms to the design of the Framers of the Constitution. *See generally* Carter, *From* Sick Chicken *to* Synar: *The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U. L. REV. 719. *But see* United States v. Ruiz-Villanueva, 680 F. Supp. 1411, 1424 (S.D. Cal. 1988) ("The prevailing approach today is to regard the lines which separate the branches as somewhat indistinct . . . . [W]here the government is presented with a task as important as restructuring the criminal sentencing system, it is appropriate that the branches coordinate their efforts.").

16. INS v. Chadha, 462 U.S. 919, 951 (1983).

17. 108 S. Ct. 2597 (1988).

18. *Id.* at 2611-12 (citing Muskrat v. United States, 219 U.S. 346, 356 (1911)).

19. *See Morrison*, 108 S. Ct. at 2613. This holding echoes the Court's decision in Buckley v. Valeo, 424 U.S. 1 (1976): "This Court has not hesitated to enforce the principle of the separation of powers embodied in the Constitution . . . . The Court has held that executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution." *Id.* at 123.

authority or undertake tasks that are more properly accomplished by those branches."[20]

The Supreme Court established long ago that the power to define federal crimes and to prescribe punishment rests with Congress.[21] This principle has been the basis for many judicial opinions[22] holding that the guidelines and Sentencing Commission provisions of the Sentencing Reform Act are unconstitutional.[23] In the words of the Ninth Circuit Court of Appeals:

> Reason and authority point squarely to the conclusion that the Commission is assigned the function of promulgating substantive rules and policies governing primary conduct and having the force and effect of law, tasks that only the legislative or executive branches, not the judicial branch, may constitutionally perform.[24]

3. The Utah District Court's Holding in Swapp—The federal district court for Utah, expressing its views in an en banc memorandum opinion,[25] echoed the separation of powers concerns noted above. The court held that, by assigning legislative powers to members of the federal judiciary, Congress impermissibly delegated its authority.[26] According to the court, the power to define and fix criminal penalties cannot be transferred.[27] The court ob-

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20. *See Morrison*, 108 S. Ct. at 2613.

21. *See Ex parte* United States, 242 U.S. 27 (1916); United States v. Wiltberger, 18 U.S. (5 Wheat.) 35 (1820).

22. The *Swapp* court, by its own admission, was not the first to grapple with the question of whether the Act is constitutional. According to the court's estimate, over 50 judicial opinions had considered the issue as of July 18, 1988, "with the cases running more than two to one against the constitutionality of the Act." United States v. Swapp, 695 F. Supp. 1140, 1143 (D. Utah 1988).

23. *See, e.g.*, United States v. Arnold, 678 F. Supp. 1463 (S.D. Cal. 1988) (Act held unconstitutional); United States v. Frank, 682 F. Supp. 815 (W.D. Pa. 1988) (same); United States v. Estrada, 680 F. Supp. 1312 (D. Minn. 1988) (same).

24. Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245, 1254 (9th Cir. 1988). The Ninth Circuit is the highest court to date to have found the Act unconstitutional.

25. "[S]tatutes do not forbid, and some districts on occasion follow, the practice of having all of the judges of the court sit en banc in important matters . . . to establish uniformity within the district on recurring questions." 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3505 (2d ed. 1984) (footnotes omitted).

26. *See Swapp*, 695 F. Supp. at 1146. The court cited Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), in support of the proposition that "[i]t has been fundamental since 1803 the Congress cannot constitutionally give the judiciary more power than the Constitution provides." *Swapp*, 695 F. Supp. at 1146.

27. *See Swapp*, 695 F. Supp. at 1149. *But see, e.g.*, United States v. Arnold, 678 F. Supp. 1463, 1468-69 (S.D. Cal. 1988) (holding that the Commission did not receive unlawfully delegated authority because the Sentencing Reform Act provided "ample statements of policy and specific rules to guide the Commission's exercise of the delegated power"). *Cf.*

served that the legislative and judicial branches are fundamentally different:

> Legislative power and judicial power are ordinarily applied at differing levels of abstraction, with the legislative power dealing with the general and the judicial power dealing with the concrete and fact specific. Congress is not well equipped to render individualized judgments in cases and controversies, nor should it be expected to do so . . . . And the judicial branch should no more legislate than legislators should judge cases and controversies.[28]

The court noted that, even though the Act places the Commission in the judicial branch, the Commission's function in promulgating the guidelines is legislative in nature.[29] As the court wrote, "Courts may impose sentences within the ranges Congress prescribes, but it is for Congress—not the courts—to define the ranges . . . . [Courts] may not make substantive rules or policy decisions outside the context of specific cases and controversies."[30]

The *Swapp* court also ruled that the Act violated the doctrine of separation of powers by placing federal judges on the Commission in a formal working relationship with representatives of other branches, from whom they should be insulated. In the court's words, "Such intimate involvement with other branches 'undermines the status of the judiciary as a neutral forum for the resolution of disputes between citizens and their government.' "[31] Furthermore, in the court's view, the fact that judges on the

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United States v. Batchelder, 442 U.S. 114, 126 (1979). *Batchelder* involved a challenge to federal statutes imposing different sentences for the same substantive offense, affording prosecutors a choice of penalties to seek. The petitioner argued that the result impermissibly delegated power to the executive branch (in the person of the prosecutor). The Court ruled that there had been no unacceptable delegation of power because the statutes were specific about the range of penalties: "Having informed the courts, prosecutors, and defendants of the permissible punishment alternatives available under each Title, Congress has fulfilled its duty." *Id.*

28. *Swapp*, 695 F. Supp. at 1144.

29. *Id.* at 1145.

30. *Id.* at 1144-45; *see also* United States v. Estrada, 680 F. Supp. 1312, 1324 (D. Minn. 1988) ("[T]he extensive hearings, elaborate fact-finding processes, and myriad policy decisions undertaken by the Commission in promulgating general rules of future applicability are clear evidence that the Commission has performed the legislative function of prescribing the punishment for crime." (citations omitted)). This analysis accords with the Supreme Court's dictum in Keller v. Potomac Elec. Power Co., 261 U.S. 428, 440-41 (1922). " 'A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist . . . . Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter . . . .' " *Id.* (quoting Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908)).

31. *Swapp*, 695 F. Supp. at 1147-48 (citations omitted).

Commission are appointed by the President and can be removed by him gives the executive branch undue control over the judiciary, jeopardizing its independence and impartiality.[32]

In addition, the court ruled that the Act places impermissible restrictions on the freedom of the courts to exercise judicial discretion.[33] As the court noted, the guidelines treat a "poor, deeply religious grandmother from Marion, Utah, who has young children at home to support, the same as the successful, hardened mafioso from the Bronx."[34] According to the court, judges have historically had considerable latitude to individualize sentences, and the guidelines improperly standardize the sentencing process.[35]

The court also observed that the Act results in a violation of the procedural requirements of article I of the Constitution.[36] The court equated the sentencing guidelines with legislation, which to become law under article I must pass both houses of Congress and be presented for the President's signature.[37] This requirement is bypassed under the provisions of the Act because the guidelines go into effect as soon as they are created.[38]

The Utah court refused to sever the unconstitutional provisions from the rest of the Sentencing Reform Act and invalidated the entire statute, reasoning that " 'severance of the guidelines and the portion of the act that creates the Commission affects such a radical change in the legislation that it becomes an entirely new bill.' "[39] Realizing that the issue has yet to be definitively settled, however, the court ordered the United States Probation Office for the Utah District to process its presentence investigation reports to comply with both the old and the new systems, in case some de-

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32. *Id.* at 1148; *see also Estrada*, 680 F. Supp. at 1332 ("[W]hether judges are actually swayed by the prospect of an executive appointment, there is a real danger that the public will come to view the judge's actions as motivated by a desire to please the President.").

33. *See Swapp*, 695 F. Supp. at 1145; *see also* United States v. Elliott, 684 F. Supp. 1535, 1541 (D. Colo. 1988) ("Congress cannot combine a grant of discretion to the courts with such restrictions that the results of the adjudicative processes are dictated."). *Elliott*, which like *Swapp* was decided in the Tenth Circuit, also held the guidelines and Sentencing Commission provisions of the Act unconstitutional. *See id.*

34. *Swapp*, 695 F. Supp. at 1150.

35. *Id.* at 1145.

36. *Id.* at 1149.

37. *Id.*

38. *Id.*

39. *Id.* at 1150 (quoting United States v. Russell, 685 F. Supp. 1245, 1252 (N.D. Ga. 1988). *But see* United States v. Estrada, 680 F. Supp. 1312, 1336 (D. Minn. 1988) (noting that severance of unconstitutional provisions would preserve the legitimate goal of instituting "fundamental and revolutionary changes in the sentencing process").

fendants have to be resentenced at a later date.[40] For the time being, however, defendants in Utah will not be sentenced under the guidelines.

4. Analysis—The *Swapp* opinion was a well reasoned and valiant defense of the separation of powers doctrine. The court clearly demonstrated its unwillingness to allow any congressional incursion on judicial turf. Its analysis was consistent with Supreme Court precedent, which restricts the activities of the federal judiciary to the deciding of cases and controversies.[41]

While the *Swapp* court did not reach the issue, the Act also could have been attacked on the grounds that it violates defendants' due process rights. In cases where Congress has not specified a penalty for a particular offense, the guidelines now supply a minimum mandatory sentence.[42] In addition, the guidelines dictate to judges what weight they may assign to circumstances relevant to each case.[43] This not only precludes judicial discretion, but also arguably denies defendants—whose liberty interest is at stake—the opportunity for a fair hearing. Viewed in this light, judicial discretion is not merely a prerogative of judges but a constitutional entitlement of defendants.[44]

In any case, if the Supreme Court's recent statements regarding the separation of powers provide any insight into how the issue will be decided during the 1988 Term, the Court likely will declare unconstitutional the provisions of the Act establishing the Commission and providing for promulgation of the guidelines.[45] In the meantime, as *Swapp* makes clear, federal judges in Utah will continue to impose sentences just as they did before the guidelines went into effect.

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40. *See Swapp*, 695 F. Supp. at 1150.

41. *See* Buckley v. Valeo, 424 U.S. 1 (1976); Keller v. Potomac Elec. Power Co., 261 U.S. 428 (1923); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

42. *See Swapp*, 695 F. Supp. at 1145.

43. *See* United States v. Frank, 682 F. Supp. 815, 819 (W.D. Pa. 1988).

44. *See* United States v. Bolding, 683 F. Supp. 1003, 1005 (D. Md. 1988); *Frank*, 682 F. Supp. at 819.

45. *See* Morrison v. Olson, 108 S. Ct. 2597, 2613 (1988). *But see* United States v. Arnold, 678 F. Supp. 1463, 1467 (S.D. Cal. 1988) (observing that the Supreme Court historically has shown deference to congressional delegations of power).

*B. Child Abuse: Victim's Rights Versus the Sixth Amendment Right of Confrontation**

In *State v. Moton*,[1] the Utah Supreme Court held that a trial court did not abuse its discretion by failing to excuse a prospective juror for cause after the juror stated that the criminal penalty involved was too lenient, but that her opinion would not affect her ability to determine guilt or innocence. The court also held that the defendant's sixth amendment right of confrontation[2] was not denied merely because cross-examination on the victim's past sexual experiences was limited at trial.

1. The Case—Moton involved sexual abuse of a ten-year-old girl by an adult.[3] The defendant, Irvin Moton, was charged with forcible sodomy of a child, a first degree felony,[4] and sexual abuse of a child, a second degree felony.[5] During voir dire, the trial judge asked prospective jurors whether they believed the prison terms for sodomy on a child or for sexual abuse of a child were "not severe enough." Six prospective jurors responded affirmatively. The judge then asked whether their beliefs would influence their ability to determine the defendant's guilt or innocence. Two prospective jurors answered that this belief would not affect their decision, while two others answered "I don't think so." Another two prospective jurors stated that their beliefs might influence their decision. The latter two jurors were excused for cause.

The defense and prosecuting counsel were then given the opportunity to question the prospective jurors. Defense counsel's only question concerned prior involvement with special education programs. Neither counsel reexamined the criminal penalty issue during the questioning of the jury. Both counsels expressly passed the jury for cause. The two jurors who stated that they did not think their feelings regarding the penalties would affect their decisions were removed by peremptory challenge; one by the state, the other by the defense.

During the trial, Jennifer,[6] the alleged victim, testified that

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* Jonathan L. Hawkins, Junior Staff Member, *Utah Law Review*.

1. 749 P.2d 639 (Utah 1988) (opinion by Justice Howe).
2. U.S. CONST. amend. VI; UTAH CONST. art. I, § 12.
3. The facts are taken from the court's opinion in *Moton*, 749 P.2d at 641-42.
4. UTAH CODE ANN. § 76-5-403.1 (Supp. 1988).
5. *Id.* § 76-5-404.1.
6. The accuser's name is from the Brief of Respondent at 4, State v. Moton, 749 P.2d 639 (Utah 1988) (No. 20806).

her aunt's boyfriend, Irvin Moton, had entered her bedroom on December 24, 1983. Once in her room, Moton told Jennifer to face the wall while standing on her bunkbed ladder. The defendant proceeded to lick her genital area. At this time, Moton also offered Jennifer five dollars to lick his genitals. She refused. It was further alleged that on January 4, 1984, Moton approached Jennifer while she was bathing and began sucking her breast and touching her genitals.

At trial the defense counsel established that Jennifer was in a special education program for behavioral problems. Cross-examination continued and Jennifer admitted that she "knew a lot about sex and . . . knew all about sexual anatomy and understood the act of fellatio."[7] The defense counsel then attempted to question Jennifer regarding her prior sexual experiences. The trial court sustained repeated objections from the state concerning the defense counsel's line of questioning. The trial court then excused the jury and allowed the defense counsel to explain what the excluded testimony would show if it was admitted. Defense counsel argued that the questions regarding the victim's prior sexual experiences would reveal that Jennifer had a "propensity to become involved in sexual kinds of things."[8] The questions also would illustrate that Jennifer had a "propensity to lie about this sort of thing, and, in fact, that [Jennifer had fabricated this] sexual experience for attention."[9]

The trial court concluded that Jennifer's prior sexual activities were immaterial because it had been established that she had a great deal of knowledge about sex. The court would not allow defense counsel to ask questions relating to specific instances in which the victim had observed sexual activities. Defense counsel was allowed to question Jennifer about lying on prior occasions, including one occasion when she had lied about a man kissing her. Jennifer admitted to lying in each incident. Jennifer also stated that she had boasted to her friends and her relatives about her involvement in the instant case and her dislike for the defendant.

The defendant was found guilty of the charged offenses. Moton appealed the verdict, claiming that he was denied a fair trial because the trial court failed to excuse a biased prospective juror for cause. Moton also claimed that the trial court denied him

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7. *Moton*, 749 P.2d at 641.
8. *Id.*
9. *Id.*

his right of confrontation by precluding cross-examination regarding the victim's prior sexual conduct and prior fabricated accusations of sexual misconduct against others.[10]

The *Moton* decision consisted of three separate opinions.[11] Justice Howe wrote for the majority on the biased juror and ineffectiveness of counsel issues. Justice Howe noted that the defense counsel failed to make a motion at trial to dismiss the potential juror for cause. The court held that this failure constituted a waiver of subsequent objection under Rule 12(d) of the Utah Rules of Criminal Procedure.[12] Because the failure of Moton's counsel to request the juror's dismissal for cause at trial effectively waived the right to challenge the voir dire of the jury,[13] the court held that relief on this appeal must be based on the trial court's failure to dismiss a juror for cause when the dismissal should have occurred as a matter of law.[14] The court went on to hold that the prospective jurors did not have strong feelings that would require excusing them for cause.[15]

The *Moton* court's three separate opinions reflect a divided court with respect to the sixth amendment right of confrontation issue. Justice Howe's opinion was joined by Chief Justice Hall and

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10. Moton also claimed a denial of effective assistance of counsel at trial because of counsel's failure to request a prospective juror be dismissed for cause. *Id.* at 643. The Utah Supreme Court summarily rejected this issue because Moton did not show "(1) that his counsel rendered a deficient performance . . ., and (2) that the outcome of the trial would probably have been different but for counsel's error." *Id.* (citing State v. Geary, 707 P.2d 645, 646 (Utah 1985)); *see* United States v. Cronic, 466 U.S. 648 (1984); Strickland v. Washington, 466 U.S. 668 (1984). Moton failed to satisfy the first prong because the motion to dismiss for cause would have failed and therefore it was not deficient for counsel not to have requested it. Moton failed to satisfy the second prong because the outcome of the trial would not have been any different had counsel made the motion to dismiss the prospective juror. *See Moton*, 749 P.2d at 643.

11. Justice Howe's opinion was joined by Chief Justice Hall. *See Moton*, 749 P.2d at 644 (Hall, C.J., concurring). Justice Zimmerman authored a concurrence that was joined by Justice Durham. *See id.* at 644 (Zimmerman & Durham, JJ., concurring). Associate Chief Justice Stewart issued a dissenting opinion. *See id.* at 645 (Stewart, J., dissenting).

12. *Id.* at 642 (majority opinion); *See* UTAH R. CRIM. P. 12(d) ("Failure of the defendant to timely raise defenses or objections . . . at the time set by the court shall constitute waiver thereof . . . ."). The Utah Supreme Court in State v. Miller, 674 P.2d 130 (Utah 1983), ruled that any error of improper voir dire of the jury was waived when "[c]ounsel neither objected, reminded the judge of the oversight, made a new request, nor asked permission personally to voir dire the jury." *Id.* at 131.

13. Had a motion for dismissal of the juror been filed and erroneously denied by the trial court, the challenge would have been preserved for appeal. *See* State v. Hewitt, 689 P.2d 22 (Utah 1984); State v. Brooks, 631 P.2d 878 (Utah 1981); Jenkins v. Parrish, 627 P.2d 553 (Utah 1981).

14. *See Moton*, 749 P.2d at 642.

15. *Id.* at 643.

indicated that it was within the trial court's discretion to find that some of the victim's past sexual activities were immaterial and to exclude admission of that evidence.[16] The exclusion of such evidence did not violate the defendant's constitutional right of confrontation because the defense counsel was allowed to question Jennifer regarding her sexual knowledge, her possible motive for accusing Moton, and her past lies, including some fabricated sexual matter.[17] In addition, the defendant took the stand himself and attacked Jennifer's credibility.[18] Justice Howe and Chief Justice Hall, therefore, found that the right of confrontation was satisfied in this case.[19]

Justice Zimmerman wrote a separate concurrence that was joined by Justice Durham. The concurrence opined that the trial court probably unduly limited the cross-examination into the victim's prior sexual activities.[20] Nevertheless, any possible error in this case was harmless under the applicable federal constitutional standard.[21]

Justice Stewart dissented from the court's decision. Justice Stewart viewed the trial court's limitation of the cross-examination as a violation of the defendant's right of confrontation that was prejudicial error.[22]

2. Background—

(a) Jury Selection. The United States Constitution[23] and the Utah Constitution[24] guarantee criminal defendants the right to an impartial jury trial. The United States Supreme Court has recognized that a trial court is to exercise its discretion in selecting a jury. "*Voir dire* 'is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.' "[25] The Utah Supreme Court also has recognized that "there is traditionally given to the trial judge considerable latitude

16. *Id.* at 644.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* (Zimmerman, J., concurring).
21. *Id.* (citing Delaware v. Van Arsdall, 475 U.S. 673 (1986); and State v. Hackford, 737 P.2d 200, 205-06 & n.3 (Utah 1987)).
22. *Id.* at 645-47 (Stewart, J., dissenting).
23. U.S. CONST. amend. VI.
24. UTAH CONST. art. 1, § 12.
25. Ristaino v. Ross, 424 U.S. 589, 594 (1976) (quoting Connors v. United States, 158 U.S. 408, 413 (1895)) (italics in original).

of discretion as to manner and form in which he will conduct the voir dire examination to determine the qualifications of jurors."[26] Further, "[d]ue consideration should be given to the trial judge's somewhat advantaged position in determining which persons would be fair and impartial jurors."[27]

Rules 18(e)(13) and (14) of the Utah Rules of Criminal Procedure present two instances in which a prospective juror may be challenged for cause. Rule 18(e)(13) deals with actual bias toward the particular defendant's innocence or guilt.[28] This provision was inapplicable in *Moton* because the jurors merely stated a general feeling that the criminal penalties were too lenient. No beliefs about the particular defendant's guilt or innocence were expressed and the jurors indicated their ability to try the defendant fairly.

Rule 18(e)(14) does not require that actual bias be shown, but implies the existence of bias. A prospective juror may be dismissed for cause if "a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging."[29]

The Utah Supreme Court has adopted Chief Justice Marshall's test for impartiality, which states:

> "Light impressions which may fairly be supposed to yield to the testimony that may be offered; which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them; which will combat that testimony and resist its force, do constitute a sufficient objection to him."[30]

Distinguishing between "light impressions" and "strong and deep impressions" is a difficult task for the courts, at both the trial and appellate level. A review of Utah decisions helps define this distinction between light and strong impressions.

In *State v. Brooks*,[31] the Utah Supreme Court held that two

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26. Utah State Rd. Comm'n v. Marriott, 21 Utah 2d 238, 240, 444 P.2d 57, 58 (1968).

27. Jenkins v. Parrish, 627 P.2d 533, 536 (Utah 1981).

28. Rule 18(e)(13) allows dismissal of a challenged juror who has "formed or expressed an unqualified opinion or belief as to whether the defendant is guilty or not guilty of the offense charged." UTAH R. CRIM. P. 18(e)(13).

29. *Id.* Rule 18(e)(14).

30. Reynolds v. United States, 98 U.S. 145, 155 (1878) (quoting Burr's Trial at 416) (quoted with aproval in State v. Bailey, 605 P.2d 765, 767 (Utah 1980)).

31. 631 P.2d 878 (Utah 1981).

jurors should have been dismissed for cause. One juror had been burglarized twice and "he felt bitter about that particular charge."[32] The other juror was the victim of an armed robbery and assault that resulted in the responsible individual going without punishment. She admitted that she had "a very strong feeling about that."[33] Both jurors later replied that they could return a fair and impartial verdict based on the evidence presented. The court held that both jurors should have been removed for bias. Once a juror has expressed prejudice or bias, it "cannot be attenuated by the juror's determination that he can render an impartial verdict[;] . . . [t]heir reluctant disclaimers of partiality run counter to human nature," given their expressed feelings about being victims of a similar crime.[34]

In *Utah State Road Commission v. Marriott*,[35] the court upheld a jury verdict following possibly biased statements regarding the law of eminent domain.[36] The trial court's decision not to dismiss the jurors for bias was not prejudicial error according to the Utah Supreme Court. The comments were not harmful to the defendants and the jurors also indicated "that they were willing to accept the law as given them by the court, regardless of what they personally might believe the law is or ought to be."[37]

In *State v. Lacey*,[38] a prospective juror had a patient-physician relationship with a testifying doctor and a business relationship with another witness. The juror admitted "that there was a 'possibility' he might attach more credibility to his acquaintances' testimony than to another person he did not know."[39] The trial judge determined that the juror did not possess the strong and deep impressions that constitute bias. The Utah Supreme Court, while recognizing it may have been better to excuse the juror for cause, did not find an abuse of the trial court's discretion.[40]

These cases demonstrate that there is no clear demarcation

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32. *Id.* at 882.

33. *Id.*

34. *Id.* at 884.

35. 21 Utah 2d 238, 444 P.2d 57 (1968).

36. *Id.* at 240 n.1, 444 P.2d at 58 n.1. These statements included the following: "As a taxpayer I don't think any excess payments or grants should be made to the property owner"; and, "I think it is a very good law. It would be pretty hard to have growth without it." *Id.*, 444 P.2d at 58 n.1.

37. *Id.* at 240, 444 P.2d at 58 (footnote omitted).

38. 665 P.2d 1311 (Utah 1983).

39. *Id.* at 1312.

40. *Id.*

between strong and light impressions. They illustrate, however, that it is clearly within the trial court's discretion to determine the degree of these impressions.

(b) Right of Confrontation. The *Moton* court also addressed the defendant's claim that he was denied his right of confrontation because the trial court limited his cross-examination of the accuser. A criminal defendant is guaranteed "the right . . . to be confronted with the witnesses against him" by the sixth amendment to the United States Constitution.[41] Article 1, section 12, of the Utah Constitution also guarantees this right.[42] "There are few subjects, perhaps, upon which [the Supreme Court] and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."[43] The sixth amendment right of confrontation appears to guarantee the accused the right to introduce all relevant and admissible evidence,[44] including the opportunity to cross-examine the accuser.[45]

" 'Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.' "[46] The right to cross-examine a witness includes the right to show that witness' bias or self-interest.[47] Cross-examination is indispensable in a criminal proceeding in order for the defendant to enjoy his constitutional guarantee of confronting the accuser.[48] Despite the paramount importance of cross-examination, the courts have recognized a discretion to limit cross-examination.[49]

In *State v. Johns*,[50] the Utah Supreme Court listed various factors a trial judge should consider in determining the admissibil-

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41. U.S. CONST. amend. VI.

42. UTAH CONST. art. 1, § 12.

43. Pointer v. Texas, 380 U.S. 400, 405 (1965).

44. *See* United States v. Kasto, 584 F.2d 268, 272 (8th Cir. 1978).

45. *See* State v. Marcum, 750 P.2d 599, 603 (Utah 1988).

46. State v. Moton, 749 P.2d 639, 644 (Utah 1988) (quoting Davis v. Alaska, 415 U.S. 308, 316 (1974)).

47. *See* State v. Leonard, 707 P.2d 650 (Utah 1985).

48. *See Davis*, 415 U.S. at 315-16 (" 'The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*' " (quoting 5 J. WIGMORE, EVIDENCE § 1395 (3d ed. 1940))).

49. *See Leonard*, 707 P.2d at 656 (trial judge has discretion to limit cross-examination " 'to preclude repetitive and unduly harassing interrogation' " (quoting *Davis*, 415 U.S. at 316)).

50. 615 P.2d 1260 (Utah 1980).

ity of character evidence of prior sexual behavior. These factors include: (1) Relevance and probative value; (2) prejudicial effect; (3) confusion of the issues and undue consumption of time; and (4) substantial justice.[51] The *Johns* court held that evidence of a rape victim's sexual promiscuity—either specific acts or in relation to general reputation—is "ordinarily insufficiently probative to outweigh the highly prejudicial effect of its introduction at trial."[52] However, *Johns* recognized a possible exception to excluding the character evidence when the circumstances are such that the evidence's probative value outweighs its prejudicial effect.[53]

State v. Lovato[54] also dealt with the issue of consent in a rape case and upheld a trial court's refusal to admit evidence of the victim's prior sexual history. The court also held that excluding this evidence did not deny the defendant his constitutional right of confrontation.[55]

The defense counsel in *Lovato* advanced several theories for the victim's alleged fabrication. First, the defense claimed that the victim fabricated the story in order to obtain medication to abort pregnancy and prevent venereal disease. Second, the defense claimed that the victim was attempting to retaliate against the defendant's girlfriend.[56] Despite the defense counsel's fabrication theory, the court noted that " 'the law does not and should not recognize any connection between the veracity of a witness and her sexual promiscuity.' "[57] The court decided that Lovato exercised his opportunity to attack the complainant's credibility. The complainant in *Lovato* underwent a long and thorough cross-examination and the defendant also took the stand. In accordance with *Johns*, the *Lovato* court held that because the prior sexual experience was not relevant to any issue at trial, the exclusion of that evidence did not deprive the defendant of a constitutional right.[58]

State v. Suarez[59] ruled on the issue of allowing evidence of the

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51. *Id.* at 1263; *see* State v. Moton, 749 P.2d 639, 644 (Utah 1988); UTAH R. EVID. 403. Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

52. *Johns*, 615 P.2d at 1264 (footnote omitted).

53. *Id.* at 1266.

54. 702 P.2d 101 (Utah 1985).

55. *Id.* at 105-06.

56. *Id.* at 104.

57. *Id.* at 106 (quoting State v. Johns, 615 P.2d 1260, 1264 (Utah 1980)).

58. *Id.*

59. 736 P.2d 1040 (Utah Ct. App. 1987).

"victim's prior sexual history, her use of illicit drugs and her affliction with a sexually transmitted disease."[60] The defendant was convicted of three counts of forcible sexual abuse committed on a twelve-year-old girl. The court summarily disposed of the appellant's claim that the trial court improperly excluded the evidence and thereby violated his constitutional right to confrontation. No constitutional issue was involved.[61] "The [trial] court properly followed the cases of *State v. Lovato* and *State v. Johns* and found such evidence irrelevant to the charges made."[62] The court ruled that Suarez had no right to bring irrelevant and prejudicial evidence before the jury. The character evidence of the victim was properly excluded.[63]

3. Analysis—The Utah Supreme Court in *Moton* reiterated the principle that the trial court has latitude in conducting voir dire examination. The juror's statement that she thought the penalties for the crimes involved were too lenient "did not indicate strong feelings of the type that would require excusing her for cause."[64] The trial court's failure to dismiss the juror for cause, therefore, was not an abuse of its discretion.

The court also addressed the defendant's claim that the trial court's limitation on cross-examination of the accuser denied his right of confrontation. The purpose of the defense counsel's questioning was twofold: "to show that she had the knowledge and ability to create a false accusation against him and to diminish her credibility by showing that she had made such accusations in the past."[65] The majority of the court held that the exclusion of defense counsel's questions was not prejudicial error. The issue of whether the trial judge properly exercised his discretion is not definitively decided in this case. The failure of the *Moton* court to reach a majority necessitates further analysis to better define the proper discretion of the trial judge.

The *Moton* court's exclusion of evidence regarding the prior sexual history of a child abuse victim appears to be a logical step in limiting the breadth of cross-examination. A victim's sexual history is increasingly regarded as irrelevant and low in probative

60. *Id.* at 1041.
61. *Id.*
62. *Id.* (citations omitted).
63. *Id.*
64. State v. Moton, 749 P.2d 639, 643 (Utah 1988).
65. *Id.* at 643-44.

value. The unfair prejudicial effect and increased confusion of the issues clearly outweighs any small benefit from this evidence in a sexual offense case.

The probative value of character evidence, as a general proposition, appears to outweigh the negative factors in very specific types of cases. *State v. Howard*[66] illustrates one type of case in which character evidence would be admissible despite the prejudicial effect. *Howard* was a rape case with consent at issue, in which the "association between the parties [came] about in a sociable and peaceable manner"[67] with a transition into violence. A case of sexual abuse of a child or sodomy on a child usually does not involve the issue of consent.[68] This reason for admitting past sexual history evidence, therefore, generally does not exist in child sexual abuse cases.

Although evidence of past sexual history usually will not be admissible, it does not follow that it will be excluded invariably. The *Moton* court demonstrated that there is not agreement on this issue. The court's failure to reach a majority implies that the trial court in *Moton* was too extreme in limiting the questions regarding past sexual history, but not to the point of prejudicial error.

The issue of credibility or veracity can necessitate that some past sexual experiences be admitted, especially false prior accusations made by the accuser. *Moton* allowed certain instances of the victim's past to be brought out at trial even though they were sexual in nature.[69] If the prior sexual experience does not involve a false statement made by the victim, however, the evidence should not be admitted "[b]ecause the law does not and should not recognize any connection between the veracity of a witness and her sexual promiscuity."[70]

The defense counsel's failed attempt to introduce other evidence of sexual experience illustrates that the trial courts of Utah generally will guard against any prejudicial use of this evidence. Once the defense had established that the victim had prior knowl-

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66. 544 P.2d 466 (Utah 1975).

67. *Id.* at 470.

68. Under the Utah statutes, sodomy on a child and sexual abuse of a child are by definition without the consent of the victim. The statute states: "[S]odomy upon a child . . . [or] sexual abuse of a child . . . is without consent of the victim . . . [when] the victim is under 14 years of age." UTAH CODE ANN. § 76-5-406 (Supp. 1988).

69. In *Moton*, defense counsel was allowed to ask Jennifer if she had falsely stated that a man had kissed her. The defense also was allowed to ask if she had claimed she had a sexual encounter with a friend. *Moton*, 749 P.2d at 642.

70. State v. Johns, 615 P.2d 1260, 1264 (Utah 1980) (footnotes omitted).

edge from which to create an accusation, the defense was denied the right to continue that line of questioning. The trial court used its discretion in deciding that a sufficient amount of cross-examination had been allowed for the jury reasonably to infer that the victim could fabricate such a claim. After this determination, the court did not allow the defense to introduce any further evidence of sexual experience.

The *Moton* court's inability to reach agreement on this issue adds to the difficulty that trial judges and attorneys alike face in determining the admissibility or inadmissibility of this type of evidence. The Utah Supreme Court in *State v. Howard*[71] expressed concern over introducing "apprehension of embarrassment and humiliation from inquiry into [the victims'] personal lives, which sometimes has the effect of putting them on trial instead of the assailant."[72] Although *Moton* is a case of child sexual abuse as opposed to a rape case, many of the same policy concerns are present and perhaps even magnified. The parents of the child, like the rape victim, may decide not to report the incident for fear that a trial will increase the physical and mental trauma that the victim has already experienced. It is traumatic for an adult victim to be placed on trial, and the problem may be further compounded when the victim is a child. The traumatic effect of placing the victim on trial is "certainly an important factor to consider; and the evil should be minimized to whatever extent that can be done consistent with the processes of justice."[73]

4. Conclusion—Determination of the admissibility of evidence of a child abuse victim's prior sexual history remains difficult following *Moton*. Nonetheless, the policy reasons and case history appear to indicate that there is a movement toward excluding this type of evidence. This movement advances the policy concerns that will increase reporting of this often unreported crime, possibly resulting in a declining occurrence of this type of criminal behavior.

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71. 544 P.2d 466 (Utah 1975).

72. *Id.* at 469 (footnote omitted).

73. *Id.*

*C. The Meaning of "Taking" Under the Utah Constitution Just Compensation Clause**

In *Three D Corp. v. Salt Lake City*,[1] the Utah Court of Appeals held that government action that substantially impairs a long-standing right of private property owners to use their property for storefront parking, although "not amounting to a physical taking,"[2] is a taking for purposes of the "just compensation clause"[3] of the Utah Constitution. The case is significant because the court of appeals focused its attention on the decrease in the property's value rather than on the reasonableness of access to property.

1. The Case—Two Salt Lake City firms, Three D Corporation ("Three D") and Distributors, Inc. Utah ("Distributors"), owned commercial property located at 238 West 1300 South and 234 West 1300 South, respectively.[4] Both businesses used the property in front of their buildings for customer parking, and had done so for over thirty years. The absence of a curb along 1300 South allowed vehicles to turn off the street and park head-in to the buildings.

In 1983, Salt Lake City made plans to widen 1300 South and to install curbs, gutters, and sidewalks. The City offered to purchase Three D's and Distributor's land fronting 1300 South to allow for the construction of the sidewalk. That offer was declined because the City refused to compensate the businesses for the value of the lost parking places.

The City proceeded with its plans, constructing a sidewalk alongside the street but stopping at the extremities of the two commercial properties. Curbs and gutters were constructed the entire length of the properties, leaving only a driveway opening between them. Head-in parking was no longer possible in front of either business, although it was possible to park parallel to the street. As a result, Three D was left with two parking places instead of six, and Distributors was left with fewer than the seven it once had. All of the improvements were made on public land.

Three D and Distributors sued the City, claiming that al-

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* David E. Sloan, Junior Staff Member, *Utah Law Review*.

1. 752 P.2d 1321 (Utah Ct. App. 1988) (opinion by Judge Orme).

2. *Id.* at 1325.

3. "Private property shall not be taken or damaged for public use without just compensation." UTAH CONST. art. I, § 22.

4. The facts are taken from the court's opinion in *Three D*, 752 P.2d at 1322-23.

though no property was physically taken, their parking places were "taken" for purposes of the just compensation clause. Both Three D and Distributors claimed that their property value decreased as a result of the lost parking and that they were entitled to compensation for the loss. The trial court held that, because there was still reasonable access to the property, there had been no taking, and plaintiffs were not entitled to compensation. The court of appeals reversed, holding that the plaintiffs were entitled to compensation if the property had been substantially devalued. The case was remanded to the trial court for that determination.

2. *Background*—The Utah cases leading up to *Three D* are perhaps best described by Judge Orme as "not entirely consistent."[5] It appears that much of the inconsistency stems from judicial efforts to reconcile two principles: sovereign immunity and the Utah just compensation clause. The problem seems to lie in determining the extent to which the constitutional provision can be interpreted as governmental consent to be sued.

A superficial reading of the text of the just compensation clause leads to the conclusion that any time the government takes *or damages* property it must pay compensation.[6] The Utah Supreme Court has consistently rejected this interpretation; the court has "developed a procedural distinction between a 'taking' and 'damage.' "[7] To understand the reason for this distinction, and the significance of the *Three D* decision, it is necessary to review the history of the just compensation clause.

An excellent historical review of the just compensation clause can be found in the dissenting opinion of Justice Wolfe in *State ex rel. State Road Commission v. District Court, Fourth Judicial District*.[8] According to Justice Wolfe, one reason for the distinction between a "taking" and "damages" was the absence of the word

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5. *Id.* at 1325; *see* Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 51-56 (1971). Of the historical background, Van Alstyne writes: "Judicial efforts to chart a usable test for determining when police power measures impose constitutionally compensable losses have, on the whole, been notably unsuccessful. With some exceptions, the decisional law is largely characterized by confusing and incompatible results, often explained in conclusionary terminology, circular reasoning, and empty rhetoric." *Id.* at 2 (footnotes omitted). For a recent United States Supreme Court opinion discussing the federal just compensation clause, see First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378 (1987).

6. For the text of the just compensation clause, see *supra* note 3.

7. Hampton v. State *ex rel.* Road Comm'n, 21 Utah 2d 342, 344, 445 P.2d 708, 709 (1968).

8. 94 Utah 384, 406-07, 78 P.2d 502, 515-16 (1937) (Wolfe, J., dissenting).

"damaged" from the original just compensation clause.[9] Only when property was "taken" by the government could the owner be compensated.[10] When property was only damaged such damages were damage without redressable injury.[11]

Because of this restriction, some American courts expanded the meaning of "taken."[12] At first, only property physically appropriated qualified as "taken."[13] Later, recovery was generally allowed when there was "such a total practical deprivation of enjoyment as to amount to a taking."[14] Because disallowing compensation for damages seemed unfair, and perhaps as a result of the judicial tendency to stretch damages into a taking, many states, including Utah, amended their constitutions to allow for the recovery of damages.[15]

State ex rel. State Road Commission v. District Court, Fourth Judicial District[16] involved Utah's amended just compensation clause. A viaduct had been constructed on a city street by the State Road Commission. The plaintiffs claimed deprivation of their easement of access, light, air, and view.[17] The court said that the remedy was the same for the taking of property and for damage to property.[18] In either case, the contractor and the individual members of the State Road Commission could be enjoined.[19] The court, however, held that the government could not be sued because of sovereign immunity.[20]

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9. *Id.* at 408, 78 P.2d at 513.

10. Where there were damages only, the injured party could resort to the State Board of Examiners for redress, as provided by UTAH CONST. art. VII, § 13. "The inquiry by the Board of Examiners is a judicial inquiry. A claim is made, a hearing set, evidence taken, and an award or a denial of it made from the evidence. The Board of Examiners in such case sits as a court." *State Road Comm'n*, 94 Utah at 425, 78 P.2d at 521 (Wolfe, J., dissenting).

11. *State Road Comm'n*, 94 Utah at 408, 78 P.2d at 513 (Wolfe, J., dissenting).

12. "The courts thus found it necessary before the inclusion of the word 'damaged' in the Constitution to hold that serious damages were a 'taking,' thus circumventing the principle of damnum absque injuria." *Id.* at 413, 78 P.2d at 515.

13. *Id.*, 78 P.2d at 515.

14. *Id.*, 78 P.2d at 515.

15. *Id.* at 413-14, 78 P.2d at 515-16.

16. 94 Utah 384, 78 P.2d 502 (1937).

17. *Id.* at 388, 78 P.2d at 504.

18. *Id.* at 400-01, 78 P.2d at 510.

19. The Road Commission members could be enjoined because, by taking or damaging property without giving just compensation, they were acting without authority and therefore lost their immunity. *Id.* at 400, 78 P.2d at 509.

20. The court reasoned that, although it was arguable that the takings clause was an implied consent by the government to be sued, it was not necessary to reach that conclusion because ample protection had been provided by allowing the contractor and Road Commission members to be sued. *Id.* at 399, 78 P.2d at 509.

Justice Wolfe, in a lengthy dissent, argued that there was a distinction between damages and a taking, and that the members of the Road Commission were acting within their authority when property was damaged but not when it was taken.[21] The government could be enjoined from taking, but the injured party's only remedy for damaged property would be to seek compensation from the Board of Examiners.[22] In support of this view, Justice Wolfe noted:

> [I]t can be shown historically that the real reason damages were included in [the just compensation clause] was not to guarantee a certain procedure, but to guarantee a substantive right to damages . . . .
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> . . . .
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> [T]he Framers of the Constitution probably never thought of the matter of procedure when they inserted the word "damaged" . . . but intended to make actionable what was not theretofore actionable, or which was only actionable by dint of straining a damage into a taking.[23]

In the early 1960s, the court decided three cases consistently with Justice Wolfe's dissenting opinion.[24] Each decision applied the doctrine of sovereign immunity to bar suits against the Road Commission or its members when property was damaged but not taken. The grieved party's only remedy was to seek restitution from the Board of Examiners. The result of this line of cases was that the court again began to struggle with the meaning of "taken."

In *Hampton v. State ex rel. Road Commission*,[25] the plaintiffs were allowed to sue because they had been denied reasonable access to their property by the erection of a fence and guard rail, and by the excavation of the street. The court held that to deny reasonable access to property, even without an established easement,

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21. *Id.* at 412-13, 78 P.2d at 515 (Wolfe, J., dissenting).

22. *Id.* at 428, 78 P.2d at 522. The majority of the court felt that it was a denial of due process to force a property owner to go to the Board of Examiners by denying access to the courts. *Id.* at 403-04, 78 P.2d at 510-11 (majority opinion).

23. *Id.* at 412, 415, 78 P.2d at 515-16 (Wolfe, J., dissenting).

24. *See* State *ex rel.* Road Comm'n v. Parker, 13 Utah 2d 65, 368 P.2d 585 (1962); Fairclough v. Salt Lake County, 10 Utah 2d 417, 354 P.2d 105 (1960); Springville Banking Co. v. Burton, 10 Utah 2d 100, 349 P.2d 157 (1960). The three cases were marked by a continuing debate between Justice Henriod, for the majority, and Justice Wade, in dissent. Justice Wade argued that the constitutional provision was self-executing, operating as an implied consent by the government to direct suit.

25. 21 Utah 2d 342, 445 P.2d 708 (1968).

amounts to a taking.[26] In *Anderson Investment Corp. v. State*,[27] the court retreated from its holding in *Hampton*. In *Anderson*, the plaintiff claimed that its property had been taken by virtue of the "diminution of its easements of light, air, view, and access."[28] The court refused to issue an injunction and dismissed the action for failure to state a claim.[29]

In *Utah State Road Commission v. Miya*,[30] the court moved back toward its position in *Hampton*. The court stated that the easements of access, light, air, and view were property rights that could not be "taken away or impaired without just compensation."[31] *Bailey Service & Supply Corp. v. State ex rel. Road Commission*[32] reaffirmed the holding in *Anderson*. *Bailey* involved the construction of a viaduct that prevented the owner of a warehouse from maneuvering large trucks into its warehouse as it had previously done. The court held that this was not the taking of an easement of access, presumably because reasonable access still existed.[33]

3. Analysis—The court of appeals in *Three D* drew three general principles from the prior Utah cases:

> (1) Where governmental action, not amounting to a physical taking, effectively deprives a property owner of reasonable access to property, the owner is entitled to compensation, *e.g., Hampton*; (2) Where governmental action, not amounting to a physical taking, merely interferes with an owner's access to property, the owner is not entitled to compensation so long as the owner still has reasonable access, *e.g., Bailey*; (3) Where governmental action, not amount-

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26. The court had already held that the taking of an established easement was compensable. *See* Dooly Block v. Salt Lake Rapid Transit Co., 9 Utah 31, 33 P. 229 (1893). " 'It should be kept in mind that the *Dooly* case dealt with an established easement and whether such a right of access could exist in the absence of an established use was not considered.' " *Hampton*, 21 Utah 2d at 346, 445 P.2d at 710 (quoting Utah Rd. Comm'n v. Hansen, 14 Utah 2d 305, 309, 383 P.2d 917, 920 (1963)).

27. 28 Utah 2d 379, 503 P.2d 144 (1972).

28. *Id.* at 381, 503 P.2d at 145-46.

29. The court did not mention *Hampton* in the *Anderson* opinion.

30. 526 P.2d 926 (Utah 1974).

31. *Id.* at 928-29 (citing, *e.g.*, Hampton v. State *ex rel.* Road Comm'n, 21 Utah 2d 342, 445 P.2d 708 (1968)). The facts in *Miya* differed from those in *Hampton* in that *Miya* involved a proceeding in eminent domain by the state. The property owners received compensation for the land taken and also received severance damages. The severance damages arose from the construction on part of the land taken of a viaduct that impaired the property owners' view. *See id.* at 927-28.

32. 533 P.2d 882 (Utah 1975). The *Bailey* court did not mention *Hampton*.

33. *Id.* at 883.

> ing to a physical taking, substantially impairs a right appurtenant to an owner's property, or otherwise causes peculiar injury, and thereby results in substantial devaluation, the owner is entitled to compensation, *e.g., Miya.*[34]

The court of appeals determined that the trial court erred in concluding that the case was governed by the second principle—that there can be no compensation for interference if there is still reasonable access.[35] The court held that the case was properly governed under the third principle—that compensation is allowed when there is substantial impairment of an appurtenant right resulting in a substantial devaluation of property.[36] *Miya* is the basis of that principle.

Miya is distinguishable from *Three D. Miya* was a proceeding in eminent domain by the Road Commission. The compensation was for severance damages arising from the condemnation of part of the defendants' land.[37] Because *Miya* involved a condemnation proceeding, compensation for the diminished market value was allowed in the form of severance damages. Based on the cases previously discussed, it is unlikely that the court would have allowed compensation had there been no underlying proceeding in eminent domain. For this reason, *Miya* is not strong precedent for the court of appeals' third principle.

Bailey is the case most similar to *Three D.* In *Bailey*, the plaintiff could no longer maneuver large trucks in and out of its

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34. Three D Corp. v. Salt Lake City, 752 P.2d 1321, 1325-26 (Utah Ct. App. 1988) (footnote omitted).

35. *Id.* at 1326.

36. *Id.* It is important to note that, although in each of its three principles the court of appeals refers to "governmental action, not amounting to a physical taking," the theory of *Three D* still involves a taking for the following reasons: First, *Hampton* involved a taking but is referred to by the court of appeals in its first principle as "not amounting to a physical taking"; second, the basis of plaintiffs' claim in *Three D* was that their property had been taken; and third, the only other possibility, based on the constitutional language, would be damages, which have consistently been held to be uncompensable.

37. "[T]he jury found that $8000 in damages had accrued to the remaining parcel of defendants' land by reason of its severance from the part taken and the construction of the improvement . . . ." Utah State Rd. Comm'n v. Miya, 526 P.2d 926, 928 (Utah 1974). The plaintiff, Road Commission, argued that the "damages resulted not from the taking of . . . land but from the construction of the viaduct." *Id.* at 928. To this argument the court responded:

> Plaintiff has failed to distinguish between the police power, which is used to regulate, and the power of eminent domain, which is used to acquire property from private ownership . . . . [W]here a police power is exercised as an incidental result of the exercise of eminent domain, just compensation is due if the market value of the property has been diminished.

Id.

warehouse. The court held that the state's action was not a taking, presumably because the plaintiff still had reasonable access. In *Three D*, the trial judge found that reasonable access still existed. The court of appeals distinguished *Bailey* on the grounds that "the property owner . . . did not make a claim that his property had been diminished in value. He only claimed that access to his property had been impaired."[38] The difference between the two cases is the substantial devaluation claimed in *Three D*. Without that difference, *Three D* appears to come within the rule of *Bailey*, which is the basis of the second principle identified by the court of appeals—that there can be no compensation for interference when reasonable access still exists.[39]

Because *Miya* cannot be viewed as precedent for *Three D*, the *Three D* court's third principle, focusing on government action that causes peculiar injury resulting in substantial devaluation of private property, effectively expands the definition of "taking." The court allows compensation for a substantial devaluation that, except for the procedural bar of sovereign immunity,[40] would more appropriately fall within the term "damages."[41]

4. Conclusion—The court of appeals in *Three D* focused on the devaluation of property caused by government action rather than focusing on whether reasonable access was denied. By doing so, the court of appeals allowed compensation under the just compensation clause when the "reasonable access" approach may have resulted in damage without redressable injury.

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38. *Three D*, 752 P.2d at 1325.

39. The court of appeals noted that it could have reached the same result using a "right of access" analysis, although the trial court found that reasonable access still existed. *Id.* at 1326 n.4.

40. The court of appeals does not mention a recent Utah statute, passed in 1987, that provides: "Immunity from suit of all governmental entities is waived for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property without just compensation." UTAH CODE ANN. § 63-30-10.5 (Supp. 1988).

41. The court of appeals may have been concerned that

> the City [was] embarked upon a scheme to do in two steps what it could not do in one . . . . [T]hat the City [might] eventually condemn a strip from [plaintiffs' land] to complete the sidewalk, but then claim it owe[d] only for the value of the strip since the loss of parking occurred long ago and not as a result of the condemnation.

Three D, 752 P.2d at 1322 n.1. This might be an example of what Justice Wolfe would call "straining a damage into a taking" to avoid the sovereign immunity bar against recovery for damages. *See* State *ex rel.* State Road Comm'n v. District Ct., Fourth Jud. Dist., 94 Utah 384, 407, 78 P.2d 502, 516 (1937) (Wolfe, J., dissenting).

IV. CRIMINAL LAW

*A. The Utah Racketeering Influences and Criminal Enterprise Act**

In *State v. McGrath*,[1] the Utah Supreme Court held that acts constituting racketeering under the Utah Racketeering Influences and Criminal Enterprise Act [hereinafter "RICE"][2] do not need to be charged or indicted, and that both a "pattern of racketeering activity"[3] and "enterprise"[4] are elements that must be established to convict under the statute. *McGrath* is significant because it was the first appeal of a RICE conviction decided by the Utah Supreme Court and because the case demonstrates the extremely broad scope of the RICE statute.

1. The Case—Defendant Richard McGrath was arrested after an undercover narcotics investigation revealed that he was the main cocaine supplier for Eric Marcus, an Ogden, Utah, street dealer.[5] A ledger book kept by Marcus showed seventy-four transactions between him and the defendant during a five-month period in 1983. A Weber County grand jury indicted McGrath on eight counts of distribution of a controlled substance for value[6] and one count of racketeering.[7] The trial court granted the state's motion for consolidation of all indictments for a single trial and granted

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* Mark Matthew Higgins, Junior Staff Member, *Utah Law Review*.

1. 749 P.2d 631 (Utah 1988) (opinion by Justice Howe).

2. UTAH CODE ANN. §§ 76-10-1601 to -1609 (Supp. 1988). In 1987, the Act was retitled "Pattern of Unlawful Activity Act." 1987 Utah Laws ch. 238, § 1. To remain consistent with the language used by the court in *McGrath*, however, the Act will be referred to by its former title and acronym.

3. Section 76-10-1602(2) defines "pattern of unlawful [(racketeering)] activity" as

> engaging in conduct which constitutes the commission of at least three episodes of unlawful activity, which episodes are not isolated, but have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics. Taken together, the episodes shall demonstrate continuing unlawful conduct and be related either to each other or to the enterprise.

UTAH CODE ANN. § 76-10-1602(2) (Supp. 1988).

4. Section 76-10-1602(1) defines "enterprise" as "any individual, sole proprietorship, partnership, corporation, business trust, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, and includes illicit as well as licit entities." *Id.* § 76-10-1602(2).

5. Unless otherwise noted, the facts are taken from the court's opinion in *McGrath*, 749 P.2d at 632-37.

6. *See* UTAH CODE ANN. § 58-37-8(1)(a)(ii) (Supp. 1988).

7. *See id.* § 76-10-1601.

the defendant's motion to amend count VIII to attempted distribution of a controlled substance for value.

The jury acquitted McGrath on all seven distribution charges, but convicted him on a single count of attempted distribution and on the racketeering charge. McGrath was sentenced to concurrent prison terms of zero to seven-and-one-half years for attempted distribution and one to fifteen years for racketeering.[8]

On appeal McGrath argued that his conviction for racketeering should be reversed because the state had failed to allege and prove that he had engaged in two or more predicate crimes.[9] In addition, McGrath claimed that the state had not introduced evidence that proved the existence of an "enterprise." He argued that his association with Marcus at most was an arm's length relationship between a seller and buyer of drugs, lacking formal structure and with no purpose beyond the commission of the predicate crimes.

A unanimous Utah Supreme Court, however, affirmed McGrath's convictions. The court noted that, under section 76-10-1602(1) of the Utah Code, acts constituting racketeering need not be charged or indicted, and that although McGrath had been acquitted on the distribution charges, the racketeering indictment did not specifically refer to the eight alleged sales that formed the basis for the distribution indictments. The court pointed out that the jury instruction on racketeering did not limit deliberations to the eight specific distribution indictments, but rather allowed consideration of any two occasions between February 15, 1983, and July 15, 1983, when the defendant intentionally supplied cocaine to Marcus. The court found that there was ample evidence in the record to support the jury's verdict, given the broad racketeering instruction that simply required proof that on at least two occasions defendant McGrath had sold cocaine to Marcus.

The court also rejected McGrath's contention that the state

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8. Brief for Respondent at 3, State v. McGrath, 749 P.2d 631 (Utah 1988) (No. 19878).

9. At the time of McGrath's trial, "pattern of racketeering activity" was defined under section 76-10-1602(4) as "engaging in at least two episodes of racketeering conduct which have the same or similar objectives, results, participants, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated events." UTAH CODE ANN. § 76-10-1602(4) (1978). In 1987 section 76-10-1602 was repealed and reenacted and section 76-10-1602(2) now requires at least three predicate acts to establish a "pattern of unlawful activity." 1987 Utah Laws, ch. 238, § 2 (codified as amended at UTAH CODE ANN. § 76-10-1602(2) (Supp. 1988)).

had failed to prove the existence of an enterprise.[10] While agreeing that both a "pattern of racketeering activity" and a separate and distinct "enterprise" are required elements for a RICE conviction, the court found that, given the numerous recorded transactions between McGrath and Marcus, and because McGrath "regularly 'fronted' drugs to Marcus," the two men had an "ongoing association" that "functioned as a 'continuing unit for a common purpose of engaging in a course of conduct.' "[11]

2. *Background*—Utah's RICE statute is nearly identical to the federal Racketeer-Influenced and Corrupt Organizations Act [hereinafter "RICO"] passed by Congress in 1970.[12] RICE was among the numerous "little RICO" statutes adopted by a majority of states in the wake of the enactment of the federal code.[13] Because RICE has seldom been used,[14] however, a brief discussion of the legislative intent and judicial history of RICO will help illustrate the significance of *McGrath*.[15]

RICO evolved as a congressional response to the 1967 report of the President's Commission on Law Enforcement and Administration of Justice.[16] The statute was designed to provide a powerful new weapon in the fight against organized crime infiltration of le-

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10. McGrath cited the United States Supreme Court's holding in United States v. Turkette, 452 U.S. 576, 583 (1981), for the proposition that, "[i]n order to secure a conviction under RICO [(the federal statute after which RICE is patterned)], the Government must prove both the existence of an 'enterprise' and the connected 'pattern of racketeering activity.' " *Id.* The Utah Supreme Court agreed that those elements also must be established to convict under the Utah RICE statute. *McGrath*, 749 P.2d at 637. For the definition of "enterprise" under UTAH CODE ANN. § 76-10-1602(1) (Supp. 1988), see *supra* note 4.

11. *McGrath*, 749 P.2d at 637 (citing United States v. Dickens, 695 F.2d 765, 773 (3d Cir. 1982), *cert. denied*, 460 U.S. 1092 (1983)).

12. 18 U.S.C. §§ 1961-1968 (1984 & Supp. 1988). RICO was included as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941.

13. A majority of states and Puerto Rico have adopted statutes based on the federal RICO law. For a recent list of citations, see Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 715 n.236 (1987).

14. Although the author was unable to obtain an exact figure on the number of RICE criminal prosecutions that have been brought in Utah, to date there have been only four appeals of RICE criminal convictions. In addition to *McGrath*, see State v. Bell, No. 19785 (Utah, Sept. 30, 1988) (WESTLAW No. 100489); State v. Fletcher, 751 P.2d 822 (Utah Ct. App. 1988); State v. Thompson, 751 P.2d 805 (Utah Ct. App. 1988).

15. For an excellent and comprehensive discussion of the history and intent of RICO, see Lynch, *supra* note 13, at 661-764.

16. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967) (cited in Lynch, *supra* note 13, at 666) (the Katzenbach Commission was created by President Lyndon Johnson through Executive Order No. 11,236 (July 23, 1965)).

gitimate business.[17] But RICO's broad language easily lent itself to wider application[18] and the statute was soon applied to purely criminal activities. A recent review of RICO criminal prosecutions found that the statute has been used most frequently to prosecute entirely *illicit* enterprises.[19] Moreover, only one federal circuit ultimately adopted the view that a group of individuals associated for entirely illegitimate purposes could not be a RICO "enterprise."[20]

In the landmark case of *United States v. Turkette*,[21] the United States Supreme Court endorsed the use of RICO against wholly criminal enterprises. The Court established two elements that must be proven and stated that in order to sustain a RICO conviction "the Government must prove *both* the existence of an 'enterprise' *and* the connected 'pattern of racketeering activity.' "[22] *Turkette* defined enterprise as an "entity" that "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit."[23] The Court held that a pattern of racketeering activity was "a series of criminal acts as defined by the statute . . . proved by evidence

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17. *See* Lynch, *supra* note 13, at 681-85.

