USE IT OR LOSE IT!: A CRIMINAL DEFENDER'S GUIDE TO THE UTAH CONSTITUTION

R. SHANE JOHNSON[1]

TABLE OF CONTENTS

I. INTRODUCTION

For more than two decades, the Utah Supreme Court has encouraged attorneys to use Utah's Declaration of Rights in its Constitution as the starting point for constitutional challenges rather than as an afterthought to the federal Bill of Rights.[2] With rare exception, the criminal defense bar has rarely heeded this call for judicial federalism.[3] Following numerous hints and holdings suggesting the Utah Constitution's search and seizure provision in particular carries more robust protections than its federal counterpart,[4] the court reached a seeming boiling point in the 2005 case of *Brigham City v. Stuart*.[5] Lacking an argument that article I, section 14 provides greater

[1] J.D., S.J. Quinney University of Utah College of Law (2012).

[2] *See* Christine M. Durham, *Employing the Utah Constitution in the Utah Courts*, 2 Utah Bar J. 9, 25-27 (1989); *State v. Tiedemann*, 2007 UT 49, ¶ 36, 162 P.3d 1106 ("The federal law . . . will serve only as a contingent rule in Utah until this court has settled the primary question of state law, and all parties . . . are well-advised to assist this court in its obligations to interpret that law.").

[3] *See, e.g., State v. Earl*, 716 P.2d 803, 806 (Utah 1986) (noting, "despite our willingness to independently interpret Utah's constitution . . . the analysis of state constitutional issues in criminal appeals continues to be ignored."); *State v. Worwood*, 2007 UT 47, ¶ 14-15, 164 P.3d 397 ("We would have welcomed an analysis under article I, section 14 of the Utah Constitution; however, we find Worwood's state constitutional claim to be procedurally barred and inadequately briefed.").

[4] *See, e.g., State v. Brake*, 2004 UT 95, ¶ 16 n. 2, 103 P.3d 699; *State ex rel. A.C.C.*, 2002 UT 22, ¶ 27 n. 7, 44 P.3d 708; *State v. Norris*, 2001 UT 104, ¶ 28, 48 P.3d 872; *State v. Bisner*, 2001 UT 99, ¶ 46 n. 5, 37 P.3d 1073; *State v. Kohl*, 2000 UT 35, ¶ 12 n. 3, 999 P.2d 7 .

[5] *See* 2005 UT 13, 122 P.3d 506.

protection for the sanctity of privacy in the home than federal interpretations of the Fourth Amendment, the court had no choice but to root its decision in the federal provision.[6] In its opinion, predictably reversed on federal constitutional grounds by a unanimous United States Supreme Court,[7] the Utah Supreme Court warned:

> The debate over the proper relationship between the Bill of Rights and [the Utah Constitution's] Declaration of Rights has lain dormant for almost a decade. This lull does not signal resolution of the matter. The mere passage of time and the accumulation of decisions issued by this court on appeals brought solely on Fourth Amendment grounds may, however, ultimately overpower the merits of an independent analysis of search and seizure law under our Declaration of Rights. It would be unfortunate, indeed, if such a de facto abdication of our responsibility as guardians of the individual liberty of our citizens were to occur. Because we are resolute in our refusal to take up constitutional issues which have not been properly preserved, framed and briefed . . . we are once again foreclosed from undertaking a principled exploration of the interplay between federal and state protections of individual rights without the collaboration of the parties to an appeal. This collaborative effort should be renewed.[8]

Yet defense attorneys generally continue to ignore this charge.[9] Whether the court's threat constitutes bluff and bluster or the inevitable consequence of a constitution ignored is yet to be determined. This article encourages the criminal defense bar "to assist in the evolution of a rich and eventful state constitutional history," as Justice Christine Durham envisioned in 1989.[10] To this end, the article intends to practically assist attorneys in developing State constitutional claims.[11]

Part II briefly reviews the court's ongoing campaign to develop an independent body of Utah constitutional law, possible explanations for the

---

[6] *See id.* at ¶¶ 10-13.

[7] *Brigham City v. Stuart*, 547 U.S. 398 (2006).

[8] *Stuart*, 2005 UT 13 at ¶ 14, 122 P.3d 506 (internal citations omitted).

[9] *See e.g.*, *State v. Price*, 2012 UT 7, ¶ 6 n. 2, 270 P.3d 527; *State v. Maxwell*, 2011 UT 81, ¶¶ 31-33, 275 P.3d 220; *State v. Harker*, 2010 UT 56, ¶ 10 n. 8, 10, 240 P.3d 780; *State v. Worwood*, 2007 UT 47, ¶ 14-15, 164 P.3d 397; *State v. Rodriquez*, 2007 UT 15, ¶ 15 n. 1, 156 P.3d 771; *State v. Alverez*, 2006 UT 61, ¶¶ 7 n. 2, 19, 147 P.3d 425; *State v. Rynhart*, 2005 UT 84, ¶¶ 12, 24, 125 P.3d 938.

[10] *See* Durham, *supra*, note 1, at 27.

[11] For an albeit dated, yet keen treatment of these precise issues, *see* Kenneth R. Wallentine, *Heeding the Call: Search and Seizure Jurisprudence Under the Utah Constitution, Article I, Section 14*, 17 J. Contemp. L. 267 (1991).

criminal defense bar's failure to join those efforts, and incentives for attorneys to pursue this avenue of relief. Part III outlines the court's preferred analytical framework for claims seeking greater protection under the Utah Constitution where little if any Utah precedent would support such departures. Part IV highlights key decisions of the court, with nearly exclusive focus on constitutional criminal procedure, and suggests areas and issues that may be ripe for development.

II. LAGGING BEHIND THE UTAH SUPREME COURT'S MARCH TOWARD JUDICIAL FEDERALISM

Beginning in 1980 with its 3-2 decision in *Hansen v. Owens*, the Utah Supreme Court signaled a willingness to interpret the fundamental protections guaranteed by Utah's Declaration of Rights separate from those found under the federal Bill of Rights.[12] The majority interpreted the operative language of article I, section 12—"[t]he accused shall not be compelled *to give evidence* against himself"—as preventing the government from compelling a handwriting exemplar from a criminal defendant.[13] This was in contrast with the Fifth Amendment privilege against compelling a person to act as a "witness" against himself, which applies only to so-called "testimonial" or "communicative" evidence.[14]

Although this particular departure was short-lived,[15] the court continued to independently interpret non-criminal-procedure provisions of the Declaration of Rights, such that the Utah Constitutional ultimately carries important implications for criminal defendants. For example, in the 1984 case of *Malan v. Lewis*, the court struck down Utah's so-called automobile guest statute[16] (barring suit for negligence by a certain class of nonpaying automobile passengers) as violating the uniform operation of laws provision of the Utah Constitution.[17] Building on the principles announced in *Malan* and its progeny, the court later held that a facially neutral statutory scheme giving prosecutors unfettered discretion to certify juveniles for prosecution in adult courts also violated the uniform operation of laws provision, even though it may have survived scrutiny under federal equal protection standards.[18]

---

[12] *See* 619 P.2d 315 (Utah 1980) (overruled by *American Fork City v. Crosgrove*, 701 P.2d 1069, 1075 (Utah 1985)); *see also Andrews v. Morris*, 607 P.2d 816, 818 (Utah 1980) (appellant challenging death sentence "asserts no violation of the Constitution of Utah although it affords similar, if not more extensive protections.").

[13] 619 P.2d at 317 (*quoting* UTAH CONST., art. I, § 12) (emphasis by the court).

[14] *See id.*

[15] *See, i.e., American Fork City v. Crosgrove*, 701 P.2d 1069 (Utah 1985) (overruling the *Hansen* holding based on a contextual interpretation of article I, section 12).

[16] 693 P.2d 661 (Utah 1984).

[17] UTAH CONST. art. I, § 24.

[18] *State v. Mohi*, 901 P.2d 991 (Utah 1995).

Despite later reversing its this holding,[19] the court continued to urge criminal defenders to pursue challenges under the state constitution,[20] suggesting an approach set forth by the Vermont Supreme Court.[21] But in several subsequent decisions, discussed later, the court interpreted Utah constitutional provisions without reference or apparent fidelity to the approach it recommended, perhaps explaining why the defense bar has generally followed suit or, equally as likely, due to criminal defenders' failures to heed the call.

The court's modern era of judicial federalism in the criminal procedure area began in earnest in 1990 with its decision in *State v. Larocco*. But the push was marked by fits and starts.

In *Larocco*, two justices in the plurality found that article I, section 14 requires probable cause *and* exigent circumstances to justify a warrantless vehicle search, while federal Fourth Amendment jurisprudence at the time was "the source of much confusion among judges, lawyers, and police."[22] The plurality's stated rationale for the departure was "to try to simplify, if possible, the search and seizure rules so that they can be more easily followed by the police and the courts, and, at the same time, provide the public with consistent and predictable protection . . . ."[23] The plurality also pointed to sister states that had departed from the federal orthodoxy.[24]

Soon after, the court held 4-1 in *State v. Thompson* that depositors have an expectation of privacy in banking records under article I, section 14, which cannot be breached by a government subpoena.[25] It made that ruling despite the United States Supreme Court having ruled the opposite under the Fourth Amendment in *United States v. Miller*.[26] *Thompson* did not turn on inconsistent or confused federal interpretations of the Fourth Amendment, as it did in *Larocco*. Instead, the court simply disagreed with the rationale for the Supreme Court's holding in *Miller*, and noted its widespread criticism.[27]

In *Sims v. State Tax Commission*, a plurality of the court applied *Larocco*, stressing "the primacy in Utah of the warrant requirement" when it

---

[19] See *Crosgrove*, *supra*, note 14.

