UTAH BAR JOURNAL

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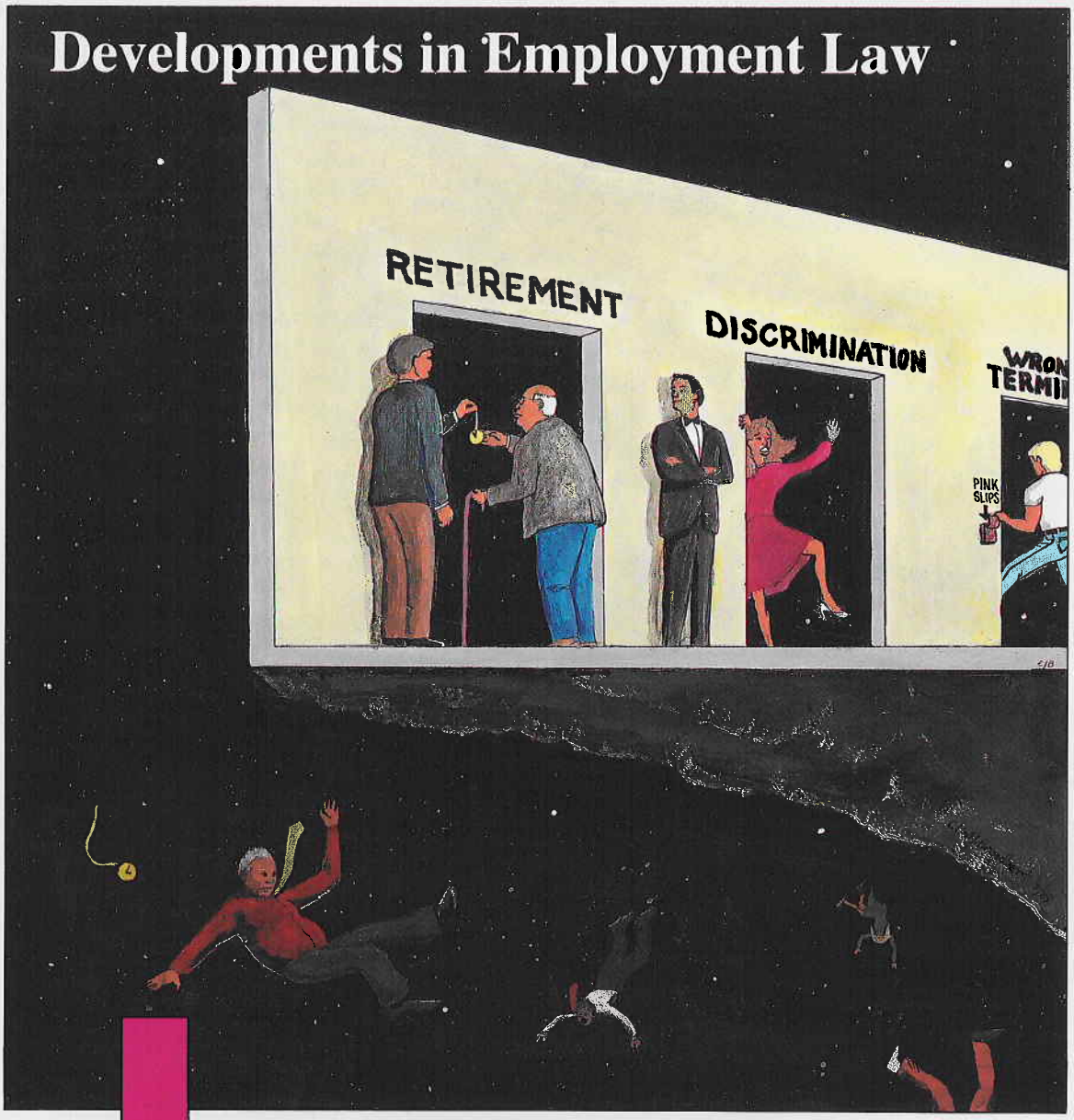
Developments in Employment Law