18. Professor Lynch notes:

> [T]he RICO bill broadly defined "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." This expansion clearly broadened the range of activities to be protected against infiltration beyond businesses to include labor unions and government bodies as well . . . .
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> . . . .
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> [RICO] implicitly defined organized crime by what it did rather than by what it was, by listing a variety of crimes to which the prohibitions of the act applied. Like earlier federal statutes enacted out of concern about organized crime, RICO thus makes no attempt to define its target and limit its applicability to organized crime.

Id. at 682-83 (quoting 18 U.S.C. § 1961(4) (1982)) (footnotes omitted).

19. Over 40% of the 228 indictments charging RICO violations that have generated appellate opinions have involved the operation of wholly criminal enterprises. *Id.* at 733-35. Professor Lynch argues that such prosecutions "transform[ed] RICO into a completely different sort of statute than Congress had envisaged," *id.* at 701, but nonetheless concludes that Congress implicitly endorsed the use of RICO against illegitimate associations by passing the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, *see id.* at 711.

20. United States v. Turkette, 632 F.2d 896 (1st Cir. 1980), *rev'd*, 452 U.S. 576 (1981). For citations to decisions by other circuits endorsing the application of RICO to entirely illicit enterprises, see Lynch, *supra* note 13, at 699 n.165.

21. 452 U.S. 576 (1981).

22. *Id.* at 583 (emphasis added). The separate element of enterprise is necessary in order for RICO to constitute a separate offense from the predicate acts for purposes of the double jeopardy clause. *See* Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 938-43 (1987).

23. *Turkette*, 452 U.S. at 583.

of the requisite number of acts of racketeering committed by the participants in the enterprise."[24]

Nonetheless, in *Turkette* the Supreme Court was satisfied that the "enterprise" element had been met by only a minimal showing of organization on the part of the defendants.[25] *Turkette* thus legitimized both the radical shift in RICO prosecutions to wholly illicit enterprises[26] and the notion that loose associations could be construed as enterprises.[27] The latter point is significant because the "enterprise" element is all that legally differentiates RICO offenses from the mere aggregation of predicate crimes.[28]

Generally speaking, the history of RICO has witnessed the application of the statute to areas not intended by its originators and the endorsement of such use by a deferential judiciary. As a result, the broad reach and procedural advantages of RICO have become most evident within the context of prosecutions of entirely illicit enterprises.[29] Not only does RICO provide for greatly enhanced sentences and forfeiture of illegally gained interests and profits, but the statute also allows for joinder of widely diverse crimes and defendants, expansive federal jurisdiction, and the introduction of evidence that would otherwise be considered prejudicial.[30] RICO

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24. *Id.*

25. For a good discussion of the facts of *Turkette*, see Lynch, *supra* note 13, at 704-06.

26. "After *Turkette*, RICO makes it a crime not only to infiltrate or corrupt legitimate enterprises, but also to be a gangster, whether in the Mafia or in a much more loosely affiliated criminal combine." *Id.* at 706.

27. "If virtually any criminal federation can be a RICO enterprise, and almost any two criminal acts can be a pattern of racketeering activity, then potential RICO liability exists whenever more than one person engages in more than one crime." *Id.* at 713-14 (footnotes omitted).

28. *See* Lynch, *supra* note 22, at 942-43. "Indeed, it can be argued that the enterprise element constitutes the essence of the crime." *Id.* at 943.

29. RICE differs from RICO in one significant respect. Section 76-10-1602(1) of the Utah Code expressly states that "[e]nterprise . . . includes illicit as well as licit entities," thus removing any doubt about its intended application to wholly criminal enterprises. UTAH CODE ANN. § 76-10-1602(1) (Supp. 1988).

30. Professor Lynch notes:

> Since the [illicit] enterprise in essence is what the enterprise does, any defendant who participated in two or more predicate acts can be found to have associated with the enterprise and can be joined in a single indictment with any other defendants who committed any other predicate acts as part of the enterprise. The various crimes need not be related to any single event or transaction, so long as they are committed in the operation of an ongoing criminal organization in which all had agreed to join . . . .
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> . . . .
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> Evidence concerning the existence, structure, and functions of such organizations, including perhaps other crimes that are not even predicate acts charged in the particular RICO indictment, might become relevant, even if such evidence does not implicate particular defendants on trial, and even if it is highly prejudicial.

thus affords prosecutors much greater flexibility in prosecuting difficult criminal cases and gives them the ability to increase penalties dramatically by transforming ordinary offenses into RICO violations.[31] Nonetheless, the statute apparently has not been abused in practice because RICO has been invoked most commonly in a few narrowly defined situations.[32]

3. Analysis—The Utah Supreme Court's decision in *McGrath* is consistent with the letter of Utah's racketeering statute and the national tendency to interpret racketeering statutes broadly. Following the United States Supreme Court's decision in *United States v. Turkette*,[33] the Utah Supreme Court held that, for a RICE conviction to stand, the state must prove both the "pattern of racketeering activity" and the "enterprise" elements. And like the Supreme Court in *Turkette*,[34] the Utah Supreme Court allowed the "enterprise" element to be satisfied by a minimal showing of organization among participants to the predicate crimes.

McGrath is important primarily because the case demonstrates the extreme scope of Utah's racketeering statute. In many respects *McGrath* represented not only the first opportunity for judicial review of RICE, but also a good opportunity for the Utah Supreme Court to restrict the statute's application. Initially the facts of *McGrath* seem surprisingly ordinary and out of place when applied to RICE, particularly with regard to the two required elements of "pattern of racketeering activity" and "enterprise." Viewed in the context of the judicial history of racketeering prosecutions, however, *McGrath* seems perfectly consistent, if not commonplace.

The first significant aspect of *McGrath* involves the RICE requirement of "a pattern of racketeering activity."[35] At the time of

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Lynch, *supra* note 13, at 703 (footnotes omitted); *see also* Lynch, *supra* note 22, at 978 ("[U]nder the rubric of RICO, federal prosecutors were given enormous discretion to prosecute cases that they felt were inadequately dealt with by existing law, because of jurisdictional or procedural barriers, or inadequate sanctions.").

31. *See* Lynch, *supra* note 13, at 719-21. Professor Lynch states: "Moreover, no substantial additional element needs to be proven beyond the commission of the predicate offenses, in most instances, for the prosecutor to make the enhanced sentence stick." *Id.* at 721 (footnote omitted).

32. *See* Lynch, *supra* note 22, at 979.

33. 452 U.S. 576 (1981).

34. *See supra* note 28.

35. UTAH CODE ANN. § 76-10-1602(2) (Supp. 1988).

McGrath's trial, "pattern of racketeering activity" was defined by the statute as engaging in at least two episodes of racketeering conduct that had the same or similar objectives, results, participants, victims, methods of commission, or were otherwise interrelated by distinguishing characteristics and not isolated events.[36] McGrath argued on appeal that his racketeering conviction should be reversed because the state had convicted him of only one predicate crime.[37]

The Utah Supreme Court disagreed and unanimously upheld McGrath's racketeering conviction. The court noted that under RICE, acts constituting racketeering need not be charged or indicted.[38] The court further pointed out that the jury instruction on racketeering given at McGrath's trial did not specifically mention the eight indictments for distribution. Instead the jury was allowed to convict if it found that on any two occasions McGrath had intentionally supplied cocaine to Marcus.[39] In short, the standard for conviction on the RICE predicates was much less stringent than the standard for conviction on the indicted charges of distribution. As a result, even though McGrath was acquitted on seven of the eight indicted charges, the racketeering conviction was allowed to stand.[40]

In dicta the court discussed the use of uncharged predicates to support RICE convictions. While holding that the jury reasonably could have found that McGrath had engaged in two uncharged episodes of racketeering conduct, the court nonetheless raised the issue of notice and stated that "[w]hile . . . a criminal defendant is entitled to notice of the charges against him so that he can adequately defend against them, no objection was raised in the trial court by defendant as to lack of notice, nor was any surprise

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36. *Id.* § 76-10-1602(4) (1978) (current version at *id.* § 76-10-1602(2) (Supp. 1988)).

37. McGrath was charged with eight counts of distribution of a controlled substance for value, but was convicted of only one count of attempted distribution. *See* State v. McGrath, 794 P.2d 631, 633 (1988).

38. *Id.* at 635.

39. *Id.* at 635-36.

40. The court held that any two of the uncharged drug transactions between McGrath and Marcus (74 were recorded in a ledger book kept by Marcus) would satisfy the RICO "pattern of racketeering" requirement. *Id.* at 636. In contrast, the instruction on the distribution for value charges was tremendously complex and required the jury to find that several intricate relationships existed between McGrath and Marcus before a conviction could be returned. The instruction also cautioned that "the mere fact, if it is a fact, that Mr. McGrath with reasonable certainty delivered, or attempted to deliver, or helped arrange for Mr. Marcus to have cocaine available for sale, would not alone be sufficient." *Id.* at 635.

claimed."[41] The court added that "[o]n this appeal, defendant does not complain of lack of notice or surprise."[42]

It is clear from those statements that the Utah Supreme Court saw notice as a potentially important issue in *McGrath*. Unfortunately, the issue was never raised by the defense. Had it been, the court might have followed federal courts that have held that in RICO prosecutions the jury must agree unanimously on the particular predicates found.[43]

A second significant aspect of *McGrath* involves the requirement that the state prove the existence of an enterprise in addition to the predicate racketeering acts. In *United States v. Turkette*,[44] the Supreme Court held that "[t]he enterprise is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages . . . at all times . . . a separate element which must be proved by the Government."[45] The Utah Supreme Court followed *Turkette*, and ruled that in *McGrath* there was sufficient evidence in the record to establish the existence of an enterprise.[46] The court noted that McGrath and Marcus had an ongoing association for the purpose of making money from the sale of controlled substances, that McGrath regularly fronted drugs to Marcus, and that the two men kept a written account of their transactions as evidence of an enterprise.[47] In addition, the court noted that McGrath often paid others to deliver drugs for him.[48] The court concluded that "[t]hese facts show an ongoing enterprise the purpose of which was to traffic in controlled substances."[49]

Initially it is difficult to distinguish the factors listed in *McGrath* as evidence of an enterprise from those that were merely incidental to the functioning of the racketeering activity. Surely most of the factors listed are common to ordinary drug trafficking situations. As noted earlier, however, even the *Turkette* Court allowed a minimal showing of organization among the defendants to

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41. *Id.* at 636.

42. *Id.*

43. *See, e.g.*, United States v. Ruggiero, 726 F.2d 913, 922-23 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984); *id.* at 925-28 (Newman, J., concurring in part and dissenting in part); United States v. Palmeri, 630 F.2d 192, 202-03 (3d Cir.), *cert. denied*, 450 U.S. 967 (1981).

44. 452 U.S. 576 (1981).

45. *Id.* at 583.

46. *McGrath*, 749 P.2d at 637.

47. *Id.*

48. *Id.*

49. *Id.*

satisfy the enterprise requirement.[50] In so doing, the Supreme Court stated that the enterprise element is proved by evidence of "an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit."[51] In addition, the judiciary has consistently shown great deference to the broad language of the racketeering statutes and in most cases has required little more than a showing of the commission of the predicate offenses.[52]

Thus the Utah Supreme Court's decision in *McGrath* is legally sound and consistent with the judicial history of racketeering prosecutions of wholly illicit enterprises.[53] Nonetheless, *McGrath* did not involve the type of fact situation for which racketeering statutes were originally passed,[54] and the case likely represents the extreme to which RICE might apply.[55]

4. Conclusion—In *McGrath*, the Utah Supreme Court for the first time reviewed an appeal of a conviction under Utah's RICE statute. Consistent with judicial interpretations of the nearly identical federal RICO statute, the court held that two elements must be proven to convict under RICE. First, the state must prove that the defendant(s) have engaged in a "pattern of racketeering activity." Second, the state must prove the existence of an "enterprise," separate and distinct from the pattern of racketeering activity in which it engages.

The *McGrath* court also held that predicate acts need not be charged or indicted, and that an enterprise can be a loosely structured, illicit association in fact. *McGrath* is significant precisely because it demonstrates the tremendous scope of the RICE statute and because it reflects the trend toward racketeering prosecutions of entirely illicit enterprises at the federal level.

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50. *See supra* note 25.

51. United States v. Turkette, 452 U.S. 576, 583 (1981).

52. *See supra* note 31; *see also* United States v. Cagnina, 697 F.2d 915, 921 (11th Cir.) ("*Turkette* did not suggest that the enterprise must have a distinct, formalized structure."), *cert. denied*, 464 U.S. 856 (1983).

53. *See supra* note 20.

54. *See supra* notes 16-17 and accompanying text.

55. *See, e.g.*, Lynch, *supra* note 22, at 975 ("Whatever the imprecision in our concept of organized crime, three burglars don't make it." (footnote omitted)).

*B. The Constitutionality of Utah's Aggravated Sexual Assault Statute**

In *State v. Egbert*,[1] the Utah Supreme Court held that the punishment imposed by Utah's aggravated sexual assault statute[2] is not unconstitutionally vague when read in conjunction with Utah's mandatory sentencing provision.[3] The aggravated sexual assault statute requires that one of three mandatory minimum imprisonment terms be imposed for conviction.[4] The mandatory sentencing provision imposes the middle severity term unless aggravating or mitigating circumstances exist.[5] Thus the mandatory sentencing provision preserves the aggravated sexual assault statute by explaining when each term is to be imposed. Although an aggravated sexual assault conviction itself requires an aggravating circumstance,[6] the court maintained that the mandatory sentencing provision saves the aggravated sexual assault statute. The court reasoned that *additional* aggravating circumstances logically must be present in order for a court to impose

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* Jeffery J. Devashrayee, Junior Staff Member, *Utah Law Review*.

1. 748 P.2d 558 (Utah 1987) (opinion by Chief Justice Hall).

2. "Utah's aggravated sexual assault statute" refers to section 76-5-405(2) of the Utah Code. The statute provides: "Aggravated sexual assault is a felony of the first degree punishable by imprisonment in the state prison for a term which is a minimum mandatory term of 5, 10, or 15 years and which may be for life." UTAH CODE ANN. § 76-5-405(2) (Supp. 1988).

3. "Utah's mandatory sentencing provision" refers to section 76-3-201(5) of the Utah Code, which provides: "If a statute under which the defendant was convicted mandates that one of three stated minimum terms shall be imposed, the court shall order imposition of the term of middle severity unless there are circumstances in aggravation or mitigation." *Id.* § 76-3-201(5)(a).

In addition to the issue discussed in this Development, the court addressed Egbert's claims that "the minimum mandatory sentencing scheme under which he was sentenced violate[d] equal protection principles, constitute[d] cruel and unusual punishment, and [ran] afoul of Utah's constitutional separation of powers doctrine." *Egbert*, 748 P.2d at 559.

4. *See* UTAH CODE ANN. § 76-5-405(2) (Supp. 1988).

5. *See id.* § 76-3-201(5)(a).

6. Section 76-5-405(1)(a)-(c) provides:

> (1) A person commits aggravated sexual assault if in the course of a rape or attempted rape, object rape or attempted object rape, forcible sodomy or attempted forcible sodomy, or forcible sexual abuse or attempted forcible sexual abuse:
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> (a) the actor causes bodily injury to the victim;
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> (b) the actor uses or threatens the victim by use of a deadly or dangerous weapon; [or]
>
> (c) the actor compels, or attempts to compel, the victim to submit to rape, object rape, forcible sodomy, or forcible sexual abuse, by threat of kidnapping, death, or serious bodily injury to be inflicted imminently on any person
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> . . . .

Id. § 76-5-405(1)(a)-(c).

the term of highest severity for aggravated sexual assault.[7]

The court also determined that trial courts can properly weigh aggravating or mitigating circumstances when imposing a sentence for an aggravated sexual assault conviction.[8] The mandatory sentencing provision, however, indicates that the legislature intended to limit the trial courts' sentencing discretion for a conviction of aggravated sexual assault.[9] Despite the court's holding, the statutory scheme appears vague as a source of sentencing guidance for an aggravated sexual assault conviction. The significance of the decision, however, is that the trial courts' sentencing discretion has been expanded despite legislative intent to narrow that discretion.

1. The Case—Michael David Egbert pleaded guilty to six criminal charges, including two counts of aggravated sexual assault.[10] Before sentencing, Egbert challenged the aggravated sexual assault sentencing provisions as unconstitutionally vague.[11] An aggravating circumstance must exist for an aggravated sexual assault conviction. Aggravating circumstances must also exist to impose the most severe minimum mandatory sentence.

The trial court dismissed Egbert's motions and sentenced him to the highest minimum term possible for each count of aggravated sexual assault. In justification, the trial court concluded that the number of aggravating circumstances was significant in comparison to the evidence offered in mitigation.[12] On appeal, the Utah Supreme Court affirmed the trial court's decision, holding that Utah's sexual assault statute,[13] if vague, is clarified by the mandatory sentencing provision.[14] The aggravated sexual assault statute mandates one of three possible terms for conviction. The mandatory sentencing provision imposes the term of middle severity unless aggravating or mitigating circumstances exist.

The court relied on federal constitutional law to analyze the

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7. *See Egbert*, 748 P.2d at 560.

8. *See id.*

9. *See id.* at 563 (Zimmerman, J., dissenting).

10. The facts are taken from the court's opinion in *Egbert*. *See id.* at 558-59 (majority opinion).

11. Egbert also raised other challenges. *See supra* note 3.

12. Egbert was involved in " 'five rape cases, forcible rapes.' " *Egbert*, 748 P.2d at 560 (quoting the trial record). In contrast, the evidence in mitigation consisted only of a statement of apology and two letters identifying his need and desire for treatment. *See id.*

13. *See* UTAH CODE ANN. § 76-5-405(2) (Supp. 1988).

14. *See id.* § 76-3-201(5)(a); *Egbert*, 748 P.2d at 559.

vagueness question.[15] According to federal constitutional law, " 'vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute.' "[16] Although holding that this standard was satisfied, the court noted the conceptual problem of requiring an aggravating circumstance for an aggravated sexual assault conviction then applying that same circumstance to impose a more severe sentence.[17] The court finessed this conceptual problem by requiring additional aggravating circumstances for sentencing beyond the circumstances required for conviction.[18]

In dissent, Justice Durham stressed that, although Utah's aggravated sexual assault statute makes the term of middle severity available for the crime of aggravated sexual assault, Utah's mandatory sentencing provision actually makes it unavailable "because aggravated sexual assault always requires proof of an aggravating circumstance."[19] Justice Durham argued that this inconsistency made it impossible for any court to discern from the statutory language the legislative intent regarding punishment for aggravated sexual assault, thus rendering the statute unconstitutionally vague.[20]

Justice Zimmerman agreed with Justice Durham's conclusion, adding that, because of the inherent vagueness of the statute, the trial courts would have "unfettered discretion" in choosing among the three alternatives specified in Utah's aggravated sexual assault statute.[21] He pushed beyond Justice Durham's analysis, however, to conclude that such a result was actually contrary to legislative intent—that the trial courts' sentencing discretion be curbed.[22] As evidence of the legislative intent to curb the courts' sentencing discretion, Justice Zimmerman observed that Utah's mandatory sen-

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15. Egbert relied solely on federal constitutional principles. *See Egbert*, 748 P.2d at 559 n.3.

16. *Id.* at 559 (quoting United States v. Batchelder, 442 U.S. 114, 123 (1979)).

17. *Id.* at 559-60.

18. *See id.*

19. *Id.* at 561 (Durham, J., dissenting).

20. *See id.* Justice Durham also maintained that the statute is vague in that it does not tell the sentencing judge what the legislature intended when both aggravating and mitigating circumstances are present. *See id.*

21. *See id.* at 563 (Zimmerman, J., dissenting). Justice Zimmerman wrote separately because, although he agreed with Justice Durham's conclusion, he did not believe it was necessary to address whether the Judicial Council constitutionally could establish rules that trial judges could use to impose the proper sentence. *See id.*

22. *See id.*

tencing provision[23] requires the trial court to abide by the sentencing rules of aggravation and mitigation provided by the Judicial Council.[24]

2. *Background*—Prior to *Egbert*, no Utah case had addressed vague sentencing provisions; however, the case of *State v. Packard*[25] provides helpful insight regarding the examination of criminal statutes for vagueness in general. The *Packard* court noted that "a statute will not be held void for uncertainty if any sort of sensible, practical effect may be given it."[26]

Colorado and Massachusetts have dealt with the vague sentencing provision problem directly. In *People v. Phillips*,[27] the Colorado Supreme Court held that a trial court was correct in imposing a sentence outside the presumptive range[28] for first-degree murder. One Colorado Code section requires a trial court to evaluate existing aggravating circumstances before imposing a sentence within the presumptive range.[29] Another sentencing section allows a sentence outside the presumptive range based on an evaluation of extraordinary aggravating or mitigating circumstances.[30] Because the same evaluation is necessary under both sections, the ap-

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23. UTAH CODE ANN. § 76-3-201(5)(e) (Supp. 1988) provides: "The court in determining a just sentence shall be guided by sentencing rules regarding aggravation and mitigation promulgated by the [Utah] Judicial Council." *Id.*

24. UTAH CONST. art. VIII, § 12 provides:

> A Judicial Council is established, which shall adopt rules for the administration of the courts of the state. The Judicial Council shall consist of the chief justice of the supreme court, as presiding officer, and such other justices, judges, and other persons as provided by statute. There shall be at least one representative on the Judicial Council from each court established by the constitution or by statute. The chief justice of the supreme court shall be the chief administrative officer for the courts and shall implement the rules adopted by the Judicial Council.

Id.

25. 122 Utah 369, 250 P.2d 561 (1952).

26. *Id.* at 373, 250 P.2d at 563 (citations omitted). The Utah Supreme Court has acknowledged the *Packard* rule in more recent cases. *See, e.g.*, State v. Owens, 638 P.2d 1182, 1183 (Utah 1981); Greaves v. State, 528 P.2d 805, 807 (Utah 1974).

27. 652 P.2d 575 (Colo. 1982).

28. The range of possible penalties for each conviction listed under COLO. REV. STAT. § 18-1-105 (1986) is called a presumptive range. The presumptive range for first-degree sexual assault is four to eight years of imprisonment. The actual sentence was for 12 years. *See Phillips*, 652 P.2d at 577.

29. COLO. REV. STAT. § 18-1-105(1)(b) (1986) provides that, when imposing a sentence within the presumptive range, "the court shall consider . . . all aggravating or mitigating circumstances surrounding the offense and the offender." *Id.*

30. Colorado statutes provide that a court may impose a sentence outside the presumptive range if it "concludes that extraordinary mitigating or aggravating circumstances are present." *Id.* § 18-1-105(6).

pellant challenged one section as unconstitutionally vague.

The court explained that the legislature must have intended "*other* aggravating or mitigating circumstances" to be present when a court imposes a sentence outside the presumptive range.[31] The court reasoned that "[t]o conclude otherwise would be to render subsection (6) mere surplusage, contrary to the well-established rule of statutory construction that the entire statute is intended to be effective."[32]

In *Commonwealth v. Gagnon*,[33] the Massachusetts Supreme Judicial Court held that a sentencing statute for the unlawful distribution of heroin was unconstitutionally vague. The statute included a minimum mandatory imprisonment provision that appeared to conflict with other possible punishments for the same crime within the same statute.[34] The *Gagnon* court took a stricter approach than the Colorado court, claiming to be "required by ordinary rules of statutory construction to construe any criminal statute strictly *against* the Commonwealth."[35]

3. Analysis—The *Packard* case indicates that, in Utah, a court has some discretion to interpret criminal statutes.[36] For instance, *Packard* implies that even when the legislative intent of a given statute is vague the court may still hold the statute valid if it

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31. *Phillips*, 652 P.2d at 578 (emphasis added).

32. *Id.*

33. 387 Mass. 567, 441 N.E.2d 753 (1982).

34. The Massachusetts statute in question provided:

> Any person who knowingly or intentionally . . . distributes . . . with intent to . . . distribute . . . a controlled substance . . . shall be punished by a term of imprisonment in the state prison for not less than one year and not more than ten years, or by a fine of not less than $1000 and not more than $10,000, or both. Any person convicted of violating this subdivision shall be punished by a mandatory minimum one year term of imprisonment.

MASS. GEN. L. ch. 94C, § 32(a) (1971) (revised version at MASS. ANN. LAWS ch. 94C, § 32A(a) (Law. Co-op. 1985)).

35. *Gagnon*, 441 N.E.2d at 755 (citations omitted; emphasis added). The court cautioned that such a rule of thumb was to be used to resolve ambiguity, and not as a requirement that statutory interpretation be in favor of the defendants. *See id.* The court derived its requirement for strict statutory construction from prior Massachusetts case law. *See, e.g.*, Commonwealth v. Clinton, 374 Mass. 719, 374 N.E.2d 574 (1978); Commonwealth v. Devlin, 366 Mass. 132, 314 N.E.2d 897 (1974).

36. *See* State v. Packard, 122 Utah 369, 374, 250 P.2d 561, 563 (1952). Nevertheless, the court's discretion is not without limitation. For instance, the *Packard* court recognized that " 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.' " *Id.*, 250 P.2d at 563 (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1925)).

can give the statute a reasonable interpretation.[37] This view supports the *Egbert* court's conclusion that the term of highest severity is appropriate for a conviction of aggravated sexual assault only if additional aggravating circumstances exist. In this sense, Justice Durham's criticism—that the legislative intent for the punishment of aggravated sexual assault is hopelessly ambiguous—is answered. A trial court would be within its discretion in determining the existence of additional aggravating circumstances for sentencing. Nevertheless, Justice Zimmerman's complaint that the majority ignored the legislature's intent to curb the trial courts' sentencing discretion remains unresolved.

Justice Zimmerman maintained that the legislature intended to limit the courts' sentencing discretion by requiring the courts to follow the rules of aggravation and mitigation to be established by the Judicial Council.[38] No limitations on the courts' sentencing discretion exists, however, because the Judicial Council failed to promulgate rules regarding aggravation and mitigation.[39] The Judicial Council's failure to establish the aggravation and mitigation rules for sentencing runs contrary to legislative intent to curb sentencing discretion. The trial courts' sentencing discretion has been expanded because they have license to ignore legislative intent to limit sentencing discretion. Therefore, the statutory scheme to limit the courts' sentencing discretion appears ineffective.

In addition to expanding the trial courts' sentencing discretion, the statutory scheme also appears unconstitutionally vague even if the legislature intended that additional aggravating circumstances must exist before a court can impose the term of highest severity. The legislature mandated that the Judicial Council establish rules of aggravation and mitigation to provide proper guidelines for a trial court to follow for sentencing.[40] The courts' sentencing guidelines remain unclear, however, because the mandated sentencing guidelines have not been established.[41] Therefore, the

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37. *See id.* at 373, 250 P.2d at 563.

38. *See supra* text accompanying notes 22-24.

39. The Judicial Council had established sentencing rules regarding aggravation and mitigation, but Justice Zimmerman agreed with Justice Durham's observation that these recommendations were to assist the judge in deciding whether to incarcerate, not in determining the appropriate minimum mandatory imprisonment term. *See* State v. Egbert, 748 P.2d 558, 562 (Utah 1987) (Durham, J., dissenting); *id.* at 564 (Zimmerman, J., dissenting).

40. *See id.* at 563 (Zimmerman, J., dissenting).

41. The majority approved of the trial court's weighing the aggravating and mitigating circumstances when it sentenced Egbert. Chief Justice Hall explained that this situation was no different than imposing indeterminate sentences, suspending sentences, or placing of-

Judicial Council's failure to provide sentencing guidelines appears to render the statutory scheme unconstitutionally vague.

Egbert arguably would have been decided differently applying the *Phillips* "other aggravating circumstances" approach or the *Gagnon* "strict construction" approach. Like the *Phillips* court, the *Egbert* court had to distinguish between two sets of "aggravating circumstances."[42] Indeed, one might conclude that to render Utah's aggravated sexual assault statute effective as the legislature intended, the term of highest severity for aggravated sexual assault requires additional aggravating circumstances. If not, the requirement of existing aggravating circumstances necessary for the highest term under Utah's mandatory sentencing provision would be mere surplusage.[43] A trial court could make such an interpretation without abusing its discretion.

Under *Phillips*, however, a trial court has to distinguish aggravating circumstances necessary for a sentence within the presumptive range[44] from "extraordinary" aggravating circumstances necessary for a sentence outside the presumptive range.[45] On the other hand, under *Egbert*, a trial court would have to analyze two statutes that simply require "aggravating" circumstances, first for conviction, and second for a sentence of the highest severity. Thus Utah's aggravated sexual assault statute is more ambiguous in stating the proper sentence for aggravated sexual assault than the Colorado statute in question. Consequently, reliance on the Judicial Council's failure to produce proper sentencing guidelines for a vagueness determination is unnecessary. Ambiguity also exists in the determination of whether the sentence of highest severity for aggravated sexual assault requires additional aggravating circumstances.

The *Gagnon* court's analysis requires that any vagueness found in a criminal statute is to be construed against the government.[46] In the *Egbert* case, it is arguable that vagueness exists even after applying Utah's mandatory sentencing provision to the aggravated sexual assault statute. The mandatory sentencing provision

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fenders on probation. *See id.* at 560 (majority opinion).

42. *See* UTAH CODE ANN. § 76-5-405(2) (Supp. 1988) (a person convicted of aggravated sexual assault receives a minimum mandatory sentence of ten years unless aggravating or mitigating circumstances exist); *id.* § 76-5-405(1)(a) (an aggravating circumstance must be present before a person can be convicted of aggravated sexual assault).

43. *See Egbert*, 749 P.2d at 559-60.

44. *See supra* note 28; COLO. REV. STAT. § 18-1-105(1)(b) (1986).

45. *See* COLO. REV. STAT. § 18-1-105(6) (1986).

46. *See supra* text accompanying note 35.

simply does not indicate that additional circumstances are necessary for the highest term to be imposed for an aggravated sexual assault conviction.[47] Indeed, the lack of sentencing guidelines from the Judicial Council also seems to render the statutory scheme vague. As a result of these lingering ambiguities, the *Egbert* case may have been decided differently if the *Phillips* or the *Gagnon* analyses had been applied.

4. Conclusion—The implications of *Egbert* extend beyond simply requiring additional aggravating circumstances before a court can impose the mandatory minimum term of highest severity for an aggravated sexual assault conviction. The real implication appears to be that trial courts may exercise additional sentencing discretion in the process of determining the legislative intent of sentencing statutes, even if the result is actually contrary to other expressions of legislative intent. As a result, the legislature will have the additional responsibility of being more specific in writing sentencing statutes if it intends to limit trial courts' discretion in sentencing.

V. CRIMINAL PROCEDURE

*A. Warrantless Search and Seizure: Exigent Circumstances and the Independent Source and Inevitable Discovery Doctrines**

In *State v. VanHolten*,[1] the Utah Court of Appeals overruled a trial court's determination that exigent circumstances justified police officers' warrantless entry into appellant's residence. The court, however, upheld the admissibility of evidence seized during a later search pursuant to a valid warrant. *VanHolten* is significant for two reasons. First, it narrowly construes the factors, recognizable under *State v. Ashe*,[2] used to justify warrantless entries based on exigent circumstances. Second, *VanHolten* is the first time a Utah appellate court has applied the *Segura v. United States*[3] and

47. *See* UTAH CODE ANN. § 76-3-201(5)(a) (Supp. 1988).

* J. David Milliner, Junior Staff Member, *Utah Law Review*.

1. 756 P.2d 1288 (Utah Ct. App. 1988) (opinion by Judge Greenwood).
2. 745 P.2d 1255 (Utah 1987).
3. 468 U.S. 796 (1984).

Nix v. Williams[4] independent source and inevitable discovery doctrines. *VanHolten*'s probable effect will be to discourage findings of exigent circumstances in situations where police have foregone an opportunity to obtain a warrant, or where police could stage a clandestine siege long enough to obtain a telephone warrant rather than making a warrantless search.

1. The Case—On two occasions codefendant Mark A. VanHolten took undercover officers to a residence in Salt Lake City where, while the officers waited in the car, VanHolten arranged sales of cocaine from a supplier inside the house.[5] On February 26, 1985, an officer again arranged to purchase cocaine through VanHolten. The officer picked up VanHolten, drove to the same residence, and gave VanHolten $1000 in evidence money.[6] VanHolten took the money into the house and returned about ten minutes later with a substance that proved to be cocaine. The officer then drove VanHolten to a nearby parking lot where he was arrested by police surveillance units. At this time another car left the residence. Officers stopped the vehicle and searched the driver, Ronald Varney. Varney did not have the evidence money but was arrested and detained.

The officers, believing that the money might be destroyed, approached the residence and knocked on the door. Daniel B. Northrup answered the door, refused to allow the officers into the residence, and closed the door. The officers forcibly entered the residence, conducted a protective sweep of the premises, and secured all five occupants in the front room. While patting down Northrup, the officer pulled a hard object out of Northrup's pocket and discovered $2061, including all the evidence money.[7] The officers testified that when they entered Northrup's room, they saw drugs and drug paraphernalia in plain view. Approximately two and one-half hours after the officers entered the residence, a search warrant arrived and the officers seized various items for evidence.

Prior to trial, Northrup moved to suppress all the evidence seized. He contended that the warrantless entry violated his fourth

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4. 467 U.S. 431 (1984).

5. Unless otherwise indicated, the facts are taken from the court's opinion in *VanHolten*, 756 P.2d 1289-90.

6. The police had a list of the serial numbers on the bills given to VanHolten. *Id.* at 1289 n.3.

7. The officer testified that he originally believed the hard object to be a weapon. *Id.* at 1290.

amendment rights and that the evidence seized thereafter should be suppressed according to the exclusionary rule. The trial court found that exigent circumstances existed—making the entry into the home proper—but that a search of the home before the warrant arrived was illegal. The judge admitted all evidence seized during the pat-down and pursuant to the warrant.[8]

Northrup appealed, contending, among other things, that the trial court erred in ruling the entry proper, and therefore that the evidence seized during the pat-down and pursuant to the warrant was inadmissible. The Utah Court of Appeals agreed with Northrup that the entry was improper and that the evidence money discovered during the pat-down should have been suppressed. On this basis, the court reversed and remanded Northrup's convictions involving the distribution of cocaine, but affirmed his conviction for possession of mushrooms.[9]

The court addressed two major issues on appeal. First, the court considered whether the police officers' entry into the home prior to the arrival of the search warrant violated Northrup's rights under the fourth amendment to the United States Constitution. After distinguishing *State v. Ashe*,[10] the court held that because the prosecution failed to demonstrate that the evidence would be endangered if the officers were required to obtain a warrant, the trial court erred in finding exigent circumstances to justify the warrantless entry.[11]

Second, the Court of Appeals considered whether the evidence seized pursuant to the warrant was admissible even though the initial entry was illegal. In upholding the admissibility of the evidence that had not been in plain view before the warrant arrived, the court reasoned that the warrant was issued on information independent of the illegal entry.[12] This information, under *Segura v. United States*,[13] provided an untainted independent source for the discovery and seizure of the evidence.[14] The court also held that the evidence in plain view during the initial entry was admissible under either the independent source doctrine or, alternatively,

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8. Northrup was convicted of two counts involving distribution of cocaine, and one count of possession of mushrooms. *Id.* at 1289.

9. *Id.* at 1296.

10. 745 P.2d 1255 (Utah 1987).

11. *VanHolten*, 756 P.2d at 1292.

12. *Id.* at 1293.

13. 468 U.S. 796 (1984).

14. *VanHolten*, 756 P.2d at 1293.

under the *Nix v. Williams*[15] theory that the evidence inevitably would have been discovered pursuant to the valid warrant.[16] Nonetheless, because the officers had no evidence independent of their illegal entry on which a warrant authorizing a search of Northrup's person could be based, the court held that the evidence money discovered on Northrup during the initial pat-down should have been suppressed. Without the evidence money, the court found a "reasonable likelihood that . . . the judge may not have found Northrup guilty of the two counts involving the distribution of cocaine."[17]

2. Background—The Utah Supreme Court recently addressed the question of warrantless entries based on exigent circumstances in *State v. Ashe*.[18] In *Ashe*, an undercover police officer met with a drug dealer to arrange a purchase.[19] The dealer was given $500 to procure a one-ounce sample of cocaine. If the cocaine proved satisfactory, the officer was to purchase four ounces.

While waiting for her courier, the dealer disclosed to the officer that her supplier expected the transaction to be completed within a few minutes. When the courier—who was under surveillance—arrived with the cocaine, both he and the dealer were arrested. To prevent the supplier from becoming suspicious when the courier did not return, and from escaping or destroying the evidence, the officers decided to secure the supplier's house immediately. No attempt was made to obtain a warrant at that time.

On approaching the house, one officer saw Ashe look out of a window and then move away. When no one responded to their knock and identification as police, the officers kicked open the door and entered. The officers heard a flushing toilet and went to an upstairs bathroom where they discovered the fully clothed Ashe and two plastic bags containing a white residue. After taking Ashe into custody and performing a security search of the premises, several officers remained at the house while others went to obtain a search warrant. Both the evidence in plain view during the initial entry and the evidence found later pursuant to the search warrant were admitted at trial.

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15. 467 U.S. 431 (1984).
16. *VanHolten*, 756 P.2d at 1293.
17. *Id.* at 1296.
18. 745 P.2d 1255 (Utah 1987).
19. The facts are taken from *Ashe*. *See id.* at 1256-57.

The *Ashe* warrantless entry was held proper for two primary reasons. First, the courier's failure to return during the time necessary for the officers to obtain a warrant might alarm Ashe, which in turn "would likely lead to the speedy removal or destruction of the contraband, as well as escape or retaliation against the officers."[20] Second, "[t]he urgency of the situation escalated" when, as the officers approached the house, Ashe was seen to look out, then move away from the window.[21] These facts alone were sufficient to prove exigent circumstances, but were further supported because a warrant could not have been obtained prior to the transaction because the officers were not previously aware of Ashe or of his location.[22]

In *Segura v. United States*,[23] the United States Supreme Court addressed whether an illegal entry precludes the admission of evidence later seized under a valid warrant. In *Segura*, police arrested a drug supplier on probable cause as the supplier entered the lobby of his apartment building. The officers, however, did not have a warrant to search the supplier's apartment at that time and no exigent circumstances were present. Nevertheless, the officers entered and secured the apartment for nineteen hours until a valid search warrant arrived. In upholding the admissibility of the evidence seized during the search after the arrival of the warrant, the Court stated:

> [W]here officers, having probable cause, enter premises, and . . . secure the premises from within to preserve the status quo while others, in good faith, are in the process of obtaining a warrant, they do not violate the fourth amendment's proscription against unreasonable seizures.
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> . . . [T]he evidence discovered during the subsequent search . . . pursuant to the valid search warrant issued wholly on information known to the officers before the entry into the apartment need not have been suppressed as "fruit" of the illegal entry because the warrant and the information on which it was based were unrelated to the entry and therefore constituted an independent source for the evidence . . . .[24]

The *Segura* Court reasoned that the exclusionary rule extends to evidence obtained as a result of illegal police activity, but evidence obtained in a way that dissipates the taint of illegality

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20. *Id.* at 1259.
21. *Id.*
22. *See id.*
23. 468 U.S. 796 (1984).
24. *Id.* at 798-99 (citations omitted).

should not be excluded. An example of such dissipation is where the evidence is discovered through a legal and independent source.[25]

In *Nix v. Williams*,[26] the United States Supreme Court addressed whether evidence discovered through police misconduct must be excluded if it would have been found later through a separate and untainted process. There, a body was discovered through statements made during an interrogation that violated the defendant's sixth amendment right to counsel. The Court held that because the body was easily found within the area designated to be covered by an ongoing search, the evidence regarding the body need not be excluded because the body inevitably would have been discovered without the police misconduct. The Court noted:

> [I]f the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury . . . . In that situation, the State has gained no advantage at trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a *worse* position than it would have occupied without any police misconduct.[27]

The Court also reasoned that in such cases the exclusionary rule would have no deterrent effect on police officers because it is difficult to tell beforehand whether the evidence sought would be discovered inevitably. Also, if officers are aware that the evidence inevitably will be discovered, they will avoid questionable practices in order to assure admissibility once the evidence is obtained.[28]

3. Analysis—A determination of exigent circumstances involves "a balancing of the individual's right to be free from unreasonable intrusions against the interest of society in investigating crimes quickly and preventing danger to life or disappearance of evidence necessary to convict criminals."[29] In the *VanHolten* determination of no exigent circumstances, the court of appeals first

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25. *See id.* at 805.

26. 467 U.S. 431 (1984).

27. *Id.* at 447 (emphasis in original).

28. *See id.* at 445-46.

29. *District of Columbia Court of Appeals Project on Criminal Procedure—Exceptions to Requirement of a Search Warrant: With Probable Cause to Search but with Exigent Circumstances*, 27 How. L.J. 705, 723 (1984) (footnote omitted).

reviewed and then distinguished the Utah Supreme Court's opinion in *State v. Ashe*.[30] It noted first that, unlike *Ashe*, "the officers in this case knew the exact location of the house where the cocaine would be purchased,"[31] having twice previously used VanHolten to purchase a white powdery substance from a supplier at the same residence. Second, "[t]here was no known danger that the occupants of the residence would be alarmed if VanHolten did not return shortly"[32] because the transaction was already completed. The court further stated that because Varney was stopped and taken into custody, there was no danger of someone warning the occupants of the residence about the impending search.[33] Because the incident occurred when the courts were open and search warrants could be readily requested, the court held that the officers could have obtained a telephone warrant pursuant to Utah Code section 77-23-4(2).[34] Thus, "the prosecution failed to demonstrate that preservation of evidence would be endangered if the officers were required to obtain a warrant."[35]

Without citing to it, *VanHolten* follows the same line of reasoning as *United States v. Rosselli*.[36] The *Ashe* court summarized *Rosselli* as holding:

> [S]ince no actual exigent circumstances existed . . . prior to the agents' knocking on Rosselli's door, and since therefore, absent only deliberate police action there was no basis for believing Rosselli had any reason to destroy the valuable contraband evidence, there was sufficient time for the agents to obtain a warrant, and the agents should not have created a situation to avoid the same.
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> . . . [T]he agents had plenty of time to obtain a warrant before they themselves created the only risk that evidence would be destroyed.[37]

Not wanting to go too far down this path, the *Ashe* court noted

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30. 745 P.2d 1255 (Utah 1987).
31. State v. VanHolten, 756 P.2d 1288, 1291 (Utah Ct. App. 1988).
32. *Id.* at 1292.
33. *Id.*
34. *Id.*; *see* UTAH CODE ANN. § 77-23-4(2) (1982).
35. *VanHolten*, 756 P.2d at 1292.
36. 506 F.2d 627 (7th Cir. 1974).
37. State v. Ashe, 745 P.2d 1255, 1263 (Utah 1987) (reviewing *Rosselli*, 506 F.2d at 629-30). Professor LaFave noted that police failure to avail themselves of an earlier opportunity to obtain a warrant is a dominant factor in courts' refusing to find an exigency. "This is not to say, however, that a claim of exigent circumstances deserves to be rejected in every case where it was theoretically possible for a search warrant to be obtained at some earlier time." 2 W. LAFAVE, SEARCH AND SEIZURE § 6.5(b), at 660-61 (2d ed. 1987).

that, especially in ongoing investigations,

> the officers' failure to avail themselves of an earlier opportunity to obtain a warrant did not automatically preclude them from acting upon exigent circumstances arising thereafter. And the fact that the exigency may have been foreseeable at the time the decision was made to forego or postpone obtaining a warrant does not control the legality of a subsequent warrantless search triggered by that exigency.[38]

VanHolten, like many drug cases, involved an ongoing investigation. By emphasizing the fact that "the officers in this case knew the exact location of the house where the cocaine would be purchased,"[39] the Utah Court of Appeals suggested that it was improper for the officers to approach the house having foregone a previous opportunity to obtain a warrant. This emphasis apparently contradicts the language from *Ashe*, and would require that officers predict whether a court will later refuse to find exigent circumstances because of a foregone opportunity to obtain a warrant, even where an actual exigency occurs.

The court also stated that, because the transaction was complete and Varney was in custody, there was no danger that the occupants of the residence could be alerted to the impending search.[40] Testimony in the record, however, indicated that a dealer commonly telephones his source after a successful transaction to assure the source that everything has gone well.[41] Without such a telephone call, Northrup could have suspected that something was amiss.

Moreover, the court of appeals' analysis takes into account only one exigent circumstance—that of the possible destruction of evidence. Other factors that have been relevant in determining exigent circumstances include:

> (1) [T]he degree of urgency involved and the amount of time necessary to obtain a warrant; (2) reasonable belief that the contraband is about to be removed [or destroyed]; (3) *the possibility of danger to police officers guarding the site . . . while a search warrant is sought*; (4) information indicating the possessors of the contraband

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38. *Ashe*, 745 P.2d at 1266 (footnotes omitted); *see id.* at 1266 n.57. In fact, Ashe's reaction when the officers approached his house is one of the factors the court relied on to find an exigency. *See id.* at 1259.

39. *VanHolten*, 756 P.2d at 1291.

40. *Id.* at 1292.

41. Respondent's Brief at 4 n.1, State v. VanHolten, 756 P.2d 1288 (Utah Ct. App. 1988) (No. 86-369) (citing Record at 162, 170, 172, 178).

> are aware that the police are on their trail; and (5) *the ready destructibility of the contraband and the knowledge [of] characteristic behavior of persons engaged in the narcotics traffic.*[42]

Also, in *Gaulmon v. United States*,[43] the District of Columbia Court of Appeals noted that "[n]ot all the indicia of exigency need be present to justify a warrantless search."[44]

The *VanHolten* trial court's finding of exigent circumstances seems to embrace these other factors to a greater extent. The trial judge specifically noted that it was not reasonable to expect the police to stop and search everyone entering and leaving the residence while an officer went to obtain a warrant.[45] In this respect the judge recognized the possibility of a situation similar to *United States v. Curran*,[46] in which surveillance officers conducted a warrantless search after they were forced to intercept three cars that left the residence. In finding exigent circumstances, the *Curran* court noted how easily such a siege could be discovered.[47] The *VanHolten* trial judge's reasoning also may have included the possibility that the occupants of the house could elude the officers by leaving simultaneously, or by leaving through an exit inadequately covered by surveillance officers. More importantly, the officers' safety could be placed in jeopardy from an attack by the occupants of the residence in an attempt to escape once the siege was discovered.

Another important factor is a strong showing of probable cause. Professor LaFave noted that, in cases with an exceptionally strong showing of probable cause, courts have found exigent circumstances more readily.[48] In the present case there was very strong probable cause. The police knew that evidence money had been taken inside the house and that cocaine had been brought out from it. The totality of the circumstances indicated that evidence of drug trafficking was still inside the residence.

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42. United States v. Rubin, 474 F.2d 262, 268-69 (3d Cir. 1973) (citations omitted; emphasis added).

43. 465 A.2d 847, 852-53 (D.C. 1983) (the mere presence of a handgun provided sufficient exigency to allow the police to enter a hotel room and seize the gun before its owner returned).

44. *Id.* at 850 (citing United States v. McEachin, 670 F.2d 1139, 1144 n.7 (D.C. Cir. 1981)).

45. *See* Respondent's Brief at 6, State v. VanHolten, 756 P.2d 1288 (Utah Ct. App. 1988) (No. 86-369); Record at 85-86, *VanHolten* (No. 86-369).

46. 498 F.2d 30 (9th Cir. 1974).

47. *Id.* at 35.

48. *See* 2 W. LaFave, *supra* note 37, § 6.5(b), at 659.

The standard of review of the trial court's denial of a motion to suppress utilized in *VanHolten* was that pronounced in *Ashe* as "against the clear weight of the evidence [leaving us] with a definite and firm conviction that a mistake has been made."[49] Despite this rather deferential standard of review, the *VanHolten* court held the assessment of exigency to be in error because, "[a]t a minimum, officers could have obtained a telephone warrant pursuant to Utah Code Ann. [section] 77-23-4(2) (1982)."[50]

The Utah Supreme Court, however, noted in *Ashe* that more than a simple telephone call is required to obtain a telephone search warrant in Utah.[51] In *United States v. Hackett*,[52] the Ninth Circuit Court of Appeals held that twenty to thirty minutes was insufficient time in which to obtain a federal telephone warrant through a similar process.[53] Obtaining a telephone warrant takes significant time. Also, some merited warrants may be denied due to a magistrate's insecurity in making quick decisions over the telephone instead of carefully examining written affidavits.

In properly upholding the admission of evidence that had not been in plain view, the *VanHolten* court cited the "independent source" doctrine of *Segura v. United States*.[54] *Segura* states that evidence discovered pursuant to a valid search warrant, issued wholly on information known to the officers before the illegal entry, should not be suppressed as fruit of the improper entry.[55] The reason for admitting this evidence is that the warrant and the information on which it is based are unrelated to the entry and therefore constitute an "independent source" for discovery.[56]

With respect to the evidence that had been in plain view during the illegal entry, the *VanHolten* court properly stated the "inevitable discovery" rule of *Nix v. Williams*:[57] "[E]vidence that would otherwise be inadmissible under the exclusionary rule [is] admissible if the evidence would inevitably have been discovered

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49. *VanHolten*, 756 P.2d at 1291 (citing State v. Ashe, 745 P.2d 1255, 1258 (Utah 1987)).

50. *Id.* at 1292. For a detailed explanation of the process required to obtain a telephone warrant, see *Ashe*, 745 P.2d at 1267-68.

51. *Ashe*, 745 P.2d at 1267.

52. 638 F.2d 1179 (9th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981).

53. *Id.* at 1184-85.

54. 466 U.S. 796 (1984).

55. *See id.* at 799.

56. *Id.*

57. 467 U.S. 431 (1984).

without reference to the police error or misconduct."[58] Dismissing the contention that evidence is seized when merely observed by the police, the court concluded that "evidence which is in plain view during an illegal entry and later seized pursuant to a valid warrant based upon independent information, may be admissible under either the 'independent source' or the 'inevitable discovery' doctrine."[59]

The "independent source" and "inevitable discovery" doctrines place great importance on the inclusion of all relevant evidence in criminal determinations. These doctrines recognize that the need for informed decision-making outweighs the marginal deterrence of police misconduct gained by excluding evidence that was improperly discovered but would later be obtained through independent and proper investigation.

Consistent with finding no exigent circumstances, the *VanHolten* court excluded the evidence money discovered during the pat-down. The court ruled that, because the warrant did not authorize a search of Northrup, "[t]he evidence money was not seized pursuant to independent information, nor would it have been 'inevitably discovered,' it was obtained solely by exploitation of the illegal entry."[60] Without the evidence money there was insufficient evidence to convict Northrup on the two counts involving the distribution of cocaine.

4. Conclusion—In *State v. VanHolten*,[61] the Utah Court of Appeals narrowly construed the factors considered in determining exigent circumstances and overruled the trial court's justification of a warrantless entry. The court of appeals, however, upheld the admission of evidence seized during a later search pursuant to a valid warrant under the "independent source" and "inevitable discovery" doctrines. The probable effect of *VanHolten* will be to discourage findings of exigent circumstances in situations where police have foregone an earlier opportunity to obtain a warrant, or when they could conduct a clandestine siege of the premises while obtaining a telephone warrant.

The facts in *VanHolten* may make a closer case than *State v.*

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58. State v. VanHolten, 756 P.2d 1288, 1293 (Utah Ct. App. 1988) (citing *Nix*, 467 U.S. at 448).

59. *Id.* at 1294.

60. *Id.* at 1295.

61. 756 P.2d 1288 (Utah Ct. App. 1988).

Ashe.[62] Nevertheless, appellate courts should use great restraint in attempting to second-guess the trial judge and the officers at the scene with their superior vantage points and experience. The frequent exposure trial judges and police officers receive by virtue of their positions gives them an expert understanding of the habits and practices of modern drug traffickers. Accordingly, the "against the clear weight of the evidence leaving us with a definite and firm conviction" standard of review announced in *Ashe* is properly deferential and should be strictly construed.

*B. The Knock and Announcement Rule**

In *State v. Buck*,[1] the Utah Supreme Court held that police officers operating without a no-knock warrant must knock and give notice of their purpose and authority before carrying out a search, regardless of whether the officers believe the dwelling to be unoccupied.[2] Failure to give notice, however, will not result in suppression of evidence, either on constitutional or statutory grounds, if the officer's conduct is otherwise reasonable and the premises are unoccupied. The holding in *Buck* deals solely with unoccupied premises. The case is significant, however, because it gives lower courts and the police a bright line test to use in an area of law—the degree that the fourth amendment incorporates a requirement of notice—that has been subject to much confusion. The case also signals that the Utah Supreme Court will not be overly formalistic in dealing with fourth amendment issues.

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62. 745 P.2d 1255 (Utah 1987).

* Robert J. Moore, Junior Staff Member, *Utah Law Review*.

1. 756 P.2d 700 (Utah 1988) (opinion by Justice Stewart).

2. *See* UTAH CODE ANN. § 77-23-10 (1982). The statute states:

> When a search warrant has been issued authorizing entry into any building, room, conveyance, compartment or other enclosure, the officer executing the warrant may use such force as is reasonably necessary to enter:
>
> (1) If, after notice of his authority and purpose, there is no response or he is not admitted with reasonable promptness; or
>
> (2) Without notice of his authority and purpose, if the magistrate using the warrant directs in the warrant that the officer need not give notice. The magistrate shall so direct only upon proof, under oath, that the object of the search may be quickly destroyed, disposed of, or secreted, or that physical harm may result to any person if notice were given.

Id.

1. The Case—Danny Dwayne Buck was arrested and convicted on two counts of possession of a controlled substance with the intent to distribute, after a search of his house uncovered one and one-quarter pounds of marijuana and approximately 800 amphetamines.[3] The only issue at trial and on appeal was Mr. Buck's contention that the unauthorized, unannounced entrance of the police into his unoccupied home violated his rights under section 77-23-10[4] of the Utah Code and the fourth amendment to the United States Constitution.[5] The arresting officer testified that he believed he had the authority to break into Mr. Buck's home without notice under section 77-23-10(2), which allows for unannounced entrance when the magistrate issues a warrant stating that no notice is required.[6] The officer assumed he possessed a no-knock warrant because he was informed by the deputy county attorney that no-knock authority would be requested from the magistrate. When the officer read the warrant he did not notice that it did not grant authority for an unannounced entrance.

The court, dismissing Mr. Buck's statutory claim, held that although the police technically violated the statute the interests that the statute protects do not justify exclusion in a situation where

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3. The facts are taken from the court's opinion in *Buck*, 756 P.2d at 700-01.

4. For the text of § 77-23-10, see *supra* note 2.

5. Mr. Buck did not claim that the police violated his rights to be free from unreasonable search and seizure under article I, section 14, of the Utah Constitution. In State v. Hygh, 711 P.2d 264 (Utah 1985), however, the court held that the warrant requirements under the Utah Constitution were congruent with those developed by the federal courts under the fourth amendment to the United States Constitution. *Id.* at 267.

Justice Zimmerman, concurring separately in *Hygh*, stated that the warrant requirements in the state constitution differ from those in the federal constitution. *Id.* at 271 (Zimmerman, J., concurring). Justice Zimmerman argues that the state is free to, and should, consider alternate rules (as opposed to those developed by the federal courts for warrantless searches) and alternate remedies (as opposed to exclusion) for police actions that violate Utah's constitution but not the federal constitution. *Id.* at 271-73.

6. Section 77-23-10 states that the magistrate may issue a no-knock warrant on proof that the evidence can be destroyed quickly. *See* UTAH CODE ANN. § 77-23-10(2) (1982).

The courts split on the level of proof required to show that the object of the search may be destroyed quickly. Utah follows the blanket rule, holding that no-knock authority is justified in any case dealing with narcotics. *See* State v. Spisak, 520 P.2d 561 (Utah 1974). An increasing number of jurisdictions follow the rule framed in State v. Gassner, 6 Or. App. 452, 488 P.2d 822 (1971), stating that the police need a particular reason to believe that evidence may be destroyed, such as evidence that the amount of narcotics is small and can be easily destroyed. For further discussion of the blanket rule, see People v. Gastelo, 67 Cal. 2d 586, 432 P.2d 706, 63 Cal. Rptr. 10 (1967); 2 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.8(d) (2d ed. 1987) (arguing against the constitutionality of the blanket rule); Note, *No-Knock and the Constitution: The District of Columbia Court Reform and Criminal Procedure Act of 1970 (A Critique and Proposed Alterations)*, 55 MINN. L. REV. 781, 882-87 (1971) (arguing against application of the blanket rule).

the premises are unoccupied. The court pointed to three interests that the notice requirement protects: "(1) the protection of an individual's private activities within his home, (2) the prevention of violence and physical injury to both police and occupants which may result from an unannounced police entry, and (3) the prevention of property damage resulting from forced entry."[7] The court reasoned that when no one is home, the first two interests are not implicated and the third interest, although implicated, is the least significant.[8]

The court also dismissed Mr. Buck's claim that the police actions violated his fourth amendment rights. The court pointed out that case law supports the notion that an unauthorized, unannounced, forced entrance into an unoccupied premises is not a per se violation of the fourth amendment.[9] The court then held that, under the circumstances, the search was constitutional.[10] In doing so, the court stressed that no privacy interest was violated outside those already compromised by the warrant because no one was home. In addition, the court emphasized that the officer's conduct was otherwise reasonable.[11]

2. *Background*—The requirement of notice has its origin in early common law and has been traced back to *Semayne's Case* in 1603.

> "In all cases when the King is a party, the sheriff (if the doors not be open) may break the party's house, either to arrest him, or to do execution of the King's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and make request to open the doors."[12]

The requirement of notice has existed, in this general form, in the Anglo-American common law for nearly 400 years.[13]

Beginning in this century, many jurisdictions, including the

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7. *Buck*, 756 P.2d at 701 (citations omitted). These three factors are the basic interests protected by the knock-and-announcement requirements. *See* Payne v. United States, 508 F.2d 1391, 1393-94 (5th Cir. 1975); State v. Farber, 314 N.W.2d 365, 369 (Iowa 1982); State v. Iverson, 364 N.W.2d 518, 526 (S.D. 1985).