[20] *State v. Hygh*, 711 P.2d 264, 271 (Utah 1985) (Zimmerman, J., concurring) ("I cannot agree . . . that the scope of the warrant requirement under article I, section 14 is congruent with that developed by the federal courts under the fourth amendment . . . ."); *State v. Watts,* 750 P.2d 1219, 1221 n. 8 (Utah 1988) ("[C]hoosing to give the Utah Constitution a somewhat different construction may prove to be an appropriate method for insulating this state's citizens from the vagaries of inconsistent interpretations given to the fourth amendment by the federal courts." (citations omitted)).

[21] *State v. Earl*, 716 P.2d 803, 805-06 (Utah 1986) ("We cite with approval the summary of scholarly commentary and analytic technique set forth . . . in *State v. Jewett*, Vt., 500 A.2d 233 (1985).").

[22] 794 P.2d 460, 466, 470-71.

[23] *Id.* at 469.

[24] *Id.* at 465-66.

[25] 810 P.2d 415, 418 (Utah 1991)

[26] 425 U.S. 435, 443-44 (1976).

[27] *Thompson*, 810 P.2d at 417-18.

invalidated a suspicionless investigatory roadblock by police.[28] The court contrasted its "warrant approach"—which considers the expectation of privacy inquiry as the threshold criterion for determining whether article I, section 14 applies—with federal vacillation between that and a "reasonableness approach."[29]

Despite the court's earlier guidance, the court problematically failed to apply a uniform independent approach when deciding these state constitutional issues, nor did it clearly define the circumstances that would justify a departure. Indeed, in the 1996 decision of *State v. Anderson*, a plurality of the court—which did not include members of the *Larocco* plurality—seized on this ambiguity, declaring the court's policy as "endeavor[ing] toward uniformity in the application of the search and seizure requirements of the state and federal constitutions" except in "compelling circumstances."[30]

The matter had not been resolved almost a decade later when the court noted "an ongoing and robust discussion over whether and to what extent we should defer to the federal courts when called upon to interpret provisions of our Declaration of Rights . . . ."[31] Again the court did not decide between the alternatives of deference except in "compelling circumstances," as the *Anderson* plurality suggested,[32] or whether "[t]he framers of the Utah Constitution necessarily intended that this Court should be both the ultimate and final arbiter of the meaning of the provisions in the Utah Declaration of Rights and the primary protector of individual liberties," as then-Justice Stewart reckoned in a concurring opinion.[33]

Utah's intermediate appellate court only added to the confusion. For example, in *State v. Bobo*, the Utah Court of Appeals invited parties to use the precise approach endorsed by the Utah Supreme Court in *State v. Earl* when seeking independent analysis under the state constitution.[34] But then in *State v. Jackson*, the appeals court shirked its role in such matters, explaining that the task of "fashioning a state constitutional rule different from the federal rule . . . lies more appropriately with the Utah Supreme Court . . . ."[35] The *Jackson* court also interpreted *Larocco* and *Thompson* as permitting departures from federal search and seizure jurisprudence only if it will establish "a more workable rule for police and trial courts than exists under confusing federal case law."[36]

Given this regime of ambiguity, the criminal defense bar's lack of buy-in was understandable. But that regime changed decidedly in the 2007

---

[28] 841 P.2d 6, 8-9 (Utah 1992).
[29] *Id.* at 8.
[30] 910 P.2d 1229, 1235 (Utah 1996) (plurality opinion).
[31] *Brigham City v. Stuart*, 2005 UT 13, ¶ 13, 122 P.3d 506.
[32] 910 P.2d at 1235.
[33] *Id.* at 1240.
[34] 803 P.2d 1268, 1272 n. 5 (Utah Ct. App. 1990).
[35] 937 P.2d 545, 550 (Utah Ct. App. 1997).
[36] *Id*. at 549 (citations omitted).

decision of *State v. Tiedemann*, with a 4-1 majority clearly articulating the view that prevails today:

> [T]he State's position that the analysis of federal constitutional provisions constitutes the default interpretive stance of this court vis-à-vis state law is not correct. The fact that the state and federal constitutional language is identical does not require a claimant to create some threshold for independent analysis of the state language. This court, not the United States Supreme Court, has the authority and obligation to interpret Utah's constitutional guarantees . . . and we owe federal law no more deference in that regard than we do sister state interpretation of identical state language.[37]

The *Tiedemann* Court rejected the federal rule that criminal defendants must prove the government acted in bad faith to obtain a remedy for destruction of evidence under Fifth Amendment due process.[38] Under the Utah Constitution's due process provision,[39] the court held that fundamental fairness dictates a balance, considering both the reprehensibility of police action and the degree of prejudice to the defendant.[40]

Before *Tiedemann*, suggested explanations for the criminal defense bar's recalcitrance included lack of familiarity with the Utah Constitution or its importance, lack of time or know-how to do the research required, and a belief that such arguments are futile.[41] After *Tiedemann*, no excuse remains to treat the Utah Constitution as anything but the preeminent authority in constitutional matters. And, although the issue has yet to arise in Utah, other courts have suggested that failure to pursue claims under strong state constitutions may constitute ineffective assistance of counsel or malpractice.

Former Oregon Supreme Court Justice Hans Linde, credited with developing the state constitutional primacy approach,[42] commented that "[a] lawyer today representing someone who claims some constitutional protection and who does not argue that the state constitution provides that

---

[37] 2007 UT 49, ¶ 33, 162 P.3d 1106.

[38] *Id.* at ¶ 44; *see also Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (*holding* that defendant must prove destruction of evidence done in bad faith to violate federal due process).

[39] UTAH CONST. art. I, § 7.

[40] *Tiedemann*, 2007 UT 49, ¶ 45, 162 P.3d 1106.

[41] *See* Paul Wake*, A Precious Birthright or Federal Porridge: Which Should Utah Lawyers Choose?* http://www.utahbar.org/utah-bar-journal/article/a-precious-birthright-or-federal-porridge-which-should-utah-lawyers-choose/, posted April 26, 2007, (last visited April 27, 2015).

[42] *See* Hans A. Linde, *First Things First: Rediscovering the State's Bills of Rights*, 9 U. Balt. L. Rev. 379 (1980).

protection is skating on the edge of malpractice."[43] In a strongly worded opinion, three of six justices of the Iowa Supreme Court suggested more recently that failure by an attorney to raise a state constitutional challenge, even one that would not clearly prevail, could constitute ineffective assistance of counsel.[44] While not reaching that issue, the three members of the court stressed:

> In light of our jealously guarded right and duty to differ in our interpretation of state constitutional provisions, counsel should be attentive to the possibility that we might not follow Supreme Court precedent in cases involving the interpretation of the Iowa Constitution. Instead of following the approach of the Supreme Court, we might fashion an independent state rule based, in whole or in part, upon a dissenting opinion of the Supreme Court, upon an alternate approach utilized by other state supreme courts under state constitutional provisions similar to Iowa's, upon analysis of law found in the academic literature, or upon our collective constitutional common sense distilled from law, logic, and experience. When a defendant has a potential claim under both the United States and Iowa Constitutions, counsel should ordinarily scour these sources to determine if there is a solid legal basis for asserting an independent interpretation of the Iowa Constitution which would be more beneficial to the accused than is available under the Federal Constitution.[45]

While the Utah Supreme Court has given no indication it would employ such a cudgel for failures to raise state constitutional claims, defendants are far better served by counsel who recognize and wield all available options for advocacy. Moreover, lawyers practicing in Utah today hold a rare and exciting invitation to help mold the contours of the state's guiding legal document. This should be a welcome invitation.

III. DEVELOPING A NOVEL STATE CONSTITUTIONAL CLAIM

The court prefers the "primacy" approach to framing and briefing constitutional questions, stressing that "it is part of the inherent logic of federalism that state law be interpreted independently and *prior to*

[43] *State v. Jewett*, 500 A.2d 233 (Vermont 1985) (quoting Welsh & Collins, *Taking State Constitutions Seriously*, 14 The Center Mag. 6, 12 (Sept./Oct. 1981)).

[44] *State v. Effler*, 769 N.W.2d 880, 897 (Appel, J., opinion, joined by Hecht and Wiggins, JJ.) (Iowa 2009).

[45] *Id.* at 895.

consideration of federal questions."[46] Under this model, "a state court looks first to state constitutional law, develops independent doctrine and precedent, and decides federal questions only when state law is not dispositive."[47]

There is no precise "formula" required.[48] But "mere mention of state provisions will not suffice."[49] Except in cases of plain error, "a state constitutional law argument must be raised in the trial court, preserved through the appellate process, and adequately briefed to [the Utah Supreme Court.]."[50] The court urges a traditional approach to constitutional interpretation by looking: (1) primarily to the language of the constitution itself, then to (2) supporting historical and textual evidence, (3) sister state law, and (4) policy arguments in the form of economic and sociological materials.[51]

No single type of argument is indispensable, and those listed above are not exhaustive.[52] The court will also entertain arguments for greater protections based on flawed, confused, inconsistent, or vague interpretations of federal provisions.[53] And, although federal constitutional jurisprudence is not controlling, it can be persuasive.[54] To this end, defenders should mine the dissents in close United States Supreme Court cases for arguments that the Utah Constitution should be interpreted to provide its citizens greater protections than the constitutional "floor" provided by the federal rulings.[55]

In 2006, Utah criminal defense attorney Ralph Dellapiana produced a comprehensive example of a challenge by ably distilling the somewhat abstruse Vermont approach endorsed by the court some 20 years earlier in *Earl*.[56] Dellapiana summarized the Vermont approach as:

1. reviewing the history of the state constitution, to examine "the controversies, attitudes, and decisions of the period during which the constitutional provision at issue was proposed and ratified;"
2. analyzing the textual construction of the provision, which "considers the present sense of the words of the provision;"

---

[46] *State v. Tiedemann*, 2007 UT 49, ¶ 33, 162 P.3d 1106 (*citing* Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt L. Rev. 379, 383-84 (1980); *West v. Thomson Newspapers*, 872 P.2d 999, 1006 (Utah 1994)).