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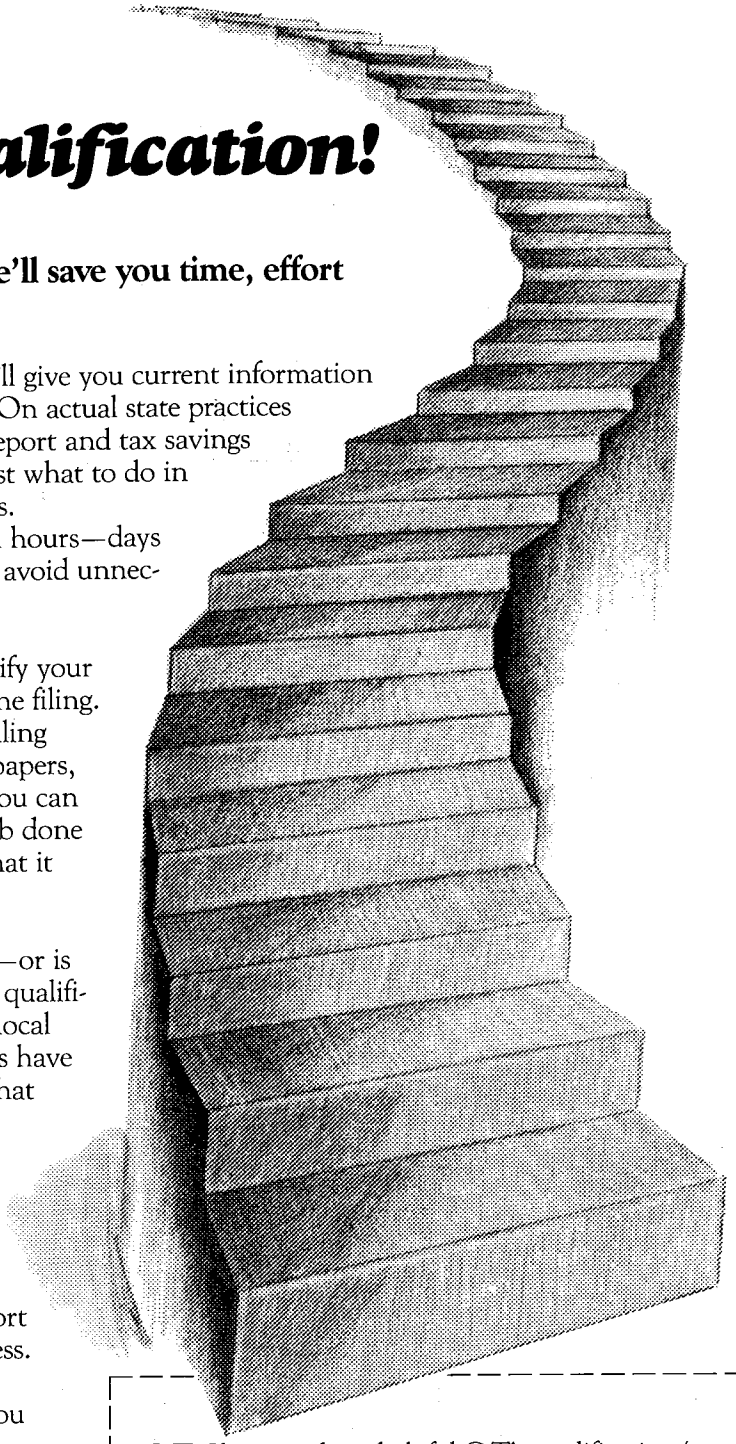

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COVER: Our thanks to Clint J. Broadbent, a student at the University of Utah with a double major in economics and Spanish, for the cover artwork which illustrates some employment-related issues of current legal interest. Clint is co-owner of Legal Art Works.

The Utah Bar Journal is published monthly, except July and August, by the Utah State Bar. One copy of each issue is furnished to members as part of their State Bar dues. Subscription price to others, $20; Single copies, $2.50; second-class postage paid at Salt Lake City, Utah. For information on advertising rates and space reservation, call or write Utah State Bar offices.

LETTERS

EDITOR'S NOTE: Although the following letters were not addressed to the Utah Bar Journal, *the* Journal *was recently asked by the Government Law Section of the Bar to publish the letters and the* Journal *is happy to oblige.*

January 30, 1989
Justice Michael D. Zimmerman
Utah Supreme Court
State Capitol
Salt Lake City, Utah 84114
Re: Article in *Utah Bar Journal* on Ethics

Dear Justice Zimmerman:

I read your article, "Professional Standards Versus Personal Ethics: The Lawyers Dilemma," which appeared in the December 1988 edition of the *Utah Bar Journal.* A note at the end indicated that it was based on a commencement address which you gave at the University of Utah College of Law in May 1988. The note also stated that it was a slightly edited version of your remarks. I am not sure to what extent your remarks were edited or taken out of context in the printed article.