8. *Buck*, 756 P.2d at 701.

9. *Id.* at 703.

10. *Id.*

11. *Id.*

12. *Id.* at 701 (quoting Semayne's Case, 77 Eng. Rep. 194 (K.B. 1603)).

13. For a full discussion of the common law development and state statutes, see Blakey, *The Rule of Announcements and Unlawful Entry*: Miller v. United States *and* Ker v. California, 112 U. PA. L. REV. 499, 500-16 (1964).

federal government, have enacted statutes codifying the common law requirement of notice. The confusion surrounding the announcement requirement does not arise from the interpretation of these statutes, but from the notion that to some extent the fourth amendment incorporates the common law rule of notice. Only one United States Supreme Court case, *Ker v. California*,[14] discusses the relationship between the announcement requirement and the fourth amendment. *Ker* dealt with an unannounced entry into a house for the purposes of carrying out an arrest. Lower courts split on whether the language in *Ker* extends to situations involving search warrants.[15] The majority of courts, and many commentators, are of the opinion that the notice requirement in *Ker* applies to situations involving search warrants.[16]

One of the reasons for the confusion in this area is because *Ker* is a plurality decision. Justice Clark, writing for four members of the Court, ruled that although the Constitution requires notice, the situation in this case constitutes a valid exception to the constitutional rule.[17] Justice Brennan, writing in dissent for four members of the Court, stated that the search was unreasonable because the facts of the case did not constitute a valid exception to the constitutional requirement of notice.[18] Justice Harlan gave Justice Clark the majority by reasoning that Ker's conviction should stand because the fourth amendment should not be applied to the states through the fourteenth amendment.[19] It is generally accepted that

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14. 374 U.S. 23 (1963).

15. *See* State v. Valentine, 264 Or. 54, 504 P.2d 84 (1972) (in a case involving a search warrant, the court stated that if police actions violate the notice requirement set out in *Ker*, the evidence should be suppressed), *cert. denied*, 412 U.S. 948 (1973). *But see* State v. Vrtiska, 225 Neb. 454, 406 N.W.2d 114, 121 (1987) (holding that Supreme Court decisions do not require that police officers must knock and announce their purpose and be refused admittance before making a forced entry to execute a warrant), *cert. denied*, 108 S. Ct. 180 (1988).

16. *See, e.g.*, People v. Stephens, 18 Ill. App. 3d 817, 310 N.E.2d 755 (1974); State v. Carufel, 112 R.I. 664, 314 A.2d 144 (1974); *Valentine*, 504 P.2d at 84; W. LaFave, *supra* note 6, § 4.8(a).

17. *Ker*, 374 U.S. at 40-41. Justice Clark's opinion is rather ambiguous, resulting in some confusion on whether the case, as a whole, recognized a constitutional requirement of notice. Subsequent lower court decisions and a majority of the commentators, however, have stated that *Ker* stands for the proposition that the constitution requires notice. *See, e.g.*, United States v. Francis, 646 F.2d 251 (6th Cir. 1981); State v. Gassner, 6 Or. App. 452, 488 P.2d 822 (1971); State v. Valentine, 264 Or. 54, 504 P.2d 84 (1972), *cert. denied*, 412 U.S. 948 (1973); Blakey, *supra* note 13, at 551; Sonnenreich & Ebner, *No-Knock and Nonsense: An Alleged Constitutional Problem*, 44 St. John's L. Rev. 626, 640 (1970); Note, *Announcement in Police Entries*, 80 Yale L.J. 139, 146 (1970).

18. *Ker*, 374 U.S. at 60 (Brennan, J., dissenting).

19. *Id.* at 44-46 (Harlan, J., concurring).

the Court in *Ker* recognized a constitutional requirement of notice. Because of the split decision and the relative ambivalence of the consensus opinion, however, and because no other constitutional notice case has reached the Supreme Court,[20] the nature[21] of and exceptions to the constitutional requirement of notice are unclear.[22]

Several lower courts dealt with cases involving unoccupied premises and statutory and constitutional requirements of notice. Although defendants have put forth a wide variety of claims, the courts have held consistently that evidence should not be suppressed in situations involving unauthorized, unannounced entrances into unoccupied premises.

Case law has established that carrying out a search of a dwelling in the occupant's absence is not a violation of either the announcement statutes or the federal constitution.[23] The courts have uniformly rejected claims that announcement statutes require the police to make a reasonable effort to find the absent resident before breaking into a premise[24] and claims that it is unconstitu-

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20. Although the Supreme Court has not addressed the issue of a constitutional notice requirement outside of *Ker*, the Court has decided cases dealing with the federal announcement statute. *See, e.g.*, Sabbath v. United States, 391 U.S. 585 (1968); Miller v. United States, 357 U.S. 301 (1958). In *Sabbath*, the Court made a passing reference to "any possible Constitutional Rule." *Sabbath*, 357 U.S. at 591 n.8. The Nebraska Supreme Court relied on this language in State v. Vrtiska, 225 Neb. 454, 406 N.W.2d 114, 121 (1987), to hold that the United States Supreme Court has not ruled on the constitutionality of announcement as it relates to search warrants.

21. Two state courts have held that the violation of the announcement rules does not reach constitutional proportions unless police actions violate private interests and endanger the occupants of the premises. *See* State v. Bishop, 288 Or. 349, 605 P.2d 642 (1980); People v. Maddox, 46 Cal. 2d 301, 294 P.2d 6, *cert. denied*, 352 U.S. 858 (1956).

22. The language in *Ker* suggests that the constitutional requirement of notice may be different than the notice requirement embodied in the state and federal announcement statutes. *See Ker*, 374 U.S. at 30-34. The states are free, therefore, to fashion remedies other than the constitutional remedy of exclusion in instances where a violation of a state's announcement statute does not rise to constitutional proportions. *See* State v. Gassner, 6 Or. App. 542, 488 P.2d 822 (1971).

In *Buck*, Justice Zimmerman's concurrence spoke of fashioning a remedy for situations where the officers wait until the premises are unoccupied so that they may conduct the search in the occupants' absence. State v. Buck,. 756 P.2d 700, 703 (Utah 1988) (Zimmerman, J., concurring). Mr. Buck claimed that the evidence against him should be excluded. That the court entertained his statutory claim, as opposed to dealing with the case solely on constitutional grounds, may suggest that the majority of the Utah Supreme Court believes that exclusion is the proper remedy for a meaningful violation of Utah's announcement statute.

23. *See, e.g.*, State v. Farber, 314 N.W.2d 365, 368 (Iowa 1982); State v. Iverson, 364 N.W.2d 518, 527 (S.D. 1985).

24. *See, e.g., Farber*, 314 N.W.2d at 370; *Iverson*, 364 N.W.2d at 527.

tional to initiate a search when the officer knows that the premises are unoccupied.[25] Some courts have held that announcement statutes are not applicable to a situation involving unoccupied dwellings.[26] Similarly, courts have stressed that the interests the statute protects do not justify exclusion of evidence if the police break into unoccupied premises.[27]

3. Analysis—With *Buck*, Utah joins the line of case law holding that a violation of the rule of announcement should not result in suppression of evidence in situations where the premises are unoccupied. Although the *Buck* court relied heavily on this line of precedent, the situation in *Buck* may be distinguished from most of the cases the court cites. The great majority of cases the court cites deal with situations where the police knew before entering the premises that the dwelling was unoccupied. The *Buck* court cites only one case, *State v. Vrtiska*,[28] in which the police did not know, but only suspected, that the premises were empty. In *Vrtiska*, the court did not address the statutory issue because it was not properly raised on appeal.[29] In deciding the constitutional issue, the *Vrtiska* court took the minority view that the United States Supreme Court has not decided whether notice is required prior to the execution of a search warrant.[30] The court, therefore, was free to hold that the actions of the police were not in violation of the fourth amendment.

The rationale used in *Buck*—that although the police technically violated Utah's announcement statute, the interests that the statute protects do not justify exclusion in a situation where the premises were unoccupied—is well supported in case law.[31] The Utah Supreme Court, however, is the first court to apply this rationale retroactively to a situation where the officer did not know that the premises were vacant until after the officers had made a forced entry. In effect, the Utah court held that any failure to give

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25. *See* Payne v. United States, 508 F.2d 1391 (5th Cir. 1975); United States v. Gervato, 474 F.2d 40 (3d Cir. 1973).

26. *See Payne*, 508 F.2d at 1393; *Gervato*, 474 F.2d at 40.

27. *See, e.g., Iverson*, 364 N.W.2d at 527.

28. 225 Neb. 454, 406 N.W.2d 114 (1987).

29. *Vrtiska*, 406 N.W.2d at 120.

30. *Id.* at 121.

31. *See Iverson*, 364 N.W.2d at 527; State v. Farber, 314 N.W.2d 365, 369 (Iowa 1982); *see also* Payne v. United States, 508 F.2d 1391, 1393 (5th Cir. 1985) (knock-and-announce statutes are inapplicable to unoccupied premises); United States v. Gervato, 474 F.2d 40, 41 (3d Cir. 1973) (same).

notice, no matter how unreasonable, will not result in suppression of evidence if the premises turn out to be unoccupied.

The court's brief discussion of Mr. Buck's constitutional claim is not framed on the limits and exceptions to the constitutional requirement of notice established in *Ker*. Rather, the *Buck* court framed the issue by asking whether the search was unreasonable given the circumstances of the case.

The controlling circumstance in *Buck* was that the officers' forced entrance did not violate any privacy interest that was not already compromised by the warrant,[32] a circumstance solely contingent on the premises being unoccupied. Translating this rationale into the structure of *Ker*, this holding would be consistent with either the proposition that the language in *Ker* does not extend to situations involving search warrants or, more likely, the proposition that there exists a valid exception to the constitutional rule of notice when the premises are unoccupied.

Because the issue was framed in this fashion, the opinion does not reach many of the questions raised by *Ker*, such as whether the language in *Ker* extends to searches made during the execution of a search warrant, and the limits and exceptions to the constitutional requirement of notice. Therefore, although the opinion in *Buck* gives a bright line test for situations dealing with unoccupied premises, it does little to clarify general questions concerning Utah's view on the constitutional requirement of notice.

4. Effect—The *Buck* decision establishes a bright line test for police officers to follow when confronted with apparently unoccupied premises. Although it may seem self-evident that the police must announce their purpose and authority regardless of whether the premises are unoccupied, it has been suggested that a reasonable mistake as to whether the premises are unoccupied might excuse the failure to give notice.[33] This assertion apparently will not be viable in Utah.

Outside the court's rather narrow holding, the case signals that the Utah Supreme Court will not be overly formalistic in dealing with fourth amendment cases. In holding that the search was reasonable, the court emphasized that no privacy interest was violated, outside those already compromised by the warrant, because

32. State v. Buck, 756 P.2d 700, 703 (Utah 1988).

33. State v. Gassner, 6 Or. App. 452, 488 P.2d 822, 885 (1971); W. LAFAVE, *supra* note 6, § 4.8(b).

the premises were unoccupied. That the premises were unoccupied was not known until the police officers had forcibly entered the house. The court's holding, therefore, rejects the language in *Ker* stating that in determining the lawfulness of an entry the court should concern itself only with what the officers had reason to believe at the time of their entry.[34] The court refused to view the reasonableness of the circumstances solely from the officer's eyes when such an approach would bar the court from considering a fact viewed as fundamental to the case, such as that "the manner of entry in this case had nothing to do with the intrusion on the defendant's privacy."[35]

Furthermore, if the search was held to violate the fourth amendment, the evidence would be excluded, yet the purpose of the exclusionary rule would not be fulfilled. In *United States v. Leon*,[36] the Supreme Court held that the purpose of the exclusionary rule was to deter future illegal activity by law enforcement personnel. In the *Buck* case, however, there is no danger that the holding will encourage unauthorized forced entries. The police will be deterred by the possibility of having evidence suppressed if the premises turn out to be occupied.

5. Conclusion—The extent to which the fourth amendment embodies a notice requirement is a perplexing issue in constitu-

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34. *Ker*, 374 U.S. at 40-41 n.12.

> It goes without saying that in determining the lawfulness of entry and the existence of probable cause we may concern ourselves only with what the officers had reason to believe *at the time of their entry*. Johnson v. United States, 333 U.S. 10, 17 (1948). As the Court said in United States v. Di Re, 332 U.S. 581, 595 (1948), "a search is not to be made legal by what it turns up. In law it is good or *bad* when it starts and does not change character from" what is dug up consequently.

Id. (emphasis in original).

35. *Buck*, 756 P.2d at 703.

36. 468 U.S. 897 (1984). In *Leon*, the Court held that the exclusionary rule should not be applied when the officer conducting a search acts in reasonable reliance on a warrant issued by a detached and neutral magistrate that is subsequently determined to be invalid. *Id.* at 922. The Court reasoned that the exclusionary rule is not a corollary of the fourth amendment, but a judicially created remedy designed to deter illegal police activity. *Id.* at 906. In *Leon*, the search was ruled to be unreasonable because of a magistrate's mistake in granting the warrant and was not caused by recklessness or disregard of the law by law enforcement personnel. The exclusionary rule, therefore, should not apply because there is no need to deter illegal police conduct.

In *Buck*, both the respondent and the petitioner stressed their interpretation of the *Leon* line of cases in their appellate briefs. That the court made no mention of *Leon* in its decision may suggest the court's reluctance to apply the *Leon* rationale to a case in which it is not clear that the mistake concerning the warrant was the magistrate's fault.

tional law. *State v. Buck* clarifies the limited question of how the requirement of notice relates to unoccupied premises in Utah. Outside its holding, the decision also suggests that the court will not be overly formalistic in fourth amendment cases.

*C. Clarification as an Acceptable Form of Questioning Following a Suspect's Equivocal Request for Counsel**

In *State v. Griffin*,[1] the Utah Court of Appeals adopted a "clarification rule" for police when a suspect makes an equivocal or ambiguous request for counsel during custodial interrogation.[2] The clarification rule requires that when a suspect makes a statement that reasonably could be construed as a request for counsel, an interrogating officer must restrict further questioning to clarifying whether the suspect desires the assistance of counsel at that time. If the equivocal request is clarified as a present request for counsel, questioning must cease. The interrogation may continue, however, if, absent persuasion by the interrogating officer, the suspect indicates no desire to have counsel present during the interrogation.[3]

The United States Supreme Court, in *Miranda v. Arizona*,[4] recognized the right to have counsel present during custodial interrogation to safeguard the privilege against self-incrimination under the fifth amendment to the United States Constitution. *Miranda* provides: "If the individual states he wants an attorney, the interrogation must cease until an attorney is present."[5] *Miranda* offers no guidance, however, as to how an interrogating officer should proceed if the suspect makes an ambiguous statement that could be construed as a request for counsel.

The procedure used for an ambiguous request for counsel may differ from that used for a straightforward request. The United States Supreme Court has not yet adopted any single approach for dealing with an equivocal or ambiguous request for counsel during custodial interrogation, leaving this decision to each jurisdiction.[6]

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* Lisa M. Rischer, Junior Staff Member, *Utah Law Review*.

1. 754 P.2d 965 (Utah Ct. App. 1988) (opinion by Judge Bench).

2. The Court of Appeals in *Griffin* also addressed the standard by which admissibility and voluntariness of an accused's confession will be evaluated. This Development discusses only the clarification rule.

3. *Griffin*, 754 P.2d at 969.

4. 384 U.S. 436 (1966).

5. *Id.* at 474.

6. *See* Smith v. Illinois, 469 U.S. 91, 96 (1984).

Some jurisdictions have adopted a rigid approach under which interrogation by the officer must cease altogether at any mention of counsel by the suspect.[7] The "clarification approach" adopted by the Utah Court of Appeals is a more pragmatic alternative because it allows interrogation to continue if the suspect does not want the assistance of counsel during the immediate interrogation.[8]

1. The Case—Steven L. Griffin was charged with two counts of sexual abuse of a child in violation of section 76-5-404.1 of the Utah Code.[9] The alleged victim, a nine-year-old girl, was a friend of Griffin's daughter. After viewing a public service message about sexual abuse, the girl told her mother that Griffin had molested her. The girl's mother called the police. The police interviewed the girl, then went to Griffin's home. Griffin agreed to speak with them privately. The detectives conducted a tape-recorded interview in the police car.

During the interview, Griffin was advised of, but waived, his *Miranda* rights. He then proceeded to deny the allegations that he had sexually abused the young girl saying, "This is a lie. I'm calling an attorney." The detective replied, "Okay, are you saying you don't want to talk anymore?" Griffin responded, "No, I ain't saying that. I'm just saying it's a lie. I am going to talk to an attorney." The detective continued the interview, and eventually arrested Griffin after Griffin confessed to all of the allegations made against him. Griffin confessed again during a later interview at the jail.

Griffin filed a pretrial motion to suppress his initial confession, claiming it was taken in violation of his right to counsel.[10] The trial court denied the motion, and his initial confession was admitted at trial through the testimony of the interviewing officers. The jury convicted Griffin on two counts of sexual abuse of a child.

On appeal, Griffin argued that the trial court erred in admitting evidence concerning his two confessions. Again Griffin claimed that the confessions were involuntary and were taken in violation of his right to counsel. The Utah Court of Appeals concluded that Griffin's request for counsel was equivocal, but held that the detec-

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7. *See, e.g.*, Ochoa v. State, 573 S.W.2d 796, 800-01 (Tex. Crim. App. 1978) (questioning must cease if suspect indicates in any way a desire to have an attorney present).

8. *See* State v. Griffin, 754 P.2d 965, 969 (Utah Ct. App. 1988).

9. UTAH CODE ANN. § 76-5-404.1 (1987). The facts are taken from the court's opinion in *Griffin*, 754 P.2d at 966-68.

10. The detectives interrogated Griffin on two separate occasions—the initial interview in the police car and a later interview at the jail. The issue involving clarification of a request for counsel relates only to the first interview.

tive's further questioning satisfied the clarification rule. The court reasoned that Griffin's further comments indicated his willingness to talk and therefore constituted a waiver of his right to counsel.[11]

During the initial interrogation in the squad car, Griffin stated he intended to consult an attorney, but he did not clearly indicate whether he wished to stop the interrogation until counsel was made available. The court concluded that the detective responded properly by limiting his interrogation immediately following Griffin's mention of counsel to clarifying whether Griffin was willing to proceed without counsel. Because Griffin indicated that he was willing to continue talking, the court concluded that his first statement was not taken in violation of his right to counsel.[12]

2. Background—The basis of the *Griffin* decision can be traced to the privilege against self-incrimination guaranteed by the fifth amendment to the United States Constitution.[13] The right to counsel during custodial interrogation safeguards the right against self-incrimination.[14]

The landmark case in protection of fifth amendment rights during police custodial interrogation is *Miranda v. Arizona*,[15] decided by the United States Supreme Court in 1966. *Miranda* established procedural safeguards to preserve individual rights and prevent a compulsive, haphazard application of justice, especially

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11. The court of appeals reversed Griffin's conviction on other grounds. It held that the trial court erred in admitting Griffin's statements taken in each of the two interviews because they were involuntary in light of the detective's coercive questioning. The court of appeals also held that the police failed to advise Griffin properly of his *Miranda* rights prior to the second interview. The case was remanded to the trial court for a new trial. *Griffin*, 754 P.2d at 971.

12. *Id.* at 969-71. The court then inquired into the form and language used to interrogate Griffin, once he had waived his right to counsel, stating: " 'In order for a confession to be admissible, it must be made freely and voluntarily; it must not be extracted by threats or violence or obtained by improper influences or promises.' " *Id.* at 969 (quoting State v. Watts, 639 P.2d 158, 160 (Utah 1981)).

For examples of improper interrogative methods leading to inadmissible confessions, see State v. Ashdown, 5 Utah 2d 59, 296 P.2d 726 (1956), *aff'd*, 357 U.S. 426 (1958), and State v. Crank, 105 Utah 332, 142 P.2d 178 (1943). The court of appeals in *Griffin* concluded that the language used by the detective was sufficient to overcome Griffin's will and induce him to talk when he otherwise would not have talked. The *Griffin* court, for this reason, held that the trial court had erred in admitting testimony of the first confession into evidence. *Griffin*, 754 P.2d at 969-71.

13. The fifth amendment to the United States Constitution provides in part: "No person shall be . . . compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

14. *See, e.g.*, State v. Newton, 682 P.2d 295, 296 (Utah 1984).

15. 384 U.S. 436 (1966).

while the suspect is in police custody. For example, interrogating officers are often eager and may overreach their authority. Such conduct creates an atmosphere that may induce suspects to make self-incriminating statements. The *Miranda* rights are intended to protect a suspect under such circumstances by safeguarding the suspect's constitutional right against self-incrimination. *Miranda* rights include the right to remain silent and the right to have counsel present during custodial interrogation.[16] *Miranda* also requires that the police advise the accused of these rights at the beginning of any interrogation.[17]

The Supreme Court also held in *Miranda* that the suspect could invoke the right to counsel at any time by indicating "in any manner and at any stage of the process"[18] the desire to consult an attorney. If the interrogation has been continued without an attorney present, the prosecution must demonstrate "that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel"[19] before any statements taken during the interrogation can be admitted as evidence at trial.[20]

The Supreme Court further developed the *Miranda* rights in *Michigan v. Mosley*.[21] In *Mosley*, the Court addressed the suspect's right to remain silent, stating that invocation of the right to remain silent did not preclude forever subsequent interrogation concerning other offenses.[22] If the interrogating officers have honored the suspect's request to end questioning, the court implied that questioning on other issues could be initiated at a later time.[23]

In *Edwards v. Arizona*,[24] the Supreme Court again addressed a suspect's right to end questioning by invoking the right to counsel. In *Edwards*, the Court indicated that a suspect may volunta-

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16. *Id.* at 471-73.
17. *Id.* at 471.
18. *Id.* at 444-45.
19. *Id.* at 474-75.
20. *Id.* at 475.
21. 423 U.S. 96 (1975).
22. *Id.* at 102-03. In *Mosley* the suspect stated that he no longer wished to discuss the robberies about which he was being questioned. The officer ceased interrogation at that time, but questioning was later resumed by another officer regarding another incident. The Court found that the detective had "scrupulously honored" the defendant's right to stop questioning. *Id.* at 104. The Court also found that the statements made to the second officer were voluntary. *Id.* at 104-06.
23. *See id.* at 104-07.
24. 451 U.S. 477 (1981).

rily reinitiate discussion with police despite having invoked his right to counsel, and thereby waive his *Miranda* rights.[25]

Miranda, Mosley, and *Edwards* dealt with circumstances in which the suspect's request was unequivocal. This is often not the case. The law needed further development to encompass those cases in which the request was either equivocal or ambiguous.

In *Smith v. Illinois*,[26] the United States Supreme Court noted that various lower courts had developed three conflicting standards to determine the consequences of an equivocal request for counsel by an accused.[27] In deciding *Smith*, the Court did not adopt any one approach, concluding that the case should be reversed under any of the three standards.[28]

The three standards discussed in the third footnote to the *Smith* opinion have been adopted by various jurisdictions. Some jurisdictions have held that if any reference to counsel is made, regardless of how ambiguous, interrogation must cease. An example of this approach is *Ochoa v. State*,[29] in which the Texas Court of Criminal Appeals concluded that any manner of indicating a desire for an attorney used by the accused is sufficient to terminate further interrogation.[30] The court stated that any further interrogation would violate the suspect's *Miranda* rights, and any subsequent confession would not be admissible.[31]

Another approach to dealing with equivocal requests for counsel was taken by the Illinois Supreme Court in *People v. Krueger*.[32] That court attempted to define a standard of clarity for evaluating such requests. Under the *Krueger* standard, if a suspect's request for counsel was not sufficiently clear, the suspect would be found not to have invoked the right to counsel.[33]

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25. *See id.* at 485-87.

26. 469 U.S. 91 (1984).

27. *Id.* at 96 n.3.

28. *See id.* at 96.

29. 573 S.W.2d 796 (Tex. Crim. App. 1978). The *Ochoa* court relied on a very literal reading of the *Miranda* language, supported by the narrow reading in *Mosley*. "We read this language in *Miranda* literally; where a defendant indicates *in any way* that he desires to invoke his right to counsel, interrogation must cease. Such literal reading of *Miranda* is supported by Michigan v. Mosley, 423 U.S. 96 (1975)." *Id.* at 800 (emphasis in original).

30. *Id.* at 800-01.

31. *Id.*

32. 82 Ill. 2d 305, 412 N.E.2d 537, 539-40 (1980), *cert. denied,* 451 U.S. 1019 (1981).

33. *Krueger*, 412 N.E.2d at 539-40. The "in any manner" language used in *Miranda* indicates that a request for counsel need not be explicit or unequivocal, but the Supreme Court did not intend that every vague reference to an attorney should constitute an invocation of the right to counsel. *Id.* at 540.

The third approach is the clarification approach, which the United States Court of Appeals for the Fifth Circuit approved in *Nash v. Estelle*.[34] *Nash* involved a defendant who equivocally requested counsel, but at the same time expressed a willingness to talk. The court held that, in light of the defendant's equivocal request, questions by the officer to clarify the defendant's wishes were permissible.[35] The court quoted language from *Miranda* in support of this approach.[36]

While the Utah courts had not previously ruled on the issue raised in *Griffin*, the Utah Supreme Court had decided two cases in related areas. In *State v. Newton*,[37] the defendant claimed that officers had violated his right to counsel during custodial interrogation.[38] The court in *Newton* focused specifically on the issue of waiver and held that the defendant waived his right to counsel "voluntarily, knowingly and intelligently"[39] as required by *Edwards v. Arizona*.[40] The court did not directly address the issue of whether, and in what manner, an interrogating officer may continue questioning after a request for counsel has been made.

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34. 597 F.2d 513 (5th Cir.), *cert. denied*, 444 U.S. 981 (1979).

35. *Id.* at 517.

36. *Id.* (" ' "If [a suspect] is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must necessarily be left to the judgment of the interviewing agent." ' " (quoting Miranda v. Arizona, 384 U.S. 436, 485 (1966) (quoting a letter from the Solicitor General concerning FBI interview procedures))).

Another example of the third approach is Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979). The *Thompson* court held that questioning after an equivocal request for counsel has been made cannot take the form of argument regarding the accused's best interest. In other words, the interrogator may not attempt to act as a substitute for counsel by suggesting to the suspect what counsel's advice would be. *Id.* at 772.

The Idaho Court of Appeals also followed the clarification approach in State v. Moulds, 673 P.2d 1074, 1083 (Idaho Ct. App. 1983). In *Moulds*, a case of first impression in Idaho, the court considered only two approaches. The first, based on a literal interpretation of the *Miranda* language, would have required that if any form of request for an attorney was made, questioning must halt. The other approach considered was more pragmatic, based partially on the flexibility given to the *Miranda* doctrine in Edwards v. Arizona, 451 U.S. 477, 486 n.9 (1981) ("[W]aiver is possible, however, when the request for counsel is equivocal."). The Idaho Court of Appeals followed the latter approach. *See Moulds*, 673 P.2d at 1082.

More recently, the Wyoming Supreme Court addressed the clarification issue in Cheatham v. State, 719 P.2d 612 (Wyo. 1986). The court noted: "The officer acted properly in attempting to clarify what was an equivocal request for counsel." *Id.* at 619. The Court then addressed the issue of waiver and found that the defendant had invited the officer to ask further questions, and thereby voluntarily waived his right to counsel. *See id.* at 620.

37. 682 P.2d 295 (Utah 1984).

38. *Id.* at 296.

39. *Id.* (quoting *Edwards*, 451 U.S. at 482).

40. 451 U.S. 477 (1981).

The Utah Supreme Court also decided another case, *State v. Moore*,[41] on the similar issue of whether a "knowing and intelligent" waiver of the right to counsel had been made.[42] *Moore* involved the admissibility of statements made after the defendant had requested counsel. The court concluded that the defendant waived the right to counsel by initiating a conversation in which he made incriminating statements.[43]

3. Analysis—Although Griffin's claim of right to counsel is rooted in the *Miranda* doctrine, *Miranda* offered little guidance to police interrogators confronted with an ambiguous or equivocal invocation of the right to counsel.[44] After considering approaches taken in other jurisdictions for resolving this problem, the court in *Griffin* followed *Nash* and adopted the clarification approach.[45] This approach is illustrated by the procedure followed by the interrogating officer during the first custodial interrogation of Griffin.

With the *Griffin* decision, the Utah Court of Appeals adopted a standard to be followed by police interrogators in Utah. The court made a choice between the three approaches outlined briefly in *Smith v. Illinois*.[46] Prior to this time, the Utah courts had not adopted any specific standard or guideline for determining the admissibility of statements made by a suspect who has mentioned his desire for counsel.

The immediate effect of *Griffin* is that law enforcement officers will have flexibility in questioning a suspect who has made an ambiguous request for the assistance of counsel. The *Griffin* standard requires that the interrogating officer determine the intent of the accused by asking clarifying questions. If it is determined that the suspect seeks the immediate assistance of counsel, all questioning must end. Absent police coercion, if the accused initiates continued interrogation or indicates he does not want counsel present immediately, the questioning may continue.

If the questioning officers obtain a confession during custodial interrogation, the interview will be subject to close scrutiny to determine the admissibility of the confession. The *Griffin* court de-

41. 697 P.2d 233 (Utah 1985).

42. *See id.* at 235-37.

43. *Id.* at 236.

44. Miranda v. Arizona, 384 U.S. 436, 444-45 (1966). In general terms, the *Miranda* Court stated: "If . . . [defendant] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Id.*

45. State v. Griffin, 754 P.2d 965, 969 (Utah Ct. App. 1988).

46. 469 U.S. 91, 96 n.3 (1984).

clined to adopt a rigid approach under which any mention of counsel would necessitate an end to interrogation, favoring instead a more flexible approach. This approach will allow more confessions and statements to be admitted into evidence provided the clarification requirement is met. The clarifying questions will permit suspects to express their intentions clearly, and either to wait for an attorney or to waive that right and continue to talk without the aid of counsel.

The other side of the argument cannot be ignored. Law enforcement officers are usually expert, experienced interviewers. At times they may be overreaching in their interrogation. Additional questioning, even if only to "clarify" an ambiguous request for an attorney, may induce a suspect to make incriminating statements that the suspect would not have made had counsel been present.

4. Conclusion—In deciding *Griffin*, the Utah Court of Appeals provided a standard for interrogating officers to follow when questioning a suspect in custody. The United States Supreme Court has not yet adopted any of the three existing approaches to this problem.[47] The Utah Court of Appeals followed the most flexible standard in *Griffin*. Following this flexible clarification approach, police may be able to elicit more confessions from suspects. Courts will still need to scrutinize closely the circumstances surrounding confessions obtained during custodial interrogation to prevent officers from overstepping the bounds of their authority.

*D. The "Good Faith" Exception to the Exclusionary Rule**

In *State v. Mendoza*,[1] the Utah Supreme Court held that the "good faith" exception to the exclusionary rule[2] does not apply to a warrantless stop and search.[3] In addition, the court invalidated the Fourth Amendment Enforcement Act[4] as unconstitutional.[5] The

47. *See id.*

* Gary R. Johnson, Junior Staff Member, *Utah Law Review*.

1. 748 P.2d 181 (Utah 1987) (opinion by Justice Durham).

2. *See* United States v. Leon, 468 U.S. 897 (1984) (excepting from the exclusionary rule any evidence seized by an officer in good faith reliance on a warrant issued on a magistrate's erroneous probable cause determination).

3. *See Mendoza*, 748 P.2d at 186.

4. Fourth Amendment Enforcement Act of 1982, ch. 10, 1982 Utah Laws 84 (codified in scattered sections of UTAH CODE ANN).

5. *See Mendoza*, 748 P.2d at 186.

court based its decision solely on federal constitutional grounds.

1. The Case—In the early morning hours of March 16, 1985, two border patrol officers of the United States Immigration and Naturalization Service pursued a black Mustang automobile at high speed.[6] Without activating their light bar, the officers overtook defendants' car and followed at a distance of two to six feet. Eventually, with what the officers described as "jerky" movements, the Mustang pulled into the right lane and quickly slowed. According to the officers, the two defendants appeared to be of "Latin descent," and behaved "nervously."[7]

In view of the time of year, the Mustang's California license plates, defendants' nervous behavior, defendants' physical characteristics, and defendants' jerky driving, the officers thought they had good reason to stop defendants and question them about their citizenship status. Neither defendant was able to produce adequate identification. After arresting defendants, the officers opened the Mustang's trunk to search for other passengers. The trunk held fifty-one bags of marijuana.

The trial court suppressed the evidence obtained in the officers' search of defendants' car. On appeal, the court addressed at length two of the state's assignments of error:[8] (1) that the trial court applied a probable cause standard, rather than a reasonable suspicion standard, to determine the validity of the stop; and (2) that the trial court failed to make findings, pursuant to section 77-35-12(g) of the Utah Code, about whether the officers substantially

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6. The facts are taken from the court's opinion in *Mendoza*, *see id.* at 182, and from Justice Zimmerman's concurring opinion, *id.* at 187 (Zimmerman, J., concurring).

At the suppression hearing there was some doubt about the officers' reasons for suspecting the defendants. Although Officer Stiegler testified that Officer Fox had stated that the Mustang deserved a closer look because the occupants appeared to be of Latin descent, Officer Fox later testified that he could not remember making such a statement. *See id.* at 182 (majority opinion).

7. The officers' testimony identified only defendants' "white knuckled" or rigid look and their failure to make eye contact as illustrative of their nervous behavior. *See id.* at 184. Justice Zimmerman was particularly skeptical of defendants' anxious reaction as a justification for the stop. "Any sane person would appear nervous if [overtaken at high speed and followed closely by a car with only its headlights illuminated] along a lonely stretch of one of our interstates in the early morning hours." *Id.* at 187 (Zimmerman, J., concurring).

8. As a third assignment of error, the state argued that the defendants lacked standing to challenge the validity of the search because the search was proper. *See* Brief of Appellant at 23-24, State v. Mendoza, 748 P.2d 181 (Utah 1987) (No. 20922). Because the court held the initial stop unconstitutional, however, it summarily dismissed the standing issue. *See Mendoza*, 748 P.2d at 184.

violated the fourth amendment in bad faith.[9] The Utah Supreme Court affirmed the trial court's order to suppress.

On the state's first assignment of error, the court held that, despite the confusing language used in the suppression order, the trial court did not suppress the evidence in question solely because it applied a probable cause standard. The trial court found neither probable cause nor "any basis whatsoever for the stop."[10]

The Utah Supreme Court determined that the facts known to the border patrol officers lacked the relevance and probity necessary to create reasonable suspicion.[11] Moreover, several of the factors necessary for justifying the stop and search of a vehicle suspected of transporting illegal aliens[12] were absent.[13] Defendants did not try to evade the officers or attempt to hide anyone or anything when the officers began pursuit. Defendants were a considerable distance from the Mexican border. Defendants' car was neither heavily loaded nor typical of vehicles used for smuggling. Absent these justifying factors, the court held that the officers' stop and search violated defendants' fourth amendment rights.[14]

In its second assignment of error, the state argued that the trial court erred in failing to make the findings required by section 77-35-12(g) of the Utah Code.[15] Under that section, the trial court could suppress evidence only when the investigating officer substantially violated the fourth amendment in bad faith.[16] The court held that the substantial violation requirement fell below the standard of protection required by the fourth amendment of the federal constitution, thus making "invalid all of the statutes passed in the Fourth Amendment Enforcement Act."[17]

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9. *See Mendoza*, 748 P.2d at 181-82.

10. *Id.* at 182.

11. *Id.* at 184; *see* United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) (establishing reasonable suspicion standard for stops and searches investigating possible transportation of illegal aliens).

12. *See Brignoni-Ponce*, 422 U.S. at 884-85.

13. *Mendoza*, 748 P.2d at 184; *see infra* notes 17-20 and accompanying text (discussion of *Brignoni-Ponce*).

14. *Mendoza*, 748 P.2d at 184.

15. UTAH CODE ANN. § 77-35-12(g) (1982) was a part of the Fourth Amendment Enforcement Act. The state legislature intended that if the court held any part of § 77-35-12(g) invalid the Fourth Amendment Enforcement Act would "be void in its entirety." H.B. 69, 44th Leg., Bud. Sess., 1982 Utah Laws ch. 10, § 16.

16. *See* UTAH CODE ANN. § 77-35-12(g)(1) (1982).

17. *Mendoza*, 748 P.2d at 186. Chief Justice Hall "reserve[d] judgment as to the constitutionality of Utah Code Ann. § 77-35-12(g) (1982) and whether it has application to a warrantless search." *Id.* at 187 (Hall, C.J., concurring and dissenting). Justice Howe also saw the statute as applying only to searches conducted pursuant to warrants, and therefore re-

2. Background—In *United States v. Brignoni-Ponce*,[18] the United States Supreme Court set the minimum constitutional standard for the investigatory stop and search of a vehicle suspected of transporting illegal aliens.[19] The officers in *Brignoni-Ponce* based their investigatory stop on a single factor: "the apparent Mexican ancestry" of the car's occupants.[20] In holding the stop unconstitutional, the Court established a "reasonable suspicion" standard:

> Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.[21]

Additionally, the Court enumerated certain factors that officers may consider when assessing whether there is a reasonable suspicion on which to base an investigatory stop in the border area. Officers may consider: (1) the characteristics of the area where the vehicle is encountered, including its proximity to the border, the usual patterns of traffic on the road, and previous experience with alien traffic; (2) information about recent illegal border crossings in the area; (3) the driver's behavior including erratic or obviously evasive driving; (4) aspects of the vehicle itself, such as station wagons with large, concealed compartments; (5) the loaded-down appearance of the vehicle; (6) persons observed trying to hide in the vehicle; and (7) the characteristic appearance of natives of Mexico, including style of dress and haircut.[22]

In *Weeks v. United States*,[23] the Court created the exclusionary rule by holding that federal courts must exclude evidence when officers have gathered it in violation of the fourth amendment. In *Mapp v. Ohio*,[24] the Court extended the exclusionary rule to state criminal trials. The Court bound state courts with the rule on the theory that it is "an essential part of the right to privacy" guaran-

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served judgment as to its constitutionality. *Id.* at 187-88 (Howe, J., concurring and dissenting).

18. 422 U.S. 873 (1975).
19. *Id.* at 884-85.
20. *Id.* at 885-86.
21. *Id.* at 884 (footnote omitted).
22. *Id.* at 884-85 (citations omitted).
23. 232 U.S. 383 (1914).
24. 367 U.S. 643 (1961).

teed by the fourteenth amendment's due process clause.[25] In the words of one commentator, however, subsequent decisions "cut the exclusionary rule entirely free from any personal right or necessary remedy approach, thereby removing the clearest authority for imposing the rule on the states."[26]

In *United States v. Calandra*,[27] the Court held it proper to base a grand jury interrogation on information obtained in a prior unlawful search and seizure. In summarizing the majority's reasoning, Justice Powell wrote that "the [exclusionary] rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[28] In *United States v. Peltier*,[29] the Court held that the exclusionary rule should operate only when deterrence of future fourth amendment violations would result, and when required by "the imperative of judicial integrity."[30] Similarly, in *Stone v. Powell*,[31] the Court stated that the fourth amendment "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons."[32] The Court's eventual announcement of an objective good faith exception to the exclusionary rule was foreseeable.[33]

In *United States v. Leon*,[34] the Court excepted from the exclusionary rule any evidence seized by officers in good faith reliance on a warrant issued on a magistrate's erroneous probable cause determination. The exclusionary rule, the Court reasoned, "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity."[35] Therefore, when the state shows that an officer acted in objectively reasonable reliance on a magistrate's probable cause determination, and on the techni-

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25. *See id.* at 655-56.

26. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

27. 414 U.S. 338 (1974).

28. *Id.* at 348 (footnote omitted).

29. 422 U.S. 531 (1975).

30. *Id.* at 537-39.

31. 428 U.S. 465 (1976).

32. *Id.* at 486.

33. In four cases preceding *Leon*, four justices expressed support for an objective good faith exception. *See* Illinois v. Gates, 462 U.S. 213, 241-75 (1983) (White, J., concurring); California v. Minjares, 443 U.S. 916, 916 (1979) (Rehnquist, J., dissenting from denial of stay); Stone v. Powell, 428 U.S. 465, 496, 501 (1976) (Burger, C.J., concurring); Brown v. Illinois, 422 U.S. 590, 609-12 (1975) (Powell, J., concurring in part).

34. 468 U.S. 897 (1984).

35. *Id.* at 919.

cal sufficiency of the search warrant issued, the rule does not apply.[36]

While the *Mapp* Court regarded the exclusionary rule as an essential corollary to the right of privacy, subsequent decisions have relegated the rule to the role of a mere deterrent. It is no longer viewed by a majority of the Court as a personal right or a necessary remedy. Consequently, it is within the province of a state either to maintain the exclusionary rule or to enact a constitutionally acceptable alternative.

The Fourth Amendment Enforcement Act was the Utah Legislature's attempt to enact an alternative to the exclusionary rule that would comport with the decisions of the United States Supreme Court. Rather than deterrence through the exclusion of illegally seized evidence, the legislature intended both a remedy and a deterrent through the allowance of damages for parties whose fourth amendment rights were violated.[37] The Act waived the state government's immunity from suit "for injury proximately caused or arising out of a violation of protected fourth amendment rights."[38] Furthermore, with the goal of avoiding fourth amendment violations, the Act provided for the training of officers.[39]

3. Discussion—

(a) The Leon *Exception and Warrantless Searches.* Although *Mendoza* comports with other state and federal cases holding that the *Leon* exception does not apply to warrantless searches,[40] it was a case of first impression for the Utah Supreme Court. The court refused to extend the *Leon* exception to the search in *Mendoza*, or to warrantless searches in general. Particularly significant was the *Mendoza* court's invalidation of the Fourth Amendment Enforcement Act.[41] *Mendoza* provided the court with a solid opportunity to advance the "separate jurisprudence of state constitutional law" to which it had alluded in earlier cases. Nonetheless, the court restricted its analysis in *Mendoza* to

36. *See id.* at 922-23; *see also* Massachusetts v. Sheppard, 468 U.S. 981 (1984) (validating a search pursuant to a warrant clearly deficient on its face).

37. *See* UTAH CODE ANN. §§ 78-16-1, -6 (1986).

38. *Id.* § 63-30-10(2).

39. *See id.* § 67-15-5.

40. *See, e.g.*, United States v. Morgan, 743 F.2d 1158, 1165 (6th Cir. 1984); United States v. Rule, 594 F. Supp. 1223, 1238-39 (D. Maine 1984); Commonwealth v. Elliot, 714 S.W.2d 494, 497 (Ky. Ct. App. 1986).

41. *See supra* note 15.

the fourth amendment of the federal constitution.

The state argued that the *Leon* good faith exception should encompass warrantless searches.[42] Indeed, the Utah Supreme Court acknowledged that "much of the language in *Leon* intimates a broader application of the rule . . . [and] no language in the *Leon* opinion specifically restricts application of the exception to searches pursuant to a warrant."[43] For two reasons, however, the court refused to extend *Leon* to encompass the warrantless search in *Mendoza*, or warrantless searches in general.[44]

First, in searching defendants' car, the border patrol officers did not act in reliance on the express authorization of an outside authority.[45] The policy objective of the exclusionary rule is to deter law enforcement officers from knowingly or negligently conducting an illegal search.[46] An officer who reasonably relies on and restricts his search to the limits of a subsequently invalidated search warrant is not deterred by the later exclusion of the illegally seized evidence;[47] hence, the *Leon* exception. Because the officers in *Mendoza* did not rely on the authorization of any outside authority, the policy justifications of *Leon* were not present.[48]

Second, the very terms of the *Leon* exception make it inapplicable to an investigatory stop and search undertaken without a warrant. Under the *Brignoni-Ponce* standard, evidence obtained

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42. *See* Brief of Appellant at 8-10, State v. Mendoza, 748 P.2d 181 (Utah 1987) (No. 20922).

43. *Mendoza*, 784 P.2d at 185. Moreover, the Justice Department probably will continue to seek extension of the *Leon* exception to warrantless searches. *See, e.g.*, Brief for the United States at 21, United States v. Leon, 468 U.S. 897 (1984) (No. 82-1771) (arguing for a good faith exception applicable to all searches); *see also Leading Cases of the 1983 Term*, 98 HARV. L. REV. 87, 115-18 (1984) (arguing that the exclusionary rule is minimally costly in terms of lost indictments or convictions, and that the extension of *Leon* to warrantless searches would remove many of the safeguards offered by the pre-search review of a neutral and detached magistrate and would enable courts to dodge difficult questions of fourth amendment law).

44. Both Chief Justice Hall and Justice Howe reserved judgment about whether the *Leon* exception applies to warrantless searches. *See supra* note 17 and accompanying text.

45. As noted by the court, the United States Supreme Court, in Illinois v. Krull, 480 U.S. 340 (1987), extended the *Leon* exception to include subsequently invalidated statutes as outside authority on which officers can reasonably rely. The border patrol officers in *Mendoza*, however, did not rely on any prior external authorization. *See Mendoza*, 748 P.2d at 185 n.3.

46. *See Leon*, 468 U.S. at 918-19.

47. *See id.* at 918-20.

48. The court, although it did not specifically comment on the deterrence rationale, did seem skeptical of the *Leon* view of the exclusionary rule. *See Mendoza*, 748 P.2d at 185 ("Whether or not we agree with the *Leon* view of the exclusionary rule's purpose, the exception cannot operate in this situation . . . .").

during an investigatory stop and search is admissible only when articulable facts give rise to a reasonable suspicion.[49] That standard, the *Mendoza* court reasoned, requires the same objectively reasonable conduct in the decision to search that an officer must exercise when relying on a subsequently invalidated search warrant.[50] When an officer's investigatory stop is not based on reasonable suspicion, the subsequent search is illegal; the officer who conducted the search "could not have acted reasonably."[51] Therefore, the court reasoned, the *Leon* exception could never apply in warrantless stop and search situations.[52]

(b) The Fourth Amendment Enforcement Act. Because the Fourth Amendment Enforcement Act purported to create an exception in situations similar to *Mendoza*, the court ruled it unconstitutional.[53] The court gave two additional reasons for declaring the Act unconstitutional. First, section 77-35-12(g)(1) shifted to defendants the burden of proving a substantial violation of their fourth amendment rights before the trial court could apply the exclusionary rule.[54] Second, the definition of substantial violation in section 77-35-12(g)(2)(i) and (ii) validated police conduct not satisfying *Leon*'s "objectively reasonable" standard.[55]

(c) State Constitutional Jurisprudence. A state court has the authority to extend greater fourth amendment protection to criminal defendants than is required by the federal constitution.[56] Moreover, in *State v. Earl*,[57] the Utah Supreme Court said that it will consider interpreting the Utah Constitution without strictly adhering to the conclusions of the United States Supreme Court.[58] Utah lawyers, however, must brief the court on relevant

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49. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975).

50. *See Mendoza*, 748 P.2d at 185-86.

51. *Id.* at 186.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *See, e.g.*, Cooper v. California, 386 U.S. 58, 62 (1967) (recognizing the authority of a state court "to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so").

57. 716 P.2d 803 (Utah 1986). For an in-depth discussion of *State v. Earl*, see *Recent Developments in Utah Law*, 1987 UTAH L. REV. 79, 82.

58. In *Earl*, the court recognized its willingness in prior cases to interpret the Utah Constitution independently. *Earl*, 716 P.2d at 806; *see, e.g.*, American Fork City v. Crosgrove, 701 P.2d 1069, 1072 (Utah 1985) (scope of privilege against self-incrimination); Malan

state constitutional questions. In *State v. Earl*,[59] *State v. Dorsey*,[60] and *State v. Ashe*,[61] the defendants failed to argue for more extensive protection under the Utah Constitution. Consequently, the court restricted its analysis in those cases to the boundaries of the fourth amendment to the federal constitution.[62]

Apparently the court desires to avoid "traveling the tortuous paths paved by the federal courts in [the fourth amendment] area."[63] Nonetheless, the court has not budged from its refusal to advance a separate jurisprudence under the state constitution when the parties have failed to brief those issues.[64]

The court expressly reserved for the future its determination of the degree of protection afforded by article I, section 14, of the

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v. Lewis, 693 P.2d 661, 670 (Utah 1984) (constitutionality of automobile guest statute); Kearns-Tribune v. Lewis, 685 P.2d 515, 520-22 (Utah 1984) (press access to preliminary hearings); State v. Ball, 685 P.2d 1055, 1061 (Utah 1984) (constitutionality of questioning a juror about drinking alcohol); Gray v. Department of Employment Sec., 681 P.2d 807, 825-29 (Utah 1984) (Durham, J., concurring and dissenting) (due process protections when terminating unemployment benefits); *see also* Comment, *The Utah Supreme Court and the Utah State Constitution*, 1986 UTAH L. REV. 319 (thoroughly discussing Utah cases in which the Utah Supreme Court independently interpreted the Utah Constitution).

59. 716 P.2d at 805.

60. 731 P.2d 1085, 1087 n.2 (Utah 1986).

61. 745 P.2d 1255, 1257 n.2 (Utah 1987).

62. More recently, the court's message about a separate state constitutional jurisprudence has been mixed. In State v. Watts, 750 P.2d 1219 (Utah 1988), Chief Justice Hall's majority opinion stated that "the court has always considered the [fourth amendment] protections afforded [by the Utah and the federal constitutions] to be one and the same." *Id.* at 1221. "In declining to depart in this case from our consistent refusal heretofore to interpret article I, section 14, of our constitution in a manner different from the fourth amendment to the federal constitution, we have by no means ruled out the possibility of doing so in some future case." *Id.* at 1221 n.8. Justice Zimmerman's dissent was discordant on these issues:

> I certainly do not agree with the categorical assertions in the majority opinion that this Court has "never drawn any distinctions" between article I, section 14, and the federal fourth amendment and has "always considered the protections afforded to be one and the same" or with the majority opinion's intimation that there is no substantive distinction between the state and federal provisions.

Id. at 1225-26 (Zimmerman, J., dissenting).

63. State v. Ashe, 745 P.2d 1255, 1269 (Utah 1987) (Durham, J., dissenting).

64. If counsel has failed to brief the state constitutional issues, some state courts have ordered the parties to rebrief the relevant state constitutional provisions. *See, e.g.*, State v. Johnson, 68 N.J. 349, 346 A.2d 66, 67-68 (1975).

> While counsel for defendant did not contend, either on argument of the motion or on appeal, that our State constitutional provision against unreasonable searches should be interpreted to give the individual greater protection than is provided by the Fourth Amendment, this Court, *sua sponte*, posed the issue and afforded counsel the opportunity to submit supplemental memoranda on the question.

Id.; *see also* Comment, *supra* note 58, at 323-25 (taking issue with Utah Supreme Court's failure to demand supplemental briefing of state constitutional questions).

Utah Constitution.[65] As the court acknowledged, however, much of the language in *Leon* intimates an application of the good faith exception that extends beyond searches pursuant to a warrant. Under the *Leon* view of the exclusionary rule and the fourth amendment, the Utah Supreme Court could have extended the good faith exception to warrantless searches. The court could just as well have relied on article I, section 14, of the Utah Constitution either to refuse to extend *Leon*, or to bypass altogether the question whether the federal good faith exception was applicable.

Indeed, the court could have addressed the issues in *Mendoza* independent of even the exclusionary rule. A foundational tenet of the majority opinion is eminently arguable. That "the United States Supreme Court applied the exclusionary rule to the states by virtue of the fourteenth amendment"[66] in *Mapp* does not force the majority's conclusion that "the United States Constitution requires suppression of evidence seized pursuant to a search or seizure made in violation of the fourth amendment."[67] According to later decisions of the United States Supreme Court, the exclusionary rule is primarily a deterrent to fourth amendment violations.[68] As the rule is not an essential corollary of a constitutional right, the states are arguably not bound by it.[69] The critical question is: "To what extent can the Court insist upon adherence to constitutionally inspired, but not compelled, rules without considering as decisive whether the state has provided minimally satisfactory alternatives?"[70] A state that legislates its own mechanisms

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65. State v. Mendoza, 748 P.2d 181, 186 n.4 (Utah 1987). Article I, section 14, of the Utah Constitution is almost identical to the fourth amendment of the United States Constitution.

66. *Id.* at 185 (citation omitted).

67. *Id.* The *Mendoza* majority is not alone in considering the exclusionary rule at least an essential corollary of a constitutional right. *See, e.g.*, United States v. Leon, 468 U.S. 897, 930 (1984) (Brennan, J., dissenting) ("A proper understanding of the broad purposes sought to be served by the Fourth Amendment demonstrates that the principles embodied in the exclusionary rule rest upon a far firmer constitutional foundation than the shifting sands of the Court's deterrence rationale.").

68. *See supra* notes 27-36 and accompanying text (discussing the Court's deterrence rationale for the exclusionary rule).

69. *See* Monaghan, *supra* note 26.

> [A] surprising amount of what passes as authoritative constitutional "interpretation" is best understood as something of a quite different order—a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress.

Id. at 2-3.

70. *Id.* at 9.

for protecting fourth amendment rights seems to be well within its appropriate realm of power.[71]

In summarily invalidating the Fourth Amendment Enforcement Act, the Utah Supreme Court voided a well considered enactment of the Utah Legislature—an alternative to the exclusionary rule and the tangle of related federal case law. In so doing, the court commented on neither the merits of the Act as a whole nor the larger issue of legislating an alternative to the exclusionary rule. The court's pronouncements in *Mendoza*, if more informative, would have been much more useful to the legislature in any attempt to redraft the Act. At a minimum, the question whether the Act should have been invalidated either on the facts of *Mendoza*[72] or on federal constitutional grounds[73] is more troublesome than the court's opinion seems to suggest. Finally, by confining its analysis to the fourth amendment of the federal constitution and federal case law, the court ignored a sterling opportunity to advance its oft-mentioned state jurisprudence of constitutional law.

4. Conclusion—Justice Brennan, dissenting in *Calandra*, expressed the fear that the Court's decision "may signal that a majority of my colleagues have positioned themselves to reopen the door [to evidence secured by official lawlessness] still further and abandon altogether the exclusionary rule in search and seizure cases."[74] The portent of the Court's holdings in *Leon* and *Sheppard* have engendered concern over the truth of Justice Brennan's prediction.[75] While the Utah Supreme Court seems vigilant in its

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71. *See, e.g.*, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 421 (1971) (Burger, C.J., dissenting) (suggesting that Congress should experiment legislatively with remedial alternatives to the suppression doctrine). Chief Justice Burger's quotation of Holmes is also germane in the state government context:

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

Id. at 420 (quoting Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)). Monaghan has stated, "At the most, the exclusionary rule can be rationalized only on the assumption that the Court is saying to the states: Here is a practice that, for constitutional purposes, 'will work,' but you are now free to come up with an alternative. *Callandra* and *Peltier* portend such a rationalization . . . ." Monaghan, *supra* note 26, at 9 n.45.

72. *See supra* note 17 (concurring and dissenting opinions of Chief Justice Hall and Justice Howe).

73. *See supra* notes 56-71 and accompanying text.

74. United States v. Calandra, 414 U.S. 338, 365 (1975) (Brennan, J., dissenting).

75. *See, e.g., Leading Cases of the 1983 Term*, *supra* note 43, at 108-18.

protection of fourth amendment guarantees, the question whether the Utah State Constitution provides any greater protection than the federal constitution remains unanswered.

E. Miranda-*like Warnings in Noncustodial Settings**

In *In re a Criminal Investigation*,[1] the Utah Supreme Court held that witnesses subpoenaed pursuant to the Subpoena Powers Act ("Act")[2] are constitutionally entitled to *Miranda*-like[3] warnings before being interrogated.[4] The court further held that witnesses targeted for investigation by the state must be notified of their target status and of the charges being considered against them.[5] Under the secrecy provisions of the Act, the court mandated that the state's attorneys apply for and the court issue secrecy orders on a subpoena-by-subpoena basis.[6] The *Investigation* decision significantly clarifies and expands the self-incrimination provision of Utah's Constitution[7] and further defines the Utah court's interpretation of the fourth,[8] fifth,[9] and fourteenth[10] amendments to the United States Constitution. By invoking its inherent supervisory power,[11] however, the court not only expressed its increased willingness to construe statutes to avoid constitu-

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* Erik A. Christiansen, Junior Staff Member, *Utah Law Review*.

1. 754 P.2d 633 (Utah 1988) (opinion by Justice Zimmerman).
2. UTAH CODE ANN. §§ 77-22-1 to -3 (1982 & Supp. 1988).
3. Miranda v. Arizona, 384 U.S. 436 (1966).
4. *See Investigation*, 754 P.2d at 647-48.
5. *Id.* at 650.
6. *Id.* at 656.
7. *See* UTAH CONST. art. I, § 12 (providing that "the accused shall not be compelled to give evidence against himself").
8. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.").
9. *See id.* amend. V (providing that "no person . . . shall be compelled in any criminal case to be a witness against himself").
10. *See id.* amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").
11. *See In re* a Criminal Investigation, 754 P.2d 633, 642-43 (Utah 1988); *see also* UTAH CONST. art. V, § 1 (separation of powers); *id.* art. VIII, § 1 (judicial powers); *id.* art. VIII, § 4 (rule-making power); UTAH CODE ANN. §§ 78-7-5, -17 (1987 & Supp. 1988) (powers of courts); *id.* §§ 78-24-5 to -7 (1987) (subpoena powers of courts). Supervisory powers have been limited to establishing rules of evidence and judicial procedure, and formulating sanctions for misconduct by prosecutors and government investigators operating in the criminal justice system. *See* Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1434 (1984).

tional deficiencies, but also left open the possibility of requiring additional procedural protections if prosecutorial abuse occurs. As a result, further rulings by the court, and further clarification by the legislature, undoubtedly will be required to define the precise contours of the Act.