[47] *State v. Worwood*, 2007 UT 47, ¶ 14-15, 164 P.3d 397 (citations and internal quotation punctuation omitted).

[48] *Tiedemann*, 2007 UT 49, ¶ 37.

[49] *Id.*

[50] *Worwood*, 2007 UT 47, ¶ 18.

[51] *Tiedemann*, 2007 UT 49, ¶ 37 (*citing, e.g., State v. Gardner*, 947 P.2d 630, 633 (Utah 1997)).

[52] *See Worwood*, 2007 UT 47, ¶ 18.

[53] *Tiedemann*, 2007 UT 49, ¶ 37 (citations omitted).

[54] *State v. Debooy*, 2000 UT 32, ¶ 10, 996 P.2d 546.

[55] *See West v. Thompson Newspapers*, 872 P.2d 999, 1007 (Utah 1994).

[56] Ralph Dellapiana, *Preserving State Constitutional Issues in the Trial Court*, 19 Utah Bar J. 3, 12-16 (2006).

3. comparing the decisions of other states' courts construing their states' constitutional provisions of similar or identical language;
4. reviewing sociological materials;
5. doing a doctrinal analysis which "asserts principles derived from precedent;"
6. using a prudential analysis, which "advances a particular doctrine according to the practical wisdom of the courts;"
7. employing a structural analysis, claiming that "a particular principle or practical result is implicit in the structure of government and the relationships that are created by the constitution among citizens and government;"
8. making an ethical argument, which relies on "a characterization of American institutions and the role within them of the American people in attempting to legitimize judicial review of the constitutional provisions;" and
9. using "any other approach that an imaginative lawyer might offer."[57]

A. PLAIN LANGUAGE

For arguments based on state constitutional provisions that differ textually from their federal counterparts, the plain language must be the starting point. For example, the court has held that article I, section 9, which provides that "[p]ersons arrested or imprisoned shall not be treated with unnecessary rigor," protects arrestees and inmates against "needlessly harsh, degrading, or dehumanizing treatment," in addition to the prohibition of cruel and unusual punishment under the Eighth Amendment.[58] Similarly, the Utah Constitution's uniform operation of laws provision provides different protections than the Fourteenth Amendment's Equal Protection Clause.[59]

Perhaps the liveliest illustration of the justices' various approaches to textual interpretation came with the 2006 decision in *American Bush v. South Salt Lake*. There, the court held in a 3-2 decision that the free speech provisions of the Utah Constitution do not protect nude dancing exhibitions.[60]

Writing for the majority in *American Bush*, Justice Parrish noted that the justices should "first look to the text's plain meaning," but that they should also "inform [their] textual interpretation with historical evidence of the framers' intent."[61] For Justice Parrish, that evidence took the form of

[57] *Id.* at 12-13 (*citing State v. Jewett*, 500 A.2d at 225-227, 236-37 & n.14 (Vt. 1985)).

[58] *See Dexter v. Bosko*, 2008 UT 29, ¶¶ 7-9, 11-17, 184 P.3d 592 (citation and internal quotes omitted).

[59] *See, e.g.*, *State v. Mohi*, 901 P.2d 991, 997 (Utah 1995).

[60] 2006 UT 40, 140 P.3d 1235; *see also* Furse, Evelyn J., *The Successful Creation of a Platform for Debate: Utah Chief Justice Christine M. Durham's Legacy Embodied in* American Bush v. City of South Salt Lake, 75 Alb. L. Rev. 1643 (2013) (summarizing the four resulting opinions).

[61] 2006 UT 40, ¶ 10.

common law, traditions particular to Utah at the time, the documented intent of the constitution's drafters, court decisions made around the time of the framing, sister states with similar provisions, and analogous federal provisions, inasmuch as the Utah Constitution was "adopted . . . against the background of over a century of experience under the United States Constitution."[62]

The majority opinion ultimately concluded that the framers and the citizens of Utah at the time of the framing did not intend to protect nude dancing under the free speech provisions of the Utah Constitution.[63] The majority stressed that when the Utah Constitution was drafted, obscene speech was not protected, and nude dancing was criminalized under state law.[64] Each opinion turned substantively on the interplay of the article I, section 1 permissive provision that "[a]ll men have the inherent and inalienable right . . . to communicate freely their thoughts and opinions," with the restrictive caveat, "being responsible for the abuse of that right."

For his part, in a concurring opinion, now-Chief Justice Durrant endorsed the majority's historical approach, but he also took the opportunity to denounce alternative approaches to constitutional interpretation, which he deemed the "contemporary-context approach," and the "subjective approach."[65] Justice Durrant made clear that consideration of the modern values and attitudes of society in general, and of judges in particular, has no place in constitutional interpretation.[66] The justice criticized then-Chief Justice Durham's dissent as a contemporary-context approach,[67] inasmuch as she argued that nude dancing deserved protection as "communication" under the plain meaning of that term, regardless of whether the framers had contemplated protection for the particular type of communication at issue.[68] Justice Durrant also criticized the chief justice for what he regarded to be a sweeping construction of the permissive clause of article I, section 1, while she narrowly construed the restrictive clause to apply only to defamation actions.[69]

Concurring in part, and dissenting in part, Chief Justice Durham argued there was no need to resort to historical context, because the term "communicate" is unambiguous.[70] The chief justice went on to argue that dance, including nude erotic dance, is one of the oldest forms of communication, as deserving of protection as other forms of entertainment, including music, painting, theater, literature, and sculpture, and to hold

---

[62] *Id.* at ¶ 11 (citations and internal quotations omitted).
[63] *Id.* at ¶ 65.
[64] *Id*.
[65] *Id*. at ¶¶ 73, (Durrant, J., concurring).
[66] *See id.*, ¶¶ 73-86.
[67] *Id.* at ¶¶ 88, 93.
[68] *Id.* at ¶¶ 114-16, 130.
[69] *Id.* at ¶ 95.
[70] *Id.* at ¶¶ 116, 132.

otherwise was aesthetic discrimination.[71] Responding to the majority's criticism that her approach would permit so broad an interpretation of the term "communicate" that it could "include virtually any aspect of human conduct," Chief Justice Durham countered that the majority's approach "allows a judge to *restrict* the meaning of constitutional text to only the law existing at the time of enactment," and is "uniquely suited for turning prejudices into constitutional doctrine."[72]

For good measure, Justice Nehring added yet another "alternative reading of the intent of the framers and ratifiers—the third interpretation offered by this court in this case—us[ing] the same tools, the examination of text and historical evidence, employed by the majority and the dissent and endorsed by Justice Durrant in his concurrence."[73] Justice Nehring argued that the text of article I, section 1 originates from a natural law tradition in which speech was fully shielded from government restraint unless and until it inflicted injury on others.[74] Given the court's widely diverging approaches and conclusions in *American Bush*, Justice Nehring ultimately questioned whether the court is up to the task of pinpointing an interpretive framework, at least for the provisions at issue there. As he put it:

> If there is one other matter upon which the majority and the Chief Justice are in accord, it is in their dissatisfaction with federal First Amendment jurisprudence. I am far less troubled by it. In fact, I have come away from this appeal with a newfound sympathy for it. The attraction of the federal First Amendment approach may have more to do with my unease over the alternatives proposed by my colleagues. The majority offers too little protection for expression, while the Chief Justice is overprotective.[75]

Despite the justices' inconsistent approaches and divergent conclusions, *American Bush* is a must-read, revealing the broad spectrum of judicial philosophies that advocates will likely encounter at every stage of a state constitutional challenge. That said, the court offered a much more digestible read several years later—perhaps to Justice Nehring's pleasant surprise—when it issued a unanimous opinion in a case that also turned on distinct textual differences between the Utah and federal constitutions, plus adroit historical analysis. In that case, *State v. Hernandez*, the court held without reservation that defendants charged with class A misdemeanors are

[71] *Id.* at ¶¶ 118, 123.
[72] *Id.* at ¶ 134.
[73] *Id*. at ¶ 158 (Nehring, J., dissenting).
[74] *See id.* at ¶ 169.
[75] *Id.* at ¶ 200.

entitled to preliminary hearings under the Utah Constitution based primarily on a textual and historical analysis of the phrase "indictable offense."[76]

B. HISTORICAL

The Utah judiciary solicits arguments that rely on the distinctive history of Utah's founding, and the tenor of the times when the constitution was adopted in 1896.[77] This is often a daunting type of argument for attorneys. After all, membership in the Utah bar does not require expertise in state history as a prerequisite, and Utah's law schools provide no courses in state constitutional law, let alone the Utah Constitution.

Still, numerous expositions on the Utah Constitution and Utah history provide fodder for historical challenges.[78] Valuable sources have been digitized and published online. Important among these is the Utah Digital Newspapers project, a no-cost, text-searchable online historical archive of the state's newspapers.[79] Historical journals are available free of charge to the public on state government websites, too.[80] The territorial laws from the time of settlement through statehood are available through the University of Utah's S.J. Quinney College of Law library website.[81]

When independently interpreting a state constitutional provision, the court has often considered "the unique history of church-state relations in Utah—relations that occupied center stage in our state's social and political history for the almost fifty years preceding adoption of the 1896 constitution."[82] That history is one of a people under siege by local, state and federal authorities—rich, tragic, and eminently insightful as far as the Utah Constitution is concerned.

Members of the Church of Jesus Christ of Latter-day Saints in the mid-nineteenth century were violently driven from several states to the unsettled Utah Territory.[83] On the way, members were massacred at Haun's

---

[76] 2011 UT 70, ¶¶ 7, 18, 21, 268 P.3d 822.