While the focus of the article concerns the need for ethical practitioners in the area of civil litigation, I am concerned with that portion of it on page 35 that may suggest to some that criminal defense attorneys may properly operate free of any ethical responsibility for their actions.

I believe that there is a distinction to be made, implicit in your article, between zealously representing a criminal defendant without making moral judgments about the correctness of the client's cause or the justness of the result sought, on the one hand, and using proper and ethical means to do so on the other hand. Unfortunately, I think there are some who are not making that distinction in interpreting your article.

I think you would agree that there are limits to any attorney's zealous representation of a client, including criminal defense attorneys. I think that defense attorneys are sometimes confronted with very difficult ethical issues, but my understanding is that the *Rules of Professional Conduct* apply to all members of the Bar. For example, under Rule 1.2 and Rule 3.3 of the *Rules of Professional Conduct*, no attorney should assist a client in perpetrating a fraud against the court by putting on perjured testimony.

This limitation was recognized by the United States Supreme Court in *Nix v. Whiteside*, 89 L.Ed.2d 123 (1986), wherein a criminal defense attorney properly refused to cooperate with his client in presenting perjured testimony at trial:

> In Strickland, we recognized counsel's duty of loyalty and his "overarching duty to advocate the defendant's cause," Ibid. "Plainly, that duty is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth. Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law."
>
> *Id.* at 134.

I believe that many criminal defense attorneys in Utah take their ethical responsibilities seriously. I would like to see such attorneys used as role models for young attorneys practicing criminal defense work, similar to your suggestion that civil litigaters should seek role models among ethical civil practitioners.

Some attorneys with whom I have spoken interpret your article as advancing the position that criminal defense attorneys have no ethical constraints on their conduct. Such an interpretation, I believe, does a disservice to the spirit of the article as well as to the many ethical defense attorneys in this state, and may encourage others to act in violation of their ethical responsibilities.

I am not at all convinced that your article truly advocates such a position. In fact, I think the opposite is true. I know that its purpose was to encourage ethical conduct. I thought I would bring to your attention my concerns in the event that your remarks were either taken out of context or you believe some further clarification might be helpful.

Very truly yours,

Creighton C. Horton II
Assistant Attorney General
Litigation Division

February 28, 1989

Creighton C. Horton II, Esq.
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Dear Mr. Horton:

Thank you for your letter regarding my article on the conflict between professional standards and personal ethics that appeared in the December 1988 number of the *Utah Bar Journal.* You suggested some have read my article as implying "that criminal defense attorneys may properly operate free of any ethical responsibility for their actions."

The title of the article expresses its basic theme—that a lawyer following the literal requirements of the Code of Professional Conduct may still engage in conduct that is difficult to defend as a matter of personal ethics. I did state that the criminal defense lawyer, although bound to conform his or her behavior to the technical requirements of the Code of Professional Conduct, can legitimately assert the "adversary system excuse" in response to calls that he or she act in accordance with some higher personal ethical code. But, as I explained, the criminal defense attorney's justification for not heeding the call of personal ethics is because when that attorney is defending his or her client against the overwhelming power of the state, the client is, in a real sense, a surrogate for us all as the lawyer attempts to ensure that the state proceeds against the defendant only in accordance with the constitution and the laws.

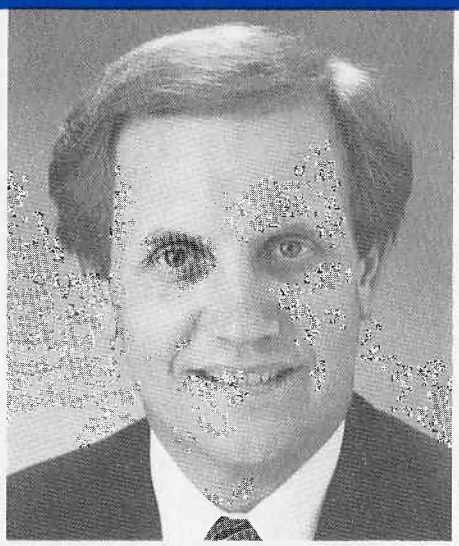
I am hard put to understand how what I said regarding the conflicting demands of the Code of Professional Conduct and one's personal ethical code could be construed as suggesting that criminal defense lawyers have no constraints on their conduct. I suppose, however, that some who do not like the role criminal defense lawyers must play under our system, or who think that certain members of that group violate the Code of Professional Responsibility, might read the article and leap to the mistaken impression that I was granting them license to do as they please. I hope this letter will alleviate any concerns you might have had about my true intentions.