1. The Case—On January 26, 1983, Utah's Seventh Judicial District Court authorized the attorney general to investigate alleged criminal activities at Utah Power & Light Co.[12] Pursuant to the Subpoena Powers Act,[13] the district court authorized the attorney general to issue subpoenas compelling the attendance and testimony of witnesses and the production of documents relevant to the investigation.

During 1983 and 1984, the attorney general issued numerous subpoenas to various banks and document repositories. None of the subpoenas issued by the attorney general described the nature of the investigation to the subpoenaed individuals or institutions, nor were any of those subpoenaed informed of their status as targets of the investigation. Few of the subpoenaed individuals were told that they had a right to exercise their privilege against self-incrimination. In addition, relying on the secrecy provisions of the Act,[14] the attorney general instructed witnesses not to speak to anyone other than their counsel about the investigation. In response to a motion to quash an issued subpoena, the district court dismissed the criminal investigation and held the Act unconstitutional on its face and as applied.

On appeal, the attorney general conceded that the Act was unconstitutionally applied because of various misrepresentations made on the face of several subpoenas. However, the attorney general argued that the Act was constitutional on its face. The Utah Supreme Court agreed with both arguments. To avoid finding the Act unconstitutional on its face, the court relied on its inherent supervisory powers over the administration of criminal justice[15] to

12. The facts are taken from the court's opinion in *Investigation*, 754 P.2d at 636-40.

13. UTAH CODE ANN. § 77-22-2(1) (1982).

14. *Id.* § 77-22-2(3).

15. *See Investigation*, 754 P.2d at 640-43. Judicial supervisory powers were first employed by the United States Supreme Court in McNabb v. United States, 318 U.S. 332 (1941) (defendant's confession excluded because of court's implied duty to maintain civilized standards of procedure and evidence). The United States Court of Appeals for the Sixth Circuit first relied on its supervisory power in Helwig v. United States, 162 F.2d 837 (6th Cir. 1947) (defendant not procedurally entitled to new trial, but court ordered a new trial on the basis of its supervisory power). Examples of early state court use of supervisory

interpret the Act as allowing subpoenaed witnesses to exercise their privilege against self-incrimination when interrogated.[16] The court, however, limited the privilege by holding that subpoenaed witnesses have no general right to remain silent.[17] The court also held the coercive nature of the Act's interrogation proceedings to be more like police custodial interrogations[18] than grand jury interrogations, and concluded that in order to provide witnesses a meaningful opportunity to exercise their privilege against self-incrimination, the state must read every witness a *Miranda*-like warning prior to interrogation.[19]

The court next held that the fourth amendment prohibition against unreasonable searches and seizures was satisfied if precompliance review of every subpoena was available and the trial court had a meaningful opportunity to supervise the initial authorization of the investigation.[20]

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power include *In re* Integration of Nebraska State Bar Ass'n, 133 Neb. 283, 275 N.W. 265 (1937) (inherent supervisory power is essential to the existence, dignity, and function of the court), and Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432 (1973) (supervisory power over state criminal proceedings is broad and not limited by federal constitutional law).

16. *See Investigation*, 754 P.2d at 645-46.

17. *Id.* at 646-47. In contrast, the United States Supreme Court has held that criminal suspects have an absolute right to remain silent in police custodial interrogations. *See* Michigan v. Mosley, 423 U.S. 96, 100-04 (1975).

18. An interrogation may take place in a prosecutor's office before the state's investigative team and may be conducted without the presence of a citizen panel. These circumstances led the court to conclude that the Act was psychologically more compulsive than grand jury proceedings. *Investigation*, 754 P.2d at 648.

19. *Id.* at 648-50. Every witness must be notified prior to interrogation of the following:

> (i) [T]he general subject matter of the investigation, (ii) of the existence and nature of the privilege against self-incrimination, (iii) that any information provided may be used against the witness in a subsequent criminal proceeding, and (iv) of the right to have counsel present.

Id. at 648. The court also added that if a witness is the target of an investigation the witness must be so informed. *Id.* at 649-50. Of the five *Miranda*-like warnings required by the Utah Supreme Court, only the second, third, and fourth stem from *Miranda*. The first warning stems from the court's concern that witnesses be in a position to exercise their self-incrimination privilege. The fifth requirement—target warnings—stems independently from article I, section 12, of the Utah Constitution. The United States Supreme Court rejected target warnings in federal grand jury proceedings in United States v. Washington, 431 U.S. 181, 189 (1977).

20. *See Investigation*, 754 P.2d at 642-44. The court concluded that an investigation may proceed: (1) only after the district court makes an objective determination that "good cause" has been shown to authorize the investigation; (2) only after the investigating attorney has made a "good faith" determination that the evidence sought is reasonably relevant to the investigation; and (3) only if a subpoenaed witness is afforded a precompliance opportunity to challenge the "objective reasonableness" of the subpoena. *Id.* at 643-44.

Utilizing the United States Supreme Court's framework for determining the minimum procedural safeguards required by the fourteenth amendment in federal agency proceedings,[21] the court also categorized the Act's interrogation process as merely preliminary to the type of formal adjudicative proceedings in which procedural guarantees are constitutionally required.[22] Thus persons targeted for investigation need not be provided an opportunity to confront and cross-examine adverse witnesses or present evidence in their defense.[23] Nevertheless, in order to ensure that authorizing courts have sufficient information to exercise their inherent supervisory power, the court required that certain orders, motions, and documents be preserved in the record.[24]

Finally, to safeguard the fourth and fourteenth amendment rights of subpoenaed witnesses, the court held that the state must make an individual showing justifying secrecy with regard to each interrogation.[25] The state's secrecy request will only be allowed if it

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Although the court did not precisely define "good cause," it did note that the standard does not allow the initiation of an investigation "on mere whim or pretext." *Id.* at 644 n.11. Similarly, although the court did not precisely define the "objective reasonableness" standard, it did note that the reasonableness of a subpoena issued under the Act is measured by less exacting standards than subpoenas issued during trial. *Id.* at 644 n.12.

21. The United States Supreme Court has divided all agency proceedings into two main categories (adjudicative and investigative) and has divided the investigative category into three subcategories (accusative proceedings, preliminary proceedings, and legislative fact-finding proceedings). *See, e.g.*, Jenkins v. McKeithen, 395 U.S. 411, 425-28 (1969); Hannah v. Larche, 363 U.S. 420, 440-42 (1960).

22. *See Investigation*, 754 P.2d at 650-52.

23. *Id.* at 650.

24. *Id.* at 653-54. While the court did not specify every document that must form the permanent record of any investigation, at a minimum the following must be included:

(i) the application for authorization to commence the investigation, together with the supporting good cause statement;
(ii) all motions made to the court;
(iii) all orders of the court concerning the investigation, including the original order authorizing the investigation and any orders modifying its scope or duration;
(iv) copies of all subpoenas issued;
(v) detailed descriptions of all evidence produced in response to subpoenas;
(vi) copies of all transcripts of testimony prepared;
(vii) all communications between the state's attorneys or their staffs and the court.

Id. at 654.

25. *Id.* at 656. Requested orders may keep the following secret: (1) "[T]hat a particular interrogation will occur or has occurred"; (2) "the substance of the evidence obtained"; (3) "the identity of the witness"; and (4) "documents in the hands of the court and of participants in the investigation, including state's attorneys, court reporters, court personnel, investigating agency staff, and other persons who have access to investigation documents or are present in interrogations." *Id.* at 655.

demonstrates a reasonable likelihood that public release of information about the identity of a witness "would pose a threat of harm to someone or otherwise impede the investigation."[26] The order authorizing the investigation and the good cause statement filed by the attorney at the beginning of an investigation, however, are public records that can never be kept secret.[27]

2. Background—Prior to *Investigation*, the Utah Supreme Court required *Miranda* warnings "[o]nly when a suspect's freedom of action is curtailed to a degree associated with a formal arrest."[28] In *State v. Fulton*,[29] the court noted:

> [A] suspect is not entitled to the benefit of *Miranda*'s procedural protections until the suspect is interrogated in a custodial setting; custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[30]

In *Salt Lake City v. Carner*,[31] the court approved four factors to be considered in determining if an accused has been taken into custody. The factors are "(1) the site of interrogation; (2) whether the investigation focused on the accused; (3) whether the objective indicia of arrest were present; and (4) the length and form of interrogation."[32] The absence of any one of these factors may indicate a noncustodial setting.[33]

Applying the *Carner* factors to the facts in *Investigation*, no *Miranda* warnings would have been required. Although the *Investigation* court found the psychological compulsion facing a subpoenaed witness to be "analogous to that present in a police custodial inquiry,"[34] the most important *Carner* factor was not present in the facts of *Investigation*[35]—none of the interrogations conducted

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26. *Id.* at 656.
27. *Id.*
28. State v. East, 743 P.2d 1211, 1212 (Utah 1987).
29. 742 P.2d 1208 (Utah 1987).
30. *Id.* at 1211 n.3 (quoting Miranda v. Arizona, 384 U.S. 436, 444 (1966)).
31. 664 P.2d 1168 (Utah 1983).
32. *Id.* at 1171.
33. *Id.*
34. *In re* a Criminal Investigation, 754 P.2d 633, 648 (Utah 1988). The court reasoned that the site of the interrogation made the interrogation analogous to a custodial setting. *Id.* The Utah Code provides for the right to hold interrogations "anywhere within the jurisdiction of the prosecutor." UTAH CODE ANN. § 77-22-2(2) (1982).
35. *See Investigation*, 754 P.2d at 648. The *Investigation* court limited its discussion of custodial settings to the site, length, and form of the interrogation. *Id.* The court did not consider whether the objective indicia of arrest were present. More importantly, it did not

in *Investigation* had any objective indicia of arrest. Thus the *Investigation* court noted that the "procedural rulings issued in the context of police custodial interrogations and grand jury investigations" were merely "instructive."[36] As a result, the warning fashioned by the court is by no means an exact copy of the *Miranda* warning required in custodial settings under *Carner*.[37]

The warning fashioned by the *Investigation* court reflects that the United States Supreme Court has not yet decided if a shorter *Miranda*-type warning is required in grand jury proceedings. In *United States v. Mandujano*,[38] the Supreme Court held that *Miranda* warnings need not be provided to federal grand jury witnesses.[39] The *Investigation* court interpreted the plurality opinion in *Mandujano* and the companion cases of *United States v. Washington*[40] and *United States v. Wong*[41] as leaving open the question whether "some shorter form of warning" might be required.[42]

With regard to target warnings, the *Investigation* court found itself constrained by the Supreme Court's ruling in *United States v. Washington*[43] and acknowledged that its decision rested independently on article I, section 12, of the Utah Constitution.[44] Ten years before the Supreme Court's decision in *Washington*, Utah had required target warnings for witnesses appearing before the grand jury.[45]

Few state legislatures have enacted statutes similar to Utah's Subpoena Powers Act.[46] Of those states that have, all but one re-

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consider whether the investigation focused on the accused. Because subpoenas issued under the Act are preliminary to full adjudicatory proceedings and apply equally to suspects and nonsuspects, the second *Carner* factor—whether the investigation focused on the accused—is arguably absent in *Investigation*.

36. *Id.* at 647.

37. *See supra* note 19. Significantly, the right to remain silent is not part of the *Investigation* warnings. *See Investigation*, 754 P.2d at 646.

38. 425 U.S. 564 (1976) (plurality opinion).

39. *Id.* at 579-80.

40. 431 U.S. 181 (1977).

41. 431 U.S. 174 (1977).

42. *In re* a Criminal Investigation, 754 P.2d 633, 648 (Utah 1988). The court emphasized that its holding was based independently on the state constitution so as to eliminate any suggestion that it relied solely on the federal fifth amendment. *Id.* at 648 n.16; *see infra* text accompanying notes 50-54 (discussing cases interpreting article I, section 12, of the Utah Constitution).

43. 431 U.S. 181 (1977).

44. *See Investigation*, 754 P.2d at 650.

45. *See id.* at 650 (citing State v. Ruggeri, 19 Utah 2d 216, 225, 429 P.2d 969, 975 (1967)).

46. *See, e.g.*, DEL. CODE ANN. tit. 29, § 2508 (1983); IOWA CODE ANN. § 813.2 (West 1979); KAN. STAT. ANN. §§ 22-3101 to -3105 (1981); LA. CODE CRIM. PROC. ANN. art. 66 (West

quire precompliance approval of investigative subpoenas.[47] Thus the Utah court's precompliance approval requirements bring the state into line with the language used by most of the presently existing state statutes.[48] To date, however, no other state has required that *Miranda*-like warnings be given to subpoenaed witnesses. In addition, no other state requires that the initial court order authorizing the investigation and the "good cause" statement[49] be made available to witnesses.[50] Utah is the first state to require such protections.

3. Analysis—In 1980, the Utah Supreme Court in *Hansen v. Owens*[51] gave the privilege against self-incrimination in the Utah Constitution a more expansive reading than the corresponding privilege in the United States Constitution. Five years later, the Utah Supreme Court overruled the *Owens* interpretation in *American Fork City v. Cosgrove*,[52] holding that the Framers of the Utah Constitution intended the state privilege to have the same scope as the federal constitution.[53] Two years after the *Cosgrove* decision, in *Sandy City v. Larson*,[54] the Utah Supreme Court affirmed its holding that article I, section 12, of the Utah Constitution was no broader than its federal counterpart.[55] In a separate dissent, however, Justice Zimmerman criticized the majority opinion for its "slavish, copycat construction of parallel state and federal constitutional provisions."[56]

Supp. 1988); MONT. CODE ANN. §§ 46-4-301 to -306 (1987).

47. *See, e.g.*, DEL. CODE ANN. tit. 29, § 2508 (1983) (precompliance approval not required). *But see* State v. Kelley, 353 N.W.2d 845, 848-49 (Iowa 1984) (attorney general must outline general nature of the subject matter sought to be investigated and documents sought must be relevant to the inquiry).

48. *See, e.g.*, State *ex rel.* Cranford v. Bishop, 230 Kan. 799, 640 P.2d 1271, 1273 (1982) (court has inherent power to refuse to issue subpoenas to prevent abuse of judicial process).

49. *Investigation*, 754 P.2d at 644 n.11.

50. *See, e.g., In re* Hawkins, 50 Del. 61, 123 A.2d 113, 116 (1956) (limits of investigation and relevancy of documents sought are matters that are no concern to the witness summoned before the attorney general); Chidester v. Needles, 353 N.W.2d 849 (Iowa 1984) (documents produced in response to county attorney's subpoena remain confidential until a charge is filed and cannot be disclosed without violating the subpoenaed individual's privacy rights); MONT. CODE ANN. § 46-4-304(2) (1987) (a person who divulges the contents of the application or the proceedings without legal privilege to do so is punishable for contempt).

51. 619 P.2d 315 (Utah 1980).

52. 701 P.2d 1069 (Utah 1985).

53. *Id.* at 1073.

54. 733 P.2d 137 (Utah 1987).

55. *Id.* at 138.

56. *Id.* at 143 (Zimmerman, J., dissenting). *See generally* Brennan, *State Constitu-*

Now writing for the majority in *Investigation*, Justice Zimmerman seriously questions the ruling in *Larson* in two significant ways. First, the majority interprets the plurality decision in *United States v. Mandujano*[57] as allowing a "shorter form" of *Miranda* warning in noncustodial settings.[58] The majority is careful to emphasize, however, that its holding is based independently on the state constitution.[59]

Second, in requiring routine target warnings in the context of interrogations, the *Investigation* majority acknowledges that federal case law[60] restrains the court from relying on the fifth amendment.[61] As a result, the majority concludes that, despite the common law roots of the state and federal privileges against self-incrimination, "[d]iffering state and federal experiences, concerns, and policy objectives may lead to differing interpretations of the two constitutional privileges."[62]

The court now appears willing to reconsider the scope of the article I, section 12 privilege against self-incrimination. In fact, in inviting argument on whether the article I, section 12 privilege might be available to entities other than natural persons, the court observed "that the resolution of such questions will not necessarily follow the federal model."[63] As a result, the *Investigation* decision may significantly affect future interpretations of the privilege against self-incrimination under Utah law.

Until recently, the Utah Supreme Court appeared to imply procedural protections into legislation by interpretation.[64] That

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tions and the Protection of Individual Rights, 90 HARV. L. REV. 489 (1977) (encouraging independent decisions based solely on state constitutions).

57. 435 U.S. 564, 582 n.7 (1976).

58. *See In re* a Criminal Investigation, 754 P.2d 633, 648 (Utah 1988).

59. *Id.* at 648 n.16.

60. *See* United States v. Washington, 431 U.S. 181, 189 (1977) (fifth amendment target warnings not required in federal grand jury proceedings).

61. *See Investigation*, 754 P.2d at 649-50.

62. *Id.* at 650. In this particular circumstance, the court cited State v. Ruggeri, 19 Utah 2d 216, 225, 429 P.2d 969, 975 (1967) for authority that article I, section 12, of the Utah Constitution independently requires target warnings. *Investigation*, 754 P.2d at 650.

63. *Id.* at 647 (citation omitted).

64. Early Utah law does not mention the court's supervisory power. In fact, in Mountain States Tel. & Tel. Co. v. Public Serv. Comm'n, 107 Utah 502, 155 P.2d 184 (1945), the court held that it had no power to rewrite statutes to make them conform to an intention not expressed by the legislature. Despite this disclaimer, however, many early cases were undoubtedly supervisory power decisions. *See, e.g.*, State v. Ruggeri, 19 Utah 2d 216, 429 P.2d 969 (1967) (a target of a grand jury investigation must be warned of his suspect status in the investigation); Baine v. Beckstead, 10 Utah 2d 4, 347 P.2d 554 (1959) (court implied two procedural safeguards into a statute governing the revocation of probation).

changed, however, with the court's 1985 decision in *In re Clatterbuck*.[65] In *Clatterbuck*, the Utah Supreme Court broke the pattern and openly relied on its supervisory powers. Writing for the majority, Justice Zimmerman invoked the court's supervisory authority to require juvenile courts to issue orders containing sufficiently detailed statements of fact in order to aid the supreme court in determining whether a full investigation had been made in the certification of juvenile defendants for trial as adults.[66] Similarly, in *Carlson v. Bos*,[67] although not identifying the court's inherent supervisory powers by name, Justice Zimmerman again mandated that "certain limited procedural requirements" be incorporated into Utah's service of process statute to save it "from constitutional infirmity."[68]

More recently, in 1988 the court specifically invoked its supervisory powers no less than three times.[69] In *State v. Lafferty*,[70] Justice Zimmerman relied on the court's supervisory authority to add two requirements to the penalty phase of capital trials.[71] And in *State v. Bishop*,[72] Justice Zimmerman's concurring opinion noted that it was appropriate for the court to exercise its inherent supervisory powers "to require certain procedures when fundamental values are threatened by other modes of proceedings."[73]

Although many commentators have criticized the judiciary's increasing use of its supervisory powers as expansive,[74] the United States Supreme Court, explaining the *Miranda* warnings, pointed out that Congress and the states remain free to provide alternative warnings so long as they are as effective in apprising accused persons of their rights.[75] Similarly, the *Investigation* court itself ac-

65. 700 P.2d 1076 (Utah 1985).

66. *Id.* at 1081.

67. 740 P.2d 1269 (Utah 1987).

68. *Id.* at 1276.

69. *See In re* a Criminal Investigation, 754 P.2d 633 (Utah 1988); State v. Bishop, 753 P.2d 439 (Utah 1988); State v. Lafferty, 749 P.2d 1239 (Utah 1988).

70. 749 P.2d 1239 (Utah 1988).

71. *Id.* at 1260.

72. 753 P.2d 439 (Utah 1988).

73. *Id.* at 499.

74. *See, e.g.*, Beale, *supra* note 11, at 1433-34; Schwartz, *The Exercise of Supervisory Power by the Third Circuit Court of Appeals*, 27 VILL. L. REV. 506 (1981-82) (criticizing supervisory powers as nothing more than pure discretion); Note, *The "New" Supervisory Power and Judicial Impotency: The Loophole in the Fourth Amendment*, 12 SW. U.L. REV. 449 (1981) (criticizing supervisory powers in fourth amendment cases); Note, *The Independent Application of State Constitutional Provisions to Questions of Criminal Procedure*, 62 MARQ. L. REV. 596, 602-04 (1979) (discussing the use of supervisory power in state courts).

75. *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966).

knowledged that the legislature could have provided the same type of protections "at least as effectively as, and certainly more efficiently than, the judicial branch."[76] Actually, the court left open a number of questions that could be answered by the legislature.[77]

4. Conclusion—The *Investigation* decision significantly expands the privilege against self-incrimination under article I, section 12, of the Utah Constitution and seriously undermines the broad holding of *Sandy City v. Larson*. Under *Investigation*, the Utah Constitution extends beyond the federal constitution in two respects. First, it requires *Miranda*-like warnings in noncustodial settings. Second, despite federal case law indicating that no target warnings are necessary, the Utah court requires target warnings for subpoenaed witnesses.

Extensions of the scope of the privilege against self-incrimination increase the risk of protecting the guilty at the expense of effective investigation and law enforcement. The Utah Supreme Court should be careful to balance these two interests in future cases that expand the privilege into other areas. Coupled with the court's recent identification of its inherent supervisory powers, such an expansion of authority may provide an attractive vehicle for judicial experimentation, but it carries with it the danger of crossing the " 'point where interpretation stops and judicial legislation begins.' "[78]

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76. *In re* a Criminal Investigation, 754 P.2d 633, 640 n.6 (Utah 1988). The legislature might choose to adopt the approach used by the legislature following the *Ruggeri* decision and codify the *Miranda*-like warnings, the target warnings, or both. *See* UTAH CODE ANN. § 77-11-3(2) (1982).

77. For example, if future cases show that the Act is subject to practical abuse, the court may reconsider the facial constitutionality of the statute. *See Investigation*, 754 P.2d at 658 n.31. The court also left open the possibility of requiring that persons who cannot afford counsel be accorded and notified of their right to counsel. *Id.* at 652 n.20. Similarly, the court left open the possibility of notifying subpoenaed persons of their right to challenge subpoenas. *Id.; see also id.* at 647 (inviting argument on whether the privilege against self-incrimination is available to nonnatural persons under the Utah Constitution); *id.* at 658 n.31 (leaving open the possibility of facially invalidating the Act if future cases show that the powers are subject to practical abuse and leaving open the possibility of invalidating the application of the Act under article I, section 24, of the Utah Constitution if the Act is applied arbitrarily).

78. *Id.* at 640 n.6 (quoting Mountain States Tel. & Tel. v. Public Serv. Comm'n, 107 Utah 502, 517-18, 155 P.2d 184, 191 (1945) (Wolfe, J., concurring)).

VI. FAMILY LAW

*A. Terminating Parental Rights Based on Abandonment: No State Duty to Notify or Assist the Parent**

In *State ex rel. J.R.T. v. Timperly*,[1] the Utah Court of Appeals held that, in cases of abandonment, the state does not have a duty to notify a parent of alleged deficiencies or advise the parent of appropriate remedial action before terminating parental rights.[2] *Timperly* is the first case in which a Utah court has specifically addressed the state's duty to notify parents of alleged inadequacies in cases of abandonment.

1. The Case—J.R.T. was born in Colorado in May 1981.[3] When J.R.T. was several months old, his mother left him and Timperly, J.R.T.'s father. J.R.T. and his father moved to Utah to live with Timperly's brother.

At three and one-half years of age, J.R.T. was enrolled in a program for underdeveloped preschoolers because he was severely underdeveloped academically, physically, emotionally, and socially. Later, when Timperly's brother moved to California, Timperly moved back to Colorado. At the suggestion of a social worker from the Division of Family Services ("DFS"), J.R.T. was placed in a Utah foster home to continue his specialized education.

DFS obtained a court-ordered treatment plan whereby Timperly was to: (1) establish economic sufficiency and adequate housing; (2) maintain steady employment; (3) attend parenting classes; (4) comply with a visitation schedule; (5) submit to psychological evaluations; (6) contact Recovery Services to establish child support payments; and (7) furnish releases of information to DFS. For fifteen months Timperly failed to abide by the treatment plan, made no contact with his son, and failed to respond to DFS's attempts to contact him. As a result of Timperly's apparent lack of interest in J.R.T., DFS initiated a petition to terminate Timperly's parental rights,[4] which the trial court granted.

Timperly appealed, contending that the evidence failed to meet the legal standard of "abandonment," and that the state had

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* Elizabeth Dolan Winter, Junior Staff Member, *Utah Law Review*.

1. 750 P.2d 1234 (Utah Ct. App. 1988) (opinion by Judge Bench).
2. *Id.* at 1238.
3. The facts are taken from the court's opinion in *Timperly*. *See id.* at 1235-37.
4. *See* UTAH CODE ANN. § 78-3a-48(1)(b) (1987).

failed in its duty to provide him assistance with the terms and conditions of the treatment plan. The Utah Court of Appeals upheld the termination, ruling that abandonment was established and that in abandonment cases the state has no duty to notify a parent of alleged inadequacies in parenting skills or to assist the parent in complying with a plan to remedy the parent's conduct.[5]

The court first determined that a prima facie case for abandonment had been established.[6] "Abandonment," the court noted, "unlike cases of parental unfitness involving circumstances over which the parent has no control, 'can only result from inaction or a course of conduct where the parent is personally responsible.' "[7] The deficiency of failing to "manifest[] . . . a firm intention to resume custody"[8] is obvious and rehabilitation is within the sole responsibility and power of the parent.[9] In light of this control, the court held that in abandonment cases the state does not have a duty to notify the parent of the alleged inadequacies or assist in complying with a treatment plan.[10]

2. *Background*—Section 78-3a-48(1) of the Utah Code permits a court to terminate parental rights when abandonment occurs. Because the parent-child relationship is recognized as a fundamental right and a liberty protected by the United States and Utah Constitutions,[11] however, a court cannot terminate parental rights absent "clear and convincing" evidence that such an order is appropriate.[12]

The Utah Supreme Court established a two-part test for determining abandonment in *State ex rel. Summers Children v. Wulfenstein*.[13] Under this test, the parent's conduct must first evidence a conscious disregard for parental obligations. Second, that disregard must have led to the destruction of the parent-child relationship.[14] Abandonment may be proven either by the parent's ob-

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5. *Timperly*, 750 P.2d at 1236-38.
6. *Id.* at 1236.
7. *Id.* at 1238 (quoting *In re* J. Children, 664 P.2d 1158, 1159 (Utah 1983)).
8. UTAH CODE ANN. § 78-3a-48(1)(b) (1987).
9. *Timperly*, 750 P.2d at 1238.
10. *Id.*
11. *See In re* J.P., 648 P.2d 1364, 1372 (Utah 1982).
12. *Id.* at 1377 (citing Santosky v. Kramer, 455 U.S. 745 (1982) (invalidating New York's termination statute that required a mere "preponderance" of the evidence to terminate parental rights)).
13. 560 P.2d 331 (Utah 1977).
14. *Id.* at 334.

jective conduct or expressed subjective intent.[15]

Section 78-3a-48(1)(b) of the Utah Code supplements the Utah Supreme Court's analysis by outlining a prima facie case of abandonment. A prima facie case for abandonment is established if a parent surrenders custody for longer than six months without a manifested intent to regain custody.[16] In keeping with due process concerns, the state is statutorily required to notify the parent of the termination proceedings at least ten days before trial.[17] The statute, however, does not require the state to notify the parent of parental deficiencies.

Before *Timperly*, neither the Utah Court of Appeals nor the Utah Supreme Court had addressed the issue whether the state has a duty to notify a parent that parental rights were being terminated for the "parental deficiency" of abandoning a child. Prior Utah decisions divide reasons for termination into two categories. The first category includes termination based on unfitness, and the second is based on physical abuse or abandonment.[18] In cases of unfitness in which the parent is unaware of the alleged parenting deficiencies, the state must notify the parent of the allegations and provide assistance to remedy the parent's conduct.[19] By contrast, in situations where the parent is or should be aware of the conduct leading to the termination, notification and assistance are unnecessary.[20] Abandonment, like physical abuse, now falls into this latter category.

(a) Unfitness. The first category of parental rights termination cases is termination based on unfitness. Unfitness is evidenced by parental conduct that is seriously detrimental to the child.[21] The policy reason for notifying allegedly unfit parents is that the parent might be unaware the conduct is inappropriate.[22]

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15. *In re* J. Children, 664 P.2d 1158, 1159 (Utah 1983).

16. UTAH CODE ANN. § 78-3a-48(1)(b) (1987).

17. *Id.* § 78-3a-48(2) (1987).

18. State *ex rel.* J.R.T. v. Timperly, 750 P.2d 1234, 1237-38 (Utah Ct. App. 1988).

19. *See* State *ex rel.* E. v. J.T., 578 P.2d 831 (Utah 1978) (in cases of unfitness a parent must be advised of alleged inadequacies and of appropriate remedial action).

20. *Ex rel.* J.C.O. v. Anderson, 734 P.2d 458, 463 (Utah 1987) (no duty to notify parents of parenting deficiencies or assist them in remedying those deficiencies when children are physically endangered by abuse or neglect); State *ex rel.* M.A.V. v. Vargas, 736 P.2d 1031, 1034-35 (Utah Ct. App. 1987) (duty requirement does not apply in cases of physical abuse or neglect).

21. UTAH CODE ANN. § 78-3a-48(1)(a) (1987). The term "seriously detrimental" is not defined by the code or by case law.

22. *See Timperly*, 750 P.2d at 1238; *J.T.*, 578 P.2d at 836.

The Utah Supreme Court noted this policy in *State v. Lance*[23] when it reversed a trial court decision that had terminated parental rights because of unfitness. The court held that the evidence did not demonstrate that the mother's conduct was seriously detrimental to her children.[24] The court noted that the lack of evidence showing whether the mother was informed of the alleged inadequacies so that she might have an opportunity to improve the alleged inadequate environmental conditions strongly militated against the judgment of the trial court.[25] The mother's unfitness consisted of "subtle psychological factors," such as interference with the adequate social, educational, and psychological adjustment of her children.[26] No physical abuse or abandonment, however, was alleged. The *Lance* court stated that, because of the subtle nature of the mother's conduct, justice required the state to put her on notice of her alleged inadequate conduct prior to terminating her parental rights.[27]

The state's duty to notify a parent of alleged inadequacies was broadened beyond the specific facts of *Lance* in *In re Walter B.*[28] In *Walter B.*, the court noted that it is a "condition precedent to termination that the conduct or condition alleged to be seriously detrimental to the child cannot be corrected, after *notice* and opportunity, implemented by reasonable efforts of assistance."[29] The

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23. 23 Utah 2d 407, 464 P.2d 395 (1970).

24. *Id.* at 412, 464 P.2d at 398.

25. *Id.* at 413, 464 P.2d at 399.

26. *Id.*, 464 P.2d at 399. The "subtle psychological factors" leading to the initial termination of the appellant's parental rights included moving nine times, leaving her children with relatives, and failing to provide them with necessary dental care. Lack of stability caused by the frequent moves and the lack of learning ability on the part of the children were noted by a social worker as the factors contributing to the children's frightened, disturbed, and unhappy demeanor. The court decided that there was insufficient evidence on the record to indicate that the appellant's acts had a seriously detrimental effect on her children. *Id.* at 409-10, 464 P.2d at 396-97.

27. *Id.* at 409-10, 464 P.2d at 396-97. This "duty to notify or assist" has frequently been cited as the holding of *Lance*. Before discussing the propriety of terminating parental rights without notice or assistance, however, the court held that the evidence that Ms. Lance's acts had a seriously detrimental effect on her children was insufficient. *Id.* at 412, 464 P.2d at 398; *see also Ex rel.* J.C.O. v. Anderson, 734 P.2d 458, 463 (Utah 1987) (the evidence in *Lance* connecting the children's problems with the parental behavior did not demonstrate that the mother's behavior was seriously detrimental to the children); State *ex rel.* M.A.V. v. Vargas, 736 P.2d 1031, 1034 (Utah Ct. App. 1987) (comment in *Lance* requiring a duty to notify a parent of the alleged unfit conduct is dicta (citing *Ex rel.* J.C.O. v. Anderson, 734 P.2d 458 (Utah 1987))).

28. 577 P.2d 119 (Utah 1978).

29. *Id.* at 124 (emphasis added); *see also In re* S.R., 735 P.2d 53, 57 (Utah 1987) (the parent's conduct or condition need not be permanent, but merely such that it cannot be

state in *Walter B.* alleged that termination was appropriate if a boy's hyperactive condition, rather than unacceptable conduct on the part of his mother, necessitated termination. The termination order granted by the trial court, however, was reversed. The Utah Supreme Court held that the state failed to establish that the mother was unfit "by reason of conduct or condition which was seriously detrimental to her son."[30] The language requiring notice and assistance as a condition precedent has since been criticized as dicta.[31]

The Utah Supreme Court, in *State ex rel. E. v. J.T.*,[32] again cited *Lance* as requiring a state to notify and assist an alleged unfit parent in overcoming deficiencies. The court decided that a mother who had secured employment, attempted contact, and obtained adequate housing for her children had not abandoned them.[33] Although the mother did not financially support the children while they were in foster homes, she had not been instructed to do so. The court held that if failing to financially provide for her children was to be used as the basis of a termination decision for unfitness, the state had a duty under *Lance* to notify the mother of the inadequacy and allow her the opportunity to remedy her conduct.[34]

(b) Abuse, Neglect, and Abandonment. The second category of parental rights termination cases are those involving physical abuse or blatant neglect. By contrast to terminating parental rights based on unfitness, in cases of physical abuse no state duty to notify or assist the parent in overcoming deficiencies exists.[35] In these cases the deficiency is assumed to be obvious to the parent; hence notification by the state is unnecessary.[36] Two recent Utah decisions,[37] although not involving abandonment exclusively, lend support to the *Timperly* finding that notice is not required in all instances prior to the termination of parental rights.

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corrected by reasonable efforts).

30. *In re* Walter B., 577 P.2d at 124.

31. *See Ex rel.* J.C.O. v. Anderson, 734 P.2d 458, 463 (Utah 1987).

32. 578 P.2d 831 (Utah 1978).

33. *Id.* at 834-35.

34. *Id.* at 836.

35. State *ex rel.* J.R.T. v. Timperly, 750 P.2d 1234, 1237-38 (Utah Ct. App. 1988).

36. *Id.* at 1238.

37. *See Ex rel.* J.C.O. v. Anderson, 734 P.2d 458 (Utah 1987); State *ex rel.* M.A.V. v. Vargas, 736 P.2d 1031 (Utah Ct. App. 1987).

In *Ex rel. J.C.O. v. Anderson*,[38] the court found that the appellant parents were unfit, incompetent, and physically abusive to one of their children.[39] The parents moved eighteen times in four years, consistently failed to keep appointments to visit their children, and failed to inform the foster parents or DFS where they could be located.[40] The appellants, citing *Lance*, asserted that termination was improper because the state never advised them of their parenting deficiencies or attempted to rehabilitate them.[41] The court rejected the appellants' reliance on *Lance*, stating that the duty articulated by *Lance* was dicta, does not apply where children are physically endangered by abuse or neglect, and that, even if required, the notice need not be formal.[42] The court similarly rejected the contention that *In re Walter B.*[43] required the state to attempt to rehabilitate parents before terminating their parental rights.

The appellants in *Ex rel. J.C.O.* were offered services by DFS yet failed to utilize them.[44] They did not heed counseling provided to them by their pastor or use the nutritional counseling available through the state's Women, Infants, and Children program. The court found it unnecessary to reach the issue of the scope of a state's duty to rehabilitate parents because of the appellants' apparent lack of commitment to rehabilitate themselves.[45]

The proposition that it is unnecessary for a state to attempt rehabilitation efforts when such efforts would clearly be futile was followed by the Utah Court of Appeals in *State ex rel. M.A.V. v. Vargas*.[46] The father in the case physically abused his four-year-old son by allowing him to drink alcohol to the point of inebriation and to smoke marijuana. The father refused to acknowledge past deficiencies and expressed no desire to improve as a parent or to correct abuses and neglect.[47] The *Vargas* court emphasized *Ex rel. J.C.O.*'s findings that the *Lance* requirement of duty was dicta, reinforcing the absence of a duty in cases of physical abuse or neglect. The court also stated that, even if there were some general

38. 734 P.2d 458 (Utah 1987).
39. *Id.* at 459-61.
40. *Id.* at 460-61.
41. *Id.* at 462.
42. *Id.* at 463.
43. 577 P.2d 119 (Utah 1978).
44. *Ex rel. J.C.O.*, 734 P.2d at 463.
45. *Id.*
46. 736 P.2d 1031 (Utah Ct. App. 1987).
47. *Id.* at 1035.

requirement of rehabilitative or remedial state assistance as a condition precedent to valid termination of parental rights, the termination order would still be affirmed because any efforts at rehabilitation would have been ineffectual.[48]

3. Analysis—The *Timperly* decision treats abandonment like past courts have treated physical abuse. Notification of alleged parenting deficiencies and assistance with rehabilitation as required in cases of parental unfitness is not required.

In *Timperly*, the father placed his three-year-old child in a foster home and moved to Colorado. He made no contact with the child for the next fifteen months. Had the state attempted to terminate his parental rights based on unfitness,[49] the state would have had to notify Timperly of his alleged parenting inadequacies and assist him in complying with a treatment plan.[50] A court-ordered treatment plan proposed by DFS, in fact, was sent to Timperly when J.R.T. was placed in the foster home. Timperly argued that termination was improper because no effort was made to assist him in complying with the terms and conditions of the plan.

Rather than address the adequacy of the state's effort in carrying out its duty to notify and assist, the court held that Timperly's failure to maintain contact was sufficient to terminate his parental rights. The court reviewed the prior Utah law on termination and categorized parental conduct into two groups. The first category includes cases in which the parent has no control over the circumstances leading to termination, as in cases of unfitness. The second category includes cases in which the parent has control of and sole responsibility for the circumstances necessitating termination.

Abandonment, the *Timperly* court decided, is analogous to cases of physical abuse because in both instances the parent has control over the circumstances and is fully responsible for the conduct leading to termination. Because it is assumed the parent is aware of his lack of contact with his child, the state has no obligation to bring such conduct to the attention of the parent.

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48. *Id.*

49. Terminating on the basis of unfitness was undoubtedly a possibility considering the child's severe physical, social, and developmental delays noted when the child was placed in the special education program in 1984. State *ex rel.* J.R.T. v. Timperly, 750 P.2d 1234, 1235 (Utah Ct. App. 1988).

50. The state's duty of notice and assistance in certain cases of parental unfitness was acknowledged by the court in *Timperly*. *See id.* at 1237.

4. *Effect*—The rule of law announced in *Timperly* places a greater burden on the parents to monitor their own behavior and lessens the state's obligation to make parents aware of improper parenting behavior. Specifically, the *Timperly* decision limits instances in which the state has a duty to notify parents of alleged parenting deficiencies and to assist them in engaging in proper parenting behavior prior to terminating their parental rights. Permanent termination of parental rights may now be ordered in cases of abandonment absent any affirmative effort on the part of the state to rehabilitate the parent. This was previously possible only in cases of physical abuse or neglect when the child was in danger of harm.

The decision may have been influenced by the specific facts of the case. First, Timperly not only abandoned his child, the evidence of J.R.T.'s severe developmental delays suggested that he was an unfit parent as well. Second, a treatment plan was actually sent to Timperly by DFS. Finally, DFS did attempt to contact Timperly. The effect of the court's decision is to allow termination for abandonment absent any effort on the part of the state. In *Timperly*, however, a significant effort was actually put forth.

The court went beyond prior precedent that allowed termination absent state assistance only for physical abuse or obvious neglect.[51] The *Timperly* court's ruling that the state has no duty to notify or assist a fit parent is inconsistent with the facts of the case. The evidence suggested that Timperly was unfit and that the state had made an effort to notify and assist him in remedying his behavior. It is questionable whether courts in the future will actually follow this decision in situations where a fit parent is out of contact with the child for only six months[52] and the parent is never notified that the parent has abandoned under the statute, is not assisted in regaining custody, or even asked about any intention to resume custody.

Under the Utah statute, failing to demonstrate an interest in resuming custody of one's child for six months establishes aban-

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51. *See Ex rel.* J.C.O. v. Anderson, 734 P.2d 458, 463 (Utah 1987) (any duty set forth by State v. Lance, 464 P.2d 395 (Utah 1970), does not apply when children are physically endangered by abuse or neglect); State *ex rel.* M.A.V. v. Vargas, 736 P.2d 1031, 1035 (Utah App. 1987) (*Lance* duty requirement does not apply in cases of physical abuse or neglect).

52. It is prima facie evidence of abondonment if the parent, after surrendering physical custody of the child, does not show an effort to resume custody or provide for the child for six months. *See* UTAH CODE ANN. § 78-3a-48(1)(b) (1987).

donment.[53] Because the consequences of abandonment are so serious, and because parental rights are so important, allowing termination after this relatively short period without state notification of the parent's obligation to maintain contact may prove too severe.

*B. "Equitable Restitution" in Divorce Cases: Utah's Approach to Professional Degree Distribution**

In *Martinez v. Martinez*,[1] the Utah Court of Appeals reexamined whether a professional degree is property subject to division in a divorce settlement. In a split decision, the court reaffirmed its ruling in *Petersen v. Petersen*[2] that increased earning capacity resulting from a professional degree is not property.[3] Notwithstanding the reaffirmation of *Petersen*, the *Martinez* court circumvented its earlier decision by creating an "equitable restitution" approach to distribution. This revolutionary approach augments traditional alimony awards and, although purporting not to, effectively creates a property-type interest in the professional degree or license. The "equitable restitution" award applies in cases where the divorce occurs shortly before or after the educated spouse reaches a threshold where he or she will receive a significant increase in earning capacity and prior to the accumulation of material assets.

1. The Case—The facts in *Martinez* are similar to a number of other cases. Mr. and Mrs. Martinez were married two years prior to Mr. Martinez' enrollment in college.[4] After his college graduation, Mr. Martinez enrolled in medical school. Both Mr. and Mrs. Martinez were aware of the potential sacrifices and difficulties associated with extended educational pursuits. They were willing to make these sacrifices, however, to achieve long-term financial benefits.

During Mr. Martinez' undergraduate education the family

53. *Id.*

* Clark A. McClellan, Junior Staff Member, *Utah Law Review*.

1. 754 P.2d 69 (Utah Ct. App. 1988).

2. 737 P.2d 237 (Utah Ct. App. 1987).

3. Most courts deciding this issue base their analysis on the enhanced earning capacity of the educated spouse and not a valuation of the degree itself. *See In re* Marriage of Horstmann, 263 N.W.2d 885, 891 (Iowa 1978); Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527, 532-33 (1982).

4. The facts are taken from the court's opinion in *Martinez*, 737 P.2d at 70-71.

supported itself on his G.I. Bill benefits and his wages. Because the couple had three children while Mr. Martinez was an undergraduate, Mrs. Martinez' contributions to the family consisted of homemaking and child rearing—intangible benefits that are difficult to quantify. The family financed medical school through a combination of student loans, Mr. Martinez' G.I. Bill benefits, a $7000 inheritance from Mr. Martinez' mother, and Mrs. Martinez' part-time wages.

Two years after Dr. Martinez began his residency, Mrs. Martinez filed for divorce.[5] The trial judge granted Mrs. Martinez a divorce and gave her custody of the children. In addition, she received the family residence valued at $63,000 and subject to a $28,439 mortgage, $300 per month per child in child support, $400 per month in alimony for up to five years[6] and $2500 in attorney's fees.

Mrs. Martinez appealed, arguing that the child support and alimony payments were inadequate. Moreover, she argued that she was entitled to a portion of Dr. Martinez' increased earning capacity, achieved in part with her assistance.[7] The court of appeals increased the child support to $600 per child per month and her alimony to $750 per month. Although the court rejected Mrs. Martinez' argument that a professional degree is property subject to division, the court created an award of " 'equitable restitution' in addition to traditional alimony."[8] The court noted "[t]he function of equitable restitution is to enable a spouse to share the *newly obtained* earning capacity of a former spouse who has achieved that capacity through the significant efforts and sacrifices of the requesting spouse which were detrimental to that spouse's development."[9] In fashioning the "equitable restitution" award, the court of appeals suggested a nonexhaustive list of factors for the trial court to consider:

(1) the length of the marriage; (2) the financial contributions and

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5. At the time of the divorce decree, Dr. Martinez had finished his residency and was earning $100,000 per year. Mrs. Martinez was making $12,000 per year. *Id.* at 73.

6. The alimony was made nonterminable for three years. This ensured payments even if Mrs. Martinez were to remarry. *Id.* at 71.

7. *See* Brief of Appellant at 15, Martinez v. Martinez, 754 P.2d 69 (Utah Ct. App. 1988) (No. 860159-CA). Mrs. Martinez argued that "[w]here the parties to a marriage jointly sacrifice for and contribute to an investment, whether in tangible capital or human capital, equity dictates that the parties and children equitably share in the return on that investment." *Id.*

8. *Martinez*, 754 P.2d at 78.

9. *Id.*

> personal development sacrifices made by the requesting spouse; (3) the duration of these contributions and sacrifices during the marriage; (4) the resulting disparity in earning capacity between the requesting spouse and the spouse benefited thereby; and (5) the amount of property accumulated during the marriage.[10]

In a strongly worded dissent, Judge Jackson flagged the majority's "decision as being at the forefront of judicial activism."[11] He rejected any compensation based on future earning capacity and argued that these types of cases should be decided according to traditional alimony and property distribution.[12] In the *Martinez* case, he reasoned that the trial court's award for alimony was sufficient, but he would have remanded for reevaluation subject to traditional child support analysis.[13]

2. *Background—Martinez* is the extension of several recent cases decided by the Utah Court of Appeals and the Utah Supreme Court. Although the court of appeals held in *Petersen* that an advanced degree is not property, the court also suggested that under specific fact situations "alimony analysis must become more creative to achieve fairness."[14] In *Rayburn v. Rayburn*,[15] the court of appeals reaffirmed its decision in *Petersen*. Although the *Rayburn* court rejected the property approach, it also anticipated that the creative alimony approach mentioned in *Petersen* might apply in "situations where an award of non-terminable rehabilitative or reimbursement alimony would be appropriate."[16] The court, however, did not contemplate the "equitable restitution" award created in *Martinez*.

The Utah Supreme Court has never specifically ruled whether

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10. *Id.*
11. *Id.* at 79 (Jackson, J., dissenting).
12. *Id.* at 82.
13. *Id.*
14. Petersen v. Petersen, 737 P.2d 237, 242 n.4 (Utah Ct. App. 1987). The court in *Petersen* stated:

> In another kind of recurring case, typified by Graham [(*In re* Marriage of Graham, 194 Colo. 429, 574 P.2d 75 (1978))], where divorce occurs shortly after the degree is obtained, traditional alimony analysis would often work hardship because, while both spouses have modest incomes at the time of the divorce, the one is on the threshold of a significant increase in earnings. Moreover, the spouse who sacrificed so the other could attain a degree is precluded from enjoying the anticipated dividends the degree will ordinarily provide.

Id.
15. 738 P.2d 238 (Utah Ct. App. 1987) (medical degree is not property and not subject to division in a divorce decree).
16. *Id.* at 241 (citation omitted).

a professional degree is property. It confronted the question in *Gardner v. Gardner*,[17] but the facts of the case did not compel a decision.[18] Nevertheless, the court noted in dicta that "an educational or professional degree is difficult to value and that such a valuation does not easily fit the common understanding of the character of property."[19] The majority further noted that several theories are available for valuation in cases in which "the husband is supported throughout a long graduate or professional program by the working wife, and the couple is divorced soon after graduation."[20] This passage might support an inference that the Utah Supreme Court is willing to accept one of several approaches to ensure that the supporting spouse is treated equitably. This is merely supposition, however, because the court gave no indication which theory, if any, should be followed.[21]

The "equitable restitution" award is a truly original development.[22] Courts in other jurisdictions confronting this issue have limited themselves to three basic approaches.[23] First, some have considered enhanced earning capacity as property subject to division like any other type of property.[24] Jurisdictions applying this theory generally do so under a legislative directive expanding traditional property notions or under specific statutory language providing for the supporting spouse to receive a portion of the increased earning capacity.[25] Second, other courts recognize that the

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17. 748 P.2d 1076 (Utah 1988).

18. In *Gardner*, the husband and wife were married for 18 years. Over that time they accumulated substantial material assets that allowed for an equitable division based on traditional divorce distribution. *See id.* at 1081.

19. *Id.*

20. *Id.*

21. The court specifically addressed the hypothetical case in which the wife worked to support the family financially. *Id.* The already weak inference that the court might support one of the mentioned theories in making a distribution of an advanced degree may be further weakened in a case like *Martinez* in which the contribution is not monetary.

22. The court of appeals limited the "equitable restitution" award to cases with facts similar to those of *Martinez*. It "stress[ed] that equitable restitution would not be awarded in the more frequent case where the marriage lasted for many years after the professional degree had been granted." Martinez v. Martinez, 754 P.2d 69, 78 n.10 (Utah Ct. App. 1988).

23. For a general discussion of the different approaches, see Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379 (1980).

24. *See* O'Brien v. O'Brien, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985); Washburn v. Washburn, 101 Wash. 2d 168, 677 P.2d 152 (1984); Haugan v. Haugan, 117 Wis. 2d 200, 343 N.W.2d 796 (1984); Mullenix, *The Valuation of an Educational Degree at Divorce*, 16 LOY. L.A.L. REV. 227 (1983).

25. *See, e.g., O'Brien*, 66 N.Y.2d at 576, 489 N.E.2d at 712, 498 N.Y.S.2d at 743. *O'Brien* was based on N.Y. DOM. REL. LAW § 236(B)(5)(d)(6) (McKinney 1986), which states

supporting spouse is entitled to the amount of any contribution toward the degree. Under this approach the court makes an award based on a quasi-unjust enrichment theory and limits the supporting spouse to the monies expended in furtherance of the degree or in support of the family during the time of the educational experience.[26] Finally, some courts hold that the enhanced earning capacity is not property but is one element, among many others, that is factored into traditional alimony payments.[27] The distinction between the latter approach and a property distribution approach is that the alimony approach is based on need and is subject to future changes in economic conditions and marital status, while property distribution is not subject to modification.[28] *Petersen* and *Rayburn* followed the alimony approach;[29] Judge Jackson recommended that approach in his dissent in *Martinez*.[30]

3. Discussion—The effect of *Martinez* on Utah law is twofold. First, *Martinez* recognizes that a spouse who "supports" a partner through a professional program and who is divorced prior to reaping the benefits of that sacrifice is entitled to share the resulting benefits from the enhanced earnings capacity of the de-

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in part:

> [A]ny equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party.

Id. A Wisconsin statute authorizes a trial court to make its alimony award after looking at "[t]he contribution by one party to the education, training or increased earning power of the other." WIS. STAT. ANN. § 767.26(9) (West 1981).

26. *See* Inman v. Inman, 578 S.W.2d 266 (Ky. App. 1979); De La Rosa v. De La Rosa, 309 N.W.2d 755 (Minn. 1981); Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982); Hubbard v. Hubbard, 603 P.2d 747 (Okla. 1979).

27. *See In re* Marriage of Graham, 574 P.2d 75 (Colo. 1978); *In re* Marriage of Vanet, 544 S.W.2d 236 (Mo. Ct. App. 1976).

28. Utah's alimony statute is a good example of traditional alimony, which allows the court to make subsequent changes in support and maintenance as is reasonable and necessary. *See* UTAH CODE ANN. § 30-3-5(3) (Supp. 1988). In addition, the court has the right to terminate alimony payments if the person remarries or cohabitates with a person of the opposite sex. *Id.* § 30-3-5(5), (6).

29. In *Petersen*, the court of appeals determined that the trial judge's $1000-per-month award classified as property was inappropriate. Nevertheless, the court held that if the monthly payments were reclassified as alimony, the award was proper. Petersen v. Petersen, 737 P.2d 237, 242 (Utah Ct. App. 1987). In *Rayburn*, the court recognized that a nonterminable $750-per-month five-year payment schedule could be awarded if it were called alimony and not property. Rayburn v. Rayburn, 738 P.2d 238, 240 (Utah Ct. App. 1987).

30. Martinez v. Martinez, 754 P.2d 69, 82 (Utah Ct. App. 1988) (Jackson, J., dissenting).

gree.[31] *Petersen* tacitly recognized this right but limited it to alimony payments, which are subject to dissolution or modification.[32] The "equitable restitution" notion is like a division of property in that the supporting spouse is entitled to a lump sum or annual payments depending on a valuation of the degree at the time of the trial and the award is not subject to modification.[33]

Second, in *Martinez* the term "support" is specifically extended beyond economic terms. This is critical to the court's reasoning. If Mrs. Martinez were limited to her economic support, as several jurisdictions hold,[34] she would be allowed only the money contributions earned from her part-time job. The *Martinez* court rejected this limitation on the award because it would logically imply that "the functions of mother, homemaker, and helpmate contribute nothing of value to a family."[35] To support the proposition that homemaker services form a basis for awarding payment in compensating support, the *Martinez* court cited cases acknowledging that it is the totality of the contribution and not solely economic factors that determine whether one spouse supported the other spouse's education.[36] The court of appeals' definition of support makes it clear that the supporting spouse is entitled to a portion of the enhanced earning capacity regardless of whether the contribution is economic or in some other form. This expanded definition of support pushes Utah's analysis of distribution of the earning capacity in a divorce settlement well beyond other jurisdictions recognizing a form of "rehabilitative" or "reimbursement" alimony and closer to those jurisdictions that consider increased earning capacity as property.[37]

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31. *Id.* at 78 (majority opinion).

32. The Utah Supreme Court, in Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986), noted that "[t]he purpose of [alimony] is to enable the receiving spouse to maintain as nearly as possible the standard of living enjoyed during the marriage and to prevent the spouse from becoming a public charge." *Id.* (citation omitted). The *Paffel* alimony award is inequitable in cases like *Martinez* because the standard the supporting spouse enjoyed was that of a struggling student and not of a doctor's wife.

33. *Martinez*, 754 P.2d at 78-79.

34. *See supra* note 25.

35. *Martinez*, 754 P.2d at 77.

36. *See* Saint-Pierre v. Saint-Pierre, 357 N.W.2d 250 (S.D. 1984); Washburn v. Washburn, 101 Wash. 2d 168, 677 P.2d 152 (Wash. 1984); Haugan v. Haugan, 117 Wis. 2d 200, 343 N.W.2d 796 (1984).

37. The only real distinction between Utah's "equitable restitution" approach and a property approach is that equitable restitution does not apply to the case in which the couple has accumulated sufficient assets to allow a traditional division of property. In cases like *Martinez* there is no distinction.

4. Conclusion—In arriving at its "equitable restitution" award, the Utah Court of Appeals implicitly overruled its holding in *Petersen*, and thus uncovered the difficult problems associated with creating a property-like interest in a professional degree.[38] Because the Utah Supreme Court, in the past, has hesitated to rule whether a professional degree is property, and because there is no legislative directive to create such a policy and the majority of jurisdictions oppose this approach, it seems unlikely that the Utah Supreme Court will be willing to make a de facto ruling on this issue by affirming *Martinez*.

To the credit of the court of appeals, however, the *Martinez* decision correctly recognizes that traditional alimony payments, limiting the supporting spouse to the standard of living enjoyed during the marriage, do not adequately address the equitable concerns of the supporting spouse in cases like *Martinez*. The Utah Supreme Court could achieve the equitable results of *Martinez* without creating the problems of a professional degree as property, by extending traditional alimony awards and adjusting for increased earning capacity. While courts would have to employ an analysis similar to that employed in *Martinez* to arrive at an equitable alimony, they also would be able to modify future alimony payments depending on future events, and thus avoid the unforeseeable problems of a nonmodifiable "equitable restitution" award. This modified alimony approach reaches the equities of cases like *Martinez* and at the same time is more in line with the earlier holdings in *Petersen*, *Rayburn*, and *Gardner*.

C. *Divorce, Premarital Property, and the Art of Equity**

1. Introduction—In *Peterson v. Peterson*,[1] the Utah Court of Appeals decided that a court may award exclusive possession of the family home to the custodial parent when doing so best serves the interests of the parties' children, even if the home was the non-

38. These problems include: (1) The speculative nature of the degree's value because of unforeseeable future events; (2) the forced career path that the professional is compelled to follow in order to make substantial restitution payments; (3) the personal nature of the degree; and (4) future judicial concerns that might compel courts to expand the "equitable restitution" notion beyond professional degrees and into other areas where one spouse achieves a benefit at the expense of the other.

* David S. Prince, Junior Staff Member, *Utah Law Review*.

1. 748 P.2d 593 (Utah Ct. App. 1988) (opinion by Judge Garff).

custodial parent's separate premarital asset. Although this precise issue was one of first impression, past decisions point toward the court's result. As a result of this and similar recent cases, Utah's divorce law is likely to undergo a healthy modernization, resulting in more equitable divorce decrees.

2. The Case—In January 1986, Kelly Renee and Jerry Allen Peterson were divorced after five years of marriage.[2] The marriage produced two children, ages one and two. The couple owned few marital assets. The principal asset was the family home, a three-bedroom house located on ten and one-half acres in Scipio, Utah. Jerry owned the house and the property prior to the marriage. This property had been Jerry's family home for two generations. He also brought a washer and dryer to the marriage. The trial court awarded Jerry the house, land, washer, and dryer. The court allowed Kelly and the children to stay in the house for six months, after which they would be required to vacate.[3] Kelly appealed, claiming that the divorce decree issued by the trial court was inequitable, and therefore an abuse of the trial court's discretion.

The court of appeals found that the trial court had abused its discretion by ignoring the best interests of the children.[4] The trial court followed the general principle that, "if possible, each party should receive the real and personal property he or she brought into the marriage."[5] The court of appeals awarded Kelly exclusive occupancy of the house until she remarries or until the children reach their majority, marry, or otherwise become independent. The court of appeals also held that Jerry should retain title to the house along with the responsibility to pay any mortgage or property tax obligations.