[77] *See, e.g., Society of Separationists v. Whitehead*, 870 P.2d 916, 921-29 (Utah 1993).

[78] *See, e.g.*, Paul Wake, *Fundamental Principles, Individual Rights, and Free Government: Do Utahns Remember How to Be Free?* 1996 Utah L. Rev. 661; John J. Flynn, *Federalism and Viable State Government—The History of Utah's Constitution*, 1966 Utah L. Rev. 311; Kenneth R. Wallentine, *Heeding the Call: Search and Seizure Jurisprudence Under the Utah Constitution*, Article I, Section 14, 17 J. Contemp. L. 267 (1991); Jean Bickmore White, *The Utah State Constitution* (2011); Thomas G. Alexander, *Utah's Constitution: a Reflection of the Territorial Experience*, 64 Utah Hist. Q. 264 (1996); Miriam B. Murphy, *Utah's Unique Declaration of Rights*, 20 Beehive History 13 (1994).

[79] Digitalnewspapers.org.

[80] http://publications.utah.gov/history/index.html.

[81] http://content.lib.utah.edu/cdm4/browse.php?CISOROOT=/uthisstat.

[82] *Society of Separationists*, 870 P.2d at 921; *see also West v. Thompson Newspapers*, 872 P.2d 999, 1007 (Utah 1994) (stating that the federal Constitution provides a minimum level of protection, beyond which states may consider "the unique history, needs, and experiences of their residents" in finding greater state constitutional protections).

[83] See *Society of Separationists*, 870 P.2d at 921.

Mill in Missouri.[84] A mob lynched their founder and prophet in an Illinois jail.[85] Escape to the west for the survivors would mean decades of persecution at the hands of the federal government leading up to statehood in 1896.[86] The faith's tenet of polygamous marriage, although practiced by a relatively small minority,[87] riled the nation.[88] Congress passed laws criminalizing the practice, which led to warrantless raids of homes across the territory;[89] trials[90] and expulsion from territorial and local offices for prominent Mormons;[91] prison terms for the heads of outsized households;[92] dissolution of families;[93] elimination of the spousal testimonial privilege;[94] religious tests that struck Mormons from juries, ballots and ballot boxes;[95] dissolution of the church and forfeiture of its holdings;[96] and, finally, official renouncement of polygamy in an ultimate capitulation to save the church, gain statehood, and get the feds out of Utah.[97]

The so-called "irrepressible conflict" is most known for a long line of raids across Utah Territory into the homes of suspected polygamists to arrest husbands and subpoena as many wives as the marshals could roust.[98] The "Polygamy Crusade," as it came to be known throughout the nation began in earnest in 1884.[99] "It led to the hunting, harassing and imprisonment of women and their babies and of venerable old men whose lives . . . had been exemplary except for a defiance of law dictated by religious conviction," wrote *Salt Lake Tribune* journalist and historian O.N. Malmquist in a 100-year retrospective of *The Tribune*.[100] The farcical trials

---

[84] Edwin B. Firmage, *Religion & the Law: The Mormon Experience in the Nineteenth Century*, 12 Cardozo L. Rev. 765, 769 (1991) (hereinafter "Firmage").

[85] *History of Joseph Smith*, Deseret News, Nov. 11, 1857, at 1 (on file with the author).

[86] *Society of Separationists*, 870 P.2d at 921.

[87] *See* Firmage, *supra,* note 83, at 775.

[88] John J. Flynn, *History of Utah's Constitution*, 1966 Utah L. Rev. 311, 316 (1966) (hereinafter "Flynn").

[89] *See* Wallentine, *supra*, note 10, at 277.

[90] Firmage, *supra*, note 83, at 775.

[91] *Id.* at 783.

[92] Martha Sonntag Bradley, *"Hide and Seek": Children on the Underground*, 51 Utah Hist. Q. 133, 138 (1983).

[93] *Ibid*.

[94] Firmage, *supra*, note 83, at 779-80.

[95] *Id.* at 775, 781.

[96] *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 42 (1890) (upholding congressional authority to repeal the church's charter and seize its property).

[97] *See Society of Separationists*, 870 P.2d at 927 (citations omitted).

[98] *See, e.g. The American Fork Raid*, Deseret News, April 28, 1886, at 1. Deputies reportedly made four arrests during this pre-dawn raid, and gathered another 16 witnesses made up of the wives, children and friends of the arrestees for the trip back to Salt Lake City to see the magistrate.

[99] O.N. Malmquist, *The First 100 Years: A History of The Salt Lake Tribune* 1871-1971, p. 9 (1971).

[100] *Id.* at 81.

excluded Mormons from juries for refusing to renounce their religious beliefs.[101]

A typical raid, carried out before sunrise, had a team of deputy marshals ride into town, station sentinels at the egresses, and search home by home for those named in arrest warrants on suspicion of unlawful cohabitation.[102] A raid could last well into the afternoon, the entire town on lockdown until the marshals caught their targets or gave up trying.[103] Wives and children were arrested, too, taken as material witnesses to be examined by the magistrate.[104] The standard bail for a suspect was $1,500, plus $200 security for each wife or child he intended to take home with him. About 1,300 Mormons were imprisoned under the federal anti-polygamy law.[105]

These were the same Saints, by and large, who comprised the delegates to the Constitutional Convention a decade later. Of 107 elected delegates, only 28 were non-Mormons.[106] They retained a deep-seeded mistrust of the secular government.[107] But they also realized "complete capitulation on the issue of [polygamy] was the price for statehood."[108] Thus, "it is impossible to say that the Utah Constitution of 1896 was drafted by Utahns for Utah."[109] This arguably explains why the Mormon delegates were mostly silent on many of the new constitution's provisions guaranteeing individual rights, despite long suffering gross violations of those same rights.

Consequently, advocates for greater protections must argue that traditional notions of framers' intent—as expressed during the constitutional convention—are less relevant than the "unique history, needs, and experiences" of the residents at the time the constitution was adopted.[110] This approach thus requires criminal defenders to be at least moderately familiar with the history of Utah's settlement and the events leading up to statehood.

---

[101] *See id.* at 85.

[102] *See, e.g.*, *The Brigham City Raid*, Deseret News, Feb. 2, 1887, at 1. "After searching the last named place . . . the deputies laid aside their straightjacket etiquette and began searching houses with a vengeance." *Id*. According to the newspaper's account, this included the homes of six other city residents, and the church's Co-operative store and tithing office.

[103] *See id*.; *see also A Wholesale Raid*, Deseret News, April 6, 1887, at 9. In the account of this Herriman raid, "It is stated that but few domiciles escaped the process." *Id*. "None were allowed to leave the settlement, being prevented by the official outposts on guard in the suburbs, the village being thus put under a state of siege, so to speak." *Id*.

[104] *See* Malmquist, *supra*, note 98.

[105] Daniel H. Ludlow, *Antipolygamy Legislation*, Encyclopedia of Mormonism, 1992, at 52.

[106] *Society of Separationists v. Whitehead*, 870 P.2d 916, 928 (Utah 1993).

[107] Flynn, *supra*, note 87, at 314.

[108] *Id.* at 321.

[109] *Id.* at 324.

[110] *See West*, 872 P.2d at 1007.

C. SISTER STATES

In light of the United States Supreme Court's retreat over the past three decades or so from the Warren Court's defendant-friendly criminal procedure decisions,[111] many states have heeded Supreme Court Justice Brennan's call to breathe new life into the potential protections of state constitutions.[112] Utah defenders should survey the opinions of these courts to determine just how far states have departed from the federal orthodoxy in interpreting their own founding documents. But simply noting those departures will not be as compelling as comparing the Utah Constitution to those of states with similar pedigrees.

For example, the Pennsylvania Supreme Court laid out a framework for independently interpreting that state's constitutional provisions in the 1991 decision of *Commonwealth v. Edmunds*,[113] just a year after Utah's *Larocco* decision. In conducting a historical analysis of its search and seizure provision, which is textually very similar to the federal provision, the court stressed that the United States Constitution was patterned after earlier colonial constitutions, rather than vice versa.[114] Moreover, "[u]nlike the Bill of Rights under the United States Constitution which emerged as a later addendum in 1791, the Declaration of Rights in the Pennsylvania Constitution was an organic part of the state's original constitution of 1776, and appeared (not coincidentally) first in that document."[115] The Pennsylvania Constitution was drafted during the American Revolution, "as the first overt expression of independence from the British Crown."[116] Its warrant requirement was intended to abolish the general warrants used by the British "to conduct sweeping searches of residences and businesses, based upon generalized suspicions,"[117] and its search and seizure provision as a whole embraced "a strong notion of privacy."[118]

Similarly, Utah's Constitution was drafted at the tail end of a protracted rebellion against the federal government, which had routinely flouted the protections of the Fourth Amendment in carrying out its anti-polygamy agenda. Utah's Declaration of Rights was an integral part of the

---

[111] *See, e.g., Gideon v. Wainright*, 372 U.S. 335 (1963) (right to counsel); *Miranda v. Arizona*, 384 U.S. 436 (1966) (right to warnings prior to custodial interrogation); *Escobedo v. Illinois*, 378 U.S. 478 (1964) (right to counsel during custodial interrogation); *Mapp v. Ohio,* 367 U.S. 643 (1961) (exclusionary rule applied to the states); *but also see Terry v. Ohio*, 392 U.S. 1 (1968) (permitting stop, detention, and frisk based on reasonable suspicion); *Schmerber v. California*, 384 U.S. 757 (1966) (exigent circumstances permit forced extraction of bodily fluids).

[112] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

[113] 526 Pa. 374, 390, 586 A.2d 887 (Penn. 1991).

[114] *Id*. at 392.

[115] *Id*.

[116] *Id.* (citation omitted).