Thank you for taking the time to write. In the event that others might share your concern, I am taking the liberty of forwarding a copy of your letter and of my reply to the *Utah Bar Journal.* If they conclude that there is a real danger that my views can be read as you suggest, then I will request that they publish our correspondence.

Sincerely,

Michael D. Zimmerman

PRESIDENT'S MESSAGE



By Hans Q. Chamberlain

It is with a great deal of humility that I commence my term as President of the Utah State Bar. I have now served on the Bar Commission since 1982, and I have a deep sense of loyalty to the Bar and appreciate past leaders who have left big shoes to fill. Living in Cedar City and trying to fulfill all responsibilities required will indeed be challenging, but likewise provide a great opportunity to serve and a chance to broaden one's base. I doubt that anyone realizes the complexity of Bar activities until they have to sit down and write their first President's message and report matters of interest to fellow members of the Bar.

The Utah Bar has changed significantly over the past few years, as has the legal profession as a whole. In 1960, 290,000 attorneys were licensed to practice on a national level. In 1986, more than 700,000 enjoyed that same privilege. By the year 2000, estimates indicate that there will be 1 million licensed lawyers in the United States, or one for every 300 people. In 1960, the median age of lawyers was 46, today it is 38 years, and more than one-half of the Bar of the United States have been admitted since 1975.

In 1984, the number of law students was approximately 127,000, but the mix of students has changed significantly, i.e., from 1,900 women in law school in 1960 to 40 percent of the 127,000 enrolled students in 1984. Likewise, between 1971 and 1985, minority enrollment has doubled from 5,600 to 12,300.

In Utah, since July 1985, membership in the Utah State Bar has increased from 4,100 to 5,100 members, with proportionate demands on the Utah State Bar staff and the Bar Commission. As one would expect, the Utah State Bar budget has likewise increased to approximately 1.2 million based on increased membership, regulatory functions and Bar discipline. A separate budget is also administered and maintained by the Bar for the Law and Justice Center. During that same period of time, sections and committees for the Bar have increased in number from 35 to 59.

With that statistical base, what are the major trends facing lawyers today, or perhaps better said, what do you need to watch out for to stay in the mainstream of the practice?

With mandatory continuing legal education coming into effect January 1, 1990, more of us will attend seminars to enhance our skills. The Bar must be receptive to the oft asked question, "What's in it for me?" The Bar Commission and staff are very concerned about how the CLE seminars can help you earn a better living and do your job better. With mandatory CLE attendance, seminars and Bar activities must be more skill-building and technical in nature than they have been in the past.

The changing demographics of the legal work force mandate every bar association's attention. The fact that the number of women lawyers is increasing and that women make up a larger percentage of American workers requires each of us to analyze our views and office policies concerning maternity leave, child care, job flexibility and other family-oriented benefits. We must keep the most important aspects of living in perspective.

With the acceleration of change, ways we do things create an enormous opportunity for service. Thus, my initial pitch to you is to recognize that belonging to an association like the Utah State Bar is often the most effective and least expensive way to keep abreast of change. Hopefully, the Bar can stay in tune with changes and pressures and, as an association, provide early warnings of both expectant changes and the ways in which other associations and individual lawyers are responding to those changes. When you think about it, that's exactly why you join a particular section or seek appointment to a certain committee of the Bar. You want to stay abreast of the latest trends in your area of expertise and provide service to others.

One of my goals this year is to aid you with as much support from an association standpoint as possible to allow you to deliver quality legal services with a high degree of professionalism and hopefully resulting economic rewards. The Bar Commission has recently given serious consideration of the need to keep members interested by recognizing that members expect the Utah State Bar to quantify exactly what it is doing for them, or in other words, to prove that membership is a "profitable investment." My personal view, as a rural lawyer trying to stay abreast of current trends, is that the Utah State Bar, my local Bar association and the American Bar Association have all played a valuable role in performing that task. Hopefully, it has for you. Since there is always room to improve, please let me hear from you this year and give me suggestions on ways to improve the services the Utah State Bar provides.