At the time of trial, Kelly was on public assistance and operating a small gift shop at a loss. Jerry was unemployed and drawing $830 per month in unemployment compensation. He had previously been employed as a construction worker for $11.50 per hour, with approximately $1978 in gross monthly income. The divorce decree ordered him to pay $100 per child per month in child sup-

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2. Unless otherwise noted, the facts are from the court's opinion in *Peterson*, *see id.* at 593-94, the decree of divorce, and the briefs of the parties.

3. Brief for Appellant at 5, Peterson v. Peterson, 748 P.2d 593 (Utah Ct. App. 1988) (No. 860179-CA). At the time of the appeal, Mrs. Peterson and the children were living in an apartment building owned by Mrs. Peterson's parents. Mr. Peterson had moved to California.

4. *Peterson*, 748 P.2d at 594.

5. *Id.* (citing Preston v. Preston, 646 P.2d 705, 706 (Utah 1982)).

port so long as he was receiving $830 per month in unemployment compensation. If he became gainfully employed at approximately $11.50 per hour, his child support payments would increase to $185 per child per month.

The court of appeals characterized the trial court's support order as "inadequate" in light of the custodial parent's "meager prospects to develop the ability to provide appropriate support."[6] The appellate court also held that the order was "vague and indefinite," stating that the trial court should "anticipate future exigencies, as much as possible, in awarding alimony and support payments to avoid the necessity of future court appearances."[7] In this case, Jerry's support obligation was indefinite if his unemployment compensation payments dropped below $830 per month or if he obtained employment at wages other than $11.50 per hour.

3. Background—Peterson was handed down by Utah's new court of appeals. Prior to 1987, the Utah Supreme Court handled all divorce appeals. Divorce appeals filed after December 31, 1987, are assigned to the newly created court of appeals.[8] The Utah Supreme Court may still grant certiorari to review a court of appeals divorce decision.[9] The court of appeals now has primary, but not ultimate, authority in the development of Utah's divorce case law.

Section 30-3-5 of the Utah Code grants courts broad authority to resolve divorces equitably. It provides that, "[w]hen a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property and parties."[10] Nowhere in the Utah divorce statutes is "property" defined.[11] In keeping with the broad language of section 30-3-5, however, the Utah Supreme Court has held that courts should consider all pertinent circumstances when issuing orders relating to support obligations, alimony, and property division.[12] These circumstances encompass " 'all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived.' "[13]

Section 30-4-3 of the Code justifies the Utah Supreme Court's wide-reaching approach when the interests of one spouse or a mi-

6. *Id.* at 596.
7. *Id.*
8. UTAH CODE ANN. § 78-2a-33(2)(h) (Supp. 1988).
9. *Id.* § 78-2a-4 (1987).
10. *Id.* § 30-3-5(1) (Supp. 1988).
11. Mortensen v. Mortensen, 760 P.2d 304, 305 (Utah 1988).
12. Woodward v. Woodward, 656 P.2d 431, 432 (Utah 1982).
13. *Id.* (quoting Englert v. Englert, 576 P.2d 1274, 1276 (Utah 1978)).

nor child require the award of assets generally considered to be outside the marital estate. This section pertains to separate maintenance. It provides that "the court may by order or decree . . . award to either spouse possession of any of the real or personal estate of the other spouse, and decree moneys for support of that spouse and the support of the minor children."[14]

The Utah Supreme Court has noted that there is no fixed formula in property divisions.[15] Courts must determine in each case how to allocate property in the manner that " 'best serves the needs of the parties and best permits them to pursue their separate lives.' "[16] The supreme court has identified several factors that a court should weigh in pursuit of equity. These factors include the amount and kind of property the parties own, whether the property was acquired before or during the marriage, the source of the property, the parties' ability and opportunity to earn money, the parties' financial situation and necessities, the duration of the marriage, and the welfare of the parties' children.[17] The supreme court has not labeled any one factor as dispositive.

The court of appeals in *Peterson* held that when the trial court balanced its equitable equation, it failed properly to weigh the interests of the children and the lack of marital assets. The court of appeals overruled the trial court partially because the trial court treated a single factor—the policy of returning premarital assets to their owner—as dispositive.[18] In its subsequent decision relating to equitable property distribution, *Noble v. Noble*,[19] the supreme court emphasized the need to consider all parties' needs and any other relevant factors.[20] The relative import of any single factor is dependent on the factual setting.

The supreme court has recognized that each party to a divorce "should, in general, receive the real and personal property he or

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14. UTAH CODE ANN. § 30-4-3 (1987).

15. *Mortensen*, 760 P.2d at 305; Fletcher v. Fletcher, 615 P.2d 1218, 1222 (Utah 1980).

16. Noble v. Noble, 761 P.2d 1369, 1373 (Utah 1988) (quoting Burke v. Burke, 733 P.2d 133, 135 (Utah 1987)); *see also* Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985) (requiring sufficient alimony to provide support for the wife as nearly as possible at the standard of living she enjoyed during the marriage).

17. *Burke*, 733 P.2d at 135; Searle v. Searle, 522 P.2d 697, 698 (Utah 1974); Dubois v. Dubois, 29 Utah 2d 75, 76-77, 504 P.2d 1380, 1381 (1973); Wilson v. Wilson, 5 Utah 2d 79, 82-84, 296 P.2d 977, 979-80 (1956); MacDonald v. MacDonald, 120 Utah 573, 581-82, 236 P.2d 1066, 1069-70 (1951); Pinion v. Pinion, 92 Utah 255, 259-60, 67 P.2d 265, 267 (1937).

18. Peterson v. Peterson, 748 P.2d 593, 594 (Utah Ct. App. 1988).

19. 761 P.2d 1369 (Utah 1988). This Development does not discuss issues decided by the court in *Noble* other than the division of premarital assets.

20. *Id.* at 1373.

she brought to the marriage or inherited during the marriage."[21] In applying this general advice in dividing property, however, the court consistently takes into account premarital assets.[22] Courts usually consider both spouses' total assets when dividing the marital estate. Courts often award premarital assets to the owner spouse as part of the spouse's "share" of the marital estate, rather than separating these assets from the marital estate and awarding them to the owner spouse prior to the court's division of the marital estate.[23]

Prior to the court of appeals' decision in *Peterson*, the supreme court had never expressly held that a court may award the premarital assets of one spouse to the other in a property division. The broad language the court usually employs,[24] however, implies that the courts may divide any property asset, premarital or not, when equitable.[25] In *Noble*, the supreme court interpreted this line of cases to hold that premarital property of one spouse may be awarded to the other spouse when equity so requires.[26]

In *Workman v. Workman*,[27] the supreme court was given an opportunity to decide the issue of premarital asset division. The court found it unnecessary to order the division of premarital assets, however, even though the court's power to so order is implicit in the court's opinion.[28] The *Noble* court interpreted *Workman* and *Burke v. Burke*[29] as proposing that, under appropriate circumstances, premarital assets are divisible to achieve a fair, just, and

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21. Preston v. Preston, 646 P.2d 705, 706 (Utah 1982) (citing Georgedes v. Georgedes, 627 P.2d 44 (Utah 1981); Jesperson v. Jesperson, 610 P.2d 326 (Utah 1980); and Humphreys v. Humphreys, 520 P.2d 193 (Utah 1974)).

22. *Id.* (treating husband's cabin as part of his share of the property and the wife's inheritance as part of her share); *see also Georgedes*, 627 P.2d at 44 (awarding husband's prior asset, the house, to him in the divorce); *Jesperson*, 610 P.2d at 326 (holding that it was not unreasonable to permit plaintiff to withdraw from the marital property the equivalent of those assets the plaintiff brought into the marriage).

23. Workman v. Workman, 652 P.2d 931 (Utah 1982).

24. *See supra* text accompanying note 14.

25. *See* Englert v. Englert, 576 P.2d 1274, 1276 (Utah 1978).

26. Noble v. Noble, 761 P.2d 1369, 1373 (Utah 1988).

27. 652 P.2d 931 (Utah 1982).

28. *Id.* at 933. Mr. Workman claimed that the family home was an indivisible premarital asset. The supreme court upheld the trial court's division of the equity in the home based on Mrs. Workman's contributions to the appreciation in value of the home. The court did not find it necessary to determine whether the house was a premarital asset and thus indivisible. *Id.*

29. 733 P.2d 133 (Utah 1987) (upholding trial court's award of inherited property and subsequent appreciation in value entirely to the spouse that inherited the property).

equitable result.[30]

The *Workman* court recognized the general statement from *Preston v. Preston*[31] that equity often requires that each party recover the separate property that the party brought to the marriage.[32] As the supreme court noted, however, "that rule is not invariable."[33] In *Savage v. Savage*,[34] the supreme court upheld what apparently was a division of separate premarital assets, but failed to rule expressly on the issue because the division was appealed on other grounds.

In *Wilkins v. Stout*,[35] the Utah Supreme Court expressly stated that there is no rule against awarding one spouse property acquired after the divorce by the other spouse. The *Wilkins* court noted, "Under its equity power to see that the welfare of the parties and particularly the children is best served, the court can take into consideration all of the pertinent circumstances [(including any asset)] even though it was to be acquired after the decree was entered."[36] The supreme court also has held, in *Woodward v. Woodward*,[37] that retirement benefits due after the decree of divorce are awardable to either spouse under the courts' equity powers. In *Wilkins* and *Woodward*, the court based its award of postmarital assets on the broad equity powers of the courts to consider "all of the pertinent circumstances . . . [including] 'all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived.' "[38] In both of these cases the court relied entirely on its equitable powers. It did not ground such awards in one spouse having facilitated the other's ability to acquire these assets as it had done previously.[39]

Just as each spouse should recover premarital assets, each

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30. *Noble*, 761 P.2d at 1373.

31. 646 P.2d 705 (Utah 1982).

32. *Workman*, 652 P.2d at 933.

33. *Id.*

34. 658 P.2d 1202 (Utah 1983).

35. 588 P.2d 145, 145-46 (Utah 1978) (concerning the award of royalties on books written by one spouse that were edited and published after the divorce).

36. *Id.* at 146.

37. 656 P.2d 431 (Utah 1982) (overruling Bennett v. Bennett, 607 P.2d 839 (Utah 1980)).

38. *Id.* at 432 (quoting Englert v. Englert, 576 P.2d 1274, 1276 (Utah 1978)); *see Wilkins*, 588 P.2d at 146.

39. *Cf.* Huck v. Huck, 734 P.2d 417 (Utah 1986) (holding the husband's separate property to be divisible, and noting that the husband could not have acquired his separate assets if the wife had not paid their daily living expenses, thus freeing the husband's assets for investments).

spouse should recover property independently acquired by gift or inheritance.[40] This, too, is simply a guideline to a court seeking an equitable divorce decree. The supreme court has held that it is not an abuse of discretion for a trial court to modify or decline to follow this "rule."[41] In fact, the supreme court has never reversed a trial court's award of such separate property to the nonowner spouse.[42] In property division cases, the court emphasizes that the "overriding consideration is that the ultimate division be equitable—that property be fairly divided between the parties given their . . . circumstances at the time of the divorce"[43] and that "the appropriate treatment of property brought into a marriage by one party may vary from case to case."[44]

4. Discussion—These cases strongly foreshadowed the affirmance of an equitable division of separate premarital property. The Utah Supreme Court affirmed such a division in *Noble v. Noble*[45] shortly after the court of appeals issued *Peterson*. *Noble* was one of the last divorce appeals the supreme court routinely handled.[46] In *Noble*, the supreme court upheld an award to the wife of a $264,000 share of $800,000 in assets the husband brought into the marriage. The court took into account Mrs. Noble's increased living expenses and decreased earning ability, which resulted from a disabling injury that she received during the marriage. The supreme court in *Noble* did not find it necessary to examine fully the line of precedent discussed in this Development. It treated the divisibility of separate premarital property as though it were a settled issue.[47]

The facts in *Noble* are worth noting because they illustrate another situation in which equity allows the division of premarital assets. Elaine and Glen Noble were married in July 1977, when Elaine was thirty-four years old and Glen was fifty-eight.[48] The

40. Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1988).

41. Newmeyer v. Newmeyer, 745 P.2d 1276 (Utah 1987); Bushell v. Bushell, 649 P.2d 85 (Utah 1982); Dubois v. Dubois, 29 Utah 2d 75, 504 P.2d 1380 (1973); Weaver v. Weaver, 21 Utah 2d 166, 442 P.2d 928 (1968).

42. *Mortensen*, 760 P.2d at 307.

43. *Newmeyer*, 745 P.2d at 1278 (citing Huck v. Huck, 734 P.2d 417 (Utah 1986)).

44. *Id.* at 1277-78.

45. 761 P.2d 1369 (Utah 1988).

46. UTAH CODE ANN. § 78-2a-3(2)(h) (Supp. 1988) (the Utah Court of Appeals has appellate jurisdiction over appeals from district court involving domestic relations cases).

47. *Noble*, 761 P.2d at 1373.

48. The facts are taken from the court's opinion in *Noble*. *See id.* at 1370-71.

marriage produced no children. Both had been married previously. On August 18, 1980, Glen shot Elaine in the head at close range with a .22 caliber rifle.[49] He then attempted to commit suicide by shooting himself with the same rifle. Approximately seven months later, both parties filed for divorce. The trial court found that Elaine had suffered permanent injuries that left her unemployable and "'totally and permanently disabled.'"[50] Elaine needed approximately $2600 per month to meet her expenses. Glen was unable to support Elaine at that level and concurrently meet his own needs. The trial court awarded Elaine only $750 per month in alimony. The trial court, noting Elaine's need for much higher alimony, awarded Elaine a portion of Glen's premarital assets.

The trial court expressly considered Elaine's increased living expenses and decreased earning ability when it set alimony and divided the property. The trial court awarded Elaine alimony of $750 per month, the house she brought into the marriage, $264,000,[51] and $10,000 in attorney fees. Glen appealed, claiming that the trial court improperly considered Elaine's separate tort claims[52] in fixing the divorce decree and that the trial court abused its discretion in dividing $800,000 of his premarital assets. The Utah Supreme Court held that the trial court did not abuse its discretion in dividing the property. The court also held that the trial court properly considered all the circumstances in issuing the divorce decree.

In *Peterson*, the court of appeals looked beyond Utah case law to discover the demands of equity.[53] The court based its concept of equity on state law from Florida,[54] Oregon,[55] and from a general

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49. Glen was tried and acquitted for attempted murder. *Id.* at 1370 n.1.

50. *Id.* at 1372 (quoting the trial court).

51. This $264,000 represented a division of approximately $800,000 in assets that Glen brought into the marriage. *Id.* at 1371.

52. Elaine filed separate tort claims against Glen. Elaine claimed that her injuries resulted from Glen's negligent attempt to commit suicide. *Id.* at 1370.

53. It is puzzling to note that in fashioning its holding concerning the divisibility of premarital assets, the court of appeals ignored the cases examined above and those cases relied on by the supreme court in *Noble*. The supreme court's failure to mention *Peterson* probably is explained by the delay in publishing an opinion after it is written. Although *Peterson* was released by the court of appeals prior to the supreme court's release of *Noble*, *Noble* probably was written prior to the publication of *Peterson*.

54. *See* Cabrera v. Cabrera, 484 So. 2d 1338 (Fla. Dist. Ct. App. 1986) (noting the strong tendency toward awarding the custodial parent exclusive possession of family home); Pino v. Pino, 418 So. 2d 311 (Fla. Dist. Ct. App. 1982) (granting right to occupy home to custodial parent and children); Florence v. Florence, 400 So. 2d 1018 (Fla. Dist. Ct. App. 1981) (awarding to custodial parent exclusive use and possession of home that was premarital asset of noncustodial parent).

policy statement by the Utah Legislature.[56] From these sources, the court drew its equitable determination that the custodial parent and the children, if possible, should receive exclusive occupancy of the family home to best safeguard the children's welfare. "The best interest of the children may often result in premarital property being distributed to the custodial parent."[57]

The court found this principle of equity well established in Florida. It cited a per curiam decision in which the custodial parent was awarded exclusive possession of a house the other spouse purchased prior to the marriage.[58] The court noted that in Florida " '[c]ases dealing with the issue of whether the custodial parent should be awarded exclusive use and possession of the marital home until the children reach majority or the parent remarries have almost without exception answered the question affirmatively.' "[59] Florida courts ground this principle in the universally applicable policy observation that the "breakup of their parents' marriage is . . . a severe trauma to young children; this additional physical and psychological dislocation [from the family home] should not be imposed upon them unless there is a very good reason indeed for doing so."[60]

The *Peterson* court juxtaposed Oregon law with Florida law to bolster its decision to divide premarital assets in the interest of the children. Oregon law allows the division of " 'solely [sic] acquired property' " (the family home) to " 'adequately' " and " 'most effectively provide for the children.' "[61] Oregon's principle divorce statute is similar to section 30-3-5 of the Utah Code in its definition of the trial court's authority. It authorizes a court to make orders for

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55. *In re* Marriage of Seefeld, 294 Or. 345, 657 P.2d 201 (1982) (awarding possession and occupancy of home that was premarital asset of noncustodial parent to custodial parent).

56. "[C]hildren shall be maintained from the resources of responsible parents, thereby relieving or avoiding, at least in part, the burden [of support] often borne by the general citizenry through public assistance programs." UTAH CODE ANN. § 62A-11-302 (Supp. 1988).

57. Peterson v. Peterson, 748 P.2d 593, 594 (Utah Ct. App. 1988).

58. *Id.* at 595 (citing *Cabrera*, 484 So. 2d at 1339).

59. *Id.* (quoting *Cabrera*, 484 So. 2d at 1339).

60. Pino v. Pino, 418 So. 2d 311, 312 (Fla. Dist. Ct. App. 1982) (quoted in *Peterson*, 748 P.2d at 594). These fundamentals of Florida divorce law, however, are utilized by its courts under the auspices of more defined and direct legislative guidance, although the empowering clause of Florida's statute is couched in terms of "equity" similar to the Utah statute. *Compare* FLA. STAT. ANN. § 61.13 (West Supp. 1988) *with* UTAH CODE ANN. §§ 30-3-5, 30-4-3 (Supp. 1988).

61. *Peterson*, 748 P.2d at 595 (quoting *In re* Marriage of Seefeld, 294 Or. 345, 657 P.2d 201, 204 (1982)) (brackets in original); *see In re* Marriage of Peirson, 294 Or. 117, 653 P.2d 1258 (1982).

the division of property that are "just and proper in all the circumstances."[62] In *In re marriage of Seefeld*,[63] the Oregon Supreme Court partially based its authority to divide "solely acquired property" on language in the Oregon statute that is not present in Utah statutes. The same legislative intent, however, is found in the language of section 30-3-5 of the Utah Code.[64]

The supreme court in *Noble* found an equitable need to divide marital assets according to the unique circumstances of the case. The court based its support of the division of premarital assets on the "gross inadequacy of the alimony available to provide for Elaine's needs, the paucity of her separate premarital property, and Glen's relative wealth."[65] The court found no abuse of discretion in awarding a substantial portion of Glen's premarital property to Elaine.

In *Peterson*, the court of appeals used Utah case law to identify equitable factors relevant to the division of assets in divorce decrees. It considered discussions of these equitable factors from other jurisdictions as well. The *Peterson* court then wrote a prescription for equity that called for the division of Jerry's premarital assets. *Peterson* is the first time an appellate court has specifically held that courts may divide premarital assets among the parties if equity so demands. The importance of *Peterson* in deciding this issue is overshadowed by the Utah Supreme Court's release of *Noble* on the heels of *Peterson*. The supreme court treated the issue summarily and held:

> [T]here is no *per se* ban on awarding one spouse a portion of the premarital assets of another. In fact, our cases have consistently held that under appropriate circumstances, achieving a fair, just and equitable result may require that the trial court exercise its discretion to award one spouse the premarital property of the other.[66]

The supreme court's disposition of this issue in *Noble* emphasizes the loose limits the court previously employed in defining the trial court's discretion to achieve an equitable divorce decree. The court's willingness to give expansive meaning to its previous deci-

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62. OR. REV. STAT. § 107.105(1)(f) (1987).

63. 294 Or. 345, 657 P.2d 201, 205 (1982).

64. *Compare* UTAH CODE ANN. § 30-3-5 (Supp. 1988) (using the broad term "property") *with* OR. REV. STAT. § 107.105 (1987) (using the terms "marital estate" and "real or personal property, or both, of either or both parties").

65. Noble v. Noble, 761 P.2d 1369, 1373 (Utah 1988).

66. *Id.* at 1373 (citing, *e.g.*, Burke v. Burke, 733 P.2d 133, 135 (Utah 1987) (citing Workman v. Workman, 652 P.2d 931, 933 (Utah 1982))).

sions indicates an intent to allow courts the full authority section 30-3-5 of the Utah Code grants them.

Peterson may serve more as an indication of when the division of premarital assets is proper. Such an award is justified when marital assets are meager and the noncustodial parent has limited abilities to provide alimony or child support. The children's interest in remaining in the family home can warrant awarding exclusive possession of the home to the custodial parent even if it was one of the noncustodial parent's premarital assets. *Noble* allows for the division of premarital assets when one spouse is injured and disabled and without resources adequate to pay substantial medical bills, while the other spouse's income, together with the property acquired during the marriage, is insufficient to meet the needs of the disabled spouse.

Equity demands are still generally nebulous and ill-defined,[67] but there is now Utah case law that allows for the division of premarital assets. Although this has been understood to be Utah law, the issue has nimbly avoided a decision on point. Undoubtedly, trial courts will be more willing to exercise this option with the precedents of *Noble* and *Peterson*.

Peterson may be of greater importance as an indication of the new Utah Court of Appeals' willingness to take a more active role in defining and refining Utah's divorce law, an area of the law Justice Howe of the Utah Supreme Court termed "illusory" with " 'no discernible pattern."[68] The strongest principle running through Utah's divorce law is the wide latitude and strong deference given trial courts in divorce actions. The supreme court has been unwilling to disturb a lower court's action unless the evidence clearly shows that it " 'works such a manifest injustice or inequity as to indicate a clear abuse of discretion.' "[69] The supreme court has not reversed a lower court's actions as dramatically as the court of appeals did in *Peterson* in more than a decade. Even the supreme court's decision in *Noble* affirmed a trial court's determination of

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67. The day after the supreme court released *Noble*, it released Mortensen v. Mortensen, 760 P.2d 304 (Utah 1988). In *Mortensen*, the court stressed the importance of the equitable principle that the separate inherited or donated property of one spouse should be awarded to that spouse unless the other spouse has, by his or her efforts with regard to the property, acquired an equitable interest in it. *Id.* at 308. Taken together, *Mortensen* and *Noble* indicate the confusion that exists in Utah's divorce law and emphasize the individual nature of each case.

68. Newmeyer v. Newmeyer, 745 P.2d 1276, 1280 (Utah 1987) (Howe, J., concurring).

69. Peterson v. Peterson, 748 P.2d 593, 594 (Utah Ct. App. 1988) (quoting Gibbons v. Gibbons, 656 P.2d 407, 409 (Utah 1982)).

the issue. The court of appeals seems willing to reverse a lower court's failure to exercise fully the broad equitable powers granted it.

5. Conclusion—With the principal responsibility for divorce cases placed with the court of appeals,[70] an improvement in the quality of Utah divorce case law can be expected because these cases will be decided by a court that has more time and resources to devote to the full consideration of each case. It also seems reasonable to expect an increase in the number of divorce cases the court of appeals decides over the next few years. These factors, along with the court of appeals' distinctly assertive approach to divorce law, should lead to a welcome modernization of Utah's divorce law. The Utah Judicial Council's new guidelines for child support[71] may indicate general judicial support for this modernization.

The court of appeals' decision in *Peterson* is well founded in Utah case law[72] but, curiously, the court failed to make full or even adequate use of existing law in reaching its decision. *Peterson*, however, does stand as a clear statement of the importance of allowing children to stay in the family home whenever possible. It also solidifies the issue of divisibility of premarital assets more than *Noble* because of the bizarre fact situation involved in *Noble*. *Noble* serves both to remind courts of the equitable nature of a divorce proceeding and to advise them to utilize fully the discretion granted them in this pursuit. *Noble* also may encourage the court of appeals to define, modernize, and advance Utah's divorce law.

*D. Appearance of a Child Adoptee at Adoption Proceedings**

In *In re Adoption of M.L.T.*,[1] the Utah Court of Appeals recently held that a child adoptee is statutorily required to appear in

70. UTAH CODE ANN. § 78-2a-3(2)(h) (Supp. 1988).

71. The Utah Judicial Council recently adopted a set of guidelines for child support written by a task force under the direction of Judge Judith Billings. The guidelines represent a major step towards bringing uniformity to Utah's divorce decrees. *See* STAFF OF THE UTAH CHILD SUPPORT TASK FORCE, REPORT ON PROPOSED CHILD SUPPORT GUIDELINES (Task Force Print, May 1988).

72. *See, e.g.*, Noble v. Noble, 761 P.2d 1369 (Utah 1988).

* Terry E. Welch, Junior Staff Member, *Utah Law Review*.

1. 746 P.2d 1179 (Utah Ct. App. 1987) (opinion by Judge Garff).

court during the adoption proceedings in order to effectuate a legally binding adoption.[2] In so holding, the court interpreted sections 78-30-8 and 78-30-9 of the Utah Code.[3] While the Utah Supreme Court previously has interpreted provisions in these sections as they relate to the natural parents and adoptive parents,[4] the Utah Court of Appeals in *Adoption of M.L.T.* interpreted, for the first time, the same provisions with regard to the adoptee child.[5] The court held that the words "must appear" in section 78-30-8 are mandatory and not directory in nature.[6] The court disagreed with appellant's argument that the child's appearance necessarily would thwart the purpose of the statute in assuring that the child's best interest be served.[7] The decision requires that any child who is to be adopted appear in some manner before the court.

1. The Case—The appellant, the nine-year-old boy's stepmother, filed a petition for adoption of the minor child on March 14, 1986.[8] The child had lived with the appellant and the child's natural father without any knowledge that appellant was not his natural mother. The child's natural mother appeared before the Third Judicial District Court for Salt Lake County on March 28, 1986, and voluntarily consented to the adoption. After Judge Sawaya informed appellant that the child's presence would be required to finalize the adoption, appellant filed a motion to excuse the child from court. The judge denied appellant's motion and the interlocutory appeal followed.[9]

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2. *Id.* at 1179.

3. Section 78-30-8 of the Utah Code provides: "The person adopting a child and the child adopted, and the other persons whose consent is necessary, must appear before the district court of the county where the person adopting resides . . . ." UTAH CODE ANN. § 78-30-8 (1987).

Section 78-30-9 provides:

> The court must examine all persons appearing before it pursuant to the preceding provisions, each separately, and, if satisfied that the interests of the child will be promoted by the adoption, it must make an order declaring that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting.

Id. § 78-30-9 (1987).

4. *See, e.g.*, Taylor v. Waddoups, 121 Utah 279, 241 P.2d 157 (1952) (holding that persons whose consent is necessary must appear).

5. *See Adoption of M.L.T.*, 746 P.2d at 1179.

6. *Id.* at 1180.

7. *Id.*

8. The facts are taken from the court's opinion in *Adoption of M.L.T. See id.* at 1179.

9. *Id.*

Appellant asserted two arguments on appeal.[10] First, appellant argued that the word "must" in the first sentence of section 78-30-8 should be directory rather than mandatory in nature.[11] Second, appellant contended that requiring the child to appear would be contrary to the child's best interests.[12] The state argued that words in a statute are to be given their ordinary meaning and that the word "must" is mandatory in nature.[13] Furthermore, the state argued that the Utah Supreme Court had already construed the word "must" as mandatory in the context of adoption.[14] The state also asserted that the very purpose of the appearance requirement was to assure that the child's best interests would be served by the adoption.[15]

On appeal, the Utah Court of Appeals accepted the state's arguments almost in their entirety. Relying on prior Utah Supreme Court interpretations of the words "must appear" in the adoption context and on general rules of statutory construction, the court held that the same appearance requirements that apply to the child also apply to those whose consent is necessary.[16]

2. *Background*—It is well settled that adoption requirements are statutory and any changes thereto are best left to the legislature.[17] Indeed, the Utah Supreme Court has stated that "adoption

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10. Appellant's arguments are from the Brief of Appellant at 4, 10, *In re* Adoption of M.L.T., 746 P.2d 1179 (Utah Ct. App. 1987) (No. 86-0335).

11. *Id.* at 4.

12. *Id.* at 10.

13. The state's arguments are from the Brief of the Attorney General at 3, *In re* Adoption of M.L.T., 746 P.2d 1179 (Utah Ct. App. 1987) (No. 86-0335).

14. *See id.*; Taylor v. Waddoups, 121 Utah 279, 241 P.2d 157 (1952).

15. The state continued:

> The state's concern carries over into the interest that "before a child, who is an innocent party, shall be adopted its interest and welfare must be safeguarded, and only after a district court judge, set up by the statute to protect the child, has determined that the child's best interest will be assured, will an order be made."

Brief of the Attorney General at 8, *In re* Adoption of M.L.T., 746 P.2d 1179 (Utah Ct. App. 1987) (No. 86-0335) (quoting Riding v. Riding, 8 Utah 2d 136, 140, 329 P.2d 878, 881 (1958)).

16. *Adoption of M.L.T.*, 746 P.2d at 1180.

17. *See In re* Adoption of Jameson, 20 Utah 2d 53, 54, 432 P.2d 881, 882 (1967) ("Adoption proceedings are statutory in nature and we are not inclined to give the statute a meaning not intended by the legislature."); Deveraux Adoption v. Brown, 2 Utah 2d 30, 32, 268 P.2d 995, 997 (1954) ("Adoption proceedings are statutory and based on consent."); Aaron, *Proposals for Truce in the Holy War: Utah Adoption*, 1970 UTAH L. REV. 325, 330 ("Adoption can be accomplished only by meeting the terms of the statute."); Note, *Inadequate Prenatal Counseling Held a Contributing Factor in Allowing Revocation of Consent to Adoption*, 1968 UTAH L. REV. 155, 164 n.6 ("No parent may relinquish a child other than

proceedings are statutory in nature and we are not inclined to give the statute a meaning not intended by the legislature."[18] Although the word "must" in section 78-30-8 has never been interpreted in the context of a child whose adoption is at issue, the Utah Supreme Court has construed that statute as mandating the appearance of parents and others whose consent is necessary.[19]

In *Sjostrom v. Bishop*,[20] the Utah Supreme Court defined basic rules of statutory construction. The *Sjostrom* court noted that the intent of the legislature is the primary criterion that courts must use in determining whether a statute is mandatory or directory in nature.[21]

In an earlier case, *Riding v. Riding*,[22] the Utah Supreme Court discussed the purposes of the appearance requirements. Generally the appearance requirements are to ensure that the child's best interests are promoted. Prior to *Adoption of M.L.T.*, however, courts had never directly applied the "best interests" rule to determine whether requiring the child to appear would be against the child's best interests.

Analogous to *Adoption of M.L.T.* is *Taylor v. Waddoups*.[23] In *Taylor*, the Utah Supreme Court was faced with the question whether the natural mother was statutorily required to appear before the court. Although the statutes at issue were predecessors of sections 78-30-8 and 78-30-9, the relevant language was identical

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in compliance with the statutory provisions." (quoting Gilliam, *The Adoption of Children in Colorado*, 37 DICTA 100-01 (1960)); 2 AM. JUR. 2D *Adoption* § 3 (1962) ("A legal status of Adoption does not exist independently of statutory authority for its creation. One cannot be the legally adopted child of another by private agreement unless there is statutory authority for doing so." (footnote omitted)).

18. *Adoption of Jameson*, 20 Utah 2d at 54, 432 P.2d at 882; *see also Deveraux*, 2 Utah 2d at 30, 268 P.2d at 995 ("Adoption proceedings are statutory.").

19. *See* Taylor v. Waddoups, 121 Utah 279, 241 P.2d 157 (1952).

20. 15 Utah 2d 373, 393 P.2d 472 (1964).

21. *Id.* at 376, 393 P.2d at 474. The appellant argued that the legislative intent was directory:

> What was the "legislative intent" in using the word "must" in Section 78-30-8? The original relevant adoption statute, Section 2567 of the Compiled Laws (1884) did not require or even suggest the need for the adoptive child to appear in court . . . . The words "must appear" first appeared in Section 1-6 of the Revised Statutes of Utah (1898). The 1898 statute being adopted from California Civil Code Section 22 of that time and period . . . . Section 78-30-8, the Utah Code Ann. (1953) is similar to the 1898 statute.

Brief of Appellant at 5, *In re* Adoption of M.L.T., 746 P.2d 1179 (Utah Ct. App. 1987) (No. 86-0335).

22. 8 Utah 2d 136, 329 P.2d 878 (1958).

23. 121 Utah 279, 241 P.2d 157 (1952).

to that of the current statute.[24] The *Taylor* court explained that relinquishment of a child for adoption could no longer be done before a notary public. The court further stated:

> Such relinquishment is required to be done before a court. The adoptive parents, the child adopted, and the natural parents or persons whose consent is necessary, must appear before the district court where the consent must be signed, and the agreement executed that the child shall be treated as the lawful child of the adoptive parents . . . .[25]

The view adopted by the Utah Court of Appeals in *Adoption of M.L.T.*—that the child absolutely must appear—is by no means uniformly accepted. Other jurisdictions take a more lenient view with regard to the child's appearance, excusing the child for a variety of reasons—some statutorily recognized, others simply at the discretion of the court.[26]

3. Analysis—Whether the child must appear at the child's own adoption proceedings was an issue of first impression in Utah. The Utah court held that earlier interpretations of the word "must" controlled. Furthermore, the court intimated that any change in the statute's construction properly should be made by

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24. *Compare* UTAH CODE ANN. §§ 14-4-8 to -9 (1943) (discussing who must appear before court in adoption proceedings) *with id.* §§ 78-30-8 to -9 (1987) (same).

25. *Taylor*, 121 Utah at 284, 241 P.2d at 159.

26. WYO. STAT. § 1-22-105(b) (1977) states: "The petitioners and the child shall appear at the hearing unless excused by the court." *Id.* NEV. REV. STAT. ANN. § 127.210(2) (Michie 1986) (1973) states: "[B]oth the person adopting and the person to be adopted shall appear at the hearing in person, but if such appearance is impossible or impractical, appearance may be made for either or both of such persons by counsel empowered in writing to make such appearance." *Id.*

Furthermore, even California, where the Utah statute originated, apparently interprets the words "must appear" as directory and not mandatory. *See, e.g., In re* Fahlman, 84 Cal. App. 248, 257 P. 893 (1927) (failure to place child under 12 years of age on witness stand is no ground for reversal); *In re* Mckeag's Estate, 141 Cal. 403, 74 P. 1039 (1903) (holding that failure of judge to examine child's father and failure of child adoptee to attend the hearing did not invalidate the proceedings); *In re* Johnson's Estate, 98 Cal. 542, 33 P. 460 (1893) (examination of child under 12 years of age is discretionary with judge).

A number of jurisdictions interpreting statutes that require the child to appear apparently hold the requirement to be merely directory in nature. "Some adoption statutes require a separate examination of the parties, including the child adopted . . . . Such a requirement has been held, however, to be *directory only, and not mandatory*, at least so far as the statute requires examination of those whose consent is not essential . . . ." 2 AM. JUR. 2D *Adoption* § 59 (1962) (emphasis added). In such a case, failure to appear does not render the adoption void. The majority view seems to be that requiring a child under the age of consent to appear for examination would not necessarily be productive.

the legislature.[27]

While refusing to accept the adoptive mother's argument that mandating the child's appearance would be against the best interests of the child, the court noted that "there is no legislative direction as to how or when the appearance is to be made, nor what should transpire at the hearing."[28] Notwithstanding the child's mandatory appearance, circumstances including the child's age and understanding, the parent's opinion, and the overall family situation may be taken into account in determining when and how the child is to appear.[29]

The court did not adequately address the concern that such a strict reading of the statute that unconditionally mandates the child's appearance, in some instances, may contradict the very purpose of the statute and not protect the child's best interests. After all, "the purpose of the statute is to assure the court an opportunity to see that the child exists, to observe his general health and well-being, to ascertain that he is free from obvious physical abuse, and to interrogate the child as appropriate."[30]

In contrast to the holding in *Adoption of M.L.T.*, other states do not always and without question require the child to appear before the court.[31] Perhaps the best interests of the child would not always be served by a strict appearance requirement.[32] And while the Utah Court of Appeals is trying to protect the best interests of the child by mandating an appearance, perhaps the courts should reserve an exception when circumstances may be such that

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27. *See In re* Adoption of M.L.T., 746 P.2d 1179, 1180 (Utah Ct. App. 1987).

28. *Id.* at 1181.

29. *Id.* The majority was careful to point out that the individual circumstances should be considered in determining when and how the child is to "appear" before the court. *See id.* The majority, however, did not articulate the meaning of the word "appear" and whether anything other than a formal appearance in a courtroom setting might be sufficient in appropriate circumstances.

30. *Adoption of M.L.T.*, 746 P.2d at 1181 (Orme, J., concurring). As Judge Orme stated, "Those objectives can be as readily served in the context of a low-key, *in camera* chat with 'a nice person whom mommy and daddy know and who works down by the library' as in the formal and absolutely candid context which appellant fears." *Id.* at 1181-82 (emphasis in original).

31. *See supra* note 27 and accompanying text.

32. The court in *In re* Johnson's Estate, 98 Cal. 531, 33 P. 460 (1893), certainly made it clear that the child's appearance was not always necessary to ensure that the child's best interests were met, stating: "The provision in relation to the separate examination of the parties to such contract, most certainly in so far as it is applicable to a child under the age of consent, is simply directory, and is to be complied with or not, in the discretion of the judge." 33 P. at 462.

requiring the child to appear actually would not be best for the child. With this limited exception in place, the purpose of the statute would be met and appearance would be the general rule.

4. Conclusion—Before an adoption may be finalized and become legally binding, the child adoptee and those whose consent is necessary must appear before the court. *Adoption of M.L.T.* holds that this statutory requirement is mandatory and not directory in nature. The purpose of the appearance requirement in sections 78-30-8 and 78-30-9 is to give the court an opportunity to observe the child and the others involved, so that the court can determine whether the best interests of the child will be served by the adoption. Surrounding circumstances may be taken into account by the judge in determining the appropriate time and place for the child to "appear" before the court.

VII. Municipal Law

*A. Is the Board of Adjustment the Proper Body to Hear Appeals of Zoning Decisions?**

In *Scherbel v. Salt Lake City Corp.*,[1] the Utah Supreme Court held that under a council-mayor form of government the Board of Adjustment is the proper body to hear zoning appeals from the Planning Commission. The decision prohibits the City Council from hearing zoning appeals because of the absolute separation of powers provided for under the Utah Code.[2] The court also reaffirmed its earlier ruling in *Western Land Equities v. City of Logan*[3] that an applicant for a building permit has a vested right to a particular zoning ordinance if the application conforms to the zoning ordinance in effect at the time of the application, no changes are pending in the ordinance, and the city cannot show a compelling reason for the ordinance change.

1. The Case—In October 1979, plaintiff Jack F. Scherbel sought approval from the Historical Landmark Committee ("HLC")[4] to build a thirty-five-unit condominium complex in an

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* Deborah Morris, Junior Staff Member, *Utah Law Review*.

1. 758 P.2d 897 (Utah 1988) (opinion by Justice Durham).
2. *See* Utah Code Ann. § 10-3-1209 (1986).
3. 617 P.2d 388 (Utah 1980).
4. Salt Lake City ordinances require an applicant for a building permit in an historic

historical district of Salt Lake City.[5] The HLC recommended to the Planning Commission that it deny Scherbel's application. Scherbel then revised his building plans and submitted them directly to the Salt Lake City Planning Commission, bypassing the HLC. The Planning Commission approved the revised plans, prompting the Greater Avenues Citizens Council ("GACC") to petition the mayor to reverse the Planning Commission's decision.[6]

While Scherbel's building plans were under consideration, Salt Lake City's government changed from a city commission form to a council-mayor form. The new City Council approved a previously pending zoning ordinance that downzoned Scherbel's property from "R-6" to "R-2H," forcing Scherbel to revise his building plans once again. When the City Council subsequently reversed the Planning Commission decision and denied Scherbel's application, Scherbel filed suit with the Third District Court. Scherbel claimed that the City Council did not have authority to hear zoning appeals, and that he had a vested right in the "R-6" zoning ordinance in effect at the time of his initial application for building plan approval.[7]

The trial court dismissed Scherbel's complaint, holding that the City Council had authority to hear appeals from Planning Commission decisions. The court also found that Scherbel did not have a vested right in the "R-6" zoning ordinance for three reasons: first, Scherbel had never actually filed a building permit application; second, Scherbel's preliminary building plans submitted to the HLC and the Planning Commission[8] had not conformed to

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district to submit a preliminary application to the HLC, which makes an advisory recommendation to the City Planning Commission. *See* SALT LAKE CITY, UTAH REV. ORDINANCES § 51-32-6 (1981).

5. The facts are taken from the court's opinion in *Scherbel*, 758 P.2d at 897-98.

6. Prior to 1979 Salt Lake City was governed by a Board of Commissioners headed by the mayor. Under this form of government, the Board of City Commissioners took appeals from Planning Commission decisions. Before Scherbel's appeal from the Planning Commission was taken, the structure of the city government was changed to a council-mayor form. *Id.* at 898. Under the new form of government the Board of City Commissioners no longer existed, so the mayor, acting on an opinion from the city attorney's office, issued an executive order delegating the authority to hear zoning appeals to the newly established City Council. *Id.* at 900.

7. Scherbel also challenged GACC's standing as party to a zoning appeal. The Utah Supreme Court declared the standing issue moot after deciding the case on the first two issues. *Id.* at 901.

8. The trial court also noted that " '[t]he drawings for each project were otherwise too preliminary and incomplete for full zoning review, and . . . such drawings could not be used to support zoning approval which is a prerequisite to the issuance of a building permit.' " *Id.* at 900 (quoting the trial court).

the "R-6" zoning ordinance in effect at the time of his application; and third, the change in zoning to an "R-2H" ordinance was pending prior to Scherbel's initial application to the HLC.[9]

The Utah Supreme Court affirmed the trial court's decision but disagreed with its conclusion that the City Council could hear appeals of Planning Commission decisions under the council-mayor form of government. The court held that the Board of Adjustment is the proper body to hear zoning appeals from the Planning Commission, and that an applicant must meet the *Western Land Equities* criteria to obtain vested rights in a particular zoning classification.[10]

2. *Background*—Prior to 1959 the Utah Code vested both executive and legislative functions in one municipal body consisting of either a board of trustees, a board of commissioners, or a mayor and council.[11] In each of these municipal forms the mayor was a presiding officer with no separate powers, acting only to execute the decrees of the governing body. In 1959 the legislature enacted the "Strong Mayor Form of Government Act,"[12] which, by separating executive and legislative powers, offered cities an optional alternative to the single governing body. The Act created a municipal government patterned after the separation of powers system found in the federal and state constitutions, vesting all executive powers in the mayor and all legislative powers in a board of five commissioners.[13] It was from this form of government that the present council-mayor system evolved.[14]

In 1978 the Utah Supreme Court first addressed the separation of powers issue under the council-mayor form of government in *Martindale v. Anderson*.[15] The trial court in *Martindale* had interpreted separation of powers under the council-mayor system as granting the City Council all legislative and executive powers not expressly vested in the mayor by the Act.[16] The supreme court

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9. *Id.* at 901.
10. *Id.* at 899.
11. UTAH CODE ANN. § 15-6-5 (1943).
12. Strong Mayor Form of Government Act, ch. 20, §§ 1-27 (1959) (codified as amended at UTAH CODE ANN. § 10-6-77-102 (1971)), *repealed by* Uniform Fiscal Procedures Act, ch. 48, § 3 (1977) (codified at UTAH CODE ANN. § 10-3-101-1228 (1977)).
13. *See* UTAH CODE ANN. § 10-6-79 (1973).
14. *See supra* note 6.
15. 581 P.2d 1022 (Utah 1978).
16. *Id.* at 1027.

rejected the trial court's interpretation[17] and held that the legislature clearly intended the council-mayor form of government to embody a complete separation of nondelegable executive and legislative powers.[18]

Although the court had unequivocally declared the council-mayor form of government "a true separation of powers form of government" in *Martindale*, procedural application of the policy was not completely resolved. In *Chambers v. Smithfield City*,[19] the Utah Supreme Court reinforced its position regarding total separation of executive and legislative powers by designating the Board of Adjustment as the sole municipal body with the authority to hear zoning variance appeals.[20] The court held that a Smithfield City ordinance vesting the Smithfield City Council with the authority to review zoning variance decisions of both the Board of Adjustment and the Planning Commission was invalid because it conflicted with the provisions of the Enabling Act.[21] The *Scherbel* court relied heavily on both *Martindale* and *Chambers* in reaching its decision reaffirming a total separation of powers in the council-mayor system of municipal government.

With regard to vested rights to zoning classifications, the Utah Supreme Court ruled in *Contracts Funding & Mortgage Exchange v. Maynes*[22] that the date of application for a building permit fixed the zoning requirements and that an application could not be denied on the basis of an ex post facto ordinance.[23] Furthermore, the *Contracts Funding* court clearly recognized a presumption in favor of a right to a building permit for an applicant who submitted a valid application.[24]

Subsequently, in *Western Land Equities v. City of Logan*,[25] the court established three criteria for determining when a build-

17. *Id.*

18. *Id.*

19. 714 P.2d 1133 (Utah 1986).

20. *Id.* at 1136.

21. *Id.* at 1137. The Enabling Act provides that the legislative body of a city, in this case the Smithfield City Council, has the right to regulate zoning. *See* UTAH CODE ANN. § 10-9-1 (1986). In order to exercise that power, however, the legislative body must provide for the appointment of a Board of Adjustment. *Id.* § 10-9-6 (1986 & Supp. 1988). The Board is to be an appellate body for any person aggrieved by a zoning decision. *Id.* § 10-9-9.

22. 527 P.2d 1073 (Utah 1974).

23. *Id.* at 1074.

24. *Id.* The court also expressed grave concern that "omnipotence in County government to disturb or destroy pre-existing property rights," raises serious questions concerning due process, breach of contract, and the limits of sovereign authority. *Id.*

25. 617 P.2d 388 (Utah 1980).

ing permit applicant had a vested right to a particular zoning classification. First, the plans must conform to the zoning ordinance in effect at the time of the application. Second, ordinance changes cannot be pending at the time of the application. Finally, the city must be unable to show a compelling reason for exercising its zoning power retroactively.[26]

In *Scherbel*, the court applied the *Western Land Equities* test and determined that Scherbel had no vested rights to the zoning classification existing at the time of his initial application.[27] Holding that Scherbel failed both the first and second part of the *Western Land Equities* test, the court denied his appeal.[28]

3. Discussion—The decision in *Scherbel* appears to be a logical step in the progression of law governing zoning decision procedure under the council-mayor form of government. *Scherbel* clarifies the practical application of separation of powers doctrine concerning zoning appeals by holding the passing of general zoning ordinances and policy to be a legislative function, and the authority to resolve zoning disputes to be an executive function.[29] The court unequivocally designated the Board of Adjustment as the proper body under the council-mayor form of government to review zoning appeals from the Planning Commission.[30]

Prior to *Scherbel* there appears to have been some confusion as to whether hearing zoning appeals was properly an executive or legislative function.[31] The *Scherbel* court requires that legislative policymaking and executive policy execution remain separate nondelegable functions under the council-mayor municipal system.

Building on the holdings of *Contracts Funding* and *Western Land Equities*, the *Scherbel* decision confirms the standard for determining whether an applicant's right to a building permit under a particular zoning ordinance has vested. Both *Contracts Funding*

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26. *Id.* at 391.
27. Scherbel v. Salt Lake City Corp., 758 P.2d 897, 901 (Utah 1988).
28. *Id.*
29. *Id.* at 899.
30. *Id.*
31. *See, e.g., id.* at 901 (Howe, Assoc. C.J., concurring & dissenting). Associate Chief Justice Howe's concurring and dissenting opinion in *Scherbel* is an example of an alternative interpretation of the role of the Board of Adjustment. Justice Howe cites Walton v. Tracy Loan & Trust Co., 97 Utah 249, 92 P.2d 724 (1939), which clearly states that "the exercise of zoning power is definitely a legislative function and activity." *Id.* at 253, 92 P.2d at 726. The majority in *Scherbel* also made clear, however, that under the new council-mayor form of government, hearing zoning appeals is now an executive function to be carried out by the Board of Adjustment. *See Scherbel*, 758 P.2d at 899.

and *Western Land Equities* mandate a presumption in favor of a building permit applicant who satisfies the zoning requirements in place at the time of his initial application.[32] It is not entirely clear from the *Scherbel* decision, however, whether the court has modified or maintained this presumption. The phrasing of the *Scherbel* court's reference to the *Western Land Equities* test raises the question whether an applicant for a building permit is now charged with the initial burden of proving two elements: first, that no zoning ordinance changes were pending at the time of application, and second, that the plans submitted to the planning commission satisfied the requirements of the zoning ordinance then in effect.[33] In any event, only if the applicant meets these two criteria will the court look to the third element in the *Western Land Equities* test, which imposes a burden on the city to " 'show a compelling reason for exercising its police power retroactively to the date of application.' "[34]

4. Conclusion—Although the *Scherbel* court attempted to answer disputes concerning zoning ordinance appeals and the vesting of building permit rights under a particular zoning ordinance, the decision leaves some questions unresolved. In reaching its decision as to the appropriate body to hear zoning appeals, the court did not weigh the relative expertise of the Board of Adjustment over the City Council. The court also failed to address the policy considerations behind designating the Board of Adjustment a purely executive body. Other than citing statutory and case law precedent, which is far from conclusive, the court gave no reason why the City Council should be prohibited from hearing zoning appeals.

The court has yet to apply the *Western Land Equities* test to a conflict in which an applicant's vested right in a zoning ordinance is challenged by a city's claim of countervailing public inter-

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32. *See* Western Land Equities v. City of Logan, 617 P.2d 388, 396 (Utah 1980); Contracts Funding & Mortgage Exchange v. Maynes, 527 P.2d 1073, 1074 (Utah 1974).

33. Addressing the second concern the court said, "Appellant has thus failed to fulfill the first requirement of the *Western Land Equities* test because his application did not comply with the R-6 zoning ordinance requirements then in effect. His application therefore cannot serve to vest any rights to a particular zoning classification." *Scherbel*, 758 P.2d at 901. This statement indicates that applicants have the initial burden to prove they have met the requirements before they are entitled to any presumption in their favor. It is less clear who bears the burden of proving that no zoning changes were pending prior to the application.

34. *Id.* at 900 (quoting *Western Land Equities*, 617 P.2d at 391).

est. If given the opportunity to adjudicate the issue, the court must determine whether the city rejected the application in good faith, and require that the city's reasons for enacting the new ordinance be so compelling as to overcome the presumption in favor of the applicant.[35] The court also may choose to examine some of the problematic issues alluded to in *Contracts Funding*.[36] When faced with valid competing interests of both applicant and city, the court could establish a new set of criteria for determining the vesting of rights in a particular zoning ordinance.

*B. Uniform Operation of Economic Regulations**

In *Mountain Fuel Supply Co. v. Salt Lake City Corp.*,[1] the Utah Supreme Court held that Salt Lake City's imposition of an annual licensing tax on suppliers of natural gas, electricity, and telephone services was not impermissible discrimination under uniformity provisions of the Utah Constitution,[2] the Utah Code,[3] and under the equal protection clause of the federal constitution.[4] *Mountain Fuel* is significant for two reasons. First, the court relied exclusively on the uniformity provision of article I, section 24, of the Utah Constitution to decide an equal protection issue. Second, the decision expands and significantly clarifies standards of uniformity and equal protection for economic regulations.

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35. *See, e.g., Western Land Equities*, 617 P.2d at 396. The court stated:

> [C]ompelling public interests may, when appropriate, be given priority over individual economic interests . . . . There may be instances when an application would for the first time draw attention to a serious problem that calls for an immediate amendment . . . . It is incumbent upon a city, however, to act in good faith and not to reject an application because the application itself triggers zoning reconsiderations that result in a substitution of the judgment of current city officials for that of their predecessors.

Id.

36. *See supra* note 24.

* Kim J. Dockstader, Junior Staff Member, *Utah Law Review*.

1. 752 P.2d 884 (Utah 1988) (opinion by Justice Zimmerman).

2. *See* UTAH CONST. art. I, § 24 ("All laws of a general nature shall have uniform operation.").

3. *See* UTAH CODE ANN. § 10-8-80 (1986) ("All such license fees and taxes shall be uniform in respect to the class upon which they are imposed."), *repealed by* Municipality & County Business Tax Act, ch. 144, § 1, 1988 Utah Laws 591 (codified as reenacted at UTAH CODE ANN. § 10-1-203 (1988)).

4. *See* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

1. The Case—In 1977, Salt Lake City ("City") adopted utility licensing tax ordinances as a general revenue raising mechanism.[5] The ordinances imposed an annual license tax of four percent of gross revenues on all public utilities supplying "telephone, gas, or electric energy service."[6] The ordinances also applied to suppliers of telephone, gas, and electricity services in competition with public utilities.[7] Gross revenues for all suppliers of gas or electricity were based on the total sale and use of such services within the City limits. Gross revenues for suppliers of telephone services were based on basic local exchange services revenue within the City limits.[8]

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5. The facts are taken from the court's opinion in *Mountain Fuel*, 752 P.2d at 885-87.

6. Section 20-3-14 of the Salt Lake City Revised Ordinances provides:

(1) There is hereby levied upon the business of every person or company engaged in business in Salt Lake City, Utah, of supplying telephone, gas or electric energy service as public utilities, an annual license tax equal to four percentum of the gross revenue derived from the sale and use of the services of said utilities delivered from and after July 1, 1980, within the corporate limits of Salt Lake City, said fee being in addition to the two percent franchise fee.

SALT LAKE CITY, UTAH, REV. ORDINANCES § 20-3-14 (1983).

7. Section 20-3-14.1 of the Salt Lake City Revised Ordinances provides:

(1) There is hereby levied upon the business of every person or company engaged in the business in Salt Lake City, Utah, of supplying basic local exchange telephone service, as defined in Section 20-3-14 of the Revised Ordinances of Salt Lake City, Utah, natural gas or electric energy service in competition with public utilities, a[n] annual license tax equal to four percentum of the gross revenue derived from the sale and use of such competitive services sold, used or delivered within the corporate limits of Salt Lake City, after November 1, 1977.

(2) Definitions. In Competition With Public Utilities. "In competition with public utilities" shall mean to trade in products or services within the same market as a public utility taxed under section 14 of this chapter.

Id. § 20-3-14.1.

8. Section 20-3-14(2) of the Salt Lake City Revised Ordinances defines "gross revenue" and "basic local exchange service revenue" in the following manner:

(a) Gross revenue. "Gross revenue" as used herein, shall be construed to mean the revenue derived from the sale and use of public utility services within Salt Lake City, provided that "gross revenue" as applied to the telephone utility shall be construed to mean basic local exchange service revenue.

(b) Basic local exchange service revenue. "Basic local exchange service revenue" as used herein shall mean revenues received from the furnishing of telecommunications within Salt Lake City and access to the telecommunications network to either business, residential or other customers whether on a flat rate or measured basis, by means of an access line. Basic local exchange service revenues shall not include revenues obtained by the telephone public utility company from the provision of terminal telephone equipment services (such as basic telephone sets, private branch exchanges and key telephone systems), or from other telephone equipment which is obtainable from both the telephone company and other suppliers.

Id. § 20-3-14(2).

Mountain Fuel Supply Company ("Mountain Fuel"), a public utility, is the sole supplier of natural gas in the City. From 1978 to 1983, Mountain Fuel paid the City's licensing taxes under protest. During this five-year period, Mountain Fuel's licensing tax payments to the City totalled $11,072,624.13. The Utah Public Service Commission ("PSC"), which regulates public utilities, allows for such licensing tax costs to be included in the rates charged to customers by a public utility. Consequently, although the licensing taxes were levied directly on Mountain Fuel, the actual tax burden was indirectly passed on to Mountain Fuel's customers through the PSC rate-making procedure.

Mountain Fuel sought to have the licensing tax ordinances declared invalid and to obtain a refund of licensing taxes previously paid under protest. Mountain Fuel challenged the validity of the ordinances on two grounds. First, Mountain Fuel claimed the licensing tax, which was based on gross revenues, should be classified as a sales or income tax. Utah statutory law enabled the City to enact annual licensing taxes, but conferred no authority to impose sales or income taxes.[9] Second, Mountain Fuel claimed the tax illegally discriminated between sellers of different sources of energy fuels. Specifically, Mountain Fuel contended the City's imposition of the licensing tax on suppliers of natural gas and electricity, but not on suppliers of coal, firewood, bottled gas, and fuel oil, was arbitrary and discriminatory. Mountain Fuel argued that such discrimination was impermissible under uniformity provisions of the enabling statute,[10] the Utah Constitution,[11] and the equal protection clause of the federal constitution.[12]

Salt Lake City defended the ordinances on three grounds. First, the City argued the tax was a licensing tax, rather than a sales or income tax. Second, the City argued that the ordinances properly classified those utilities subject to the tax. That is, even if discrimination did result between those energy suppliers taxed and

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9. Section 10-8-80 of the Utah Code provides as follows:

> [Commissioners and city councils of cities] may raise revenue by levying and collecting a license fee or tax on any business within the limits of the city, and regulate the same by ordinance . . . . All such license fees and taxes shall be uniform in respect to the class upon which they are imposed.

UTAH CODE ANN. § 10-8-80 (1986) (current version at UTAH CODE ANN. § 10-1-203 (1988)).

10. *Id.*

11. *See* UTAH CONST. art. I, § 24 ("All laws of a general nature shall have uniform operation.").