[117] *Id.* at 394 (citation omitted).

[118] *Id.*

organic constitution, appearing first as it does in that document.[119] While the Pennsylvania Constitution was an expression of independence, the Utah Constitution was a necessary capitulation for its people's survival, but that context embodies every bit of "a strong notion of privacy," given the federal government's relentless and intemperate incursions into the Saint's businesses, homes, and bedchambers.

D. POLICY ARGUMENTS

In 2006, a majority of the court took a dim view of the value of contemporary policy arguments informing constitutional interpretation.[120] But in a decision the following year, the court seemed to revive the idea that interpretation of the Utah Constitution may be aided by "policy arguments in the form of economic and sociological materials."[121] Whatever persuasive value such arguments may carry with the court will likely depend to a large degree on the court's composition.

E. FLAWED FEDERAL ANALYSIS

This is a straight-forward approach. Defenders should mine the dissents of closely-divided, rights-altering decisions by the United States Supreme Court, exploit circuit splits, and seize opportunities that might help courts simplify constitutional rules "so that they can be more easily followed by the police and the courts, and, at the same time, provide the public with consistent and predictable protection."[122]

IV. GREATER PROTECTIONS AND STILL GREATER OPPORTUNITIES FOR PROTECTION UNDER THE UTAH CONSTITUTION

Whether declining to reach state constitutional issues for lack of adequate briefing, or finding greater protections when issues are properly raised, the court's decisions are peppered with suggestions to criminal defenders of challenges that it would entertain. Many of those suggestions are outlined below, along with some suggestions.

---

[119] UTAH CONST. art. I, "Declaration of Rights."

[120] *American Bush v. South Salt Lake*, 2006 UT 40, ¶ 12 n. 3, 140 P.3d 1325 ("We have intentionally excluded the consideration of policy arguments suggested by *Soc'y of Separationists v. Whitehead* . . . our duty is not to judge the wisdom of the people of Utah in granting or withholding constitutional protections but, rather, is confined to accurately discerning their intent.").

[121] *State v. Tiedemann*, 2007 UT 49, 37, 162 P.2d 1106 (*citing State v. Gardner*, 947 P.2d 630, 633 (Utah 1997) (plurality opinion) (*quoting Soc'y of Separationists*, 870 P.2d at 921 n. 6)).

[122] *State v. Larocco*, 794 P.2d 460, 469 (1990).

A. EXCLUSIONARY RULE

A plurality of the Utah Supreme Court first recognized an independent exclusionary rule as the proper remedy for violations of the Utah Constitution's search and seizure provision in *Larocco*.[123] Although a majority of the court affirmed the existence of the rule in *State v. Thompson*,[124] criminal defense practitioners are well-advised to not take this independent remedy for granted. When the court announced the independent exclusionary rule, it postponed resolution of several key related issues.

By its language, the court implicitly confined its holding of a so-called "necessary consequence" to "police violations of article I, section 14."[125] And it explicitly reserved comment on (1) whether exclusion is an inviolate state constitutional requirement or, akin to the federal rule, merely a judicial creation that can be limited or even eliminated as courts see fit;[126] (2) whether deterrence is the only purpose served by the rule; and (3) which governmental officials are deemed to be the target of this deterrence.[127] The court also did not address whether exclusion is proper for violations of other provisions of the Utah Constitution, and whether it is proper only for purposes of criminal proceedings.[128] Nor has the court ruled whether a good-faith exception applies.[129] These unanswered questions present myriad opportunities and obstacles for the criminal defense bar. Moreover, efforts to eliminate the remedy have gained traction with the court's newest justice, and Justice Durham is the only remaining member of the *Thompson* Court, the last to rule on the matter.

In the 2011 case of *State v. Walker*, Justice Lee argued at length in a concurring opinion that the Utah Constitution "as originally understood did not contemplate the remedy of exclusion in the event of an illegal search or

---

[123] *Id.* at 472 (plurality opinion) ("exclusion of illegally obtained evidence is a necessary consequence of police violations of article I, section 14.").

[124] 810 P.2d 415, 419 (Utah 1991).

[125] *Larocco*, 794 P.2d at 472.

[126] *See id.* at 473; *see also State v. Baker*, 2010 UT 18, ¶ 35, n. 2, 229 P.3d 650 (undecided whether a good-faith exception to the exclusionary rule exists under the Utah Constitution).

[127] *Id.* at 473 (citation and quotations omitted).

[128] *But see Sims v. State Tax Com'n*, 841 P.2d 6, 14-15 (Utah 1992) (plurality opinion) (*holding* exclusion of illegally seized evidence proper in "quasi-criminal" proceedings to enforce Utah's Illegal Drug Stamp Tax Act under article I, section 14); *Zissi v. State Tax Com'n of Utah*, 842 P.2d 848, 859 (Utah 1992) (a 3-2 majority affirmed exclusion as proper in drug stamp cases); *Beller v. Rolfe*, 2008 UT 68, ¶ 33, 194 P.3d 949, 955 (*holding* exclusion does not apply to driver license revocation proceedings). Also note this possibly instructive language from the *Beller* Court: "Considering that the exclusionary rule is a judicial construct without a constitutional pedigree, courts have clear authority to decide whether the rule should apply to a particular fact scenario or proceeding." *Id.* at ¶ 11.

[129] *State v. Baker*, 2010 UT 18, ¶ 35 n. 2, 229 P.3d 650.

seizure."[130] As three members of the *Walker* Court reckoned, that case was affirmed on grounds that precluded the need to resolve the "controversial" issue of whether the Utah Constitution contemplates an exclusionary rule.[131] Nonetheless, Justice Lee telegraphed a battle that his colleagues "have no doubt . . . will come before the court again,"[132] and defenders should be prepared to meet the challenge.

Justice Lee argued that the plain language and historical context of article I, section 14 do not contemplate exclusion as a remedy for search and seizure violations, and the court in *Larocco* and *Thompson* ignored its prior holdings to the same end.[133] Lee cited the court's prior unanimous holding that "the admissibility of evidence is not affected by the illegality of the means through which it has been obtained."[134]

B. SEARCH & SEIZURE

The court has complained more about the bar's failure to pursue claims under article I, section 14 than any other provision of the Utah Constitution.[135] For good reason, too. The decisions are rife with openings and outright invitations for practitioners to aid the court in molding a simpler, more consistent, and more protective body of search and seizure law. These will be discussed below.

1. Warrantless Searches

Given technological advances, practitioners should challenge all warrantless vehicle searches under the rule announced in *Larocco* and affirmed in *Anderson*. That rule states that the automobile exception to the warrant requirement applies under article I, section 14 only when probable cause and exigent circumstances are present.[136] And exigent circumstances exist when "the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained."[137]

The court stressed that the reasonableness determination must factor the time necessary to obtain a warrant,[138] which is significantly less now than at the time of the decision given the speed and ubiquity of Utah's electronic

---

[130] *See State v. Walker*, 2011 UT 53, ¶¶ 27-69, 267 P.3d 210 (Lee, J., concurring); *see also* Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example*, 1993 Utah L. Rev. 751.

[131] *Id*. at ¶¶ 20-26 (Nehring, J., concurring, joined by Durham, CJ, and Parrish, J.).

[132] *Id.* at ¶ 25.

[133] *Id.* at ¶ 28 (Lee, J., concurring).

[134] *Id.* at ¶ 40 (*quoting State v. Aime*, 62 Utah 476, 220 P. 704, 708 (1923); *affirmed* by *State v. Fair*, 10 Utah 2d 365, 353 P.2d 615, 615 (1960)).

[135] *See supra*, notes 2, 3, 8.

[136] 794 P.2d 460, 470 (*quoting State v. Limb*, 581 P.2d 142, 144 (Utah 1978).

[137] *Id.*

[138] *Id*.

warrant system.[139] Under Utah's fledgling electronic warrant system, police across the state can obtain warrants via e-mail from on-call judges in a matter of minutes any time of day or night.[140] When pressed, courts have been mindful of the distinctive Utah constitutional requirement, addressing impediments to obtaining warrants in several cases.[141] Taken with the "primacy in Utah of the warrant requirement," these technological innovations may give the court reason to revisit the automobile exception altogether under article I, section 14.

2. Database Searches

Under article I, section 14, the Utah Supreme Court has held that depositors have an expectation of privacy in bank records that cannot be overcome by a government subpoena,[142] and the Utah Court of Appeals has come to the same conclusion as to medical records.[143] These holdings would seem to raise analogous questions about suspicionless searches of motor vehicle and insurance coverage databases, which Utah police officers accessed approximately 400,000 times *per month* nearly a decade ago.[144]

3. Drug Dogs

Issues surrounding the reliability and propriety of police use of narcotics-detection canines (drug dogs) have recently emerged as hot topics in constitutional criminal procedure. The United States Supreme Court recently ruled that the warrantless use of drug dogs to sniff around homes and their immediate surroundings is an unreasonable Fourth Amendment search,[145] and a positive alert by a drug-dog on a vehicle provides probable cause to search if the dog is certified by a bona fide training organization or

---

[139] *See* Utah R. Crim. P. 40; Jason Bergreen, *Utah cops praise electronic warrant system*, The Salt Lake Tribune, Dec. 26, 2008 (Third District Court judge reviews and approves warrant request via e-mail in two minutes during pilot program of Utah electronic warrant system); Associated Press, *Electronics ease warrant process for Utah police: They use e-mail to obtain documents from on-call judges*, Deseret News, May 2, 2010. Utah's electronic warrant system is available to law enforcement officers statewide through the Department of Public Safety website, although officers in Salt Lake, Weber and Davis counties were the only ones using the system at the time of this 2010 article. *Id.* The system allows police to obtain search warrants from on-call judges via e-mail at all hours of the day, with the process typically taking thirty minutes. *Id.*

[140] See Ron Bowmaster, Director of IT Division, Utah Administrative Office of the Courts, *Utah's Electronic Warrant System: A partnership with the Department of Public Safety and the Utah Courts*, pp. 3 - 4.