By Jeff R. Thorne

"A Lesson From a Drowning Dog"

I have a neighbor who is an avid pheasant hunter. Some years ago he had a dog named "Zeke." Most of us in the neighborhood thought Zeke was a "waste of dog food." However, Zeke had certain qualities which made him a good hunting dog. He covered lots of ground, he was aggressive and independent.

One day, while field testing his dog out near the Pineview Canal, the dog jumped in the cement lined canal to cool off and was unable to get out of the canal.

The current swept the dog toward an open siphon which ran underground for approximately 300 yards.

My friend realized that if the dog entered into the siphon, the dog would surely drown, so he ran ahead and reached down and grabbed the dog by the back of the neck to drag it out of the water.

The dog, disliking his grab, reached up and bit him, lacerating his hand and wrist, which ultimately required 42 stitches to repair the damage.

The dog biting its owner was its last act, as it was swept into the siphon and drowned.

Biting the hand that feeds you seems shortsighted even for a mean-spirited dog.

Judging from the number and types of complaints which are filed against Bar members by clients, it appears that as attorneys we sometimes appear to bite the hands which feed us.

Perhaps complaints will always be made; some complaints are valid and warranted. However, a few rules, if followed, would substantially reduce the volume of complaints filed against lawyers.

1. **Return phone calls.**

A high percentage of complaints against lawyers involves the failure to return phone calls and keep clients informed regarding progress of their case.

Every practitioner realizes that phone calls cannot always be returned immediately, but it is a good practice to return calls as promptly as possible; and if there has been a delay in returning a call, to apologize and give accurate reasons for the failure to return calls.

2. **Don't make clients wait for scheduled appointments.**

Many people have had the experience of calling a doctor for an appointment. It is not unusual to be put on hold several times and, when you finally get through, to have the receptionist make no attempt to fit the appointment into a person's busy schedule. You arrive at the clinic on time, but have to wait 30 to 45 minutes to see the physician who offers no apology for the inconvenience.

You are upset, and understandably so.

The same thing can happen in a law firm, making a client wait invites dissatisfaction. Don't keep people waiting, and if they are required to wait, let them know the reasons for the delay and offer a sincere apology.

3. **Make certain your client cannot misunderstand your billing procedure.**

Sometimes it is not enough to explain the billing procedure so the client can understand it; you need to make it clear enough that the client cannot misunderstand the billing procedure. A great deal of misunderstanding can be solved by a short written agreement between the client and the attorney, with a concise statement as to billing charges for your representation.

4. **Keep a case moving toward a conclusion.**

Numerous complaints to the State Bar involve the failure of attorneys to work on a case for long periods of time; and then when confronted by the client about the neglect of the case, it is not an uncommon practice to put the blame on the court schedule, the opposing counsel or some other extraneous cause.

5. **Know when to say no to clients.**

Some years ago, a senior partner in our law firm turned down a rather significant personal injury case. When I asked him the reasons for it, he said in discussing the case it became evident to him that the client was such a strong-willed person that he would want to be in charge in the litigation. The senior partner stated that it has been his experience that there could only be one

captain on his ship, and if the client wanted to be the captain, he was better off getting another attorney to represent him.

In your initial interview, it is prudent to look at the client to understand what the client wants, and if the client falls into any of the following categories, you might decline to represent him or her.

(a) The client who cannot be satisfied, or the client who has a history of changing attorneys.
(b) The client who does not understand the legal system and the costs associated with litigation.
(c) The client who has an attitude that he has a "can't lose" case, or has unrealistic expectations.
(d) The client with a matter outside your area of expertise.
(e) The client with the matter that is too big for your practice.

CONCLUSION

The majority of complaints are filed by clients against the attorney who represents them. By following the above-mentioned rules, attorneys can avoid the major types of complaints which are filed with the State Bar.