12. *See* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

those not taxed, such discrimination was permissible under relevant state and federal law. Finally, the City raised a res judicata defense, arguing the above issues had been decided against Mountain Fuel on a previous occasion.[13]

The trial court issued a memorandum decision granting summary judgment for the City. In upholding the City's licensing tax ordinances, the trial court found that the licensing tax was not unreasonably discriminatory. The trial court also found that the licensing tax could not be characterized as a sales or income tax. Given these rulings, the trial court perceived no reason to decide the res judicata issue. Mountain Fuel appealed, raising the arguments previously made at trial.

On appeal, the Utah Supreme Court affirmed the trial court's decision. The court rejected Mountain Fuel's argument of discrimination, holding that the City's licensing tax ordinances satisfied the uniformity provision of article I, section 24, of the Utah Constitution.[14] The court also held that Mountain Fuel's argument that the licensing tax should be characterized as an unauthorized sales or income tax was without merit.[15] Finally, the court held that disposition of the other issues left no reason to discuss the res judicata issue.[16]

Most of the court's opinion in *Mountain Fuel* dealt with the discrimination claim. In holding that the City's licensing tax satisfied the uniformity provision of article I, section 24, of the Utah Constitution, the court articulated a two-pronged uniformity test.[17] First, the classification created by the legislation must be reasonable. Second, the classification must bear a reasonable relationship to the achievement of a legitimate legislative purpose. The *Mountain Fuel* court also stated that the scrutiny required by the uniformity test will "always meet or exceed that mandated by the fourteenth amendment" of the federal constitution.[18] Therefore,

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13. *See* Mountain Fuel Supply Co. v. Salt Lake City Corp., No. 192098 (Utah 3d Dist. Oct. 15, 1970) (Mountain Fuel and other plaintiffs challenged a similar taxing ordinance in an unrelated case that resulted in a judgment for the City).

14. *See* Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 890-91 (Utah 1988).

15. *Id.* at 891.

16. *Id.*

17. *Id.* at 890 ("[T]he stated test . . . is whether the classification of those subject to the legislation is a reasonable one and bears a reasonable relationship to the achievement of a legitimate legislative purpose.").

18. *Id.* The court also explained in great detail the relatively dormant standard of review of economic regulations under federal law. *See id.* at 889 (citing Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963) (statute outlawing debt consolidation businesses not in violation

the court chose not to rely on the federal equal protection standard to analyze the discrimination issue, preferring instead to base its decision on the uniformity provision of article I, section 24, of the Utah Constitution. In addition, the court concluded there was no reason to impose a separate standard of review under the uniformity requirement of the Utah Code,[19] because satisfaction of article I, section 24, was sufficient.[20]

In deciding whether the ordinances met the first prong of the uniformity test (reasonable classification), the *Mountain Fuel* court held there was nothing "obviously unreasonable about the classification" of those utilities subject to the tax.[21] The court believed the classification was "not in the abstract a discrimination 'with no rational basis,' "[22] because the tax applied equally to all suppliers of natural gas, electricity, and telephone service regardless of their status as public utilities. Furthermore, the defined class was not one that clearly could be "labeled impermissible, such as race."[23]

The court examined several elements in determining whether the ordinances satisfied the second prong of the uniformity test (reasonable relationship). First, the City's purposes for the ordinances were held to be "legitimate governmental objectives."[24] The City's basic purpose was to raise general revenues. The court noted the difficulty the City faced when relying on property taxes to obtain revenue in a fair and uniform manner.[25] A related City pur-

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of due process); McGowan v. Maryland, 366 U.S. 420, 426-28 (1961) (Sunday closing law does not violate equal protection); and United States v. Carolene Products Co., 304 U.S. 144, 152 (1938) (assumption that legislation affecting ordinary commercial transactions rests on rational basis)).

19. UTAH CODE ANN. § 10-8-80 (1986) (current version at *id.* § 10-1-203 (1988)) ("All such license fees and taxes shall be uniform in respect to the class upon which they are imposed.").

20. *See Mountain Fuel*, 752 P.2d at 888.

21. *Id.* at 890.

22. *Id.* (quoting Mountain States Legal Found. v. Public Serv. Comm'n, 636 P.2d 1047, 1055 (Utah 1981)).

23. *Id.* If the classification under the taxing ordinances affected fundamental rights or discriminated on a suspect basis, then the court indicated the standard of review under the federal constitution would be one of strict scrutiny requiring a showing of a compelling governmental interest. The court also indicated that such a strict scrutiny test might be appropriate under article I, section 24, of the Utah Constitution. *Id.* at 888 n.3.

24. *Id.* at 890-91.

25. *Id.* at 890 (citing Utah County v. Intermountain Health Care, Inc., 709 P.2d 265 (Utah 1985)). Salt Lake City is the site of many tax exempt governmental, religious, and charitable organizations. Thus there are several entities that may share in a smaller proportion of the tax-paying burden.

pose, therefore, was to raise revenues by a method that more fairly and uniformly spread the tax-paying burden.[26] The court believed the indirect effect of the licensing tax on users of natural gas, electricity, and telephone services promoted the City's purpose of spreading the tax burden.[27]

Second, the court held that the City chose a "permissible means to achieve its legitimate ends."[28] The *Mountain Fuel* court required that the means chosen by the City satisfy two criteria. The first criterion was that the tax not unduly burden the affected class.[29] The court held that the tax did not unduly burden Mountain Fuel.[30] The second criterion was whether the City acted reasonably in choosing the best alternative means available. The City could have chosen to include suppliers of firewood, coal, and bottled gas under the licensing tax ordinances. The court, however, surmised that including such suppliers would be too burdensome for the City.[31] Thus the City's choice not to include suppliers of firewood, coal, and bottled gas was held permissible.

2. Background—Prior to *Mountain Fuel*, the Utah Supreme Court reviewed licensing tax ordinances and other economic regulations in a variety of manners. Unlike *Mountain Fuel*, the touchstone for review of economic regulations was not always article I, section 24, of the Utah Constitution. For example, in *Continental Bank & Trust Co. v. Farmington City*,[32] the court came to the opposite conclusion. In *Continental Bank & Trust*, the court stated that licensing tax ordinances were not subject to the uniformity requirements of article I, section 24.[33] Instead, the court chose to

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26. *Id.*

27. *Id.* at 890-91.

28. *Id.* at 891.

29. *Id.*

30. The court held that the licensing tax ordinances imposed no undue burden for the following reasons: (1) Administrative costs of the tax were small because Mountain Fuel already had a customer billing system in place; (2) there was no loss of profit to Mountain Fuel because costs of the tax were passed on to the consumer; and (3) there was no evidence of a loss of Mountain Fuel's competitiveness in the heating fuel supply market since passage of the ordinances. *See id.* at 891.

31. The court stated: "[I]t would be economically inefficient and administratively cumbersome to track down every supplier of firewood, coal or bottled gas sold for use within the city and attempt to collect from each supplier a tax based on revenues earned from customers within the city." *Id.* The court did not mention whether a license tax on fuel oil would be too burdensome. *See id.*

32. 599 P.2d 1242 (Utah 1979).

33. *Id.* at 1244-45. The Farmington City licensing tax reviewed in *Continental Bank & Trust* was promulgated under authority of § 10-8-80 of the Utah Code—the very same ena-

invalidate the licensing tax then under review as an abuse of the taxing power.[34] In other cases, the Utah Supreme Court has indicated that equal protection principles arose from state constitutional sources other than article I, section 24.[35] In some cases, the court chose only to apply uniformity provisions of statutory law to the ordinance under review.[36] Finally, on other occasions the Utah Supreme Court has relied solely on federal constitutional law to review economic regulations. For example, in *State v. Taylor*,[37] the court reviewed a Salt Lake County licensing fee under equal protection requirements of the federal constitution. The *Taylor* court did not mention article I, section 24, or any other state constitutional provisions that required uniformity.[38]

Mountain Fuel's uniformity analysis is a more thorough statement of standards for economic regulations than prior Utah case law analysis. In *Continental Bank & Trust*, the court held that it could restrict a licensing tax ordinance only if the tax imposed was "clearly oppressive" or "unreasonably discriminatory" as an abuse of the taxing power.[39] In *Redwood Gym v. Salt Lake County Comm'n*,[40] the court upheld a massage parlor ordinance against a claim of impermissible discrimination. The court declined to apply a more rigid equal protection standard under Utah's article I, section 2, than was required under federal equal protection law, stating the standard this way: "Where a legislative enactment creates

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bling statute used in *Mountain Fuel*. *See id.* The *Continental Bank & Trust* court stated that article XIII, § 12, of the Utah Constitution prevented application of the uniformity provision of article I, § 24, to licensing tax ordinances. *Id.* at 1245.

34. *Id.* at 1246.

35. *See, e.g.*, Redwood Gym v. Salt Lake City Comm'n, 624 P.2d 1138, 1146 n.27 (Utah 1981) (implicating article I, § 2, of Utah Constitution as source of state equal protection principles); Weber Basin Home Builders Assoc. v. Roy City, 26 Utah 2d 215, 218 n.8, 487 P.2d 866, 868 n.8 (Utah 1971) (article I, §§ 2, 7, cited as imposing state equal protection requirements).

36. *See* Davis v. Ogden City, 117 Utah 315, 215 P.2d 616 (1950); Salt Lake City v. Utah Light & Ry., 45 Utah 50, 142 P. 1067 (1914); Salt Lake City v. Christensen, 34 Utah 38, 95 P. 523 (1908). All of these cases reviewed licensing tax ordinances under the uniformity provisions of predecessor statutes to § 10-8-80 of the Utah Code.

37. 541 P.2d 1124 (Utah 1975).

38. The *Taylor* court stated that prior Utah case law recognized a requirement of uniformity in imposing a tax on a certain class. *See id.* at 1126 (citing *Christensen*, 34 Utah at 38, 95 P. at 523; *Davis*, 117 Utah at 315, 215 P.2d at 616). The *Taylor* court, however, did not identify the source of the requirement of uniformity as article I, § 24, of the Utah Constitution. Furthermore, neither of the cases cited by the *Taylor* court, *Christensen* or *Davis*, were decisions based on art. I, § 24, of the Utah Constitution. *See supra* note 36.

39. *See* Continental Bank & Trust Co. v. Farmington City, 599 P.2d 1242, 1246 (Utah 1979).

40. 624 P.2d 1138 (Utah 1981).

no inherently suspect classification and touches upon no fundamental interest as recognized by the Constitution, it satisfies the exigencies of equal protection if the classification made thereby has a rational basis in a legitimate legislative objective."[41] The *Redwood Gym* test is similar to "rational basis" statements of equal protection principles in prior Utah case law.[42]

The *Mountain Fuel* court relied heavily on its decision in *Malan v. Lewis*[43] in articulating a uniformity test for economic regulations. *Malan* also established a two-pronged uniformity test under article I, section 24.[44] However, *Malan* represents a noneconomic regulation case involving a constitutional challenge to Utah's former vehicle guest statute. In reviewing noneconomic regulations, the Utah Supreme Court has consistently stated that article I, section 24, of the Utah Constitution is the analogue to the equal protection clause of the federal constitution.[45]

Although *Malan* was a noneconomic regulation case, its uniformity test is similar to the one used in *Mountain Fuel.* In *Malan*, the court first required that the "law apply equally to all members of the defined class."[46] This requirement of equal application within a class was apparently one of the factors considered in *Mountain Fuel* to determine whether the classification was reasonable.[47] The other factor considered in *Mountain Fuel* was whether the classification was impermissible.[48]

The second requirement of *Malan* was that the classification have a "reasonable tendency to further objectives of the statute."[49] *Malan*'s "reasonable tendency" requirement was not expressly used in *Mountain Fuel.* Rather, in *Mountain Fuel*, the court re-

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41. *Id.* at 1146 (footnote omitted).

42. *See, e.g.*, Allen v. Intermountain Health Care, Inc., 635 P.2d 30, 31 (Utah 1981); State Tax Comm'n v. Department of Fin., 576 P.2d 1297, 1299 (Utah 1978).

43. 693 P.2d 661 (Utah 1984).

44. *See id.* at 670. The *Malan* court stated that article I, § 24, protects against two types of discrimination: (1) "a law must apply equally to all persons within a class"; and (2) "the statutory classifications and the different treatment given the classes must be based on differences that have a reasonable tendency to further objectives of the statute." *Id.*

45. *See* Thompson v. Salt Lake City Corp., 724 P.2d 958 (Utah 1986); *Malan*, 693 P.2d at 661; Liedtke v. Schettler, 649 P.2d 80 (Utah 1982); Leetham v. McGinn, 524 P.2d 323 (Utah 1974).

46. *Malan*, 693 P.2d at 670; *see supra* note 44.

47. *See* Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 890 (Utah 1988). The court stated that the licensing tax was reasonable on its face because "[t]he tax applies to all suppliers of natural gas, electricity, and telephone service, whether or not they are public utilities." *Id.*

48. *Id.* at 890; *see supra* note 23 and accompanying text.

49. *Malan*, 693 P.2d at 670; *see supra* note 44.

quired a "reasonable relationship to the achievement of a legitimate legislative purpose."[50] Technically, *Mountain Fuel*'s "reasonable relationship" standard could require a different analysis than *Malan*'s "reasonable tendency" language. In *Malan*, however, the court expounded on its "reasonable tendency" language by stating that the classification must bear " 'a reasonable and just relation to the act in respect to which the classification is proposed.' "[51] As a result, *Malan*'s explanation of the "reasonable tendency" language is very close to the "reasonable relationship" standard of *Mountain Fuel.*

The analysis under the "reasonable relationship" prong of the uniformity test, as presented in *Mountain Fuel*, is different than any single statement of standards for economic regulations mentioned in earlier case law. In *Mountain Fuel*, the court first examined whether the City's purposes in enacting the ordinances were legitimate governmental objectives. This approach—examining the governmental purposes for an economic regulation—is not entirely new.[52] After reviewing the City's purposes, however, the *Mountain Fuel* court examined "whether the City chose a permissible means to achieve its legitimate ends."[53] Essentially, *Mountain Fuel* requires a means-ends congruence between the licensing ordinances and the City's purposes. An examination of the relevant case law reveals that this is the first occasion the court used such language in the context of reviewing economic regulations.[54] The means-ends congruence requirement could merely represent a different manner of stating the uniformity test (reasonable classification and reasonable relationship). Given the treatment of this requirement in *Mountain Fuel*, however, the congruence requirement appears to be a separate element requiring independent analysis. In determining this congruence, the analysis in *Mountain Fuel* focused on whether the means chosen were permissible.[55]

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50. *Mountain Fuel*, 752 P.2d at 890; *see supra* note 17.

51. *Malan*, 693 P.2d at 672 (quoting McLaughlin v. Florida, 379 U.S. 184, 190 (1964)).

52. *See* Redwood Gym v. Salt Lake City Comm'n, 624 P.2d 1138, 1146 (Utah 1981) (purpose of massage parlor ordinance was prevention of prostitution); Continental Bank & Trust Co. v. Farmington City, 599 P.2d 1242, 1245-46 (Utah 1979) (purpose of Farmington's licensing tax was to raise general revenues without any relation to costs of providing services).

53. *Mountain Fuel*, 752 P.2d at 891; *see supra* note 28 and accompanying text.

54. *See, e.g., Malan*, 693 P.2d at 661; *Redwood Gym*, 624 P.2d at 1138; *Continental Bank & Trust Co.*, 599 P.2d at 1242; State v. Taylor, 541 P.2d 1124 (Utah 1975).

55. *See Mountain Fuel*, 752 P.2d at 891. The court examined whether an undue bur-

3. Effect—Historically, the Utah Supreme Court has been inconsistent in its method of reviewing economic regulations, particularly licensing tax ordinances. In 1979, in *Continental Bank & Trust Co.*,[56] the Utah Supreme Court stated that the uniformity provision of article I, section 24, did not apply to review of licensing tax ordinances. Two years after *Continental Bank & Trust Co.*, in *Redwood Gym v. Salt Lake County Comm'n*,[57] the Utah Supreme Court refused to impose a standard on economic regulations under the Utah Constitution that was more rigorous than the federal equal protection standard.[58] Similarly, in *State v. Taylor*,[59] the court relied solely on the fourteenth amendment to the United States Constitution to review a licensing tax ordinance. Approximately seventy to eighty years earlier, however, the court chose not to review licensing tax ordinances under either the state or federal constitution, preferring instead to rely on uniformity provisions in the statutory enabling acts.[60] On other occasions the court has applied various state constitutional sources to review of economic regulations.[61] In sum, the sources and application of uniformity and equal protection analysis to economic regulations have varied greatly over the years, especially in review of licensing tax ordinances.[62]

Meanwhile, the court has developed a coherent body of case law interpreting the uniformity provision of article I, section 24, of the Utah Constitution. *Malan* represents the culmination of case law interpreting article I, section 24, in areas not dealing directly with economic regulations. *Mountain Fuel* represents a transfer of the *Malan* line of uniformity analysis to the review of economic regulations.

Although the ordinances in *Mountain Fuel* passed the uniformity test, the court increased the overall rigor of the standard. The state uniformity test certainly presents a more rigorous in-

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den was placed on the economically regulated class. In addition, the court considered whether the City had chosen the best alternative means available. *Id.*; *see supra* notes 30-31 and accompanying text.

56. 599 P.2d 1242 (Utah 1979).

57. 624 P.2d 1138 (Utah 1981).

58. *See Redwood Gym*, 624 P.2d at 1146; *supra* notes 40-41 and accompanying text.

59. 541 P.2d 1124 (Utah 1975).

60. *See supra* note 36 and accompanying text.

61. *See* cases cited *supra* note 35.

62. Some commentators have even accused the Utah Supreme Court of being inconsistent and indecisive in its method of applying the Utah Constitution to principles of equal protection. *See, e.g.*, Comment, *The Utah Supreme Court and the Utah State Constitution*, 1986 UTAH L. REV. 319, 329-32.

quiry than would be required under federal equal protection standards.[63] In clarifying the uniformity analysis, the *Mountain Fuel* court also may have increased the standard from what previous state law required.[64] At the very least, the court brought a great deal of clarity to judicial review of economic regulations. The court was careful, however, to point out that legislative classifications in economic oriented regulations generally would be given wide deference by the court, even though the level of review may vary with particular applications.[65]

4. Conclusion—Mountain Fuel represents an attempt by the Utah Supreme Court to remedy the inconsistency in application of equal protection standards to review of economic regulations by earlier case law. The *Mountain Fuel* court establishes the uniformity provision of article I, section 24, of the Utah Constitution as the source for review of economic regulations on equal protection grounds. In the process of applying state uniformity law, the *Mountain Fuel* court extended the *Malan* uniformity analysis into the economic regulatory arena.

The *Mountain Fuel* decision represents a significant clarification of the standard required of economic regulations. The *Mountain Fuel* uniformity test of economic regulations is clearly more stringent than the federal equal protection standard. The uniformity test also is arguably more searching than previous Utah case law required. Although the licensing tax ordinance under review in *Mountain Fuel* passed the uniformity test, future economic regulations could just as easily fail to meet the standard. Nevertheless, because economic regulations are effectively no longer reviewed under federal equal protection law, the exclusive reliance by *Mountain Fuel* on a uniformity provision of the Utah Constitution allows for the future development of a separate and coherent stan-

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63. The *Mountain Fuel* court declined to definitively settle the variance between the state and federal standard, but stated that the state uniformity standard will always "meet or exceed" any analysis required under the federal protection law. *See* Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 890 (Utah 1988). Given the virtually "dead letter" review of economic regulations under federal law, however, the more searching standard of review announced in *Mountain Fuel* is clearly more rigorous. *See* cases cited *supra* note 18.

64. With the exception of the best alternative means element, most of the *Mountain Fuel* analysis can be found at one time or another in prior cases. When viewed in its entirety, however, *Mountain Fuel* represents the most articulate and searching inquiry yet to occur concerning uniformity and equal protection standards for economic regulations.

65. *See Mountain Fuel*, 752 P.2d at 888-89.

dard of review for economic regulations under state law.

VIII. Real Property

*A. Levying on Real Property Under Utah Rule of Civil Procedure 69(e)(1)**

In *Taubert v. Roberts*,[1] the Utah Supreme Court held that when real property is executed against to secure a judgment lien, the levying proceedings, as defined in Utah Rule of Civil Procedure 69(e)(1),[2] must be commenced before the statutory return date. In adopting this interpretation of the executionary rules, the court rejected the notion that personally serving the writ of execution on a judgment debtor is sufficient to toll the statutory return period.[3] This ruling should induce local practitioners to take care that officers executing writs on real property comply strictly with statutory posting requirements, and that the officers initiate the levying process by posting notice on the subject property before the two-month statutory period expires.

1. The Case—In 1978, Taubert purchased property in Summit County subject to a judgment lien held by Pacific States Pipe Company ("Pacific").[4] In 1979, Roberts purchased the judgment lien from Pacific. In an effort to satisfy the judgment, Roberts obtained a writ of execution that was delivered to the Summit County Sheriff on August 4, 1981.[5] The sheriff served the writ of execution on Taubert on August 13, 1981, at his California resi-

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* Douglas H. Holbrook, Junior Staff Member, *Utah Law Review*.

1. 747 P.2d 1046 (Utah 1987) (opinion by Justice Zimmerman).

2. Rule 69(e)(1) provides:

> (1) Notice. Before the sale of the property on execution notice thereof must be given as follows: . . . . In case of real property, by posting a similar notice, particularly describing the property, for 21 days, on the property to be sold, at the place of sale, and also in at least 3 public places of the precinct or city where the property to be sold is situated, and publishing a copy thereof at least 3 times, once a week for 3 successive weeks immediately preceding the sale, in some newspaper published in the county, if there is one.

Utah R. Civ. P. 69(e)(1).

3. *See Taubert*, 747 P.2d at 1049-50.

4. The facts are taken from the court's opinion in *Taubert*. *See Id.* at 1047-48.

5. Rule 69(c) provides: "The writ of execution shall be made returnable at any time within two months after its receipt by the officer." Utah R. Civ. P. 69(c). Thus the required return date in *Taubert* would have been no later than October 4, 1981. *Taubert*, 747 P.2d at 1047. After this date, the officer is no longer authorized to levy on the real property. *See* 33 C.J.S. *Executions* § 93 (1942).

dence. The officer took no further action to execute the writ until October 16, 1981, twelve days after the return date, when Roberts instructed the sheriff to sell the property. Pursuant to Utah Rule of Civil Procedure 69(e)(1), the sheriff posted notice of sale on the subject property, in three public places, and published notice in the local newspaper.

At the sheriff's sale Roberts purchased the property, and subsequently Taubert brought suit to set aside the sale, challenging the sale's validity on the ground that it was not timely. The trial court summarily rejected Taubert's claim as a matter of law.

Taubert appealed, arguing that the sale of the subject property was invalid because the sheriff did not begin the levying process until after the two-month return period. Taubert further argued that serving the judgment debtor with the writ of execution did not constitute "service of the writ,"[6] which under Rule 69(d)[7] requires the authorized officer to levy on the real property by complying with the steps outlined in Rule 69(e)(1).

In opposition, Roberts contended that personally serving Taubert with the writ of execution constituted service of the writ under Rule 69(d), and that such service initiated the levying proceedings and tolled the two-month statutory return period. Roberts alternatively argued that, because a lien is created when a judgment is docketed,[8] levying on the real property through a writ of execution is not necessary.[9]

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6. The court uses the terms "service of the writ" (the title to rule 69(d)), "serve an execution," and "serving an execution" interchangeably. This Development will not distinguish between them.

7. Rule 69(d) provides:

> Service of the writ. Unless the execution otherwise directs, *the officer must execute the writ against the property of the judgment debtor by levying on a sufficient amount of property* . . . .
>
> When an officer has begun to serve an execution issued out of any court on or before the return of such execution he may complete the service and return thereof after such return day . . . .

UTAH R. CIV. P. 69(d) (emphasis added).

8. *See* UTAH CODE ANN. § 78-22-1 (1987) (stating that when a judgment is docketed and filed in the district or circuit court it becomes a lien on all real property of the judgment debtor).

9. *Taubert*, 747 P.2d at 1049. Several jurisdictions have held that, if a judgment creates a lien on property, no levying on property is required. *See, e.g.*, Lehnhardt v. Jennings, 119 Cal. 192, 48 P. 56 (1887), *aff'd*, 51 P. 195 (1897); Britannia Mining Co. v. United States Fidelity & Guar. Co., 43 Mont. 93, 115 P. 46 (1911); Oysterman's Bank & Trust Co. v. Weeks, 35 A.D.2d 580, 313 N.Y.S.2d 535 (1970); Jamestown Terminal Elevator v. Knopp, 246 N.W.2d 612 (N.D. 1976); Finch, Van Slyck & McConville v. Jackson, 57 N.D. 17, 220 N.W. 130 (1928); Winslow v. Klundt, 51 N.D. 808, 201 N.W. 169 (1924). The Utah Supreme Court, however, summarily rejected this argument, finding that it failed to address the pur-

The court adopted Taubert's argument and held that levying proceedings, as defined in Rule 69(e)(1), must be commenced before the end of the two-month return period. The court, interpreting the interdependency of Rule 69, sections (c), (d), and (e), followed a logical, formal line of reasoning. The sequential deductive analysis leaves no question about the court's interpretation.

The court's analysis began with a definition of the term "serve an execution" as used in Rule 69(d).[10] The court acknowledged that to serve an execution is not to serve process.[11] Rather, the statutory description of the term "serving an execution" deals with the execution of the writ by setting forth the requirements for performing the commands of the writ.[12] Rule 69(d) sets forth the requirements for executing the writ: "Unless the execution otherwise directs, the *officer must execute the writ against the property of the judgment debtor by levying* on a sufficient amount of property . . . ."[13] From this language the court concluded that, under Rule 69(d), serving an execution means to execute the writ by levying on the subject property. The court further held that the procedure of serving an execution is not initiated until the officer has started the levying process on the real property,[14] which the court defined as performance of the steps specified in Rule 69(e)(1).[15]

The result represents a rejection of Robert's assertion that personal service of the writ on the judgment debtor constitutes "serving an execution" and therefore tolls the return period delineated in Rule 69(c). To support its position, the court noted that Rule 69(d), entitled "service of the writ," does not provide or even mention a procedure for serving a copy of the writ on the judgment debtor.[16] The court further stated that Rule 69(b) provides for service of the writ on the judgment debtor, but only at the direction of the judgment creditor.[17] The court reasoned that because service on a judgment debtor is merely permissive, it is not one of the steps required for the officer to assert control over the real property.[18]

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pose of Rule 69. *Taubert*, 747 P.2d at 1049-50.

10. *See Taubert*, 747 P.2d at 1048-49.
11. *Id.* at 1049.
12. *Id.* at 1048.
13. UTAH R. CIV. P. 69(d) (emphasis added).
14. *Taubert*, 747 P.2d at 1050.
15. *Id.*
16. *Id.* at 1049.
17. *Id.*
18. *Id.*

2. Background--The *Taubert* case was one of first impression for the Utah Supreme Court. The *Taubert* court interpreted the interdependency of Rules 69(e)(1), 69(d), and 69(c). The court equated service of the writ[19] with levying on real property.[20] To arrive at this conclusion, the court strictly construed Rule 69 in agreement with other jurisdictions that strictly interpret rules of execution.[21] This strict interpretation has been widely followed in other jurisdictions.[22] In Idaho, where the executionary statutes are very similar to Utah's,[23] the courts have adopted the strict statutory interpretation.[24] Furthermore, the United States Supreme Court has said that service of an execution is comprised of all acts necessary to complete the process. In *Fallows v. Continental Commercial Trust & Savings Bank*,[25] the Court's dicta leads to the inference that the Court was defining "all necessary acts" to mean only those prescribed by statute.[26]

In contrast, other jurisdictions hold that when a judgment is docketed, a lien is created on all property owned by the judgment debtor, and the lien makes the process of levying on the property through a writ of execution unnecessary.[27]

3. Discussion—The *Taubert* court literally construed Rule 69 despite the admitted ambiguity of the rule.[28] The court, interpreting the statutory requirements of levy, followed the common law reasoning recognized by most jurisdictions: to levy on real property is to exercise control or dominion over the subject property by an authorized officer.[29] By strictly construing Rule 69(d),

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19. *See* UTAH R. CIV. P. 69(c) (execution on real property).

20. *See Taubert*, 747 P.2d at 1049.

21. *Id.* at 1049 (citing Ames v. Parrott, 61 Neb. 847, 86 N.W. 503, 504 (1901) (holding that specific statutory rules respecting levying procedures must be strictly observed); and Woodbine Sav. Bank v. Yager, 57 S.D. 645, 234 N.W. 621, 622 (1931) (statutory rule respecting levying procedures must be strictly observed)).

22. *See* 6 AM. JUR. 2D *Attachment & Garnishment* § 311 (1963) (special statutory provisions that prescribe methods for levying must be strictly observed).

23. *See* IDAHO CODE §§ 11-301, -302 (1979).

24. *See, e.g.*, Fulton v. Duro, 107 Idaho 240, 687 P.2d 1367, 1373 (Ct. App. 1984).

25. 235 U.S. 300 (1914).

26. *See id.* at 307; *see also* 30 AM. JUR. 2D *Executions* § 249 (1967).

27. *See supra* notes 8-9 and accompanying text.

28. *See Taubert*, 747 P.2d at 1048 (court acknowledged that Rule 69(d) was poorly drafted and ambiguous because, if read out of context, the term "service of the writ" might imply service of process or notice by serving a copy of the writ of execution on the property owner).

29. *See* Swanson v. Olympic Peninsula Motor Coach Co., 190 Wash. 35, 66 P.2d 842, 845 (1937) (officer must take property under dominion into his constructive possession); 33

the court adopted the widely held meaning of serving an execution as including only execution by levying on property as prescribed in Rule 69(d).[30] The court, however, rejected the concept that service of notice to the judgment debtor, followed by a demand for satisfaction, is incorporated into the definition of levying.[31]

Because of the ambiguity in Rule 69(d), the court probably would have made a less formal interpretation, but "service of the writ," meaning communication to the judgment debtor, is also addressed in Rule 69(b).[32] Because the notice to the judgment debtor is permissive[33] under Rule 69(b), the court concluded that it cannot be classified as a necessary act, and therefore it is not required under Rule 69.

After interpreting the statutory meaning of the term "serving an execution," the court followed the majority of jurisdictions by holding that service of the writ or levying on the subject property must be completed within the statutory return period; otherwise, any subsequent sale of the levied property is invalid.[34] If the levy is made after the return period, the levying officer has lost all powers to exercise control over the subject property.[35]

The majority's categorical rejection of Roberts' argument that serving an execution could be accomplished through personal service of the execution on the judgment debtor fails to recognize that one of the writ's demands is to levy the subject property. The levying of property as the court defines it under Rule 69(e)(1) deals

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C.J.S. *Executions* § 88 (1942).

30. *See Taubert*, 747 P.2d at 1049.

31. *See Swanson*, 66 P.2d at 845; 33 C.J.S. *Executions* § 88 (1942).

32. Rule 69(b) states: "The judgment creditor may require a certified copy of the judgment to be served with the execution upon the party against whom the judgment was rendered . . . ." UTAH R. CIV. P. 69(b).

33. *See Taubert*, 747 P.2d at 1049.

34. *See, e.g.*, Murphree v. International Shoe Co., 246 Ala. 384, 20 So. 2d 782, 783 (1945) (sale after return period null and void); United States Rubber Co. v. Ashback, 161 Colo. 388, 422 P.2d 372, 373 (1967) (lien of execution ceased where there was no levy on property before end of return period); Chasnoff v. Porto, 140 Conn. 267, 99 A.2d 189, 191-92 (1953) (writ is of no force after return day of execution has passed); Ralston Purina Co. v. Detwiler, 173 Ind. App. 573, 364 N.E.2d 180, 182 (1977) (lien is lost if levy is not made before return day); Hicks v. Bailey, 208 Ky. 840, 272 S.W.2d 32 (1954) (levy and sale invalid after statutory return period expires); Illi, Inc. v. Margolis, 267 Md. 30, 296 A.2d 412, 415 (1972) (writ is valid only until return date); Fulkerson v. Laird, 421 S.W.2d 523, 527 (Mo. Ct. App. 1967) (all proceedings subsequent to return date are null and void); Garro v. Republic Sheet Metal Works, Inc., 129 N.Y.S.2d 568, 570 (1954) (lien on property is lost if no levy is made during life of execution); Faull v. Cooke, 19 Or. 455, 26 P. 662, 664 (1890) (when return date has expired writ is *functus officio*).

35. *See Murphree*, 20 So. 2d at 783.

exclusively with notice: notice posted on the subject property, notice posted in three conspicuous places, and published notice. By using Rule 69(e)(1) as the definition of levy, the majority has equated levy with notice, but it has neglected to include notice to the judgment debtor.

The majority fails to extend its formalistic reasoning beyond the literal construction of Rule 69(e)(1). The purpose of Rule 69(e)(1) is to delineate the process of levying real property through a series of notice requirements. Rule 69(e)(1) is subtitled *Notice* and the primary purpose of Rule 69(e)(1) is not to establish control over the subject property, but to give notice. The court ignored the fact that serving the judgment debtor with the writ of execution is the best possible form of notice.[36] Justice Howe recognized this in his dissent,[37] in which he adamantly supported the contention that levying under Rule 69 deals exclusively with notice. Justice Howe concluded that notice to the judgment debtor should be the primary concern because the judgment debtor is the real party of interest.

4. Conclusion—Taubert clarifies the procedural requirements of the executionary rules in a sale of real property to satisfy a judgment lien. The ambiguity of Rule 69 left room for several interpretations in the context of judgment proceedings. After *Taubert*, it is clear that, in order to initiate an execution of the judgment, the officer must begin the levying process as defined in Rule 69(e)(1) before the two-month return period runs.

*B. The Validity of an Oral Offer to Exercise a Lease Option Under the Statute of Frauds**

In *Hurlburt v. Gullo*,[1] the Utah Court of Appeals held that an oral notice of election to renew a written lease for a period longer than one year does not violate Utah's Statute of Frauds.[2] The case

36. *See* Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983).
37. *Taubert*, 747 P.2d at 1050-51 (Howe, C.J., dissenting).

* Ellen A. Rouch, Junior Staff Member, *Utah Law Review*.
1. 750 P.2d 613 (Utah Ct. App. 1988) (opinion by Judge Bench).
2. *Id.* at 615. Utah's Statute of Frauds provides:

> Every contract for . . . the sale of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the . . . sale is to be made, or by his lawful agent thereunto authorized in writing.

UTAH CODE ANN. § 25-5-3 (1984).

is significant because it apparently creates a blanket exception to the Statute of Frauds in cases of oral notice of renewal of a written lease.

1. The Case—Donald and Rosetta Foote owned five acres of land in Slaterville, Utah.[3] Mr. and Mrs. Foote occupied a house on one and one-half acres of land. The remaining three and one-half acres were used for farming.

The plaintiff, Donald Hurlburt, originally met with Mr. and Mrs. Foote in April 1983 to negotiate a lease of the three and one-half acres for agricultural production. Mr. Hurlburt prepared a handwritten lease agreement that provided that he would lease the property for one year, make two semi-annual payments of seventy-five dollars, and that he had the option to renew the lease for five years. The option clause did not specify whether notice of the renewal had to be in writing. Later in the same month Mr. and Mrs. Foote reviewed the lease and Mr. Foote signed it.

During the first year, Mr. Hurlburt made the required rental payments. Prior to the end of the first year of the lease, he orally notified Mr. and Mrs. Foote of his election to exercise the five-year lease option. After giving this notice, Mr. Hurlburt made two subsequent payments and levelled the property to make more of the land suitable for agriculture.

In May 1984 Mr. Foote died. John Gullo approached Mrs. Foote in April 1985 and offered to purchase the land. Mrs. Foote informed Mr. Gullo of Mr. Hurlburt's lease, and Mr. Gullo assured Mrs. Foote that he would either honor the lease or make appropriate restitution. Mrs. Foote then informed Mr. Hurlburt of Mr. Gullo's offer to purchase the land.

Mr. Hurlburt continued to use the land to cultivate oats and alfalfa. When he attempted to tender his semi-annual rental installment to Mrs. Foote, she refused it because of the pending sale to Mr. Gullo. Subsequently, Mr. Hurlburt and Mr. Gullo attempted unsuccessfully on several occasions to communicate with each other.

Mrs. Foote and Mr. Gullo closed the sale of the property on May 2, 1985, but Mr. Hurlburt's lease was not a part of the transaction. After the closing, Mr. Gullo informed Mr. Hurlburt by letter that he was taking sole possession of the entire five acres and

3. The facts are from the court's opinion in *Hurlburt*, 750 P.2d at 614, and Brief of Appellant at 3-10, *Hurlburt* (No. 860135).

moved his horses onto the property.

Mr. Hurlburt sued Mr. Gullo and Mrs. Foote for breach of the lease agreement. The trial court granted the defendant's motion to dismiss, noting that the exercise of an option must be in writing to satisfy the Statute of Frauds. Because Mr. Hurlburt exercised the option orally, the trial court found that he did not comply with the statute.

The Utah Court of Appeals reversed, holding that "as a general rule, an oral notice of election to exercise an option to renew a written lease for a period longer than one year does not violate the statute of frauds."[4] The court reasoned that the Statute of Frauds should not bar this type of renewal because the terms and conditions of the contract are embodied in the written lease. Notice of election to exercise the option simply makes the "original lease operative for the renewal period."[5]

2. Background—Prior to *Hurlburt*, Utah courts analyzed cases involving options to renew clauses in written contracts under two distinct theories. In at least one case, the Utah Supreme Court permitted an oral renewal of a valid contract containing an option to renew clause, following the same reasoning as *Hurlburt*. Generally, however, Utah courts have used a theory of "part" or "partial performance" to analyze such situations.

In the 1949 case of *Cummings v. Rytting*,[6] the Utah Supreme Court held that an oral renewal of an option did not violate the Statute of Frauds. In *Cummings*, the plaintiff leased land to the defendant for a period of five years, with an option to renew the lease for an additional five years. As in *Hurlburt*, the lease did not specify how the option was to be exercised. The plaintiff argued that the option to renew was invalid under the Statute of Frauds because it created a new lease.[7]

The Utah Supreme Court rejected this reasoning and created a blanket exception to the writing requirement of the Statute of Frauds. The court held:

> Verbal notice of the intention of the lessee to renew the lease for a term of years, is sufficient, notwithstanding the Statute of Frauds that all leases for a longer term than one year shall be in writing, inasmuch as the lessee does not hold for the renewal period under

4. *Hurlburt*, 750 P.2d at 615 (citations omitted).
5. *Id.* at 615.
6. 116 Utah 1, 207 P.2d 804 (Utah 1949).
7. *Id.* at 5, 207 P.2d at 806.

> the notice, but under the original lease and, that being in writing, the objection grounded on the Statute of Frauds is of no merit.[8]

Utah courts have also used the doctrine of partial performance in cases involving option to renew clauses.[9] Although the doctrine of partial performance has never been reduced to a formula,[10] two observations concerning its use by Utah courts are appropriate. First, the terms of the oral contract must be "clear, definite, mutually understood, and established by clear, unequivocal and definite testimony, or other evidence of the same quality."[11] Second, partial performance requires that the plaintiff prove acts of part performance sufficient to bar the Statute of Frauds. Thus, if the plaintiff behaves as though the oral contract (or the renewal in the case of an option to renew) is valid and performs specific acts based on that belief, then the Statute of Frauds does not bar the oral contract or notice. To decide whether partial performance has occurred, courts typically consider such evidence as substantial improvements to the land, occupation of the land, or valuable consideration.[12]

In cases in which it is applicable, partial performance is an attractive analysis because of a companion statute to the Statute of Frauds. Section 25-5-8 of the Utah Code specifies that part performance may remove a contract from the bar of the Statute of Frauds. The provision states: "Nothing in this chapter contained shall be construed to abridge the . . . specific performance of

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8. *Id.*, 207 P.2d at 806 (citations omitted).

9. *See, e.g.*, Utah Mercur Gold Mining Co. v. Herschel Gold Mining Co., 103 Utah 249, 134 P.2d 1094 (1943). In this seminal case, the plaintiffs obtained written leases from the defendant to develop and mine ore until the plaintiffs could obtain the funds to purchase the mine. The defendants claimed that the oral agreement to extend the written lease violated the Statute of Frauds. The Utah Supreme Court held that acts that constituted partial performance would bar the Statute of Frauds. *Id.* at 254, 134 P.2d at 1096. In Ravarino v. Price, 123 Utah 559, 260 P.2d 570 (1953), the court noted that when the plaintiff is in possession of the leased or conveyed property, and has made permanent and valuable improvements that tend to prove the existence of the oral contract, virtually every jurisdiction will grant specific performance. *Id.* at 577, 260 P.2d at 579. In LeGrand Johnson v. Peterson, 26 Utah 2d 158, 486 P.2d 1040 (1971), plaintiffs promised to advance money toward the development of quarries, and the defendants orally agreed to convey an interest in mining claims. Plaintiffs advanced the money, and the court held that this constituted sufficient partial performance to avoid the bar of the Statute of Frauds. *Id.* at 161, 486 P.2d at 1041.

10. *See* Young v. Moore, 663 P.2d 78, 80 (Utah 1983) (citing Holmgren Bros., Inc. v. Ballard, 534 P.2d 611, 613-14 (Utah 1975)).

11. *Id.* (citing *Holmgren*, 534 P.2d at 614).

12. *See id.* at 80.

agreements in case of part performance thereof."[13]

3. Analysis—In *Hurlburt*, the Utah Court of Appeals held that an oral notice to exercise an option to renew a written lease for a period longer than one year does not violate the Statute of Frauds.[14] Although the court's holding is virtually identical to the Utah Supreme Court's holding in *Cummings*, the Court of Appeals did not cite or rely on *Cummings*. Instead, the court relied on cases from other states.[15] Furthermore, the court did not adequately explain why partial performance could not or should not control in situations factually similar to *Hurlburt*. This Development will attempt to provide a possible reconciliation of the two doctrines, focusing on the purpose of the Statute of Frauds as stated by the Utah Supreme Court and showing that the analysis utilized in *Hurlburt* should only be applied in cases in which the oral notice of renewal is uncontested.

In applying the partial performance analysis, Utah courts have recognized that the purpose of the Statute of Frauds is to prevent fraud and perjury.[16] At the same time, courts have refused to allow parties to manipulate the statute to work an injustice. The Utah Supreme Court has written that " 'no one [should] induce another to act on promise of reward for such act and then after obtaining the benefit of the same repudiate the contract.' "[17] Thus, courts have allowed an oral renewal of a lease to be proved by partial performance. By providing evidence of the oral renewal, partial performance reduces the likelihood of fraud and perjury.

By contrast, in *Hurlburt* neither party contested that oral notice of renewal had been given. Unlike cases in which renewal of the lease was disputed, partial performance was not necessary to assure the absence of fraud and perjury. In *Hurlburt* the court did not require partial performance, but merely stated that oral renewal of a lease for a period longer than one year did not violate

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13. UTAH CODE ANN. § 25-5-8 (1984).

14. Hurlburt v. Gullo, 750 P.2d 613, 615 (Utah Ct. App. 1988).

15. *See* Gruber v. Castleberry, 23 Ariz. App. 322, 533 P.2d 82 (1975); Daehler v. Oggoian, 72 Ill. App. 3d 360, 390 N.E.2d 417 (1979); Prince Enters., Inc. v. Griffith Oil Co., 8 Kan. App. 2d 644, 664 P.2d 877 (1983); Kosena v. Eck, 195 Mont. 12, 635 P.2d 1287 (1981).

16. *See, e.g.*, Bentley v. Potter, 694 P.2d 617, 621 (Utah 1984); Monroc, Inc. v. Jack B. Parson Constr. Co., 604 P.2d 901, 906 (Utah 1979).

17. Utah Mercur Gold Mining Co. v. Herschel Gold Mining Co., 603 Utah 249, 257, 134 P.2d 1094, 1097 (1943) (quoting Kennedy v. Combined Metals Reduction Co., 87 Utah 532, 51 P.2d 1064 (1935)).

the Statute of Frauds. In such cases, the concern of the court is to prevent one party from using the Statute of Frauds to avoid an agreement it does not contest. By making an exception from the Statute of Frauds, the courts reduce the likelihood that one party will manipulate the statute to work an injustice.

This distinction should be recognized by Utah courts faced with an oral renewal of a lease for a period longer than one year. If the parties contest the renewal, the courts should consider partial performance as evidence of the renewal, to protect against fraud and perjury. On the other hand, if the renewal is uncontested, the analysis in *Hurlburt* should be followed to prevent a party from manipulating the Statute of Frauds to take unfair advantage of another party.

4. Conclusion—This analysis reconciles the exception to the Statute of Frauds as announced in *Hurlburt* with the traditional doctrine of partial performance. More importantly, this interpretation will help ensure that the Statute of Frauds will continue to prevent fraud and perjury, while guarding against manipulation of the statute to the unfair advantage of one party over another.

*C. The Destruction of an Assigned Security Interest in a Uniform Real Estate Contract Without Notice**

In *Dirks v. Cornwell*,[1] the Utah Court of Appeals held that a vendor under a uniform real estate contract who does not have actual notice of an assignment for security by the purchaser has no duty to notify the assignee for security of the purchaser's default before cancelling the contract according to its terms. This decision affirms prior Utah law regarding the respective rights and duties of vendors and purchaser's assignees for security under uniform real estate contracts. The court also held, as a matter of first impression in Utah, that court recognition of the destruction without notice of an assignee for security's interest in a real estate contract does not constitute state action depriving the assignee of property without due process in violation of the fourteenth amendment to the United States Constitution.

1. The Case—On May 15, 1978, Paul S. and Catherine L. Cornwell purchased real property from Alma and Wanda Butler

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* Douglas C. Tingey, Junior Staff Member, *Utah Law Review*.

1. 754 P.2d 946 (Utah Ct. App. 1988) (opinion by Judge Garff).

under a uniform real estate contract.[2] On March 3, 1980, the Cornwells borrowed $38,000 from defendants Wilford and Dorothy Goodwill. The Cornwells assigned their interest in the contract to the Goodwills as security for the loan.[3] The Cornwells subsequently failed to make their payments under the contract and the Butlers notified the Cornwells of their default. The Butlers, in accordance with the terms of the contract, sent a notice of default and cancellation of contract to the Cornwells and recorded the notice and cancellation. Unaware of the assignment for security to the Goodwills, the Butlers did not notify the Goodwills of the contract cancellation. The Butlers subsequently sold the real property to Darwin and Jacquelyn Dirks. The Goodwills did not become aware of the Butlers' resale of the property and the loss of their security interest until three years later. The Dirks filed this action seeking to have the title to the property quieted in them, free of any interest of the Goodwills. The trial court granted the Dirks' motion for summary judgment.

The Goodwills appealed from the summary judgment. Their first claim was that the vendors under the contract were required to notify the Goodwills of the purchasers' default so the Goodwills could preserve their security interest by tendering payment.[4] Second, the Goodwills claimed that the court's sanctioning a repossession of real estate and destruction of a lender's security interest without notice to the lender constituted state action in violation of the fourteenth amendment guarantee of due process.[5]

2. Vendors' Duty—The court in *Dirks* relied on *Jeffs v. Citizens Finance Co.*[6] to decide the question of the vendor's duty, stating that the facts were indistinguishable. The *Jeffs* court held that even when the vendor has actual or constructive notice of an assignment for security by the purchaser, the vendor has no obligation to notify the lender of the purchaser's default before terminating the contract according to its terms.[7] The *Jeffs* court reasoned that requiring the lender holding the real estate contract as security to seek out and determine the assignor's rights and obligations

2. The facts are from the court's opinion in *Dirks*. *See id.* at 947-48.

3. The Cornwells actually executed a trust deed on the property in favor of the Goodwills. The court held that the trust deed effected no more than an assignment of the Cornwells' contract for security. *See id.* at 948 n.2.

4. *Id.* at 948.

5. *Id.* at 950; *see also* U.S. CONST. amend. XIV.

6. 7 Utah 2d 106, 319 P.2d 858 (1958).

7. *See id.* at 108, 319 P.2d at 859.

and to make a tender of full performance "does not seem to . . . place an unreasonable burden on the lender."[8]

In *Wiscombe v. Lockhart Co.*,[9] the Utah Supreme Court dealt with a case similar to *Dirks*. In *Wiscombe*, the lender also held an assignment for security of the purchaser's interest in a uniform real estate contract. The purchaser defaulted under the contract and the contract was subsequently cancelled according to its terms without notice to the lender. In its opinion the court quoted *Jeffs* and rejected the lender's claim that by recording the assignment the lender had given constructive notice to the vendor and was thus entitled to notice of default by the purchaser. The court also pointed specifically to the phrase in *Jeffs* stating: " '[G]iving notice to the seller, *either actual or constructive*, [does not place] the burden on him to seek out [the assignee].' "[10]

A recent Utah Supreme Court case indicates a possible change in this notice policy. *Jack B. Parsons Cos. v. Nield*[11] also dealt with the destruction without notice of the interest of a purchaser's assignee for security. The *Nield* court indicated that if the vendor under the contract had actual notice of the purchaser's assignment for security then the vendor would have a duty to notify the assignee of a default by the purchaser before terminating the contract according to its terms.[12] This change, which places a duty on a vendor to notify a known assignee for security of a default by the purchaser to give the assignee the opportunity to tender performance, is consistent with the views of a majority of western states.[13]

3. Due Process—The defendant lenders in *Dirks* argued that court recognition of the destruction of their security interest in the

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8. *Id.*, 319 P.2d at 859. The *Jeffs* holding likely is limited to assignments for security. *See, e.g.*, Hadlock v. Showcase Real Estate, 680 P.2d 395 (Utah 1984). In *Hadlock*, the court held that a vendor under a uniform real estate contract, who became aware of an assignment of the contract by the buyer only through a recorded warranty deed, had a duty to give the assignee the five-day notice of default called for in the contract before terminating the contract. *Id.* at 397. Nevertheless, sub-purchasers who take property subject to a contract without an assignment of the contract have no legal right to receive notice from the vendor because no privity of contract exists. *See* Johnson v. Austin, 748 P.2d 1084 (Utah 1988).

9. 608 P.2d 236 (Utah 1980).

10. *Id.* at 238 (quoting *Jeffs*, 7 Utah 2d at 108, 319 P.2d at 859) (emphasis in original).

11. 751 P.2d 1131 (Utah 1988) (cited with approval in Dirks v. Cornwell, 754 P.2d 946, 948-49 (Utah Ct. App. 1988)).

12. *See id.* at 1133.

13. *See, e.g.*, Credit Finance, Inc. v. Bateman, 135 Ariz. 268, 660 P.2d 869 (Ct. App. 1983); Lockhart Co. v. B.F.K., Ltd., 107 Idaho 633, 691 P.2d 1248 (Ct. App. 1984); Shindledecker v. Savage, 96 N.M. 42, 627 P.2d 1241 (1981); Sanders v. Ulrich, 250 Or. 414, 443 P.2d 231 (1968); Kendrick v. Davis, 75 Wash. 2d 456, 452 P.2d 222 (1969).

contract without notice constitutes state action in violation of the due process clause of the fourteenth amendment to the United States Constitution. The *Dirks* court first summarily dismissed the defendants' arguments based on cases concerning racial discrimination.[14] Relying on *Turner v. Impala Motors*,[15] the court reasoned that the more rigorous constitutional scrutiny necessitated by these racial discrimination cases was not applicable under the *Dirks* facts. Several federal courts have similarly acknowledged that, when racial discrimination is present in a case, it takes less state involvement to constitute state action under the fourteenth amendment.[16]

The *Dirks* court then adopted the two-part approach to the state action question expressed by the United States Supreme Court in *Lugar v. Edmunson Oil Co.*[17] The two-part approach requires first that the deprivation of property be caused by the exercise of some right or privilege created by the state.[18] The second requirement is that the responsible actor fairly be said to be a state actor.[19] After analyzing case law from other jurisdictions dealing with nonjudicial foreclosures and self-help repossession,[20] the *Dirks* court concluded that the cancellation of the uniform real estate contract and resulting destruction of the defendants' interest was not caused by the exercise of some right or privilege created by the state. The court reasoned that the statutes that au-

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14. *Dirks*, 754 P.2d at 950. The defendants based their argument on racial discrimination cases, even though the *Dirks* case did not involve any racial discrimination. The defendants cited Shelley v. Kraemer, 334 U.S. 1 (1948) (state court enforcement of racially restrictive real covenants, denying claimants the ability to purchase and live in the homes of their choice, was state action in violation of the equal protection clause of the fourteenth amendment); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (exclusion of patron because of race from a private restaurant in a building owned by a state agency was discriminatory state action in violation of the equal protection clause of the fourteenth amendment); and Reitman v. Mulkey, 387 U.S. 369 (1967) (state constitutional amendment construed as authorizing discrimination by private parties in renting or selling property was state action in violation of the equal protection clause of the fourteenth amendment).

15. 503 F.2d 607, 611 (6th Cir. 1974) (cited with approval in *Dirks*, 754 P.2d at 950).

16. *See, e.g.*, Northrip v. Federal Nat'l Mortgage Ass'n, 527 F.2d 23, 26 (6th Cir. 1975); James v. Pinnix, 495 F.2d 206, 208 (5th Cir. 1974); Pease v. Havelock Nat'l Bank, 351 F. Supp. 118, 121 (D. Neb. 1972).

17. 457 U.S. 922 (1982). Professor Laurence Tribe has suggested a two-part approach very similar to that of the Supreme Court. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1157-61 (1978); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1698-1703 (2d ed. 1988).

18. *Lugar*, 457 U.S. at 937.

19. *Id.*

20. *See, e.g., Northrip*, 527 F.2d at 32; Turner v. Impala Motors, 503 F.2d 607, 611 (6th Cir. 1974); Garfinkle v. Superior Court, 21 Cal. 3d 268, 578 P.2d 925, 146 Cal. Rptr. 208 (1978).

thorize quiet title actions did not create any rights in the parties, but merely recognized and enforced the rights created by the parties in their contracts. Such recognition and enforcement of these rights could not be state action under the fourteenth amendment to the United States Constitution. Because the first prong was not satisfied, the *Dirks* court did not reach the second prong of the *Lugar* state action test.

4. Analysis—In *Dirks* the court affirmed a line of cases that place the duty on an assignee for security of a real estate contract to notify the vendor under the contract of the assignment.[21] The failure of an assignee for security to give notice to the vendor can lead to the destruction of the assignee's security interest without notice to the assignee. If the assignee for security does give notice to the vendor, this notice, according to the *Nield*[22] decision, may place a duty on the vendor to provide notice of the purchaser's default to the assignee.[23] Absent the assignee's notice to the vendor, the vendor must only fulfill the contractual duty of notice to the purchaser before terminating the contract according to its terms.[24]

There are valid policy reasons for placing the burden of notification on the assignee for security and not on the vendor under the contract. The burden of seeking out and notifying the other party to the contract must be placed either on the vendor or on the assignee for security. The burden on lenders to notify the vendor of the assignment for security is much less than the burden on vendors to seek out unknown assignees of the purchaser's interest for security before terminating the contract according to its terms.

The court's analysis of the due process issue is supportable. The strict scrutiny of state action employed in cases dealing with equal protection challenges to racial discrimination is inapplicable here. *Dirks* involved a due process challenge to the destruction of a property interest and did not involve any racial discrimination. The less strict standard for state involvement used in *Lugar*[25] is the appropriate standard for determining whether there is state ac-

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21. *See supra* notes 5, 7, 8, 10 and accompanying text.

22. Jack B. Parsons Cos. v. Nield, 751 P.2d 1131 (Utah 1988).

23. *See supra* notes 10-12 and accompanying text.

24. The Utah courts treat the assignment for security like a mortgage. The lender-assignee for security must foreclose its interest and the borrower-assignor has the same right of redemption as a mortgagor. *See, e.g.*, Lockhart Co. v. Anderson, 646 P.2d 678, 680 (Utah 1982).

25. Lugar v. Edmunson Oil Co., 457 U.S. 922, 937 (1982).

tion for this due process claim.

The vendor's right to cancel the contract in the event the purchaser defaults was a privately created contractual right. No state action was involved in the creation or exercise of this right. Recognition by the courts of the validity of private contractual rights and duties cannot be termed state action. As the *Dirks* court pointed out, if such recognition of the legal effect of private contracts converted them into state acts, the effect would be to " 'subject to judicial scrutiny under the Fourteenth Amendment virtually all private arrangements that purport to have binding legal effect.' "[26]

The allocation of the burden of notification between the vendor and purchaser's assignee for security of a real estate contract has been made judicially. This judicial allocation does not constitute state action any more than recognition of the validity of the contract does. The allocation of the burden of notification is only judicial interpretation of the contract in an area where the contract is silent. The state, through the courts, has not created any rights in the parties that they did not already have. The state has merely placed the burden of notification on the assignee for security, a stranger to the vendor under the contract.

5. *Conclusion*—In *Dirks*, the Utah Court of Appeals reaffirmed a line of cases placing a duty on an assignee for security of a purchaser's interest in a real estate contract to notify the vendor under the contract about the assignment for security. Absent such notice, the vendor has no duty to notify the assignee for security of the purchaser's default before cancelling the contract according to its terms. The *Dirks* court also held that court recognition of the destruction without notice of an assignee for security's interest in a real estate contract when the assignee had not notified the vendor of the assignment does not constitute state action in violation of the fourteenth amendment. The effect is to put the longstanding line of cases allocating the respective burdens and duties of vendors and purchaser's assignee for security of real estate contracts beyond constitutional due process challenge.

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26. Dirks v. Cornwell, 754 P.2d 946, 951 (Utah Ct. App. 1988) (quoting Garfinkle v. Superior Court, 21 Cal. 3d 268, 578 P.2d 925, 932, 146 Cal. Rptr. 208, 215 (1978)).