[141] *See State v. Anderson*, 910 P.2d 1229, 1237 (Utah 1996); *State v. Maycock*, 947 P.2d 695, 698 (Utah Ct. App. 1997); *State v. Morck*, 821 P.2d 1190, 1194 (Utah Ct. App. 1991).

[142] *Thompson*, 810 P.2d 415, 418 (1991).

[143] *State v. Yount*, 2008 UT App 102, ¶ 24, 182 P.3d 405.

[144] *State v. Biggs*, 2007 UT App 261, ¶ 5, 167 P.3d 544.

[145] *Florida v. Jardines*, 569 U.S. ___, 133 S. Ct. 1409, 1417-18 (2013).

has recently successfully completed a training program that tested for proficiency, even if there are no records to prove the dog has previously performed well in the field.[146]

These and associated issues have not been addressed under article I, section 14. Among potential challenges: (1) whether a drug-dog sniff constitutes a search; (2) whether a suspicionless drug-dog sniff exceeds the scope of a temporary detention for a routine traffic violation; (3) whether a positive indication by a drug dog alone gives rise to probable cause that would justify a search; (4) what types of training, certification, and thresholds of reliability should be required of drug dogs and handlers for evidence to be admissible in court.

A majority of the Supreme Court in *United States v. Place* reasoned that a drug-dog sniff of an air traveler's carry-on bag is not a Fourth Amendment search, reasoning the sniff discloses only the presence or absence of contraband for which there can be no legitimate expectation of privacy.[147] A new majority affirmed this rationale 22 years later in the 2005 case of *Illinois v. Caballes*, and held that the Fourth Amendment does not require reasonable suspicion to justify a drug-dog's sniff of a vehicle during a routine traffic stop so long as the stop is not prolonged.[148] The dissenters in *Caballes* noted that the "infallible dog is a creature of legal fiction,"[149] and that the majority's opinion ignored the longstanding scope limitation on investigative detentions.[150]

As to the sniff as a search question, a challenge might begin with the concurrences in *Place*,[151] the dissents in *Caballes*, and the number of sister states that have found greater protections under their state constitutions.[152]

At the most developed and protective end of the sister-state spectrum, the Pennsylvania rule deems the sniff of a person to be a search requiring probable cause and a warrant,[153] and sniffs of the exterior of a rented storage locker[154] and the exterior of a vehicle[155] to be searches requiring reasonable suspicion. Washington's departure is the least auspicious, with the high court there noting that whether a sniff is a search

---

[146] *Florida v. Harris*, 568 U.S. ___, 133 S. Ct. 1050, 1058-59 (2013).

[147] 462 U.S. 696, 707 (1983).

[148] 543 U.S. 405, 408-09 (2005).

[149] *See id. generally* at 410-17 (Souter, J., dissenting).

[150] *See id. generally* at 417-25 (Ginsburg, J., dissenting, joined by Souter, J.).

[151] 462 U.S. at 710-11 (Brennan, J., concurring in the result, joined by Marshall, J.).

[152] *See Commonwealth v. Martin,* 534 Pa. 136, 143-44, 626 A.2d 556 (Penn. 1993); *Commonwealth v. Johnston,* 515 Pa. 454, 462-66, 530 A.2d 74 (Penn. 1987); *Commonwealth v. Rogers*, 578 Pa. 127, 137, 849 A.2d 1185 (Penn. 2004); *State v. Boyce*, 44 Wn. App. 724, 730 n. 4, 723 P.2d 28 (Wash. Ct. App. 1986); *State v. Wiegand,* 645 N.W.2d 125, 132-35 (Minn. 2002); *Pooley v. State*, 705 P.2d 1293, 1311 (Alaska Ct. App. 1985); *McGahan v. State,* 807 P.2d 506, 510-11 (Alaska App. 1991); *State v. Tackitt*, 2003 MT 81, ¶¶ 22, 31, 67 P.3d 295; *State* v. *Pellicci,* 133 N.H. 523, 580 A.2d 710 (N.H. 1990).

[153] *Commonwealth v. Martin,* 534 Pa. 136, 143-44, 626 A.2d 556 (Penn. 1993).

[154] *Commonwealth v. Johnston,* 515 Pa. 454, 462-66, 530 A.2d 74 (Penn. 1987).

[155] *Commonwealth v. Rogers*, 578 Pa. 127, 137, 849 A.2d 1185 (Penn. 2004).

depends on the circumstances, suggesting the sniff of a person would be one, but the sniff of an object in a non-private place would not be.[156]

4. Permissible Scope of a Detention

In *State v. Lopez*, the court abandoned the pretext doctrine under the federal Constitution, and declined an invitation to adopt it under article I, sections 14 and 24 (uniform operation of laws provision) of the Utah Constitution on the grounds that the doctrine was unworkable and unnecessary.[157] Unworkable, that is, because it required courts to probe officers for a subjective unconstitutional motivation, and unnecessary because the Fourth Amendment's "reasonable scope" limitation on traffic stops "precludes the officer from investigating such motivations or suspicions."[158]

Since *Lopez*, however, federal courts have broadly expanded the permissible scope of investigative activities during routine traffic stops beyond the once limited authority, as outlined by the *Lopez* Court in 1994, to "request a drivers license and a valid registration, run a computer check on the car and/or the driver, and issue a citation."[159] The Fourth Amendment now authorizes police conducting routine traffic stops to order drivers and passengers from vehicles,[160] run background checks on drivers and passengers,[161] question drivers and passengers about travel plans,[162] ask occupants any questions that do not prolong the stop,[163] or even subject a stopped vehicle to inspection by a drug-detection canine.[164] That said, the very recent United States Supreme Court decision in *Rodriguez v. United States*, holding that "a police stop exceeding the time needed to handle the matter for which the stop was made" violates the Fourth Amendment, may signal a trend in the opposite direction.[165]

As the federal courts have chipped away at the Fourth Amendment, the Utah high court's assurances that the pretext doctrine is unnecessary also crumble, as police are now much freer to exercise "standardless and unconstrained discretion . . . in the field," which the court warned against in

---

[156] *State v. Boyce*, 44 Wn. App. 724, 730 n. 4, 723 P.2d 28 (Wash. Ct. App. 1986).

[157] 873 P.2d 1127, 1135, 1140 (Utah 1994); *see also Whren v. United States*, 517 U.S. 806 (1996) (effectively abolishing pretext doctrine under Fourth Amendment).

[158] *Id*. at 1135-36.

[159] *Lopez*, 873 P.2d at 1135.

[160] *Maryland v. Wilson*, 519 U.S. 408, 410 (1997).

[161] *United States v. Holt*, 264 F.3d 1215, 1221 (10th Cir. 2001).

[162] *United States v. Bradford*, 423 F.3d 1149, 1156 (10th Cir. 2005).

[163] *Muehler v. Mena*, 544 U.S. 93, 101 (2005).

[164] *Illinois v. Caballes*, 543 U.S. 405, 409-10 (2005); *see also id.* at 421 (Ginsburg, J., dissenting, joined by Souter, J.) ("the Court diminishes the Fourth Amendment's force by abandoning the second *Terry* inquiry" of whether police action is reasonably related in "scope" to the circumstances justifying the initial interference).

[165] 575 U.S. ___ (2015).

Lopez.[166] Although the *Lopez* Court is correct to deem unworkable any regime that pretends to probe an officer's subjective state of mind for illicit motives,[167] the court could, however, roll back the creeping excesses under article I, section 14 by holding that the Utah Constitution imposes a scope limitation on investigative detentions. This would help to prevent the potential "perversion of the prosecutorial function from investigating known crimes to investigating individuals for the purpose of finding criminal behavior."[168]

5. Trash Searches

In 1988, the Supreme Court ruled that citizens have no reasonable expectation of privacy in household trash placed for collection outside of the curtilage of the home that would implicate Fourth Amendment protections.[169] Even so, this conventional wisdom might not withstand exacting scrutiny under the Utah Constitution's more protective search and seizure provision. In the 1997 decision of *State v. Jackson*, the Utah Court of Appeals followed the Supreme Court's rationale in *California v. Greenwood* in rejecting a challenge to warrantless trash searches under article I, section 14.[170]

The appeals court commended the petitioner for a "thorough and scholarly" argument for an innovative interpretation of article I, section 14.[171] But the court rejected the challenge, noting that no confusion among the federal courts justified a departure, and that the Utah Supreme Court is better suited to announce new law under the Utah Constitution. Significantly, however, the Utah Supreme Court has since clarified that "we do not require some showing that federal analysis is flawed in order to undertake independent state interpretation, although we have occasionally used such arguments to bolster our conclusions."[172]

An intrepid advocate might revisit this issue beginning with a review of the lengthy dissent in *Greenwood*,[173] followed by discussion of the myriad state court opinions that recognize an expectation of privacy in curbside trash under state constitutions.[174] The challenge might also incorporate Utah's

[166] *See Lopez*, 873 P.2d at 1135 (quoting *Delaware v. Prouse*, 440 U.S. 648, 661 (1979)).
[167] *See id.* at 1036.
[168] *See Debooy*, 2000 UT 32, ¶ 38, 996 P.2d 546.
[169] *California v. Greenwood*, 486 U.S. 35, 37 (1988).
[170] 937 P.2d 545 (Utah Ct. App. 1997) (cert. denied).
[171] *Id.* at 548.
[172] *Tiedemann*, 2007 UT 49, ¶ 37 (citations omitted).
[173] *See* 486 U.S. at 45-56 (Brennan, J., dissenting, joined by Marshall, J.) ("members of our society will be shocked to learn that the Court, the ultimate guarantor of liberty, deems unreasonable our expectation that the aspects of our private lives that are concealed safely in a trash bag will not become public").
[174] *See, i.e., State v. Boland*, 800 P.2d 1112, 1116 (Wash. 1990) (probable cause and warrant required to search curbside trash); *State v. Tanaka*, 67 Haw. 658, 662, 701 P.2d 1274, 1277 (Haw. 1985) (same); *State v. Goss*, 150 N.H. 46, 50, 834 A.2d 316 (N.H. 2003) (same); *State v. Granville*, 140 N.M. 345, 142 P.3d 933 (App. Ct. 2006) (same); *State v. Hempele*, 120

unfortunate history of dragnet-style policing during the anti-polygamy raids, particularly the prevalence of government snoops lurking at residential window sills for a peek into peoples' private lives.