Utah Bar Foundation Publishes Cliff Ashton's History of the Federal Judiciary in Utah

The Utah Bar Foundation is pleased to announce that Clifford Ashton's history entitled *The Federal Judiciary In Utah* has been published in hardbound form and is now available for purchase at a cost of $15.00. Cliff's many years of experience as a trial attorney and his well-known skill as a raconteur give him a unique perspective on the history of Utah's Federal Judiciary. The book chronicles the federal judges from the early pioneer days of the State of Deseret, through the religious and political turmoil of the Utah Territory, to the controversial era of Judge Willis Ritter. The publication of this interesting book has been made possible by the generous contributions to the Foundation by Calvin and Hope Behle and the C. Comstock Clayton Foundation. Copies may be purchased by completing the attached form and mailing it to the Utah State Bar Office together with your check made payable to the Utah Bar Foundation in the amount of $15.00 for single copies. There is a discounted price for orders of multiple copies: 10-24 volumes at $12.50 each, more than 25 volumes at $10.00 each. Price includes postage and handling.

'The Federal Judiciary In Utah'

by Clifford Ashton

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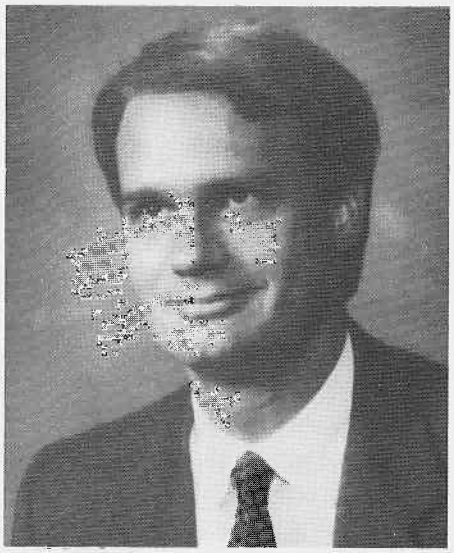
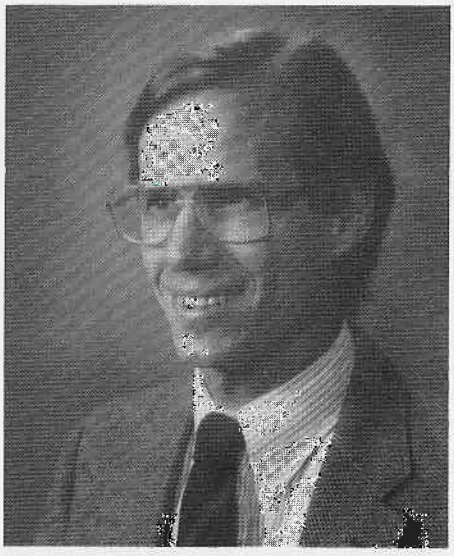
Utah Employment Law After Berube: The Demise of the At-Will Doctrine?

By David A. Anderson and W. Mark Gavre

Until recently, Utah contract law governing employment relationships was quite clear and straightforward. Utah courts followed the traditional rule of "at-will" employment, with two recognized exceptions. Unless one of the exceptions applied, an employer could discharge an employee at any time for any reason or no reason at all without incurring contractual liability. Employers no longer enjoy this unqualified freedom of action. Recent decisions, most significantly *Berube v. Fashion Centre, Ltd.*,[1] have altered the traditional at-will rule by recognizing implied restrictions on an employer's right to discharge an employee. Below we outline the traditional Utah rule of at-will employment, the changes effected by the recent decisions and some implications of those changes for employment litigation in Utah.



DAVID A. ANDERSON received his J.D. and a Masters of Industrial and Labor Relations degree from Cornell University. He practices exclusively in the areas of labor and employment law and employee benefits law with the firm of Parsons, Behle & Latimer in Salt Lake City.



W. MARK GAVRE received his B.A. from the University of California, Berkeley (1968), his Ph.D. from UCLA (1978) and his J.D. from the University of Utah College of Law (1985). Formerly an Assistant Professor of Political Science at the University of Utah, Mr. Gavre practices with the law firm of Parsons, Behle & Latimer, Salt Lake City, in the areas of labor and employment law.

I. THE TRADITIONAL AT-WILL RULE

In *Bihlmaier v. Carson*,[2] the Supreme Court summarized the traditional rule of at-will employment.