IX. TORTS

*Action for Wrongful Birth Accrues at Birth of Child**

In *Payne v. Myers*,[1] the Utah Supreme Court held that if a cause of action for "wrongful birth"[2] were recognized in Utah, the date for such an action could not accrue until the birth of the child.[3] Consequently, because the plaintiffs failed to give notice of their claim to the state within one year of the child's birth, the court held that they were barred under state law from recovering for wrongful birth injuries arising out of the negligent acts of state employees.[4] Although many jurisdictions have recognized a claim

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* Karen Scurr, Junior Staff Member, *Utah Law Review*.

1. 743 P.2d 186 (Utah 1987) (opinion by Justice Howe).

2. According to the *Payne* court:

> A "wrongful birth" claim is brought by the parents of a severely defective child against a physician who negligently fails to inform them in a timely fashion, of an increased possibility that the mother will give birth to such a child, thereby depriving the parents of the choice to make an informed decision as to whether to have a child.

Id. at 187 n.1 (citing Smith v. Cote, 128 N.H. 231, 513 A.2d 341 (1986)).

Wrongful birth often has been confused with other pregnancy related causes of action, such as fetal injury, wrongful life, and wrongful pregnancy. Claims for fetal injury allege that the physician's negligence caused an otherwise normal child to be born in a defective condition, or increased the chances that the child would be born with defects. *See* Note, *Wrongful Birth Actions: The Case Against Legislative Curtailment*, 100 HARV. L. REV. 2017, 2017 n.4 (1987) [hereinafter *Legislative Curtailment*] (citing, *e.g.*, Seattle-First Nat'l Bank v. Rankin, 59 Wash. 2d 288, 367 P.2d 835 (1962)).

"A 'wrongful life' claim is brought on behalf of a severely defective child against a physician for the physician's negligent failure to inform the parents of the risks of conceiving an impaired child, thereby denying the parents the choice to avoid the child's birth." *Payne*, 743 P.2d at 187 n.2. Most states have refused to recognize a cause of action for wrongful life on the ground that, in order to restore the infant to the position he or she would have occupied were it not for the defendant's negligence, the court must perform a calculation of damages dependent upon a comparison between the choice of life in an impaired state and nonexistence. *See Legislative Curtailment, supra*, at 2017-18 n.4 (citing, *e.g.*, Bruggeman v. Schimke, 239 Kan. 245, 718 P.2d 635 (1986) (listing courts that have refused to recognize a wrongful life cause of action)); Note, *Wrongful Birth: The Avoidance of Consequences Doctrine in Mitigation of Damages*, 53 FORDHAM L. REV. 1107 (1985).

Wrongful pregnancy alleges that negligence in the performance of a sterilization operation or abortion, or in the prescription of contraceptives, led to the birth of an unwanted child. Wrongful pregnancy typically involves the birth of a healthy, although unplanned, baby. *See Legislative Curtailment, supra*, at 2018 n.4 (citing, *e.g.*, Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); Miller v. Johnson, 231 Va. 177, 343 S.E.2d 301 (1986)).

3. *Payne*, 743 P.2d at 190.

4. Utah's statute provides: "A claim against the state or against its employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed . . . within one year after the claim arises . . . ." UTAH CODE ANN. § 63-30-12 (Supp. 1988).

for wrongful birth,[5] the *Payne* court expressly avoids creating such a cause of action.[6] The case is significant, however, in illustrating a few of the problems Utah courts face in reconciling future wrongful birth actions, similar to the *Payne* case, with Utah's Wrongful Life Act.[7]

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5. Although the action for wrongful birth is comparatively new in the history of tort law, courts in several states have recognized wrongful birth causes of action: Alabama, *see* Robak v. United States, 658 F.2d 471 (7th Cir. 1981); California, *see* Andalon v. Superior Court, 162 Cal. App. 3d 600, 208 Cal. Rptr. 899 (1984); Florida, *see* Moores v. Lucas, 405 So. 2d 1022 (Fla. Dist. Ct. App. 1981); Idaho, *see* Blake v. Cruz, 108 Idaho 253, 698 P.2d 315 (1984) (legislatively overturned by IDAHO CODE § 5-334 (Supp. 1988)); Illinois, *see* Goldberg v. Ruskin, 128 Ill. App. 3d 1029, 471 N.E.2d 530 (1984), *aff'd*, 113 Ill. 2d 482, 499 N.E.2d 406 (1986); Michigan, *see* Eisbrenner v. Stanley, 106 Mich. App. 351, 308 N.W.2d 209 (1981); New Hampshire, *see* Smith v. Cote, 128 N.H. 231, 513 A.2d 341 (1986); New Jersey, *see* Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979); New York, *see* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); North Carolina, *see* Gallagher v. Duke Univ., 638 F. Supp. 979 (M.D.N.C. 1986); Pennsylvania, *see* Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978); South Carolina, *see* Phillips v. United States, 508 F. Supp. 544 (D.S.C. 1981); Texas, *see* Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Virginia, *see* Naccash v. Burger, 223 Va. 406, 290 S.E.2d 825 (1982); Washington, *see* Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983), *aff'd*, 746 F.2d 517 (9th Cir. 1984); West Virginia, *see* James G. v. Caserta, 332 S.E.2d 872 (W. Va. 1985); and Wisconsin, *see* Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975). Only one court has found the action invalid in a case decided after Roe v. Wade, 410 U.S. 113 (1973), the United States Supreme Court decision upholding a woman's constitutionally protected right to decide, free from governmental intrusion, whether to terminate her pregnancy. *See* Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528 (1985), *cert. denied*, 479 U.S. 835 (1986). *But see Gallagher*, 638 F. Supp. 979, 982 (limiting *Azzolino* to wrongful birth claims involving post-conception misconduct).

The State of Maine legislatively has recognized a cause of action for wrongful birth. *See* ME. REV. STAT. ANN. tit. 24, § 2931(2) (Supp. 1987).

6. *Payne*, 743 P.2d at 188.

7. Act of Feb. 28, 1983, ch. 167, 1983 Utah Laws 687 (codified at UTAH CODE ANN. §§ 78-11-23 to -25 (1987)). The provisions of the Act are as follows:

> The Legislature finds and declares that it is the public policy of this state to encourage all persons to respect the right to life of all other persons, regardless of age, development, condition or dependency, including all handicapped persons and all unborn persons.

UTAH CODE ANN. § 78-11-23 (1987).

> A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted.

Id. § 78-11-24.

> The failure of any person to prevent the live birth of a person shall not be a defense in any action, and shall not be considered in awarding damages or child support, or imposing a penalty, in any action.

Id. § 78-11-25.

Several states have enacted similar statutes. *See* CAL. CIV. CODE § 43.6 (West 1982); IDAHO CODE § 5-334 (Supp. 1988); MINN. STAT. § 145.424 (Supp. 1988); MO. ANN. STAT. § 188.130 (Vernon Supp. 1988); S.D. CODIFIED LAWS ANN. §§ 21-55-1 to -4 (1987).

1. The Case—In 1975, John Payne and his wife, Stephanie, gave birth to their first child, Matthew.[8] Shortly thereafter, the child began exhibiting signs of an undiagnosed neurological disorder. The Paynes alleged that sometime during the fall of 1977, the defendants, Dr. Garth Myers and Dr. Joseph Kesler[9] ("doctors"), advised them that they could safely have a second child without the worry that Matthew's illness would recur. The Paynes further asserted that they would not have taken the risk of bearing a second child if they had been advised that the infant would incur the same defect as Matthew's.[10]

On February 14, 1978, Stephanie had her obstetrician remove her intrauterine birth control device ("IUD"). The Paynes contend they did so in reliance on the doctors' advice that the couple could safely conceive a second child. On January 27, 1979, Stephanie gave birth to her second son, Michael, who soon developed signs of the same neurological impairments as his older brother. A few months thereafter, both children were diagnosed by another physician as having Pelizaeus-Merzbacher Syndrome.[11] As a result, the Paynes brought this medical malpractice action seeking damages for wrongful birth against the doctors, the State of Utah Handicapped Children's Service, and the Division of Health of the State of Utah ("state defendants").[12]

For the wrongful birth claim, the district court entered summary judgment in favor of the state defendants on the ground that

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8. The facts are taken from the court's opinion in *Payne*, 743 P.2d at 186.

9. Dr. Myers and Dr. Kesler, at the time of the events of this action, were employed by the State of Utah Handicapped Children's Service, an agency of the Utah State Department of Health. *Id.*

10. There was no evidence in the case that the child would not have been permitted to have been born alive but would have been aborted if the Paynes had discovered a defect *after* conception. The opinion only reflects the Payne's affirmative decision to avoid conception rather than risk bearing a defective child. This distinction becomes important when applying section 78-11-24 of the Utah Code. "A cause of action shall not arise . . . based on the claim that but for the act or omission of another, a person would not have been born alive *but would have been aborted.*" UTAH CODE ANN. § 78-11-24 (Supp. 1988) (emphasis added).

11. Pelizaeus-Merzbacher Syndrome is "a rare, genetically transmitted, and progressively degenerative neurological disorder that is characterized by widespread demyelination of the brain sheath, causing severe motor disorders and eventually death." *Payne*, 743 P.2d at 187.

12. John Payne, on behalf of his son, Michael, joined in the action against the doctors and the state defendants, seeking damages for "wrongful life." *See supra* note 2. The court denied summary judgment in favor of the state defendants as to the minor plaintiff's claim, but awarded summary judgment in favor of the doctors. *See Payne*, 743 P.2d at 187. The wrongful life claim was not contested on appeal. *Id.*

the Paynes had failed to file a notice of claim against the state within one year as required by section 63-30-12 of the Utah Code.[13] The court also awarded summary judgment in favor of the doctors on the ground that the March 30, 1978, amendment to section 63-30-4[14] of the Utah Code granted them immunity for their simple negligence in the performance of their duties as state employees.[15] The Payne's sole contention on appeal was that the 1978 amendment should not apply to their suit for wrongful birth against the doctors because it was not enacted until *after* a cause of action had been established.

The Paynes argued that their cause of action for wrongful birth accrued[16] either in the fall of 1977 after the alleged negligent advice had been given by the doctors[17] or, at the latest, in February 1978 after Stephanie's IUD was removed. The Utah Supreme Court, however, rejected this argument. "Assuming, but not deciding that Utah jurisprudence should recognize an action for wrongful birth," the court held that "[b]y the very nature of their claim, i.e., an action for the wrongful birth of their child, it is axiomatic that the *injury* to the [Paynes] could not have occurred prior to Michael's birth."[18] Using this analysis, the court determined that the Payne's cause of action could not have accrued any earlier than at least ten months after the effective date of the 1978 amendment to section 63-30-4 of the Utah Code. Because the Paynes failed to

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13. For the text of UTAH CODE ANN. § 63-30-12 (Supp. 1988), see *supra* note 4.

14. UTAH CODE ANN. § 63-30-4(3) (1986) states:

> The remedy against a governmental entity or its employee for an injury caused by an act or omission which occurs during the performance of such employee's duties, within the scope of employment, or under color of authority is, after the effective date of this act, exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim . . . .

Id.

15. "Prior to the 1978 amendment, doctors, as governmental employees, had no immunity from suit for their simple negligence." *Payne*, 743 P.2d at 188.

16. " 'A cause of action accrues when the person [in] whose favor it arises is first entitled to institute a judicial proceeding for the enforcement of his rights.' " *Id.* at 189 (quoting 1 AM. JUR. 2D *Actions* § 88 (1962)).

17. Courts have recognized that, as a result of "the advances in science, . . . physicians who perform testing and provide advice relevant to the constitutionally guaranteed procreative choice, or whose actions could reasonably be said to give rise to a duty to provide such testing or advice, have an obligation to adhere to reasonable standards of professional performance." Smith v. Cote, 128 N.H. 231, 513 A.2d 341, 346 (1986); *see also* Roe v. Wade, 410 U.S. 113, 116 (1973) ("If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intraprofessional, are available.").

18. *Payne*, 743 P.2d at 188-90 (emphasis in original).

give notice of their claim to the state within one year of the birth, they were barred from any judgment they might have obtained against the defendants.[19]

2. *Background*—Much of the *Payne* case focuses on when a cause of action for wrongful birth could or could not accrue. Accordingly, the court found that there were four possibilities as to when that time might be: first, "at the time [the Paynes] received the negligent advice; [second,] at the time Mrs. Payne had her IUD removed in reliance on that advice; [third,] at the time Michael was conceived; or [fourth,] upon Michael's birth."[20] From these alternatives, the court concluded that the cause of action could not have accrued before Michael's birth.[21]

In addition, *Payne* also focuses on the statutory construction of section 63-30-4 of the Utah Code.[22] By comparing the cause of action accrual date with the effective date of section 63-30-4, the court held that the potential cause of action had exceeded its statute of limitations. By way of this analysis, the court was able to render judgment on a wrongful birth claim without actually creating a wrongful birth cause of action.

The *Payne* decision conspicuously leaves unanswered the question whether Utah jurisprudence recognizes a wrongful birth cause of action and raises significant questions on how Utah courts will reconcile future wrongful birth actions, such as the *Payne* case, with Utah's Wrongful Life Act.[23] Inasmuch as the Paynes' claim arose prior to the effective date of the Act, its provisions were inapplicable to the present case.[24] Therefore, *Payne* does not address the effect that the legislation may have on subsequent wrongful birth actions. At the time the *Payne* decision was rendered, however, the court was fully aware of the enactment of the

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19. *See* UTAH CODE ANN. § 63-30-12 (Supp. 1988).

20. *Payne*, 743 P.2d at 189.

21. *Id.*

22. For the operative text of UTAH CODE ANN. § 63-30-4(3) (1986), see *supra* note 14.

23. UTAH CODE ANN. §§ 78-11-23 to -25 (1987).

24. The *Payne* court stated:

> "[O]nce a cause of action under a particular rule of law accrues to a person by virtue of an injury to his rights, that person's interest in the cause of action and the law which is the basis for a legal action becomes vested, and a legislative repeal of the law cannot constitutionally divest the injured person of the right to litigate the cause of action to a judgment."

Payne, 743 P.2d at 190 (quoting Berry v. Beech Aircraft Corp., 717 P.2d 670, 676 (Utah 1985)).

Wrongful Life Act.[25] Rather than determine whether Utah should recognize a cause of action for wrongful birth independent of the Act, the *Payne* court declined to address the issue.

3. Analysis—In an effort to prevent a flow of wrongful birth actions into its state courts, the Utah Legislature has joined a handful of other jurisdictions[26] in enacting legislation to regulate the maintenance of actions claiming life as an injury.[27] The Utah Wrongful Life Act precludes all causes of action that are based on the theory that, but for the negligent conduct of another, the unborn child would have been aborted.[28] Proponents of the Act intended to prevent abortions by decreasing routinely performed genetic testing and counseling.[29] They claimed that the "recent decisions allowing recovery for . . . wrongful birth encourage physicians to perform such genetic testing in order to avoid malpractice liability."[30] Such prenatal screening[31] supposedly encourages parents to choose an abortion by informing them of their unborn child's defects.[32]

Critics of the Wrongful Life Act, however, use examples such as the *Payne* decision to illustrate the Act's unconstitutional violation of a couple's right to equal protection under the law.[33] Accord-

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25. "In 1983, the legislature enacted the Utah Wrongful Life Act, Utah Code Ann. §§ 78-11-23 through -25. [Because the Payne's] claim arose prior to the effective date of that Act, its provisions are inapplicable to the instant case . . . ." *Id.* at 188 n.4.

26. *See* CAL. CIV. CODE § 43.6 (West 1982); IDAHO CODE § 5-334 (Supp. 1988); MINN. STAT. § 145.424 (Supp. 1988); MO. ANN. STAT. § 188.130 (Vernon Supp. 1988); S.D. CODIFIED LAWS ANN. §§ 21-55-1 to -4 (1987).

27. *See* UTAH CODE ANN. §§ 78-11-23 to -25 (1987).

28. *See id.* § 78-11-24. The "but would have been aborted" language was added by amendment. *Id.*

29. Genetic testing and counseling is performed by a physician, genetic counselor, cytogenic laboratory, or hospital in an effort to provide parents with adequate information concerning the parents' risk of producing a child who has a serious defect. *See Legislative Curtailment, supra* note 2, at 2017 n.4; *see also* H. HAMMONDS, HEREDITARY COUNSELING—AMERICAN GENETIC SOCIETY (1977) (from 1960 to 1974, the number of genetic counseling centers increased from 13 to 350).

30. *Utah Legislative Survey—1983*, 1984 UTAH L. REV. 115, 224 [hereinafter *Wrongful Life and Wrongful Birth*].

31. Either before or after conception, prenatal screening identifies women who have a high risk of bearing an abnormal child. *See* Brock, *Prenatal Diagnosis and Screening: Present and Future*, in PREVENTION OF PHYSICAL & MENTAL CONGENITAL DEFECTS 122 (M. Marois ed. 1985). Potential risk factors include high marital age, previous children with chromosomal defects, family history of birth defects or other relevant family medical history. *Id.*

32. *See Wrongful Life and Wrongful Birth, supra* note 30, at 224.

33. *See Legislative Curtailment, supra* note 2, at 2027-34; *see also* Ochs v. Borrelli, 187 Conn. 253, 445 A.2d 883, 885 (1982) ("[P]ublic policy cannot support an exception to

ing to the *Payne* decision, "a wrongful birth claim is brought by the parents of a severely defective child against a physician who negligently fails to inform them, in a timely fashion, of an increased possibility that the mother will give birth to such a child."[34] Under the Utah Wrongful Life Act, a cause of action does not arise when, "but for the act or omission of another, a person would not have been permitted to have been born alive, but would have been aborted."[35] Consequently, according to both the supreme court's definition of wrongful birth and the language of the Wrongful Life Act, only those parents who would have chosen abortion are precluded from suing their doctor when the doctor's negligence interferes with their procreative autonomy. Thus critics argue that wrongful birth statutes single out parents whose procreative decisions lead to abortions.[36]

Furthermore, "if physician negligence or intentional misconduct in the provision of information or testing *prior* to conception interferes with a couple's decision whether to conceive,"[37] the misconduct would probably be actionable under Utah's Wrongful Life Act. On the other hand, "if negligent or intentional conduct in the provision of information or testing *after* conception interferes with a couple's decision whether to abort,"[38] the Act clearly bars actions based on that misconduct.[39] As a result, although the Act may "allow recovery for [impairment of the Payne's right] to prevent a defective or healthy child from being conceived, [it would] prohibit recovery for infringement of their parental right to prevent a de-

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tort liability when the impact of such an exception would impair the exercise of a constitutionally protected right.").

34. Payne v. Myers, 743 P.2d 186, 187 n.1 (Utah 1987).

35. UTAH CODE ANN. § 78-11-24 (1987).

36. *See Legislative Curtailment, supra* note 2, at 2028. Under the Utah Wrongful Life Act, only those parents who would have chosen abortion are precluded from suing their doctors when the physician's negligent or intentional conduct deprives the parents of the choice to make an informed decision whether to have a child. *See supra* note 10.

37. *Legislative Curtailment, supra* note 2, at 2028 (footnote omitted).

38. One state has addressed the question whether an act, such as the Utah Wrongful Life Act, impermissibly interferes with a woman's right to have an abortion. In Hickman v. Group Health Plan, Inc., 396 N.W.2d 10 (Minn. 1986), parents of a handicapped child sought to invalidate Minnesota's wrongful birth legislation on the ground that it interfered with the couple's right to decide to have an abortion as defined in Roe v. Wade, 410 U.S. 113 (1973). The Minnesota Supreme Court held that the state's wrongful birth statute was constitutional. *Hickman*, 396 N.W.2d at 12.

39. UTAH CODE ANN. § 78-11-24 (1987) states: "A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been born alive *but would have been aborted.*" *Id.* (emphasis added).

fective child, once conceived, from coming into the world."[40]

In addition, the Act's abortion nexus may also frustrate the statute's legislative objective. The Act's proponents claim that the statute was intended to prevent abortions by altering the trend toward routinely performed genetic counseling. If a physician negligently fails to inform a couple of an increased possibility that the mother will conceive a defective child, however, as demonstrated in the *Payne* case, that misconduct is still actionable under the Act.[41] Thus, because "the Act does not remove all liability for negligent genetic counseling, doctors may continue feeling compelled to routinely counsel women and thereby thwart the legislative intent."[42]

4. Conclusion—Although *Payne* avoids creating a cause of action for wrongful birth, the case is significant because it illustrates the problems Utah courts face in reconciling future wrongful birth actions, similar to the *Payne* case, with the Utah Wrongful Life Act. These problems include the Act's restrictions on a couple's constitutional right to decide, without interference from the state, whether to terminate pregnancy. In so doing, the Wrongful Life Act may violate a couple's right under the equal protection clause of the fourteenth amendment. In addition, because the Act does not remove all liability for negligent genetic counseling, doctors may continue to feel compelled to test and counsel women on a routine basis. Consequently, the Act's abortion nexus may also frustrate the statute's legislative objective to prevent potential abortions brought about through prenatal screening.

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40. *Legislative Curtailment, supra* note 2, at 2028 (emphasis in original). Ironically, Justice Stevens of the United States Supreme Court recognized that the " 'decision on child-bearing [is no less] important on the day after conception than the day before.' " *Id.* (quoting Thornburgh v. American College of Obstetricians, 476 U.S. 747, 776 (1986) (Stevens, J., concurring)).

41. *See supra* notes 33-40 and accompanying text.

42. *Wrongful Life and Wrongful Birth, supra* note 30, at 222, 224.

Legislative Enactments

I. ATTORNEY'S FEES

*The Awarding of Attorney's Fees in Frivolous Law Suits**

In 1988 the Utah legislature amended section 78-27-56 of the Utah Code[1] ("Amendment"), which originally granted trial courts the option of awarding attorney's fees to the prevailing party of a frivolous lawsuit. The Amendment attempts to remove the trial court's discretion and make an award of attorney's fees mandatory when a frivolous action is initiated. The legislature promulgated the Amendment with the hope that courts will award attorney's fees more aggressively, practitioners will refrain from filing actions that are blatantly frivolous, and the general public will benefit directly from both.

1. Background—The problem of frivolous lawsuits has plagued the legal system for centuries. In recent years, however, the problem has become exacerbated by the litigious, if not vindictive, nature of modern society.[2] With court dockets inundated by actions ranging from the bank robber who sues the state for damages caused by dye on the stolen money, to the harassing motion filed by opposing counsel, it is evident that reform is necessary. Many states have responded by enacting legislation that penalizes

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* Kevin Richards, Junior Staff Member, *Utah Law Review.*

1. Act of Feb. 19, 1988, ch. 92 (codified at UTAH CODE ANN. § 78-27-56 (Supp. 1988)) (effective Apr. 25, 1988). As enacted, the statute reads:

> (1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).
>
> (2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:
>
> (a) finds the party has filed an affidavit of impecuniosity in the action before the court; or
>
> (b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

UTAH CODE ANN. § 78-27-56 (Supp. 1988).

2. *See* Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975); Rosenberg, *Let's Everybody Litigate?*, 50 TEX. L. REV. 1349 (1972). *But cf.* Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 5 (1983) ("Comparison of current with past litigation rates shows a recent rise, but present levels are not historically unprecedented.").

the advocate of frivolous litigation by awarding attorney's fees to the opposing party.

The practice of awarding attorney's fees to the prevailing party of a lawsuit is not novel. The "English Rule," which follows this approach, has been utilized in that country since 1275.[3] Although many of the intricacies of the English legal system have been emulated by the American system, the practice of awarding attorney's fees has not.[4] Under the "American Rule,"[5] to which Utah courts have traditionally adhered,[6] attorney's fees are not awarded in the absence of an agreement between the parties or a specific statutory provision.

In light of perceived problems with the American Rule[7] and the increasing need to discourage frivolous litigation, the federal judiciary created a bad faith exception to the American Rule.[8] This exception allows the courts to award attorney's fees to a party if the opposing party "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[9]

In addition to the federal exception, a host of state legislatures have enacted statutes providing for an award of attorney's fees to the prevailing litigant in a frivolous action.[10] Consistent with federal law and this state trend, the Utah Legislature enacted section

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3. Statute of Gloucester, 6 EDW., ch. 1 (1275). For a discussion of the development of the English Rule, see Goodhart, *Costs*, 38 YALE L.J. 849 (1929).

4. One exception is the State of Alaska. ALASKA R. CIV. P. 54(d) provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." *Id.*

5. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) (prevailing litigant is ordinarily not entitled to collect reasonable attorney's fees from the loser); Hall v. Cole, 412 U.S. 1, 4 (1973) (American rule disfavors the allowance of attorney's fees); Fleischman Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717-18 (1967) (American courts generally resist any movement towards the English Rule).

6. *See, e.g.*, Christensen v. Abbott, 671 P.2d 121, 123 (Utah 1983) ("[A]ttorney fees on appeal are granted only when authorized by statute or rule of court."); Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 671 (Utah 1982) (Utah adheres to the well-established American rule); Utah Farm Prod. Credit Ass'n v. Cox, 627 P.2d 62, 66 (Utah 1981) (a party is entitled only to those fees that are provided for under a contractual obligation or imposed by statute).

7. *See* Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966); Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216, 1223 (1967). The purpose of the ideal system of justice is to make the wronged party whole, at least so far as money can compensate for injury. If the aggrieved party is not allowed to recover all litigation expenses, as is the case under the American Rule, it is theoretically impossible for the party to be made whole. *Id.*

8. *See* F.D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 129 (1974).

9. *Id.* (footnote omitted).

10. *See* Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433, 457-68 (1986).

78-27-56 of the Utah Code ("Statute") in 1981. Although Utah courts implemented the Statute on occasion,[11] it became evident to the legislature that attorney's fees were awarded only in isolated cases, and consequently, frivolous litigation was not reduced. Accordingly, an aggressive legislative amendment was needed to increase the use of the Statute.[12]

2. The Statute and Subsequent Amendment—As originally enacted in 1981, the Statute provided that "the court may award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith."[13] Although the Statute provided a prima facie test for a justified award of attorney's fees, ambiguous and undefined terms such as "without merit" and "good faith" undermined the Statute's effectiveness. The Utah Supreme Court attempted to clarify these ambiguities in *Cady v. Johnson*.[14]

In *Cady*, the court espoused a three-part test that must be satisfied to justify an award of fees under the Statute. First, the party seeking the fees must prevail at trial.[15] Second, the claim asserted by the opposing party must be without merit. This means that the claim is "of little weight or importance, having no basis in law or fact."[16] Finally, the trial court must find that the action or defense to the action was not brought or asserted in good faith.[17] The court defined "good faith" as: " '(1) An honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; and (3) no intent to, or knowledge of the fact that the activities in question will, [sic] hinder, delay, or

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11. *See, e.g.*, DeBry v. Occidental/Nebraska Fed. Sav. Bank, 754 P.2d 60, 63 (Utah 1988) (reversing a lower court's decision to award attorney's fees); Topik v. Thurber, 738 P.2d 1101, 1104 (Utah 1987) (affirming a lower court's decision to award attorney's fees); Hatanaka v. Struhs, 739 P.2d 1052, 1054 (Utah App. 1987) (affirming a lower court's decision not to award attorney's fees).

12. Interview with Rep. Hugh D. Rush, Utah House of Representatives, in Salt Lake City (Aug. 16, 1988) [hereinafter Rush Interview].

13. UTAH CODE ANN. § 78-27-56 (1987).

14. 671 P.2d 149 (Utah 1983). For a comprehensive analysis of the *Cady* decision, see Comment, *Attorney's Fees in Bad Faith, Meritless Actions*, 1984 UTAH L. REV. 593.

15. *Cady*, 671 P.2d at 151; *see also infra* text accompanying note 31.

16. *Cady*, 671 P.2d at 151. Relying on Can-Am Petroleum Co. v. Beck, 331 F.2d 371 (10th Cir. 1964), the court held that the term "without merit" implies "bordering on frivolity." Accordingly, the court found "without merit" and "frivolous" to be synonymous terms. *Id.*

17. *Cady*, 671 P.2d at 151.

defraud others.' "[18]

Since the court's analysis in *Cady*, there has not been any further interpretation of the Statute. In early 1987, however, Representative Hugh D. Rush drafted and sponsored the Amendment, which included two proposed changes to the Statute.[19] First, instead of providing courts the option of awarding attorney's fees, the Amendment would make the award mandatory once the *Cady* criteria are established.[20] Second, the Amendment would give the court discretion to limit or not award attorney's fees if an affidavit of impecuniosity is filed before the action,[21] or if the court enters in the record the reason for not making the award.[22]

On July 15, 1987, the Amendment was presented to the legislature's Judiciary Interim Committee for consideration.[23] By a vote of nine to four, the Committee voted against the bill.[24] Opponents of the bill rejected it primarily for three reasons. First, there was some concern the Amendment might violate the constitutional doctrine of separation of powers.[25] Second, it was perceived that requiring a mandatory award of attorney's fees would be too restrictive and would not permit the trial court to take equities into account in rendering a decision.[26] Finally, the State Judicial Council argued that the Utah Rules of Civil Procedure already provide

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18. *Id.* (quoting Tacoma Assoc. of Credit Men v. Lester, 72 Wash. 2d 453, 458, 433 P.2d 901, 904 (1967)) (brackets in original).

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

20. Making the award of fees mandatory was accomplished by changing the phrase "the court *may* award reasonable attorney's fees" to "the court *shall* award reasonable attorney's fees." *See* UTAH CODE ANN. § 78-27-56 (Supp. 1988). Obligating the courts to award fees once the relevant statutory criteria have been established appears to be a trend among many states. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-341.01(c) (1982); FLA. STAT. ANN. § 57.105 (West Supp. 1988); MASS. ANN. LAWS ch. 231, § 6F (Law. Co-op. 1986); N.D. CENT. CODE § 28-26-01 (Supp. 1987); WIS. STAT. ANN. § 814.025 (West Supp. 1987).

21. Interview with William C. Vickrey, State Court Administrator, in Salt Lake City (Aug. 29, 1988) [hereinafter Vickrey Interview]. The impecuniosity exception was provided to protect the pro se litigant. *Id.*

22. UTAH CODE ANN. § 78-27-56 (Supp. 1988).

23. *See* Provo Herald, July 17, 1987, at 5, col. 2.

24. Rush Interview, *supra* note 12.

25. The Utah Constitution provides that "[t]he supreme court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process." UTAH CONST. art. VIII, § 4 (1953, amended 1985). Pursuant to this section of the constitution, it is arguable that the Statute violates the separation of powers doctrine because the legislature is infringing on the supreme court's right to promulgate rules of procedure. *But see In re* Rules of Procedure and Evidence to be Used in the Courts of This State (Sept. 10, 1985) (the court adopted all existing rules of evidence and procedure as of July 1, 1985).

26. Vickrey Interview, *supra* note 21.

for an award of attorney's fees and, as a result, adoption of the Amendment would be useless.[27]

Despite the original adverse reception, in January 1988 the House Judiciary Committee voted unanimously for full floor debate of the Amendment.[28] As a result, the legislature passed the Amendment on February 19, 1988, and it became effective on April 25, 1988.[29]

3. Effect of the Amendment—Adoption of the Amendment raises at least two issues. First, the amount of discretion retained by the trial courts is critical to assessing the effectiveness of the Amendment. If a wide range of judicial discretion is retained, it is arguable that trial courts will not feel compelled to award attorney's fees, and consequently frivolous litigation will not be deterred. Second, the interrelation between the Amendment and the Utah Rules of Civil Procedure is crucial. As the Amendment's original opponents argued, the mere duplication of already existing rules is a waste of legislative effort.[30]

At first glance, the primary effect of the Amendment on Utah trial courts appears to be a removal of all discretion in awarding fees. Nevertheless, judicial discretion has not necessarily been eliminated.

Before a court is required to award fees, the *Cady* requirements of a prevailing party, a claim without merit, and a lack of good faith must be established.[31] Although the *Cady* court did not discuss in depth the element of a prevailing party,[32] considerable time was devoted to clarifying the terms "without merit" and "good faith." Because of a narrow interpretation of the term "with-

27. Salt Lake Tribune, July 17, 1987, at B12, col. 3.

28. Salt Lake Tribune, Jan. 20, 1988, at A4, col. 1. The exact reason for the opponents' shift in support is unknown. Nonetheless, the reduced opposition allowed for a more favorable reception. Rush Interview, *supra* note 12.

29. UTAH CODE ANN. § 78-27-56 (Supp. 1988).

30. Salt Lake Tribune, July 17, 1987, at B12, col. 3.

31. It is arguable that the *Cady* interpretation of the Statute's requirements of a prevailing party, without merit, and good faith were vitiated by the Amendment. The Amendment did not alter these basic requirements, however, and as a result the decision remains imperative to interpreting the Amendment.

32. One commentator contends that in Utah a party need not prevail on every issue to be considered a prevailing party. *See* Comment, *supra* note 14, at 597 n.46. This contention is based on Checketts v. Collings, 78 Utah 93, 102, 1 P.2d 950, 953 (1931), which held that a defendant who had won on an original claim but not a counterclaim was considered a prevailing party for the purpose of assessing costs. Because 20 AM. JUR. 2D *Costs* § 72 (1965) categorizes attorney's fees that are granted to a successful party as costs, it can be argued that the prevailing party rationale of *Checketts* should apply to the Amendment.

out merit," the court restricted the subjective judgment a trial judge can use in determining whether an action is lacking in merit.[33] The *Cady* court's three-part definition of good faith, however, appears to retain a more subjective element that enables courts to exercise considerable latitude in determining the existence of a good faith claim. By manipulating ambiguous terms and phrases contained in the *Cady* court's definition of good faith, such as sufficient evidence, honest belief, unconscionable advantage, and knowledge, a court could reach any one of a multitude of conclusions. Thus, although at first glance the Amendment appears to limit a court's discretion in awarding attorney's fees, in actuality the trial court retains a great deal of autonomy via the good faith requirement.[34]

Nevertheless, much of the discretion a court could conceivably exercise in determining whether a claim is frivolous is suppressed by the Amendment's other requirements. Except when an affidavit of impecuniosity has been filed, the Amendment mandates that the reason for not making an award of attorney's fees be entered into the record. In addition to preserving the record for appeal, such a requirement likely will induce the trial court to consciously limit the amount of discretion used in denying an award of fees. Nonetheless, such a tempering of judicial discretion is unlikely to negate completely the latitude the courts arguably retain in analyzing the good faith requirement. As a result, the mandatory nature of the Amendment apparently will provide the Utah courts with an incentive to award fees, but this incentive will not be as compelling as the sponsors anticipated.

The second issue concerns the usefulness of the Amendment in light of similar rules of civil procedure. For several years the Judicial Council and the Utah Supreme Court have aggressively promoted a policy that attempts to reduce court delay resulting

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33. In *Cady*, the court relied on Can-Am Petroleum Co. v. Beck, 331 F.2d 371 (10th Cir. 1964), for the contention that "without merit" implies "bordering on frivolity." *Cady*, 671 P.2d at 151. Later in the opinion, however, the court made it clear that to be without merit a claim must be completely frivolous, not just bordering on frivolity. *See id.* at 152. By rejecting the broader standard of "bordering on frivolity," the court restricted the subjective nature of the "without merit" analysis.

34. Despite the flexibility the courts retain through the good faith requirement, a trial judge is likely to feel compelled to award fees because the Utah Legislature has affirmatively attempted to restrict the court's discretion. Interview with Judge Raymond S. Uno, Third Judicial District Court of Salt Lake County, in Salt Lake City (Aug. 24, 1988); Vickrey Interview, *supra* note 21; Rush Interview, *supra* note 12.

from frivolous litigation.[35] In furtherance of this policy, the Utah courts implemented a variety of procedural changes, including the more strenuous application of the Utah Rules of Civil Procedure, which provide for the imposition of sanctions.[36] As a result, trials are commencing more than six months earlier than they were in late 1982,[37] starting dates for civil trials are set well within the time limit imposed by Rule 4.1 of the Utah Rules of Civil Procedure,[38] and there has been a one-third decrease in the number of motions filed.[39]

Although the good intent of the Amendment has not been challenged, many of the original opponents of the Amendment still contend that the anticipated reduction of frivolous litigation is illusory.[40] This assertion rests primarily on the argument that Rules 11 and 37 of the Utah Rules of Civil Procedure already provide for an award of attorney's fees, and therefore the Amendment is merely repetitive. Rule 11 allows a court, by motion or on its own initiative, to impose "an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, *including a reasonable attorney's fee.*"[41] Similarly, Rule 37 provides that when there is a failure to cooperate with discovery proceedings, a party "may apply to the court for an order requiring the other party to pay him . . . reasonable expenses . . . *including reasonable attorney's fees.*"[42]

Although Rules 11 and 37 provide courts with the option of imposing sanctions, the option is both underutilized and narrowly focused. Rule 11 historically has been ineffective in curtailing abuses of the legal system,[43] and Rule 37 is narrowly focused and

35. Letter from William C. Vickrey to Hugh D. Rush (Jan. 14, 1988) (discussing policy and intention of the Judicial Council and the Utah Supreme Court) (copy on file with the *Utah Law Review*).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. Salt Lake Tribune, July 17, 1987, at B12, col. 3.

41. UTAH R. CIV. P. 11 (emphasis added).

42. UTAH R. CIV. P. 37(c) (emphasis added).

43. *See* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1334, at 502 (1969) (noting with approval the reluctance of courts under the former rule to characterize pleadings as sham); Risinger, *Honesty in Pleadings and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 34-37 (1976) (mentioning the infrequency of imposition of sanctions under Rule 11 prior to its amendment). *But see* Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988) (noting that, since the 1983 amendment to Rule 11, it appears that courts are enforcing the rule more aggressively).

only permits an award of attorney's fees when a party fails to cooperate in the discovery process.[44]

By contrast, the Amendment equips courts with an alternative and innovative means of sanctioning a party that proceeds in bad faith. Coupled with Rule 11 and Rule 37 sanctions, the Amendment gives the judiciary a considerable amount of power that can be utilized to alleviate the adverse effects of frivolous litigation.

4. Conclusion—The Amendment represents a commendable effort by the legislature to combat the adverse effects of a litigious society. Although some ambiguity still exists with respect to the amount of discretion the Utah courts retain in determining the frivolity of an action, the mandatory nature of the Amendment provides an incentive for the judiciary to award attorney's fees. If aggressively promoted by the courts and practitioners, the Amendment could dramatically aid in returning the Utah and American judiciary to their theoretical genesis—settling legitimate disputes and making an aggrieved party whole.

II. CRIMINAL LAW

*Bail Amendments**

In 1984 Congress passed the Bail Reform Act of 1984,[1] reversing the presumption that was established by the Bail Reform Act of 1966[2] in favor of bail for convicted persons pending sentence or appeal. In 1988 the Utah Legislature amended the Utah bail statutes in a similar manner, so that the Utah bail laws parallel those of the federal system.[3] The major thrust of these amendments is to shift the burden of proof from the state to the defendant in cases in which the defendant is convicted but is either awaiting sentence or has filed an appeal or petitioned for a writ of certiorari.[4]

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44. UTAH R. CIV. P. 37.

* Tamra E. Walker, Junior Staff Member, *Utah Law Review.*

1. Bail Reform Act of 1984, tit. II, ch. 1, 98 Stat. 1976 (codified as amended at 18 U.S.C. §§ 3141-3150 (Supp. IV 1986)).

2. *See* S. REP. No. 225, 98th Cong., 2d Sess. 26, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3209, 3210.

3. *See* Act of Feb. 24, 1988, ch. 160 (codified at UTAH CODE ANN. §§ 77-20-1, -8, -8.5, -10 (Supp. 1988)) (effective Apr. 25, 1988).

4. The amendments also change the Utah bail statutes in other ways. Section 77-20-1 now provides that a defendant awaiting trial may be admitted to bail only by a circuit court or district court judge and not by a magistrate. It also allows an appeal of this decision to a

1. 1988 Bail Amendments—The 1988 bail amendments represent a significant change in Utah law and reflect a shift in policy toward the purpose of bail under federal law and in other jurisdictions.[5]

The principal thrust of the amendments is to reverse the presumption in favor of bail for convicted persons pending sentence or appeal.[6] This is accomplished in two separate code sections. First, section 77-20-8 of the Utah Code now requires that the court order that the convicted defendant be held in custody until sentencing unless the court finds by clear and convincing evidence that the defendant is not likely to flee the court's jurisdiction and will not pose a danger to the safety or well-being of any person or the community if released.[7] The burden of presenting this evidence is on the convicted defendant.[8] If the court finds that the defendant need not be detained, the defendant will be released on suitable conditions, which may include conditions specified in section 77-20-10(2) discussed below.[9]

Second, the amendments set out the conditions for release of a convicted defendant who has filed an appeal or petitioned for a writ of certiorari.[10] The court must order that the convicted defendant be detained in custody unless: (1) The appeal raises a substantial question of law or fact that is likely to result in reversal, an order for a new trial, or a sentence that does not result in imprisonment; (2) the appeal is not filed merely for the purpose of delay; and (3) the defendant presents by clear and convincing evidence that he or she is not likely to flee the court's jurisdiction and does not pose a threat to the safety or well-being of any person or the community.[11] All three factors must be present for the defendant to be released.[12]

If the court finds that the convicted defendant need not be

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judge of the court of appeals as well as a justice of the supreme court. *See* UTAH CODE ANN. § 77-20-1 (Supp. 1988). Section 77-20-25 creates a new section covering sureties and the surrender and arrest of defendants. This section is nearly identical to old § 77-20-8. *See id.* § 77-20-8.5.

5. *See* State v. Neeley, 707 P.2d 647, 648 (Utah 1985), *cert. denied sub nom.* Belt v. Utah, 108 S. Ct. 2876 (1988).

6. *See* Floor Debate, remarks by Rep. Ervin M. Skousen, 47th Utah Leg., Gen. Sess. (Jan. 26, 1988) (House Recording No. 6).

7. UTAH CODE ANN. § 77-20-8(1) (Supp. 1988).

8. *Id.*

9. *Id.* § 77-20-8(2).

10. *Id.* § 77-20-10.

11. *Id.* § 77-20-10(1).

12. *Id.*

detained under the foregoing analysis, the court must release the defendant subject to the least restrictive conditions that will assure the appearance of the defendant and the safety of the community.[13] Section 77-20-10 contains various conditions that the court may use when granting release.[14] These are not mandatory requirements but, at the court's option, may be incorporated into the conditions of release.[15] The optional conditions set forth in the statute include, among others, posting appropriate bail,[16] maintaining or seeking employment,[17] reporting on a regular basis to a designated agency,[18] refraining from the use of alcohol or narcotics,[19] and restrictions on travel, personal associations, and place of abode.[20] The court, at its discretion, also may amend an order granting release to impose different conditions from those in the original order.[21]

2. *Prior Utah Law*—Prior to the enactment of the amendments, a defendant could obtain continuance of bail after conviction but prior to sentencing under former section 77-20-8.[22] Similarly, a defendant who had been convicted and sentenced, but who had filed a notice of appeal, might have been admitted to bail under Rule 27 of the Utah Rules of Criminal Procedure.[23]

Under the original statute, the court could order that the convicted defendant awaiting sentence be taken into custody or that bail be continued.[24] No further requirements were set forth in the statute. This provision allowed convicted defendants who had been admitted to bail prior to their conviction to obtain bail after their conviction under the same requirements as defendants who had not been convicted and who were awaiting trial.[25] Convicted de-

13. *Id.* § 77-20-10(2).
14. *Id.*
15. *Id.*
16. *Id.* § 77-20-10(2)(a).
17. *Id.* § 77-20-10(2)(d).
18. *Id.* § 77-20-10(2)(h).
19. *Id.* § 77-20-10(2)(k).
20. *Id.* § 77-20-10(2)(f).
21. *Id.* § 77-20-10(3).
22. *Id.* § 77-20-8 (1982) (amended 1988).
23. *Id.* § 77-35-27(c) (1982).
24. *Id.* § 77-20-8(1).
25. Defendants awaiting trial are admitted to bail as a matter of right in all cases except "where the proof is evident or where the presumption of guilt is strong that the accused committed a capital offense, [a] felony while he was free on bail awaiting trial on a previous felony, or [a] felony while he was on probation or parole for a felony." *Id.* § 77-20-1 (Supp. 1988).

fendants awaiting sentence could be allowed continuance of bail without having to meet additional requirements if they had been granted bail prior to their conviction.

Prior to the amendments, and under the current law incorporating the amendments, defendants who had been convicted and sentenced but who had filed a notice of appeal might be admitted to bail or released pursuant to Rule 27 of the Utah Rules of Criminal Procedure[26] and the requirements set out by the Utah Supreme Court in *State v. Neeley*.[27] Rule 27 provides for a two-step process to admit convicted defendants to bail pending appeal. First, the defendant applies to the trial court for a certificate of probable cause.[28] The trial court grants the certificate if it determines that there are "meritorious issues" that the appellate court should decide.[29] If the trial court denies the certificate of probable cause, the defendant may apply to the appellate court for the certificate.[30] If the appellate court denies the certificate, the defendant commences or continues the prison sentence.[31] If either court issues the certificate, the defendant may seek admittance to bail from the issuing court.[32] The decision on the defendant's request for admittance to bail is subject to review by appellate courts.[33]

In *Neeley*, the Utah Supreme Court interpreted the meaning of the term "meritorious issues" and the criteria under which a certificate of probable cause would be issued by the courts under Rule 27.[34] The state urged an interpretation similar to the federal law under the Bail Reform Act of 1984, which defines meritorious issues to mean "substantial question[s] of law or fact likely to result in reversal, an order for a new trial, or a sentence that does not include a term of imprisonment."[35] The court, however, rejected this interpretation in favor of one similar to the federal law prior to the passage of the 1984 Act.[36] The court held that a certifi-

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26. *Id.* § 77-35-27 (1982). It is unclear what procedural effect the amendments will have on Rule 27.

27. 707 P.2d 647 (Utah 1985); *see* Jensen v. Schwendiman, 744 P.2d 1026, 1027 n.1 (Utah 1988).

28. UTAH CODE ANN. § 77-35-27 (1982).

29. *Id.*

30. *Id.*

31. *See id.* § 77-35-27(c).

32. *Id.*

33. *Id.*

34. State v. Neeley, 707 P.2d 647, 648-49 (Utah 1985); *see also* State v. Stukes, 753 P.2d 513 (Utah Ct. App. 1988) (denying petition for probable cause).

35. 18 U.S.C. § 3143(b)(2) (Supp. IV 1986).

36. *See Neeley*, 707 P.2d at 649.

cate of probable cause would be issued only when the issues raised on appeal are substantial. For an issue to be considered substantial, a question raised must be either novel—no Utah precedent that governs the question—or fairly debatable—Utah precedent bearing on the issue presents conflicting points of view or is otherwise unclear.[37] In addition, the legal issue must be integral to the conviction.[38]

Under prior Utah statutes, once a certificate of probable cause was issued, the presumption favored admittance to bail, and bail would be denied only if substantial evidence showed that the right to bail might be abused or the community might be threatened by the defendant's release.[39] The Utah Supreme Court embraced the approach of the United States Supreme Court[40] in its decision in *Leigh v. United States*[41] dealing with an applicant's request for bail pending appeal. The *Leigh* Court held that "[bail] is to be denied only in cases in which, from substantial evidence, it seems clear that the right to bail may be abused or the community may be threatened by the applicant's release."[42]

There has been recent dissatisfaction and concern with these standards for several reasons. First, the conviction finding the defendant guilty beyond a reasonable doubt is presumably correct in law.[43] Second, the decision to send a convicted person to jail shows a determination by the court that the defendant is dangerous to the community.[44] Finally, release of the defendant may undermine the deterrent effect of criminal law.[45] The federal Bail Reform Act of 1984 was enacted in response to these concerns,[46] and the 1988 Utah Bail Amendments are an effort to bring Utah under the same type of standards as those established under the federal system for dealing with bail for convicted defendants.[47]

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37. *Id.*

38. *Id.*

39. *See* State v. Pappas, 696 P.2d 1188, 1190 (Utah 1985).

40. *See id.*

41. 82 S. Ct. 994 (1962).

42. *Id.* at 996.

43. *See* Annotation, *What is "A Substantial Question of Law or Fact Likely to Result in Reversal or an Order for a New Trial" Pursuant to 18 USCS § 3143(b)(2) Respecting Bail Pending Appeal*, 79 A.L.R. FED. 673, 677 (1986) (discussing congressional concern and factors considered in enacting federal Bail Reform Act).

44. *Id.*

45. *Id.*

46. *Id.*

47. *See* Floor Debate, remarks by Rep. Ervin M. Skousen, 47th Utah Leg., Gen. Sess. (Jan. 26, 1988) (House Recording No. 6).

3. Discussion—Under the Utah Bail Amendments, it is now more difficult for a convicted defendant to obtain release on bail pending sentence or appeal. The amendments require convicted defendants to prove by clear and convincing evidence that they will not flee and that they do not pose a danger to any person or to the community. The presumption is that bail will be denied unless the defendant can show that bail should be granted. Unlike present federal law, however, the Utah amendments do not require the defendant seeking bail pending appeal to prove that the appeal raises a substantial question of law or fact and that it is not for the purpose of delay. Thus, it is more difficult for a convicted defendant to obtain bail pending appeal under federal law than under present Utah law.[48]

The increased difficulty in obtaining post-conviction bail may pose a constitutional threat to the continuing viability of the Utah amendments. The constitutionality of section 3142 of the federal Bail Reform Act, as it affects the right of *pretrial* defendants to receive bail, was challenged in *United States v. Salerno*.[49] The United States Supreme Court upheld the Act as not being facially unconstitutional, either as a violation of the excessive bail clause of the eighth amendment,[50] or as a denial of substantive due pro-

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48. Federal law provides:

> (a) Release or detention pending sentence. The judicial officer shall order that a person who has been found guilty of an offense and who is waiting imposition or execution of sentence be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) . . . .
>
> (b) Release or detention pending appeal by the defendant. The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—
>
> (1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and
>
> (2) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in reversal, an order for a new trial, or a sentence that does not include a term of imprisonment.

18 U.S.C. § 3143 (Supp. IV 1986). Many courts have held that, under Rule 9(c) of the Federal Rules of Appellate Procedure, the defendant must establish the elements of § 3143(b)(2) and § 3143(b)(1) by a showing of clear and convincing evidence or a preponderance of the evidence. *See* United States v. Crabtree, 754 F.2d 1200 (5th Cir.), *cert. denied*, 473 U.S. 905 (1985); United States v. Cirrincione, 600 F. Supp. 1436 (N.D. Ill.), *aff'd*, 780 F.2d 620 (7th Cir. 1985); United States v. Austin, 614 F. Supp. 1208 (D.N.M. 1985).

49. 481 U.S. 739 (1987).

50. *Id.* at 754-55.

cess.[51] The Court held that the government has a regulatory interest in the safety of the community[52] and that, in circumstances in which the government's interest is sufficiently strong, the greater needs of society must outweigh the individual's rights.[53] The Supreme Court has not addressed the constitutionality of section 3143 of the Federal Act, which governs bail for *post-trial* defendants. In *United States v. Affleck*,[54] however, the Tenth Circuit stated that "[t]here is no constitutional right to bail pending appeal."[55]

Although there is no constitutional right to bail pending appeal, if a state makes a provision for such bail, under the eighth and fourteenth amendments, the state may not deny bail unreasonably or arbitrarily.[56] Like the federal Bail Reform Act, the underlying purpose of the Utah bail amendments is the protection of society and the community. The Utah amendments, however, address a category of potential nonviolent crimes that are not included in the federal Act. Under the Utah amendments, defendants must present clear and convincing evidence that they will not pose a danger to the physical, psychological, or financial and economic safety or well-being of any person or the community.[57] Thus nonviolent economic crimes are in the same category as violent crimes. It may be argued that inclusion of this category of crimes in the statute may be considered unreasonable and arbitrary under the eighth and fourteenth amendments. The federal Bail Reform Act does not include these types of offenses in a consideration of bail. In upholding section 3142 of the federal Bail Reform Act, the Supreme Court in *Salerno* found that section 3142(f) of the Act "narrowly focuses on a particularly acute problem in which the government interests are overwhelming . . . on individuals who have been arrested for a specific category of extremely serious offenses."[58] Section 3143 of the Act, in its treatment of convicted

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51. *Id.* at 752.

52. *Id.* at 747.

53. *Id.* at 750-51.

54. 765 F.2d 944 (10th Cir. 1985).

55. *Id.* at 948.

56. *See* Young v. Hubbard, 673 F.2d 132, 134 (5th Cir. 1982) (affirming denial of motion for bail pending appeal); Finetti v. Harris, 609 F.2d 594, 599 (2d Cir. 1979) (same); Brown v. Wilmot, 572 F.2d 404, 405 (2d Cir. 1978) (same); *see also Salerno*, 481 U.S. at 746 ("When government action depriving a person of life, liberty or property survives a substantive due process scrutiny, it must still be implemented in a fair manner.").

57. UTAH CODE ANN. §§ 77-20-8(1), -10(3) (Supp. 1988).

58. *Salerno*, 481 U.S. at 750.

defendants, also concerns itself only with a danger to the safety of any persons or the community. The inclusion of nonviolent crimes in the Utah amendments may present a constitutional issue of unreasonableness and arbitrariness not encountered in the federal statute.

4. Conclusion—The Utah bail amendments represent a change in philosophy regarding the right to bail for convicted defendants who are awaiting sentence or appeal. The new laws create more stringent requirements for such defendants and bring Utah bail laws in harmony with the bail requirements under federal law. However, by requiring a defendant to prove that there is no danger of nonviolent and economic offenses if released, the statute may be overly broad and pose a constitutional problem to be addressed by the courts.

III. EDUCATION

*Block Grant Funding to School Districts**

In 1988 the Utah Legislature expanded the Minimum School Finance Act[1] to include a block grant funding pilot program ["Program"].[2] Implemented for a three-year trial period, the Program allows a limited number of school districts to spend their allocated state school funds on a block grant basis.[3] Nonparticipating districts, in contrast, will continue to operate under traditional categorical funding requirements. Under the Program, the Utah State Board of Education receives applications on a voluntary basis from interested school districts. After the Board of Education selects five districts to participate in the Program,[4] each pilot district has

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* Katherine B. Crawford, Junior Staff Member, *Utah Law Review.*

1. UTAH CODE ANN. §§ 53A-17-101 to -119 (Supp. 1988).

2. Act of Feb. 25, 1988, ch. 86, § 1 (codified at UTAH CODE ANN. § 53A-17-201 (Supp. 1988)).

3. In contrast with traditional categorical funding, block grant funding does not require school districts to spend specific percentages of their allocated state funds on categorical programs defined by the legislature. Instead, participating districts receive block grant funding in a lump sum and, with certain restrictions, spend the money on programs that local officials rather than state officials determine are important. *See infra* notes 28-31 and accompanying text.

4. *See* UTAH CODE ANN. § 53A-17-201(1)(b) (Supp. 1988). Under the Utah State Board of Education Rules implemented for the block grant Program, a school district had to submit an application by May 16, 1988, to be considered as a pilot district. UTAH ADMIN. R. 300-429-3 (1988). Six districts submitted applications and the Utah Legislature amended the

a year to plan how its block grant will be used. Unless changed by the legislature, after the initial planning year the Program will be in effect through June 30, 1992.[5]

The Utah block grant pilot Program reflects a national trend in educational reform of transferring budget and policy decisions from the state or federal level to a local level.[6] The Program was developed to decentralize control over state school funds and allow flexible decision-making based on the particular priorities and needs of local school districts and individual schools.[7] Local control minimizes the use of standardized formulae designed to accommodate the diverse needs of the entire state. At the same time, responsibility for failures or mismanagement is transferred from the state to the local level. Furthermore, local control causes a redefinition of the political processes that determine the allocation of school funds. Although there are some disadvantages, as discussed below, the Program is well designed for the purpose of giving participating school districts a greater degree of local control over the manner in which their allocated state funds are spent. This purpose is best understood by comparing block grant funding with traditional categorical funding.

1. Prior Law: Traditional Categorical Funding—The management and control of the Utah public school system is divided into two levels. On the state level, the Board of Education consists of nine popularly elected, nonpartisan members[8] and the Superintendent of Public Education, an appointed executive officer.[9] The

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statute to raise the number of pilot districts included in the Program from five to six. Act of July 5, 1988, ch. 8 (2d Spec. Sess.). The six districts that submitted applications are Cache, Carbon, Park City, Salt Lake City, Tooele, and Weber. Telephone interview with Colleen Colton, Administative Assistant for Education, Utah State Governor's Office (Aug. 29, 1988) [hereinafter Colton interview].

5. UTAH CODE ANN. § 53A-17-201(3) (Supp. 1988).

6. *See, e.g.*, Educational Consolidation and Improvement Act, §§ 561-587, 20 U.S.C. §§ 3811-3863 (1978 & West Supp. 1988) (consolidation of 28 categorical programs into block grants to be allocated to local educational agencies at the discretion of the states); 1988 R.I. Pub. Laws 88-642 (allocation of $2 million allowing districts to apply for funding in one of four program areas); Schools for the Twenty-First Century Pilot Program, WASH. REV. CODE §§ 28A.100.030-.068 (Supp. 1987 & Supp. 1988) (six-year pilot program restructuring certain school operations and developing model school programs to determine whether increasing local decision-making authority will produce more effective learning).

7. Colton interview, *supra* note 4.

8. UTAH CODE ANN. § 53A-1-101 (Supp. 1988); *see also* UTAH CONST. art. X, § 3 (1895, amended 1986).

9. UTAH CODE ANN. § 53A-1-301 (Supp. 1988). The Superintendent of Public Education is appointed by the members of the Board of Education. *Id.* § 53A-1-301(1).

Board of Education controls and supervises the public school system,[10] including district expenditures of state education funds,[11] and establishes rules and minimum standards for the operation of the public schools.[12] On a local level, Utah is divided into forty school districts.[13] Each district has a Superintendent of Schools[14] who heads a popularly elected local school board consisting of five or seven members.[15] Each local school board acts as the direct governing body of the individual schools. The responsibilities of the local school board include supervising the expenditure of state funds in a manner consistent with the standards and rules established by the Board of Education.[16]

The Utah public school system is financed pursuant to the provisions of the Minimum School Finance Act.[17] That statute establishes a program that provides minimum educational services as mandated by the Utah Constitution.[18] The cost of operation and maintenance of the minimum school program is divided between the state and school districts on a "partnership basis."[19] The districts raise their share of funds by imposing local property taxes.[20] Block grant funding does not affect either the amount of state funding school districts receive or the requirement that individual districts generate matching funds.[21] What the Program does affect is the manner in which school districts can spend their allocated state funds.