C. STANDING

In *State v. Thompson*, two Utah Supreme Court justices concurred in "rejecting the arguments . . . that we should follow federal standing law and deny those not directly subjected to the search any right to challenge its legality."[175] Then-Justice Michael Zimmerman wrote, "[e]ven where federal rights are at stake, standing law is state law and we are not bound to follow federal precedent."[176] Continuing, Zimmerman noted, "[i]n the area of search and seizure, the federal courts have developed extraordinarily restrictive doctrines that have the effect, if not the purpose, of placing a large percentage of illegal activities beyond the scrutiny of the courts."[177]

For these propositions, Zimmerman cited United States Supreme Court holdings that deny standing to: passengers who lack a possessory or property interest in vehicles illegally searched by police;[178] prisoners seeking habeas corpus relief to challenge illegally seized evidence introduced at trial;[179] defendants who were previously granted "automatic standing" when charged with a possessory offense to challenge the seizure of the allegedly possessed goods;[180] and defendants in cases where the government acquires evidence through intentionally unconstitutional means from third parties.[181]

Yet defenders continue to cede the issue by failing to raise, preserve, or properly brief it.[182] At least one Utah rule for standing in search and seizure cases is more permissive than its federal counterpart, and could be more permissive yet if applied in different contexts. In *State v. Thompson*, the court held that depositors have an expectation of privacy in bank records under article I, section 14, despite having entrusted possession of the records

---

N.J. 182, 576 A.2d 793 (N.J. 1990) (same); *State v. Morris*, 680 A.2d 90, 92-93 (Vermont 1996) (same); *Beltz v. State*, 221 P.2d 328, 335-36 (Alaska 2009) (reasonable suspicion of serious crime required to search curbside trash).

[175] 810 P.2d 415, 420 (Utah 1991) (Zimmerman, J., joined by Durham, J., concurring) (citations omitted).

[176] *Id.* (*citing Provo City Corp. v. Willden*, 768 P.2d 455, 456-57 (Utah 1989)).

[177] *Id.* at 420-21 (citations omitted).

[178] *See Rakas v. Illinois*, 439 U.S. 128 (1978).

[179] *See Stone v. Powell*, 428 U.S. 465 (1976).

[180] See *United States v. Salvucci*, 448 U.S. 83 (1980).

[181] *See United States v. Payner*, 447 U.S. 727 (1980).

[182] *See State v. Scott*, 860 P.2d 1005, 1006, 1007 n. 3 (Utah Ct. App. 1993) (court declines to reach standing argument for passenger in vehicle borrowed and impounded by arrested driver under article I, section 14 for lack of adequate briefing); *State ex rel. DAB v. State*, 2009 UT App 169, 214 P.3d 87 (Utah Ct. App. 2009) (standing under Fourth Amendment denied to vehicle passenger, but no challenge under article I, section 14).

to another.[183] This holding directly conflicts with the United States Supreme Court's opinion in *United States v. Miller*.[184] The court has also granted standing despite contrary federal rulings for taxpayers challenging unlawful expenditures by government agencies,[185] and standing by media outlets to challenge the classification of court records under article I, sections 2 and 15 of the Utah Constitution.[186]

Accordingly, defenders and their clients would be well-served to vie for standing in cases involving the federal rules that were criticized by concurring justices in *State v. Thompson*.

D. UNIFORM OPERATION OF LAWS

Article I, section 24 of the Utah Constitution states: "All laws of a general nature shall have uniform operations." This provision "establishes different requirements than does the federal Equal Protection Clause."[187] Important among them:

> For a law to be constitutional under [the provision], it is not enough that it be uniform on its face. What is critical is that the *operation* of the law be uniform. A law does not operate uniformly if persons similarly situated are not treated similarly . . . .[188]

That is, under the federal Equal Protection Clause of the Fourteenth Amendment, a statute that is facially neutral is subject to mere rational basis scrutiny unless it actually discriminates against a suspect class or fundamental right *and* does so by design, in which case heightened scrutiny applies.[189] No such discriminatory purpose is required to invalidate a Utah law under the uniform operation of laws provision. Where the Equal Protection Clause targets the causes of discrimination, the uniformity provision strikes at the effects.

In *State v. Mohi*, the court struck down a statute giving unfettered discretion to prosecutors in certifying juvenile offenders for prosecution in the adult criminal system.[190] There again, the statute was not facially discriminatory, but the court accepted that "a statute which does not on its face create classes may nonetheless result in classification during the actual application of the statute by those empowered to administer the law."[191]

---

[183] *Thompson*, 810 P.2d 415, 420 (Zimmerman, J., concurring) (Utah 1991).
[184] 425 U.S. 435, 442 (1976).
[185] *Jenkins v. Swan*, 675 P.2d 1145, 1149 (Utah 1983).
[186] Society of Prof. Journalists v. Bullock, 743 P.2d 1166, 1174 (Utah 1987).
[187] *State v. Mohi*, 901 P.2d 991, 997 (Utah 1995).
[188] *Id*. (emphasis and alterations by the Court; citations and internal quotations omitted).
[189] *See Washington v. Davis*, 426 U.S. 229, 252, 265 (U.S. 1976).
[190] 901 P.2d 991 (Utah 1995).
[191] *Id*. at 998.

The *Mohi* Court first determined that the direct-file statute created two sub-classes of serious juvenile offenders, distinguishable only by whether the prosecutor chose to try their cases in adult court.[192] Then, the court determined that the sub-classes were treated disparately due to dramatically harsher consequences of a criminal conviction in adult court compared to a civil delinquency adjudication. Finally, the court determined the legitimate purposes of promoting public safety, accountability, and preserving family ties were not reasonably related to the direct-file provision, because the selection process for beneficial or burdensome treatment was "arbitrary and standardless."[193]

These decisions would seem to provide grist for numerous challenges of some of the most important criminal law provisions of the Utah Code. For example, the United States and Utah Constitutions guarantee the fundamental right to adequate assistance of counsel for all indigent criminal defendants charged with felonies.[194] The Utah Indigent Defense Act purports to give effect to this right.[195]

The Act's provision delegating indigent defense services to the counties creates 29 sub-classes of similarly situated indigent defendants, indistinguishable except that their access to the fundamental right to adequate assistance of counsel varies dramatically depending on the county in which they stand charged. That is, the resources available and quality of indigent defense services vary depending on the funding and standards promulgated by county governments.[196]

A similar challenge could be mounted against Utah's aggravated murder statute, section 76-5-202, which creates two classes of defendants charged with aggravated murder who are then subjected to disparate treatment. The plain language of the statute provides that if a prosecutor files a notice of intent to seek the death penalty, "aggravated murder is a capital felony."[197] If a prosecutor does not file notice of intent to seek the death penalty, "aggravated murder is a noncapital first degree felony."[198]

Similar to the direct-file statute at issue in *Mohi*, the aggravated murder statute provides no guidance to prosecutors in deciding when to seek the death penalty against statutorily indistinguishable aggravated murder defendants.[199] The first obvious disparity is that the capital class faces the

---

[192] *Id*. at 997.

[193] *Id*. at 998.

[194] *See* U.S. Const. amend. V; UTAH CONST. art. I, § 12; *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980); *State v. McDonald*, 922 P.2d 776, 779 (Utah Ct. App. 1996).

[195] Utah Code § 77-32-301.

[196] American Civil Liberties Union of Utah, *Failing Gideon: Utah's Flawed County-By-County Public Defender System*, Aug. 24, 2011.

[197] Utah Code § 76-5-202(3)(a).

[198] *Id.* at § 3(b).

[199] *See* Utah Code §§ 76-5-202(3)(a)-(d); *but see also* Utah Code § 76-3-207(5)(b). Although the latter subsection limits the death penalty to cases in which the sentencing

possibility of death while the noncapital class does not.[200] Furthermore, the classification implicates a number of procedural rights, with benefits and burdens flowing to both classes.

Among the benefits are those arising under Rule 8 of the Utah Rules of Criminal Procedure, which governs the appointment of counsel for indigent defendants in the capital class.[201] The capital defendant is entitled to two attorneys;[202] more qualified attorneys;[203] a bifurcated trial by a jury of twelve,[204] with verdicts rendered separately in the guilt and penalty phases;[205] ten peremptory challenges versus four for the noncapital defendant;[206] plus a comprehensive mitigation investigation.[207]

Whenever a law sends similarly-situated individuals down separate prosecution or punishment paths on seemingly arbitrary or unjustifiable grounds, defenders should consider whether the classification could survive uniform operation of laws scrutiny.