> The general rule concerning personal employment contracts is, in the absence of some further express or implied stipulation as to the duration of the employment or of a good consideration in addition to the services contracted to be rendered, the contract is no more than an indefinite general hiring which is terminable at the will of either party.[3]

Under this rule, absent extra consideration or a definite term of employment, an employer could fire an employee as freely as the employee could quit. The first exception to the above rule—extra consideration—had only rare application because an employee generally brings only her services to the employment relationship. Most breach of employment contract cases accordingly came down to one issue: whether there was a definite term of employment. Employers defeated such wrongful discharge claims simply by showing that the employee was hired for an indefinite period: "When an individual is hired for an indefinite time, he has no right of action against his employer for breach of the employment contract upon being discharged."[4]

In 1986 and 1987, the Utah Supreme Court and the Court of Appeals extended the *Bihlmaier* rule to cover post-hiring, contract modification claims and situations in which an employer's informal policy deviated from the at-will practice. In both cases, however, at-will employment was upheld, and the plaintiffs' implied contract claims were summarily dismissed.[5] In short, until 1988 the rule of at-will employment appeared to govern all aspects of (non-union) employment in Utah.

II. THE PROGRESSIVE DISCIPLINE—FRONT PAY RULE

In *Brown v. Ford, Bacon & Davis*,[6] the Tenth Circuit reversed the Utah District Court's award of damages for breach of an employment contract and remanded the case for consideration of "reasonable" front pay. The employer's written manual provided that an employee would be given two warnings before being terminated for cause. That manual was deemed by the district court to create an employment contract enforceable by the plaintiff. Although the employer had cause to terminate the plaintiff, it breached the contract by failing to follow its own progressive discipline procedure prior to termination.[7] On appeal, the Tenth Circuit concluded that the plaintiff was entitled to recover "her accrued salary for the period between her procedurally defective discharge and the time when her employer 'substantially complied' with the required procedures."[8]

The *Brown* decision was based upon the Utah Supreme Court's 1981 decision, *Piacitelli v. Southern Utah State College*.[9] In *Piacitelli*, the district court held that the

college's "Personnel Manual," which set forth procedures to be followed in the dismissal of an employee, constituted a contract governing the plaintiff's employment.[10] The college breached the contract when it terminated the plaintiff without complying with the Manual's procedures.[11] The Supreme Court held that "a college employee who was dismissed with sufficient cause, but in violation of contractually guaranteed termination procedures, [is] entitled as a matter of contract law to back pay for the period between the procedurally defective dismissal and the subsequent proper dismissal."[12] Because the college had complied with its termination procedures by the time the Supreme Court ruled, the back pay owed the plaintiff was a known amount.

The *Brown* decision applies the *Piacitelli* rule in the more problematic context of front pay. The district court in *Brown* had awarded six weeks of back pay from the date of the plaintiff's termination, based on its estimate of the time it would have taken the employer to give the plaintiff the required two warnings.[13] The Tenth Circuit found this award to be "unsupportable," ruling that the plaintiff was not only entitled to back pay, *i.e.*, wages for the period between her termination and the date of judgment, but also "reasonable" front pay. The amount of front pay should be measured by the time it would take the employer to achieve substantial compliance with its progressive discipline procedures.[14]

Determining the amount of front pay due in a progressive discipline case is inherently speculative. The two warnings called for in the employer's manual in *Brown*, for example, depend upon the employee's actual performance on the job. Because a terminated plaintiff is no longer employed by the defendant, however, it is impossible to determine if her job performance would have improved sufficiently to avoid discharge had the proper disciplinary procedure been followed. *Brown* thus makes employers liable for speculative and possibly substantial front pay damages because of procedural failures, even where the termination at issue is substantively justified.

III. BERUBE AND ITS PROGENY

In *Berube v. Fashion Centre Ltd.*, the Supreme Court unanimously recognized a claim by a discharged employee for breach of an implied-in-fact contract. The plaintiff was hired for an indefinite period without a written contract. However, the employer distributed a written policy manual identifying specific grounds on which an employee could be terminated immediately and without warning. Among those grounds was a refusal by an employee to take a polygraph test. In all other circumstances, the manual provided that "an employee may not be dismissed unless a verbal and a written warning has been issued and a reasonable opportunity to improve performance has been provided."[15] As part of an inventory shortage investigation, the plaintiff was asked to take a polygraph test. She did so. She was then asked to take a second test, to which she also submitted. When she refused to take a third polygraph test, she was discharged. The plaintiff sued, alleging, inter alia, defamation, wrongful discharge, infliction of emotional distress and breach of employment contract. The trial judge summarily dismissed all but plaintiff's defamation and wrongful discharge claims. The jury found for the employer on the two remaining claims.