Under the Minimum School Finance Act, the Utah Board of Education calculates the amount of annual state funding received by each district using a formula based on "weighted pupil units."[22]

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10. *Id.* § 53A-1-401; *see also* UTAH CONST. art. X, § 3 (1895, amended 1986).
11. *See* UTAH CODE ANN. § 53A-16-103(2) (Supp. 1988).
12. *Id.* § 53A-1-402.
13. Colton interview, *supra* note 4.
14. UTAH CODE ANN. § 53A-3-301 (Supp. 1988).
15. *Id.* § 53A-3-101. All local school boards have five members except the Salt Lake City School District, which has seven members. *Id.*
16. *Id.* § 53A-3-402.
17. *Id.* §§ 53A-17-101 to -119.
18. *Id.* § 53A-17-102(1); *see* UTAH CONST. art. X, § 1 (1895, amended 1986) ("The Legislature shall provide for the establishment and maintenance of the state's education systems including . . . a public education system, which shall be open to all children of the state . . . .").
19. UTAH CODE ANN. § 53A-17-102(1) (Supp. 1988).
20. *Id.* §§ 53A-17-105 to -106.
21. *Id.* § 53A-17-201(5).
22. *Id.* § 53A-17-112. Under the Utah system, calculation of a school district's weighted pupil units is based on the average daily number of pupils attending schools in the district. *Id.* § 53A-17-112(1). Adjustments are made to the calculation based on several fac-

Depending on the number of weighted pupil units, each school district receives a certain amount of state funds.[23] Under traditional categorical funding, that money must be spent by the local school board on specific programs.[24] For example, subject to the approval of the Board of Education, a district may request money for accelerated learning programs[25] or special purpose optional programs.[26] Under traditional categorical funding, that money, once received, must be spent on the particular program for which it was allocated.[27] The school block grant funding program removes many of the categorical restrictions placed on state funding under the traditional system and, as a result, allows more local control of budgeting decisions.

2. *Funding Under the Block Grant Program*—In contrast with traditional categorical funding, Utah's school block grant program does not require the participating pilot districts to spend specific percentages of their allocated state funds on the categorical programs listed in the state supported Minimum School Program.[28] Much of the funding traditionally restricted to specific programs will be allocated to the districts as "General Revenue."[29] That funding can be budgeted for any maintenance and operation fund expenditure[30] that falls within one of the defined components of the Minimum School Program.[31] To avoid jeopardizing eligibility for receipt of federal grants and matching funds, spending of block grants must comply with federal laws in general, and in particular with specific federal regulations governing special categori-

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tors, including pupils enrolled in kindergarten, *id.* § 53A-17-112(2), small rural schools, *id.* § 53A-17-112(3)-(7), and handicapped programs, *id.* § 53A-17-112(8)-(13).

23. *Id.* § 53A-17-112.

24. *Id.* §§ 53A-17-103, -115.

25. *See id.* § 53A-17-115. Under categorical spending requirements, funding for Accelerated Learning Programs may be spent on Gifted, Advanced Placement, and Concurrent Enrollment programs. SCHOOL FINANCE UNIT, DRAFT PRELIMINARY INFORMATION BLOCK GRANT PROPOSAL 1988-1989 (1987).

26. UTAH CODE ANN. § 53A-17-112(18) (Supp. 1988). The Special Purpose Optional Programs category includes activities such as music programs in elementary schools and transportation for educational field trips. *Id.* Under categorical spending requirements, funding granted to a school district for Special Purpose Optional Programs may be spent on any one or combination of 15 such activities. SCHOOL FINANCE UNIT, *supra* note 25.

27. *See* UTAH CODE ANN. § 53A-17-112 (Supp. 1988).

28. *Id.* § 53A-17-201(2)(a).

29. *See* SCHOOL FINANCE UNIT, *supra* note 25.

30. *Id.*

31. UTAH CODE ANN. § 53A-17-201(2)(a) (Supp. 1988).

cal funding.[32]

The Program is designed so that pilot districts' funds are calculated on the same basis as if those districts had not participated in the Program.[33] In terms of the receipt of state funds and the standards of calculating matching district funds, therefore, there is no monetary incentive for districts to participate in the Program. Methods of distribution under the Program also continue under the same system used for traditional categorical funding.[34] Pilot districts will be required to follow established procedures of basic budget review and approval by the Board of Education.[35]

3. Analysis—The Utah Governor's Office initiated the Program to provide block grant funding to school districts as part of a general policy encouraging educational reform.[36] The basic purpose of the Program is to provide more authority to district officials in allocating funds to areas of particular local need.[37] Local control eliminates administrative red tape and prevents impractical or ineffective mandatory programs created under the time constraints and special interest influences present at the state level.[38] At the same time, the Program shifts responsibility for failures or mismanagement to the local level.[39] The assumption of local responsibility, however, is not compulsory because school districts participate in the Program on a voluntary basis.[40]

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32. *Id.* § 53A-17-201(2)(b). Federal laws regulating students with handicaps, vocational students, and adult high school completion have been identified by the Board of Education as areas demanding special concern. UTAH ADMIN. R. 300-429-3(C) (1988). Although restricted by federal requirements, district spending in these areas will be more flexible under the Program than under traditional categorical funding. SCHOOL FINANCE UNIT, *supra* note 25.

33. UTAH CODE ANN. § 53A-17-201(5) (Supp. 1988).

34. *Id.* § 53A-17-201(5); UTAH ADMIN. R. 300-429-5 (1988).

35. UTAH CODE ANN. § 53A-17-201(4) (Supp. 1988).

36. Colton interview, *supra* note 4. The Governor's Office initially proposed a broader program that would have provided even greater local autonomy than the Program as passed. *Id.*

37. Floor Debate, remarks by Sen. Lyle Hillyard, 47th Utah Leg., Gen. Sess. (Feb. 24, 1988) (Sen. Recording No. 101). An example of local need is the San Juan School District, which has a greater need for language programs than many other districts because of a high percentage of minority students. Colton interview, *supra* note 4.

38. Floor Debate, remarks by Sen. Lyle Hillyard, 47th Utah Leg., Gen. Sess. (Feb. 24, 1988) (Sen. Recording No. 101).

39. *Id.*

40. UTAH CODE ANN. § 53A-17-201(1)(b) (Supp. 1988). Concerns about imposing reforms on unwilling districts led to amendment of the statute during the floor debate. The amending language emphasizes the voluntary nature of the Program. Floor Debate, remarks by Sen. Hall Rogers, 47th Utah Leg., Gen. Sess. (Feb. 24, 1988) (Sen. Recording No. 101).

Once a pilot district receives block grant funding, district officials have the discretion, subject to approval by the Board of Education, to allocate decision-making responsibility beyond the district level to the individual local schools.[41] This site-based management, allocating control to the local school level, is one of the more flexible aspects of the Program. This flexibility, and the shift to local control in general, redefines the political processes that have traditionally determined educational funding in the state. When local officials have control of educational funds, the influence asserted by local interests, such as parents' groups, on the allocation of those funds increases.[42] At the same time, the influence of special interest groups that presently operate at the state level, such as national teachers' organizations, decreases.[43] Some legislators fear that this change in the political process could harm minority groups such as the handicapped and gifted.[44] Minority students who require special attention and services may be hurt by local budgeting that provides "a little something for everyone," rather than concentrating funds to benefit only a few.[45]

Another inherent problem is the three-year limitation. States often initiate educational reforms on a trial basis to allow timely effectiveness evaluation and to identify and correct any flaws. The impermanence of the Utah Program, however, inhibits long-term changes requiring a continuation of local control.[46] Also, at some

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41. Colton interview, *supra* note 4. One of the pilot districts, Salt Lake City, plans to use a site-based management approach. Salt Lake City district officials see a need for local control because "[i]n Salt Lake City, there are large variations of circumstances from school to school. Though academic expectations and standards should be high in every school, different circumstances require different strategies that can best be devised at the local school level by teachers, building administrators and parents, working together in a spirit of partnership and collegiality." Block Grant Proposal for Salt Lake City School District (June 6, 1988) (copy on file with *Utah Law Review*).

42. *See generally* Knapp, *Educational Improvement Under the Education Block Grant*, 9 EDUC. EVALUATION & POL'Y ANALYSIS 283, 296-97 (1987).

43. Education interests in Utah are among the most influential and politically powerful in the state. *See* Abrams, *Political Competition and Cooperation Between Public and Higher Education Agencies of State Government*, 12 J. EDUC. FIN. 369, 374 (1987).

44. Floor Debate, remarks by Sen. Karl Swan, 47th Utah Leg., Gen. Sess. (Feb. 24, 1988) (Sen. Recording No. 101).

45. One analysis of the effects of a federal block grant found this dilution resulted from pressure by school principals, established distribution patterns, and a belief in the value of serving all. Knapp, *supra* note 42, at 296-97.

46. One commentator discusses this problem and notes:

> If one takes educational improvements of some kind as the supreme justification for the block grant, one must consider the longevity of improvements stimulated by the block grant. The block grant mechanism, by itself, builds in little to guarantee that improvements initiated with [that type of] funding will become established over the

point the effectiveness of the Program needs to be evaluated, and the limited amount of time the Program will be in effect makes evaluation difficult.[47] The legislature, however, clearly left open the possibility of extending the Program beyond the initial three-year period.[48]

Constitutional challenges to educational financing are generally based on the equal protection clause of the fourteenth amendment.[49] Utah's block grant funding legislation avoids the creation of any new equal protection issues by maintaining the existing scheme for the allocation and distribution of state funding to the individual school districts.[50] The statute avoids other equal protection challenges by requiring that the pilot districts represent a cross-section of the forty school districts in the state.[51] This diversity has the further advantage of providing representative results

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long term. In this sense, the policy does not contribute to the "infrastructure for improvement" that appears to be so important in assuring that instructional innovations take hold at the school level.

Id. at 299 (citation omitted).

47. For a discussion of the difficulties of measuring the effectiveness of a school block grant program, see *id.* at 286-87.

48. *See* UTAH CODE ANN. § 53A-17-201(3) (Supp. 1988) (providing that funding under the pilot program shall be in effect for three years "unless otherwise continued by the Legislature"). Further, should there be additional interest, the legislature may amend the statute to allow additional districts to participate in the Program. Colton interview, *supra* note 4.

49. U.S. CONST. amend. XIV. Equal protection challenges in such cases generally are based on financing schemes that provide disparate funding for individual school districts because of the use of formulae that allow variations according to the relative prosperity of the individual districts. *See, e.g.*, Note, *The Expanding Scope of Equal Protection Review: The Case for Reform of Educational Financing in Utah*, 1972 UTAH L. REV. 228.

50. UTAH CODE ANN. § 53A-17-201(5) (Supp. 1988).

51. *Id.* § 53A-17-201(1)(b) (the selected districts shall represent "a cross section of urban and rural and large, medium, and small districts"). Whether by chance or design, the six school districts selected for the Program represent a cross-section of the state as demonstrated by the following statistics:

TABLE 1

STATE BLOCK GRANT PILOT DISTRICT APPLICATIONS

District	*Number of Students*	*1986-1987 Expenditures*	*Area*
Cashe	11,699	$11,467,984	Urban
Carbon	5,471	12,967,758	Rural
Park City	1,466	5,007,940	Rural/Urban
Tooele	7,365	16,753,617	Urban/Rural
Salt Lake City	24,317	69,103,918	Urban
Weber	24,798	51,768,438	Urban

Colton interview, *supra* note 4.

for evaluation of the effectiveness of the Program.[52]

4. Conclusion—The Utah block grant funding pilot program represents a definite, if conservative, step towards educational reform in the state. When compared with traditional categorical funding, block grant funding gives participating school districts a greater degree of control over the manner in which their allocated state funds are spent. At the same time, responsibility for failures or mismanagement is transferred to the local level. To an extent, local decision-making redefines the political processes that determine the allocation of school funds, raising the possibility that block grant funding will be distributed widely rather than being concentrated on particular target groups. In addition, the temporary nature of the Program may inhibit long-term improvements and make evaluation of the effectiveness of the Program difficult. On the whole, however, the legislation is well designed and should serve to accomplish its purpose of allowing the expenditure of state educational funds on the basis of the particular needs of the districts rather than a standardized formula.

IV. FAMILY LAW

*Joint Legal Custody of Children**

1. Introduction—Utah's new joint legal custody statute[1] ("Act") creates a rebuttable presumption that the sharing of parental responsibilities and privileges between divorced or separated parents is in the best interest of a child.[2] The Act is the Utah Legislature's first explicit recognition of joint custody as a viable op-

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52. *Id.*

* Jeffrey J. Hunt, Junior Staff Member, *Utah Law Review.*

1. Act of Feb. 5, 1988, ch. 106 (codified at UTAH CODE ANN. §§ 30-3-10 to -10.4 (Supp. 1988)) (effective Apr. 25, 1988).

2. UTAH CODE ANN. § 30-3-10.2(1) (Supp. 1988). This section states: "There is a rebuttable presumption, subject to Subsection (2), that joint legal custody is in the best interest of a child." *Id.*

Subsection (2) states:

> The court may order joint legal custody if it determines that:
> (a) both parents agree to an order of joint legal custody;
> (b) joint legal custody is in the best interest of the child; and
> (c) both parents appear capable of implementing joint legal custody.

Id. § 30-3-10.2(2).

tion in child custody disputes.[3] It also represents the most sweeping overhaul of Utah child custody law since the first statute on the subject appeared in 1903.[4] The Act's purpose is to encourage divorced or separated couples to consider joint legal custody.[5] The Act's great deference to the courts[6] and the inherent difficulties of legal intervention in domestic relations[7] are likely to make it more of a symbolic statement than a practical tool for dealing with the complex emotional web surrounding child custody.

2. *The Act*—The Act amends the previously existing section of the Utah Code concerning sole custody[8] and creates four new sections relating to joint legal custody. The first new section defines joint legal custody.[9] The second section creates a rebuttable presumption that joint legal custody is in the best interest of a child,[10] sets preconditions for a joint legal custody award,[11] and

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3. An early Utah statute provided for sole custody to be awarded to the mother of a child. *See* Act of Mar. 12, 1903, ch. 82, § 1, 1903 Utah Laws 68 (previously codified at UTAH COMP. LAWS tit. 35, ch. 3, § 1212x (1907)) (amended 1969); *infra* note 41. Later versions of this statute adopted a "best interests of the child" standard for determining custody. *See* Act of Mar. 9, 1977, ch. 122, § f, 1977 Utah Laws 562, 564 (previously codified at UTAH CODE ANN. § 30-3-10 (1984)) (amended 1988); *infra* note 46.

4. *See supra* note 3. For the text of the statute, see *infra* note 41.

5. *See* Floor Debate, remarks by Rep. G. LaMont Richards, 47th Utah Leg., Gen. Sess. (Jan. 19, 1988) (House Recording No. 3); Floor Debate, remarks by Sen. Lyle W. Hillyard, 47th Utah Leg., Gen. Sess. (Feb. 2, 1988) (Sen. Recording No. 42, side 2).

6. The court has considerable discretion in the operation of the statute. Determinations of the "best interests of the child" and whether "both parents appear capable" of implementing joint legal custody depend heavily on the facts of each case and necessarily involve a great deal of judicial discretion. In addition to the six factors the court must consider in determining the best interest of the child, it may also weigh "any other factors the court finds relevant." UTAH CODE ANN. § 30-3-10.2(g) (Supp. 1988); see *infra* note 25 for a list of the six factors. Another section of the Act outlines terms the court may include in a joint legal custody order. *See* UTAH CODE ANN. § 30-3-10.3 (Supp. 1988).

7. *See* Teitelbaum & DuPauix, *Alternative Dispute Resolution and Divorce: Natural Experimentation in Family Law*, 40 RUTGERS L. REV. 1093, 1106 (1988).

> Adjudication is ill-suited to the interests of children in custody matters. A mediated agreement is more likely than a judicial decision to match the parents' capacity and desires with the child's needs; on the other hand, the litigative process itself is likely to create adjustment problems for the children and their parents.

Id.

8. The amendment designated the former provisions as subsection one, made various stylistic and punctuation changes to this subsection, and added subsection two, which reads: "In awarding custody, the court shall consider, among other factors the court finds relevant, which parent is most likely to act in the best interests of the child, including allowing the child frequent and continuing contact with the noncustodial parent as the court finds appropriate." UTAH CODE ANN. § 30-3-10(2) (Supp. 1988)

9. *Id.* § 30-3-10.1.

10. *Id.* § 30-3-10.2(1).

11. *Id.* § 30-3-10.2(2)(a)-(c).

outlines criteria the court must consider in determining the best interest of a child.[12] The third section sets forth terms the court may include in a joint legal custody award.[13] The fourth section[14] codifies a judicially created standard that has been used by Utah courts to determine whether custody awards—including joint custody—should be modified,[15] and explains the procedure for terminating such an award.[16] The significant provisions of these sections will be examined in the order in which the sections appear in the Act.

(a) Joint Legal Custody Defined. Joint custody awards typically fall into one of two categories: joint legal custody or joint physical custody. Joint legal custody usually refers to an arrangement in which both parents share legal authority and responsibility for making major decisions regarding their child's health, education, and welfare, but does not mandate shared physical custody.[17] One parent usually maintains primary physical custody while the other enjoys liberal visitation rights. Joint physical custody, on the other hand, generally involves specifying periods of time when the child lives with one parent or the other.[18]

The Utah Legislature opted for a statute that encourages joint legal, not physical, custody. In each of its sections the Act specifically refers to "joint legal custody." The Act also states that joint legal custody "is not based on awarding equal or nearly equal periods of physical custody of and access to the child to each of the parents, as the best interest of the child often requires that a primary physical residence for the child be designated."[19]

Although this language indicates that joint legal custody does not mandate equal division of the child's physical custody, the court apparently retains the discretion, so long as both parties agree, to specify periods of physical custody for each parent.[20] The

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12. *Id.* § 30-3-10.2(3)(a)-(g); *see infra* note 25.

13. UTAH CODE ANN. § 30-3-10.3 (Supp. 1988); *see infra* note 29.

14. UTAH CODE ANN. § 30-3-10.4 (Supp. 1988).

15. *Id.* § 30-3-10.4(1)(a)-(b).

16. *Id.* § 30-3-10.4(2)(a)-(b); *see infra* note 35.

17. *See* Scott & Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 455 n.1 (1984); Skoloff, *Joint Custody: A Jaundiced View*, TRIAL, Mar. 1984, at 52.

18. *See* Scott & Derdeyn, *supra* note 17, at 455 n.1.

19. UTAH CODE ANN. § 30-3-10.1(4) (Supp. 1988).

20. *Id.* § 30-3-10.1(3). The statute states: "[Joint legal custody] does not affect the physical custody of the child *except as specified in the order of joint legal custody.*" *Id.* (emphasis added).

legislative emphasis, however, appears to have been on shared parental decision-making, not physical custody.[21]

(b) Presumption of Joint Legal Custody, Preconditions for Joint Legal Custody Awards, "Best Interest" Factors. The Act creates a rebuttable presumption that joint legal custody is in the best interest of the child.[22] The nature of this rebuttable presumption is unclear, however, because the Act specifies that joint custody is to be subject to a determination that (1) "both parents agree to an order of joint legal custody," (2) "joint legal custody is in the best interest of the child, and" (3) "both parents appear capable of implementing joint legal custody."[23]

The Act further specifies that the court must find these three threshold criteria satisfied before it may make a joint legal custody award.[24] Therefore, although the Act presumes that joint legal custody is the most desirable child custody arrangement, this presumption seems easily circumvented by the statutory requirement of parental agreement. Because the statute is nonmandatory, a parent who refuses to agree to a joint arrangement will not be forced to accept one, and thus the refusing parent would have no need to rebut the presumption.

The Act specifies seven factors the court must consider in determining if joint custody is in the best interest of the child,[25] and

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21. Senator Hillyard stated: "This is not joint physical custody. The child obviously can't live in two separate homes. But it's joint legal custody, which would give the noncustodial parent more involvement in the decisions of child raising." Floor Debate, remarks by Sen. Lyle W. Hillyard, 47th Utah Leg., Gen. Sess. (Feb. 3, 1988) (Sen. Recording No. 42, side 2).

22. UTAH CODE ANN. § 30-3-10.2(1) (Supp. 1988); *see supra* note 2.

23. UTAH CODE ANN. § 30-3-10.2(2)(a)-(c) (Supp. 1988).

24. *See id.* § 30-3-10.2(2). The relevant language provides: "The court may order joint legal custody *if* it [makes the necessary determinations]." *Id.* (emphasis added).

25. *Id.* § 30-3-10.2(3)(a)-(g). This provision states:

> In determining the best interest of the child, the court shall consider the following factors:
>
> (a) whether the physical, psychological, and emotional needs and development of the child will benefit from joint legal custody;
>
> (b) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest;
>
> (c) whether each parent is capable of encouraging and accepting a positive relationship between the child and the other parent;
>
> (d) whether both parents participated in raising the child before the filing of the suit;
>
> (e) the geographical proximity of the homes of the parents;
>
> (f) if the child is 12 years of age or older, any preference of the child for or against joint legal custody; and

states that this determination must be made by a preponderance of the evidence.[26] The Act also requires that the court give notice to parties that a joint legal custody award may preclude eligibility for public assistance under the federal Aid to Families with Dependent Children ("AFDC") program, and that acceptance of AFDC support subsequent to a joint order may be grounds for termination of the order.[27] Finally, this section contains a provision encouraging the parties to seek nonjudicial methods of resolving disputes that may arise over terms and conditions of the joint legal custody order.[28]

(c) Terms of Joint Legal Custody Order. This section provides guidelines for the court in deciding what terms to include in the joint legal custody order. The Act singles out five terms the court may wish to specify in the order.[29] The terms are designed to

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(g) any other factors the court finds relevant.

Id.

26. *Id.* § 30-3-10.2(4).

27. *Id.* § 30-3-10.2(5). This provision was added through an amendment offered by Senator Frances Farley. Senator Farley stated that children living under joint custody generally are not considered "deprived" for purposes of AFDC assistance. She said the purpose of the amendment was to give adequate notice to parties that they may be precluded from obtaining AFDC benefits by a joint legal custody award. *See* Floor Debate, remarks by Sen. Frances Farley, 47 Utah Leg., Gen. Sess. (Feb. 3, 1988) (Sen. Recording No. 42); *see also* Johnson, *Joint Custody Arrangements and AFDC Eligibility*, 18 CLEARINGHOUSE REV. 2 (1984). When both parents share physical and legal custody of the child, two issues determine AFDC eligibility—whether there is "continued absence" of a parent and whether the child is "living in the home" of the parent who claims to be the AFDC caretaker. These requirements have created problems for AFDC applicants and recipients because joint custody generally entails shared parental decision-making and frequent and continuing contact between the child and both parents. *Id.*

28. UTAH CODE ANN. § 30-3-10.2(6) (Supp. 1988). A similar provision encourages inclusion of an agreed dispute resolution mechanism in the terms of the custody order. *Id.* § 30-3-10.3(5).

29. *Id.* § 30-3-10.3(1). This provision states:

An order of joint legal custody shall provide terms the court determines appropriate, which may include specifying:

(a) either the county of residence of the child, until altered by further order of the court, or the custodian who has the sole legal right to determine the residence of the child;

(b) that the parents shall exchange information concerning the health, education, and welfare of the child, and where possible, confer before making decisions concerning any of these areas;

(c) the rights and duties of each parent regarding the child's present and future physical care, support, and education;

(d) provisions to minimize disruption of the child's attendance at school and other activities, his daily routine, and his association with friends; and

(e) as necessary the remaining parental rights, privileges, duties,and powers to be exercised by the parents solely, concurrently, or jointly.

clarify and strengthen the custody arrangement by designating the primary custodial parent, directing communication between the parents, and ensuring minimal disruption of the child's activities. These terms are not mandated, but may be included as the court deems appropriate.[30] The Act also preserves court authority to order child support payments, including payments from one custodian to the other.[31]

(d) Modification or Termination of Order. The Act codifies the standard, previously established by the Utah Supreme Court in *Hogge v. Hogge*,[32] to be used in determining whether modification of a custody order is warranted. The standard consists of a threshold requirement that "the circumstances of the child or one or both custodians have materially and substantially changed since entry of the order to be modified, or the order has become unworkable or inappropriate under existing circumstances."[33] If the threshold test is met, the party seeking modification must show the change "would be an improvement for and in the best interest of the child."[34]

Other provisions in this section specify procedural requirements for termination of a joint legal custody order,[35] and allow assessment of attorney's fees against any party who files a frivolous

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Id.

30. *See id.* Section 30-3-10.3(1) provides that "[a]n order of joint legal custody shall provide terms the *court determines appropriate*, which *may* include specifying" the terms. *Id.* (emphasis added).

31. *Id.* § 30-3-10.3(4)(a)-(b).

32. 649 P.2d 51, 53-54 (Utah 1982). *Hogge* involved modification of a sole custody award. The Utah Supreme Court, however, in Moody v. Moody, 715 P.2d 507, 508-09 (Utah 1985), held that the *Hogge* test was equally applicable in modification of joint custody awards.

33. UTAH CODE ANN. § 30-3-10.4(1)(a) (Supp. 1988). Under the *Hogge* standard, failure to meet this threshold test ends the inquiry. *Hogge*, 649 P.2d at 54. The Act lists the dual standard conjunctively, so a threshold showing is still necessary.

34. UTAH CODE ANN. § 30-3-10.4(1)(b) (Supp. 1988).

35. *Id.* § 30-3-10.4(2). This subsection states:

> (a) The order of joint legal custody is terminated upon the filing of a motion for termination by:
>
> (i) both parents; or
>
> (ii) one parent, when notice of the motion is sent by certified mail to the other parent and an affidavit is filed with the motion, indicating the motion has been mailed as required by this subsection.
>
> (b) The order of joint legal custody shall be replaced by the court with an order of sole legal custody under Section 30-3-10. All related issues, including visitation and child support, shall also be determined and ordered by the court.

Id.

action designed to harass the other party.[36]

3. Background—Historically, the father was regarded as the legal custodian of his children.[37] By the early nineteenth century, however, the presumption of paternal custody was being supplanted by the "tender years" doctrine, which preferred the mother as custodian.[38] This doctrine presumed that children of "tender years"—usually under age seven—be placed with their mothers.[39] Later, a test centering on the "best interest" of the child came into use, but judicial or legislative preferences for the mother as custodian continued to result in maternal bias.[40]

In Utah, the legislature incorporated this maternal preference in two successive statutes, and the courts sustained it through judicial policy. The first statutory preference, in 1903, specified the mother as custodian unless it was shown she was an "immoral or otherwise incompetent or improper person."[41] This presumption in favor of the mother was probably based on two assumptions current in 1903: "first, that the mother almost invariably served as a child's primary caregiver prior to divorce; and second, that biologically a child was simply better off with a mother."[42]

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36. *Id.* § 30-3-10.4(3). This provision states: "If the court finds that an action under this section is filed or answered frivolously and in a manner designed to harass the other party, the court shall assess attorney's fees as costs against the offending party." *Id.*

37. 59 AM. JUR. 2D *Parent and Child* § 24 (1987).

38. *See, e.g.*, Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision-making*, 101 HARV. L. REV. 727, 738 (1988); Derdeyn & Scott, *Joint Custody: A Critical Analysis and Appraisal*, 54 AM. J. ORTHOPSYCHIATRY 199, 200 (1984).

39. Fineman, *supra* note 38, at 738.

40. *See, e.g.*, Comment, *Joint Custody: Dividing the Indivisible*, 1986 UTAH L. REV. 577.

41. Act of Mar. 12, 1903, ch. 82, 31, 1903 Utah Laws 68 (amended 1969). The statute stated:

> In the case of separation of husband and wife having minor children, the mother of said children shall be entitled to the care, control, and custody of all such children . . . provided further, that if it shall be made to appear to a court of competent jurisdiction that the mother is an immoral or otherwise incompetent or improper person, then the court may award the custody of said children to the father or make such other order as may be just.

Id.

42. Pusey v. Pusey, 728 P.2d 117, 121 (Utah 1986) (Zimmerman, J., concurring in result). Rejecting the validity of a maternal bias, Justice Zimmerman said:

> Concerning the first assumption, we can take judicial notice that today more women than ever before have entered the work force. Accordingly, it is much more likely today than when the presumption first arose that the mother will not have been the primary caregiver. As for the second assumption, it may represent the consensus of Victorian America, and today it may be a matter of individual opinion, but I am

The Utah custody statute was rewritten in 1969 to give the courts more discretion in awarding custody.[43] The 1969 version substituted a "best interests of the child" standard for the express presumption of maternal custody contained in the 1903 statute.[44] A maternal preference was retained, however, in the form of a "natural presumption that the mother is best suited to care for young children."[45]

In 1977, the legislature amended the custody statute to delete all references to maternal preference.[46] Legislators gave several reasons for the amendment, including a belief that the mother was not always the party best suited to care for children.[47] They also indicated that the maternal preference deterred many suitable fathers from attempting to gain custody because the fathers believed the law worked against them.[48] Further, some lawmakers believed the natural presumption language of the 1969 statute exerted too much influence on some judges and was difficult to distinguish from the earlier maternal preference.[49]

Despite this movement toward a gender-neutral alternative, the judiciary maintained the maternal preference in custody cases. This judicial preference for the mother surfaced as early as 1956 in *Steiger v. Steiger*.[50] The policy favored the mother in cases where either parent was equally fit to be custodian.[51] After the legislature

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aware of no empirical evidence that supports the notion that females are superior caregivers, *all other things being equal.*

Id. (emphasis in original).

43. *See* Floor Debate, remarks by Sen. Charles Welch, Jr., 38th Utah Leg., Gen. Sess. (Feb. 18, 1969) (Sen. Recording No. 5).

44. Act of Mar. 13, 1969, ch. 72, § 7, 1969 Utah Laws 327, 330 (previously codified at UTAH CODE ANN. § 30-3-10 (Supp. 1969)) (amended 1977).

45. *Id.* The statute stated: "In determining the custody, the court shall consider the best interests of the child and past conduct and demonstrated moral standards of each of the parties and the *natural presumption* that the mother is best suited to care for young children." *Id.* (emphasis added).

46. Act of Mar. 9, 1977, ch. 122, § 5, 1977 Utah Laws 562, 564 (previously codified at UTAH CODE ANN. § 30-3-10 (1984)) (amended 1988). The pertinent portion of the statute stated: "In determining the custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties. The court may inquire of the children and take into consideration the children's desires regarding the future custody . . . ." *Id.*

47. *See Recent Developments in Utah Law*, 1987 UTAH L. REV. 79, 203-04 [hereinafter *Development*].

48. *See id.* at 204.

49. *See id.*

50. 4 Utah 2d 273, 293 P.2d 418 (1956). *Steiger* applied the 1903 statute, but the court also indicated its own judicial maternal preference.

51. *Id.* at 276, 293 P.2d at 420.

eliminated all maternal preferences in 1977, the court reaffirmed its support for a judicial maternal preference in a series of cases.[52]

In 1986, the Utah Supreme Court finally extinguished the maternal preference by holding in *Pusey v. Pusey*[53] that a gender-based preference, whether statutory or judicial, violates the equal protection provisions of the Utah[54] and United States constitutions.[55] The court jettisoned the maternal preference, saying it is "unnecessary and perpetuates outdated stereotypes"[56] and "lacked any firm foundation in today's world."[57]

Utah's joint legal custody statute now replaces the discarded maternal preference with a preference that custody be awarded to both parents. In light of the prior statutory history and case law, the Act can be seen as a logical extension of the movement away from maternal preferences toward a gender-neutral model. Utah's adoption of the Act also reflects the national trend; more than thirty states now have joint custody laws.[58]

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52. *See Development, supra* note 47, at 204 ("In these cases the court acknowledged the vitality of the policy but noted that because all things between parents were not equal in all the cases, it was inappropriate to apply the preference."). The cases cited in this Development include Nilson v. Nilson, 652 P.2d 1323 (Utah 1982); Lembach v. Cox, 639 P.2d 197 (Utah 1981); Jorgensen v. Jorgensen, 599 P.2d 510 (Utah 1979); and Smith v. Smith, 564 P.2d 3070 (Utah 1977). These cases were overruled by Pusey v. Pusey, 728 P.2d 117 (Utah 1986).

53. 728 P.2d at 119-20.

54. Article IV, § 1, of the Utah Constitution provides: "[B]oth male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges." UTAH CONST. art. IV, § 1.

55. U.S. CONST. amend. XIV, § 1.

56. *Pusey*, 728 P.2d at 120.

57. *Id.* at 121 (Zimmerman, J., concurring in the result).

58. Foster & Freed, *Joint-Custody Legislation Finds Firm Support in Majority of States*, NAT'L L.J., Apr. 28, 1986, at 25, 27. State joint custody statutes include: ALASKA STAT. §§ 25.20.060, .090-.100 (1983); CAL. CIV. CODE §§ 4600, 4600.5 (West Supp. 1988); COLO. REV. STAT. §§ 14-10-108, -123.5, -131.5 (1987); CONN. GEN. STAT. §§ 46b-56, -56a to -66 (1987); DEL. CODE ANN. tit. 13, § 701 (1981); FLA. STAT. ANN. § 61.13(2)(b) (West Supp. 1988); HAW. REV. STAT. §§ 571-46, -46.1 (1985); IDAHO CODE § 32-717(B) (1983); ILL. ANN. STAT. ch. 40, ¶¶ 602.1, 610 (Smith-Hurd Supp. 1988); IND. CODE ANN. §§ 31-1-11.5-21(f), 31-6-6.1-11 (Burns Supp. 1987); IOWA CODE ANN. §§ 598.1, .21, .41 (West Supp. 1988); KAN. STAT. ANN. § 60-1610(a)(4)(A) (Supp. 1986); KY. REV. STAT. ANN. § 403.270(3) (Michie/Bobbs-Merrill 1984); LA. CIV. CODE ANN. arts. 146, 157, 250 (West Supp. 1988); ME. REV. STAT. ANN. tit. 19, § 214, 581, 752 (Supp. 1988); MASS. ANN. LAWS ch. 208, § 31 (Law. Co-op. Supp. 1988); MICH. STAT. ANN. § 25.312(6a) (Callaghan 1984); MINN. STAT. ANN. § 518.17 (West Supp. 1988); MISS. CODE ANN. § 93-5-223 to -24 (Supp. 1987); MO. ANN. STAT. § 452.375 (Vernon Supp. 1988); MONT. CODE ANN. § 40-4-222 to -225 (1987); NEV. REV. STAT. ANN. § 125.460, .480, .490 (Michie 1986); N.H. REV. STAT. § 458.17 (1983); N.M. STAT. ANN. § 40-4-9.1 (1986); N.C. GEN. STAT. § 50-13.2(b) (1987); OHIO REV. CODE ANN. § 3109.04-.041 (Anderson Supp. 1987); OKLA. STAT. ANN. tit. 12, § 1275.4 (West 1988); OR. REV. STAT. § 107.105(1) (1987); PA. CONS. STAT. ANN. tit. 23, § 5301-5302 (Purdon Supp. 1988); TEX. FAM.

4. Purpose and Effects of the Statute—The primary purpose of the Act appears to be the legislative encouragement of joint legal custody as the ideal custodial arrangement for children of divorced or separated parents.[59] Although the House sponsor of the Act, Representative G. Lamont Richards, indicated it would reduce the estimated 14,000 single Utah parents who receive public assistance,[60] the major justification for the legislation appears to be social, not economic.[61]

The desirability of a presumption in favor of joint legal custody is the subject of much debate.[62] Proponents argue it allows children of divorced or separated parents to retain two psychological parents, thereby preventing many of the observed problems of divorced children.[63] Opponents argue that joint custody is based on the flawed proposition that men and women make exchangeable contributions to parenting, and that its appeal derives from intuitive notions that it is a "fair result" rather than solid research findings.[64] There also is some evidence that the popularity of joint custody is starting to wane.[65]

CODE ANN. § 14.06(a), 14.021 (Vernon Supp. 1988); UTAH CODE ANN. § 30-3-10 to -10.4 (Supp. 1988); and WIS. STAT. ANN. § 767.24(1)(b) (West Supp. 1988).

59. Senator Hillyard stated: "If this Bill would help five percent of the divorce cases by having the couples reflect on joint custody then the Bill is well worth the effort of doing it because it's really a severe problem of disenfranchisement between the children and the non-custodial parent." Floor Debate, remarks by Sen. Lyle W. Hillyard, 47th Utah Leg., Gen. Sess. (Feb. 3, 1988) (Sen. Recording No. 42, side 2).

60. *See* Floor Debate, remarks by Rep. G. Lamont Richards, 47th Utah Leg., Gen. Sess. (Jan. 19, 1988) (House Recording No. 3).

61. Both House co-sponsors emphasized the social benefits of joint legal custody. Representative Kelly C. Atkinson, a child of divorced parents, said: "I think there needs [sic] to be stronger laws in this state that say it's okay for a child to love both parents, and in the law's eyes they've set up a system to do that." Floor Debate, remarks by Rep. Kelly Atkinson, 47th Utah Leg., Gen. Sess. (Jan. 19, 1988) (House Recording No. 3).

62. *See generally* Fineman, *supra* note 38 (challenging the social and legal assumptions on which joint custody is based, and advocating instead a "primary parent" rule for determining custody questions).

63. *See* Comment, *supra* note 40, at 579. The author states:

> As a group, children of divorced families manifest a wide range of emotional and psychological difficulties, including anxiety, deficits in cognitive performance, delinquency, aggressive behavior and disruptions in sex role development. These problems have been linked to the absence of, or only occasional visitation by, one parental figure (usually the father), which occurs when sole custody is awarded in a divorce.

Id. (citations omitted).

64. *See* Fineman, *supra* note 38, at 734.

65. California, which led the nation with enactment of its joint custody statute in 1980, recently passed a law declaring it has "neither a preference nor presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the court and the family the widest discretion to choose a parenting plan which is in the best interests of the child or children." Act of Sept. 27, 1988, ch. 1442, 1988 Cal. Legis. Serv. 1442 (West) (to

So long as the premise of the statute is questioned, some parental and judicial skepticism is inevitable.[66] This skepticism will be compounded by the inherent difficulties in applying such a general presumption to an individualized, emotionally charged problem like child custody.

Although the premise underlying the statute is subject to attack, the practical effect of the statutory presumption likely will be minimal. First, it is hard to understand why a rebuttable presumption in favor of joint legal custody was created—other than for a symbolic purpose—when no such award may be entered unless both parents agree.[67] If the parents do not agree, there is no possibility of joint legal custody, nor any need to rebut the presumption. If the parents do agree, the court must still find that both parents appear capable of implementing joint legal custody[68] and must also find that a joint award is in the best interest of the child.[69]

The section of the Act relating to the terms of the joint legal custody order[70] may have the most practical impact because it suggests specific terms the court may wish to include in the order. The statute does not require inclusion of the terms, but a judge is likely to adopt them to clarify the respective rights and duties of joint custodians.

The modification section of the Act codifies the judicial standard created in *Hogge v. Hogge*[71] for determining when modification of a child custody order is appropriate. Before a court may consider which custody arrangement best serves the interest of the child, it must first determine whether the threshold requirement of a change in circumstances has been met.[72] The rationale behind this test is that a stable home life is important to a child's develop-

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be codified at CAL. CIV. CODE § 4600(d)). This amendment has been characterized as a response to recent studies indicating that joint custody is inappropriate for some children. *Will California Lead a Retreat? Doubts Grow on Joint Custody*, NAT'L L.J., Oct. 24, 1988, at 3, col. 1.

66. If the Act's margin of passage is any indication, the Utah Legislature strongly endorsed the premise that joint custody is the preferred custodial arrangement. The Act passed the House 63-16, and the Senate 25-1-4. For House and Senate roll calls, see *supra* note 5.

67. *See* UTAH CODE ANN. § 30-3-10.2 (Supp. 1988); *see supra* note 2.

68. *See* UTAH CODE ANN. § 30-3-10.2(2)(c) (Supp. 1988).

69. *See id.* § 30-3-10.2(2)(b).

70. *Id.* § 30-3-10.3.

71. 649 P.2d 51 (Utah 1982).

72. UTAH CODE ANN. § 30-3-10.4(1)(a) (Supp. 1988).

ment and should be protected.[73] The party seeking to disrupt the status quo, therefore, bears the burden of showing changed circumstances that warrant a new custodial arrangement. A 1985 Utah Supreme Court case[74] suggests the threshold "change of circumstances" test would be easily met in the case of a joint custody agreement that breaks down. Justice Zimmerman, concurring in the opinion, noted that an award of joint custody is premised on the parents' ability to cooperate. A failure to make the arrangement work, therefore, indicates a significant change in circumstances warranting reexamination of the original order.[75]

5. Conclusion—The ingredients in any successful child custody arrangement are cooperation, compromise, and subordination of parental differences to the welfare of the child. Unfortunately, the state cannot mandate constructive post-divorce parental behavior. But the state can encourage it. Utah's new joint custody statute is an attempt at such encouragement. However, the premise of the statute—that joint custody is presumptively in the best interest of the child—is still the subject of much debate. This presumption seems to have little practical value, although it may encourage more parents to consider a joint arrangement. The Act does establish helpful judicial standards on when and how to make awards of joint legal custody. The Act does this while leaving the courts the discretion necessary to determine if such an award is appropriate and, if so, how best to fashion it.

V. LABOR LAW

*Amendment to Utah's "Statutory Employer" Statute as Applied to General Contractors**

A 1988 amendment to Utah's "statutory employer" statute significantly limits the liability of general contractors for the workers' compensation payments of their subcontractors' employees.[1]

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73. *Hogge*, 649 P.2d at 54.
74. Moody v. Moody, 715 P.2d 507 (Utah 1985).
75. *See id.* at 510.

* Paul C. Drecksel, Junior Staff Member, *Utah Law Review*.

1. Act of Feb. 23, 1988, ch. 109 (codified at UTAH CODE ANN. § 35-1-42(5)(a)-(c) (1988)) (effective Apr. 25, 1988). This amendment also affects when a sole proprietor, a partner in a partnership and a director or officer of a corporation are considered statutory employees. UTAH CODE ANN. § 35-1-42(e)-(g) (1988). This Development, however, addresses

The amendment does so by limiting the circumstances in which a general contractor can be considered the statutory employer of those employees.[2] This change from the common law interpretation of the statute, in addition to markedly departing from the statute's previously professed purposes, is likely to increase the exposure of general contractors to the civil suits of their subcontractors' employees.

1. Background—Forty-four states, including Utah, currently have statutory employer or "contractor under" statutes.[3] These statutes impose secondary liability on a general contractor for the workers' compensation benefits of its subcontractors' employees if the court deems the general contractor to be the statutory employer of those employees.[4] The liability is secondary in that it is only imposed if the subcontractor is uninsured and insolvent.[5]

(a) Pre-Amendment "Statutory Employer" Standard. Before the 1988 amendment to Utah's statutory employer statute,[6] courts used a broad standard to determine whether a general contractor was a statutory employer for workers' compensation purposes. The court most recently articulated this standard in *Bennett v. Industrial Commission of Utah.*[7] In *Bennett*, the Utah Supreme Court held that a general contractor was the statutory employer of its subcontractor's employee despite the fact that the injured worker was hired to do only one job, was paid one lump sum with no deductions, and was subject to no demonstrable

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the statutory employer concept only as applied to general contractors.

2. *See* UTAH CODE ANN. § 35-1-42(5)(b), (c) (1988).

3. 2A A. LARSON, WORKMEN'S COMPENSATION LAW § 72.31(a) n.46 (1987) (listing the states without such a statute). The six states that currently do not have "statutory employer" or "contractor under" statutes are California, Delaware, Iowa, Maine, Rhode Island, and West Virginia. *Id.*

4. *See, e.g.*, UTAH CODE ANN. § 35-1-42 (1988) (defining Utah's statutory employer standard); 1C A. LARSON, *supra* note 3, § 49.11 (1986) (explaining the statutory employer concept).

5. *See* Lamb v. W-Energy, Inc., 663 F. Supp. 395, 398 n.8 (D. Utah 1987) ("In the increasingly common situation displaying a hierarchy of principle contractors upon subcontractors upon sub-subcontractors, if an employee of the lowest subcontractor on the totem pole is injured there is no practical reason for reaching up the hierarchy any further than the first insured contractor." (citing 1C A. LARSON, *supra* note 3, § 49.14 (1986)).

6. Prior to the amendment, this statute was found at UTAH CODE ANN. § 35-1-42(3)(b) (Supp. 1987).

7. 726 P.2d 427 (Utah 1986). For a thorough analysis of the *Bennett* case, see *Recent Developments in Utah Law*, 1988 UTAH L. REV. 149, 236-43.

amount of control in the details of his work.[8]

In its analysis, the *Bennett* court applied a two-part test derived from Utah's statutory employer statute.[9] Under this test, the court considers the general contractor the statutory employer of all its subcontractors' employees if "(1) the general contractor retains some supervision or control over the subcontractor's work, and (2) the work . . . is a 'part or process in the trade or business of the [general contractor].' "[10]

In applying this test, the *Bennett* court first addressed the "part or process" requirement, stating that "any portion of the general contractor's construction project which is subcontracted out will ordinarily be considered 'part or process in the trade or business of' the general contractor."[11] Thus the court established a presumption that subcontracted work was part or process in the trade or business of general contractors.

The *Bennett* court then delineated a similarly broad standard regarding the "supervision or control" element of the statute.[12] The court stated that this element would be satisfied if the general contractor simply retained "[t]he power to supervise or control the ultimate performance of subcontractors."[13] Inasmuch as general contractors virtually always retain control over the ultimate performance of subcontracted work, this interpretation, along with the court's interpretation of the statute's part or process requirement, essentially made all general contractors statutory employers.[14]

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8. *Bennett*, 726 P.2d at 429. This was the factual finding of the Industrial Commission. It is important to note that the question of control addressed by the Industrial Commission related to the control exercised by the subcontractor, not the general contractor. Because the Industrial Commission found that Bennett was not an employee of the subcontractor, it never addressed the question of general contractor control. When the court addressed the question of the general contractor's control, it merely stated that the "power to supervise or control the ultimate performance of subcontractors satisfies the requirement that the general contractor retain supervision or control over the subcontractor." *Id.* at 432.

9. The Utah Supreme Court first delineated this test in Pinter Constr. Co. v. Frisby, 678 P.2d 305, 307 (Utah 1984). The *Pinter* court derived the test from UTAH CODE ANN. § 35-1-42(2) (1984). The language in that statute has not been significantly altered and is now found at *id.* § 35-1-42(5)(a) (1988).

10. *Bennett*, 726 P.2d at 431.

11. *Id.*

12. *Id.* at 431-32.

13. *Id.* at 432. The court went on to reaffirm its broad interpretation of the statute, stating that, "as long as a subcontractor's work is a part or process of the general contractor's business, an inference arises that the general contractor has retained supervision or control over the subcontractor sufficient to meet the requirement of § 35-1-42(2)." *Id.* (citation omitted).

14. The *Bennett* court justified its expansive interpretation by stating that "the remedial purpose of the Workmen's Compensation Act supports the conclusion that § 35-1-42(2)

This broad interpretation seems to comport with the generally accepted policy reasons underlying statutory employer statutes. The statutes are passed " 'to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on the presumably responsible principal contractor, who has it within his power, in choosing subcontractors, to pass upon their responsibility and insist upon appropriate compensation protection for their workers.' "[15] The laws are also designed " 'to forestall evasion of [workers' compensation acts] by those who might be tempted to subdivide their regular operations among subcontractors, thus escaping direct employment relations with the workers.' "[16]

The *Bennett* court's broad interpretation of the statutory employer concept serves these aims by imposing workers' compensation liability on a greater number of "presumably responsible principal contractors."[17] By so assigning this liability the court virtually eliminated the possibility that the Workers' Compensation Act could be avoided. A general contractor who subdivides its regular operations among subcontractors nonetheless will find itself liable for workers' compensation insurance for its subcontractors' employees.[18]

(b) Current "Statutory Employer" Standard. As a direct response to the *Bennett* court's expansive interpretation of Utah's statutory employer statute, and the resultant increase in general contractors' workers' compensation liabilities, the Utah Legislature amended Utah's Workers' Compensation Act to restrict both the supervision or control requirement and the part or process require-

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should be construed in favor of protecting the employee." *Id.* (citations omitted).

15. *Id.* at 431 (quoting 1C A. LARSON, *supra* note 3, § 49.14 (1986)); *see also* Pinter Constr. Co. v. Frisby, 678 P.2d 305, 307-08 (Utah 1984) (citing the same policy justifications).

16. *Bennett*, 726 P.2d at 431 (quoting 1C A. LARSON, *supra* note 3, § 49.15).

17. *Id.*

18. By assuring that the general contractor will at least indirectly bear the workers' compensation burden of its subcontractors' employees, the *Bennett* court's interpretation of the statute comports with the traditional policy of workers' compensation—that of "allocating the burden of [workers' compensation] payments to the most appropriate source of payment, the consumer of the product." 1 A. LARSON, *supra* note 3, § 2.20 (1985); *see also* Henrie v. Rocky Mountain Packing Corp., 113 Utah 415, 427, 196 P.2d 487, 493 (1948) ("The intention of [workers' compensation is] . . . to make human wastage in industry part of the cost of production."); Chandler v. Industrial Comm'n, 55 Utah 213, 214, 184 P. 1020, 1021 (1919) ("The theory of the Compensation Act is that the whole cost and expense of conducting the business [including compensation for injuries to employees] is added to the cost of the articles that are produced and sold, and hence . . . such costs and expenses are borne by the . . . consumers of the articles produced . . . .").

ment with regard to general contractors.[19] As to the former, the amendment states: "A general contractor may not be considered to have retained supervision or control over the work of a subcontractor solely because of the customary trade relationship between general contractors and subcontractors."[20]

This amendment was added to reverse the *Bennett* court's interpretation of the statutory employer statute's supervision or control requirement.[21] While it establishes that satisfaction of this requirement cannot be presumed merely because of the customary trade relationship between general contractors and subcontractors, it does not define a standard for determining what can satisfy this requirement.

The 1988 amendment also altered the *Bennett* court's interpretation of the statute's part or process requirement,[22] adding the following language:

> A portion of a construction project subcontracted to others may be considered to be a part or process in the trade or business of the general building contractor, only if the general building contractor, without regard to whether or not it would need additional employees, would perform the work in the normal course of its trade or business.[23]

This language erases the presumption raised in *Bennett* that any subcontracted work will "ordinarily be considered 'part or process in the trade or business of' the general contractor."[24] It limits the types of subcontracted work that will satisfy the part or process requirement to those that the general contractor would perform in the normal course of its trade or business. The general contractor subcontracting out other types of work will not be considered the statutory employer of the individuals thereby employed.[25]

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19. The sponsor of the amendment stated that it was designed to "take [the statutory employer standard] back to where it was prior to the *Bennett* decision . . . that brought about the problem to contractors throughout the state that were being held liable for [the workers' compensation payments of their subcontractors' employees]." Floor Debate, remarks of Rep. H. Craig Moody, 47th Utah Leg., Gen. Sess. (Feb. 10, 1987) (House Recording No. 8).

20. UTAH CODE ANN. § 35-1-42(5)(b) (1988).

21. *Id.; see supra* note 18.

22. *Bennett*, 726 P.2d at 431.

23. UTAH CODE ANN. § 35-1-42(5)(c) (1988).

24. *Bennett*, 726 P.2d at 431.

25. Thus, in the common situation where a general contractor subcontracts work out precisely because it is of a type not performed in the normal course of its trade or business, the general contractor will not be considered a "statutory employer."

2. Effects of the Amendment—The amendment to the supervision or control[26] and part or process[27] requirements of Utah's statutory employer statute likely will have one significant effect: courts will deem fewer general contractors the statutory employers of their subcontractors' employees.[28] This result, in addition to representing a marked departure from previously professed public policy, is likely to increase the exposure of general contractors to the civil suits of their subcontractors' employees.

(a) Change in Public Policy. Under the *Bennett* court's broad interpretation of Utah's statutory employer statute, a general contractor faced "ultimate liability"[29] for the workers' compensation coverage of its subcontractors' employees. With the changes introduced by the 1988 amendment to that statute, this is no longer true. A general contractor failing to meet the statute's amended requirements is no longer the statutory employer of those employees. As a result, ultimate liability for workers' compensation coverage on that employee is shifted from the general contractor to the Uninsured Employers' Fund of Utah—a fund designed to "assist in the payment of workers' compensation benefits" to one who is entitled to benefits but whose employer is insolvent.[30]

This shift in liability markedly departs from the previously professed policy reasons underlying the statute—the imposition of ultimate liability on the presumably responsible principle contractor in an attempt to protect employees and prevent evasion of the

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26. UTAH CODE ANN. § 35-1-42(5)(b) (1988).

27. *Id.* § 35-1-42(5)(c).

28. In RGD Assocs./Jorman Corp. v. Industrial Comm'n, 741 P.2d 948 (Utah 1987), the court stated that it was "obliged to presume that a significant change in the words of the statute by the Legislature was intended to effectuate a change in interpretation." *Id.* at 951. Thus it seems that Utah courts are obliged to presume that the changes to § 35-1-42 were intended to effectuate a change in its interpretation.

29. The term "ultimate liability," as used by Professor Larson and the *Bennett* court, is somewhat inaccurate. Even under the broadest interpretation of the "statutory employer" concept, general contractors do not face ultimate liability for the workers' compensation coverage of their subcontractors' employees. Rather, ultimate liability always rests with the Uninsured Employers Fund of Utah. This fund is designed to "assist[] in the payment of workers' compensation benefits" to one who is entitled to the benefits but whose employer is insolvent. UTAH CODE ANN. § 35-1-107(1) (1988). This inaccuracy, however, does not affect the validity of the argument. The Fund will not be liable if there is an insured or solvent general contractor who is deemed to be the injured worker's "statutory employer." *See supra* note 4. Thus a narrow construction of the statute shifts liability to the Fund by removing the general contractor from the hierarchy of statutory employers.

Because the term "ultimate liability" is used by commentators and the courts, and because, in substance, it is not inaccurate, the term will be used throughout this Development.

30. UTAH CODE ANN. § 35-1-107(1) (1988).

Workers' Compensation Act.[31] The presumably responsible principal contractor no longer will be forced to insist on appropriate compensation coverage for its subcontractors' employees. As a result, general contractors will have increased opportunities to evade the Workers' Compensation Act by subdividing their operations among small, cost-cutting subcontractors who fail to carry compensation insurance.[32]

(b) Increased Exposure of General Contractors to Civil Suit. In addition to representing a change in public policy, the narrow definition of the statutory employer concept contained in the amended statute is likely to increase the exposure of general contractors to the civil suits of their subcontractors' employees. The Utah Code makes workers' compensation the exclusive remedy of an injured worker as against the employer.[33] Section 35-1-62 of the Code, however, gives an injured employee the right to maintain an action for damages against any third person whose neglect caused the injury.[34] Prior court decisions establish that a statutory employer is not a third person within the meaning of section 35-1-62.[35] Thus a general contractor deemed a statutory employer is immune from the civil suits of its statutory employees.

Under the *Bennett* court's expansive interpretation of Utah's

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31. *See supra* text accompanying note 15.

32. This shift in liability is likely to result in an increase in the cost of workers' compensation insurance for all employers. Under the Utah Code, "[f]unds for the Uninsured Employer's Fund [are] provided under Subsection 59-9-101(2)(a)." UTAH CODE ANN. § 35-1-107(2) (1988). That subsection provides that a tax sufficient to support the Uninsured Employers' Fund on a "positive cash flow basis" shall be assessed to all insurers writing workers' compensation insurance in Utah. *Id.* § 59-9-101(2)(a)-(b) (Supp. 1988). Thus, as the Fund's liability increases, so must the premium tax.

It is quite likely that this increased premium tax will be passed along to purchasers of workers' compensation insurance in the form of higher premiums. Because all employers are required to obtain some form of workers' compensation insurance for their employees, it is likely that this increase ultimately will be financed by all employers. *See id.* § 35-1-46.30 (1988). This section requires that all employers obtain compensation coverage for their employees through the Workers' Compensation Fund of Utah, through an authorized writer of workers' compensation, or through proof of financial ability to make direct compensation payments. *See id.*

33. *Id.* § 35-1-60 (1988). In explaining the exclusive nature of workers' compensation, Professor Larson states that "[t]his is part of the *quid pro quo* in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts." 2A A. LARSON, *supra* note 3, § 65.11 (1988).

34. UTAH CODE ANN. § 35-1-62 (Supp. 1988).

35. *See* Lamb v. W-Energy, Inc., 663 F. Supp. 395, 398 (D. Utah 1987); Hinds v. Herm Hughes & Sons, Inc., 577 P.2d 561, 562-63 (Utah 1978).

statutory employer statute, a general contractor virtually always would be protected from civil suits brought by the injured employees of its subcontractors. The recent amendment to the statute, however, erodes that protection. General contractors whose activities do not satisfy the statute's amended requirements will not be deemed the statutory employers of their subcontractors' employees. As a result, general contractors, as third persons, will find themselves vulnerable to the civil suits of these employees.

3. Conclusion—The 1988 amendment to Utah's statutory employer statute departs markedly from the statute's previously professed policy justifications. By limiting the statutory employer concept, the amendment shifts ultimate workers' compensation liability from general contractors to the Uninsured Employers' Fund of Utah. Even as to general contractors, this result is of dubious benefit. Any decrease in general contractors' workers' compensation liabilities likely will be largely offset by a corresponding increase in their exposure to the civil suits of their subcontractors' employees. Considered in conjunction with the amendment's abandonment of accepted public policy, this increased exposure casts at least some doubt on the appeal of the amendment.

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