E. SEPARATION OF POWERS

As the Utah Supreme Court stressed in *State v. Gallion*, unlike the federal constitution's judge-made separation-of-powers jurisprudence, Utah's Separation of Powers provision is enshrined as a constitutional imperative.[208] The *Gallion* Court determined the intent of article V, section 1 is to "prevent those, who exercise the power assigned by the Constitution to their department, from aggrandizement of their power, however derived, by exercising functions appertaining to another department."[209]

At issue in *Gallion* was whether the Legislature properly delegated authority to the Utah Attorney General to add, delete or reschedule the substances proscribed by the Utah Controlled Substances Act.[210] The Court held the delegation violated Separation of Powers, because it delegated to an

---

authority finds beyond a reasonable doubt that total aggravation outweighs total mitigation, it contains no constraint on the prosecution's choice to seek the death penalty.

[200] Utah Code § 76-3-206(1) (prescribing the penalty for a capital felony as 25 years to life in prison, life in prison without the possibility of parole, or death); Utah Code Ann. § 76-3-207.7(2) (prescribing the penalty for first degree felony aggravated murder as 25 years to life in prison, or life in prison without the possibility of parole).

[201] *See* Utah R. Crim. P. 8.

[202] *Id.* at § 8(b); *see also* UTAH CONST. art. I, § 12 (guaranteeing accused the right to assistance of counsel).

[203] *Id.* at §§ 8(b)(1)-(b)(4).

[204] Utah Code Ann. §§ 78B-1-104(1)(a); *see also* UTAH CONST. art. I, § 10 (guaranteeing right to trial by jury of 12 in capital cases).

[205] *See* Utah Code Ann. § 76-3-207.

[206] Utah R. Crim. P. 18(d).

[207] *State v. Taylor*, 947 P.2d 681, 687 (Utah 1997) ("failure to perform an adequate mitigation workup represents ineffective assistance of counsel").

[208] *See* 572 P.2d 683, 686-87 (Utah 1977).

[209] *Id*. at 687.

[210] *See id*. at 685.

executive branch official, charged with enforcing the Controlled Substances Act and defending its constitutionality, the authority to define those same offenses and, effectively, fix their penalties.[211] The Court stated the axiom that "[a] determination of the elements of a crime and the appropriate punishment therefor are, under our Constitutional system, judgments, which must be made exclusively by the legislature."[212] At that, "[t]he Legislature is not permitted to abdicate or transfer to others the essential legislative function with which it is thus vested . . . ."[213]

As many defenders who practice in Utah's justice courts are aware, prosecutors routinely charge legislatively-defined misdemeanors as infractions to avoid jury trials and the appointment of indigent defense counsel. Although this practice would appear to benefit most defendants, and tends to ease public defenders' caseloads, it also works a disadvantage to defendants who would rather take their chances with a jury of their peers than a judge. Prosecutors and judges cite the Utah Court of Appeals decision in *West Valley City v. McDonald* for this authority, however, the court there did not consider a separation of powers challenge.[214] Accordingly, defenders with clients intent on trying their cases to a jury might consider a separation of powers argument.

F. SPEECH, PROTEST & RELIGION

Freedom of expression is not generally associated with constitutional criminal procedure. However, a creative attorney might wield the Utah Constitution's more protective expression provisions to challenge so-called contempt-of-cop statutes—disorderly conduct, resisting arrest, interfering with an officer—and their application. Indeed, the Utah Constitution carries more precise and robust protections in the areas of speech, self-preservation, and protest than does its federal counterpart. Among them, article I, section 1 of the Utah Constitution states:

> All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely

---

[211] *See id*. at 689.

[212] *Id*. at 690.

[213] *Id*. at 687 (quoting *Western Leather and Finding Co. v. State Tax Commission*, 87 Utah 227, 231, 48 P.2d 526, 528 (1935)).

[214] *See* 948 P.2d 371, 375 (Utah Ct. App. 1997) (*holding* that amending legislatively-defined misdemeanor to infraction did not violate Utah Rules of Criminal Procedure, the defendant did not have a right to a jury trial once the trial court agreed not to impose jail, and the statute disallowing jury trials for infractions did not violate the Federal Constitution).

> their thoughts and opinions, being responsible for the abuse of that right.[215]

Article I, section 15 states:

> No law shall be passed to abridge or restrain the freedom of speech or of the press. In all criminal prosecutions for libel the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.[216]

Given dramatic textual differences from the federal constitution's First Amendment, any challenge based on them must begin with analysis of the plain language of the provisions as the court stressed in *Society of Separationists*. Writing for the court there, Justice Zimmerman rejected the parties' competing suggestions to follow decisions from "jurisdictions with different constitutional provisions and different histories than Utah."[217] He noted: "the federal courts have an entirely different task before them than do we. They have only cryptic sentences to interpret; we have paragraphs that are expressed in clearer terms and that are given even more vivid meaning by our unique and relatively recent history."[218]

In that vein, an advocate can make strong arguments that the text of article I, sections 1 and 15, taken with Utah's unique history, bespeak an individual right to resist unlawful government conduct through nonviolent means, or through means necessary to resist unlawful government violence. In a line of cases beginning with *State v. Bradshaw* in 1975,[219] and culminating with *State v. Gardiner* in 1991,[220] the court considered the degree to which people may lawfully resist or interfere with *unlawful* police conduct.

In a 3-2 decision, the *Bradshaw* Court considered a statute prohibiting interference with an arresting officer "regardless of whether there is a legal basis for the arrest." Under the federal and state[221] constitutions, the court stressed that a statute prohibiting interference with an arrest no matter the legal basis is unconstitutional "in that it permits and authorizes an arrest

---

[215] UTAH CONST. art. I, § 1.
[216] UTAH CONST. art. I, § 15.
[217] *Society of Separationists*, 870 P.2d 916, 940.
[218] *Id*.
[219] 541 P.2d 800 (Utah 1975).
[220] 814 P.2d 568 (Utah 1991).
[221] The *Bradshaw* Court made only passing reference to article I, section 14, treating that search and seizure provision concomitantly with the Fourth Amendment in a scant opinion. *See* 541 P.2d at 801.

without probable cause and without lawful basis."[222] The court ultimately held that the term "interferes," as used in the statute, "may mean any protest or verbal remonstration with an officer as well as the employment of physical force to avoid an arrest," failing to inform an ordinary citizen of the conduct sought to be proscribed.[223]

In *Gardiner*, the court considered whether the occupant of a private business had a common law or statutory right to forcibly oppose a concededly unlawful forcible entry and arrest by a police officer.[224] The court held that the common law right to resist unlawful police force had been subsumed by the Utah Code, and none of the defenses contained in the Code specifically mentioned "the illegality of police conduct," thus such police misconduct cannot be lawfully resisted.[225] This decision relegated as dicta the *Bradshaw* Court's reasoning that a statute prohibiting interference with unlawful police violence must be unconstitutional.[226]

The resulting rule of utter deference to police misconduct is not in keeping with the intent of the framers of the Utah Constitution. The Deseret News was owned by the Church of Jesus Christ of Latter-day Saints, and served as its mouthpiece during the decades leading up to the framing. The population of the territory was overwhelmingly made up of church members, and continued to be after statehood. Members subjected to harsh federal incursions to enforce the anti-polygamy laws were counseled to respect and abide by lawful enforcement of albeit unjust laws, but to resist the unlawful exercise of that authority:

> We speak strongly because we feel deeply the wrong of these proceedings. While an unjust and special law is in operation we do not oppose the fair and impartial execution of that law, no matter where it strikes or what may be the consequence. We may argue against its injustice but we do not and will not hinder its execution, nor speak against those who are charged with its administration when they act lawfully and consistently. What we protest against is the lawless execution of the law. The oppression of the people. The unjustifiable acts of brutal men. The excess of authority. The partial and extreme measures that are adopted. The persecution which is being conducted under the name of

[222] *Bradshaw*, 541 P.2d at 801.
[223] *Id.* at 801.
[224] *See Gardiner*, 814 P.2d at 571.
[225] *See id.* at 573-76.
[226] *Id.* at 570.

> prosecution. And these we expect to denounce and call upon the people to resist in every lawful way.[227]

This passage typifies the attitudes of the majority of Utahns toward abuses of official authority at the time of the framing. It follows then that the framers did not intend to qualify Utahns' "inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; . . . assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions."[228] Adding legislative support to this notion, in 2007, the Utah Legislature amended the assault on a peace officer statute to clarify: "This section does not affect or limit any individual's constitutional right to the lawful expression of free speech, the right of assembly, or any other recognized rights secured by the Constitution or laws of Utah or by the Constitution or laws of the United States."[229] Accordingly, defenders should not be so quick to capitulate in so-called contempt-of-cop cases if their clients were defending their lives or liberties against unlawful police action.

IV. CONCLUSION

This article is not intended as an authority on Utah constitutional criminal procedure. It is intended to spark ideas, discussions and action among members of the criminal defense bar, who stand peculiarly as the bridge between regular people and the rights they should enjoy. Discussing the historical persecution of Mormons in general, and Mormon polygamists in particular, constitutional law scholar and prominent Utahn Edwin B. Firmage has observed:

> The law, especially the criminal law, has severe limitations. Law, and the criminal law particularly, is not a scalpel. It is a big brutal meat cleaver. Anyone who has gone through a divorce knows this, let alone someone who has done time in the slammer.

A dedicated criminal defender can wield the individual protections found in the Utah Constitution as a scalpel where those protections have been chopped away under decades of unforgiving federal constitutional jurisprudence. The framers of the Utah Constitution arguably foresaw this necessity, reminding us as they did in the Declaration of Rights, that "[f]requent recurrence to

---

[227] *Resistance to Unlawful Authority*, Deseret News, May 12, 1886; *see also No Submission to Lawless Violence*, Deseret News, Jan. 27, 1886; *Lawless Doings of the Deputies*, Deseret News, March 24, 1886 (on file with author).

[228] UTAH CONST. art. I, § 1.

[229] Utah Code Ann. § 76-5-102.4(7) (2012).

fundamental principles is essential to the security of individual rights and the perpetuity of free government."[230]

[230] UTAH CONST., art. I, § 27.