In reversing the lower court's decision on the employment contract claim, the Supreme Court announced that it was "signaling a change in the employment-at-will law of Utah."[16] Because the Court issued three opinions, none of which commanded a majority, the scope of that change is not entirely clear. Nevertheless, the *Berube* opinions do make clear (a) that at-will employment in most circumstances is no more than a rebuttable presumption, (b) that the Court will recognize a public policy wrongful discharge cause of action and (c) that a majority of the Court does not now recognize an implied covenant of good faith and fair dealing in employment contracts.

> "...the Supreme Court was 'signaling a change in the employment-at-will law of Utah.' "

All members of the Court agreed expressly or impliedly that neither extra consideration nor a stipulation as to duration is required to take an employment relationship out of the at-will context. Declaring the at-will employment rule to be merely a "presumption" regarding the parties' intentions, the Court held that it may be rebutted by "a showing of expressed or implied intentions to the contrary" without additional consideration.[17] The parties may agree that the employment relationship can be terminated only for cause; the contract need not have a specific term for such an agreement to be enforceable.[18] Similarly, mutuality of obligation is not required in an employment contract because the parties are free to decide upon their own contract terms.[19]

While all five members of the Court recognized an implied employment contract, the Court reached no consensus regarding the facts which will create such a contract. Justice Durham's opinion, in which Justice Stewart joined, presented the most expansive view of the possible sources of an implied contract. A promise to discharge only for cause "may arise from a variety of sources, including the conduct of the parties, announced personnel policies, practices of that particular trade or industry, or other circumstances which show the existence of such a promise."[20]

In contrast, Justice Howe's brief concurring opinion, joined by Justice Hall, focused on the actual language of the written manual, recommending that the case be retried to determine whether the employer "violated its own policy manual" in discharging the plaintiff.[21] Nevertheless, Justice Howe did not actually limit the implied contract to the terms of the written manual, because he described the manual as "part of the total employment contract."[22] Justice Zimmerman indicated that "employee manuals, bulletins and the like are legitimate sources" for determining the implied contractual intent of the parties.[23] He focused on "the contents of the written policy manual" as the basis of the plaintiff's implied contract claim, but did not expressly limit the claim to the terms of the manual.[24]

The Court remanded the case for trial on whether the defendant breached an implied contract term in discharging the plaintiff for refusing to take a third polygraph test. Justice Zimmerman justified the remand on the grounds that there was sufficient evidence in the record to permit the implied contract claim to go to the jury.[25] Justice Durham, however, suggested that an implied employment contract claim must *always* go to the jury: "The determination of whether sufficient indicia of an implied-in-fact promise exists is a question of fact for the jury...."[26] Finally, a majority of the court agreed that if the plaintiff were to prevail at trial, she would be entitled to the expansive measure of general and consequential contract damages, which the Court had previously recognized in the insurance context.[27]

In addition to recognizing an implied employment contract, Justices Durham, Stewart and Zimmerman also agreed that in an appropriate case they would recognize a public policy exception to at-will employment. Because *Berube* did not involve a public policy issue, the scope and basis of

that cause of action remains to be developed.[28] Justices Durham and Stewart also favored recognizing a cause of action for breach of an implied covenant of good faith and fair dealing in the employment context.[29] No other members of the Court joined in that opinion, and Justice Zimmerman expressed strong reservations about the appropriateness of such a cause of action in the employment area.[30]

The Supreme Court's three separate opinions on the implied-in-fact contract claim deserve careful scrutiny and comparison because none speaks for a majority of the Court. A recent Court of Appeals decision illustrates the importance of such scrutiny. In *Gilmore v. Salt Lake Area Community Action Program,*[31] *the Court of Appeals, invoking Berube*, reversed a summary judgment in favor of the employer. The Court of Appeals completely ignored the differences in the three different *Berube* opinions and simply adopted Justice Durham's opinion as if it were a majority opinion. The Court of Appeals suggested that an implied employment contract claim is *always* a matter for the jury, explaining that "summary judgment was improperly entered" because "the existence of an implied-in-fact contract is a question of fact."[32]

The Court of Appeals' statement should be viewed as a comment limited to the facts of the case before it. The Court surely cannot mean that no implied employment contract claim can ever be resolved summarily. Such a position would effectively insulate implied employment contract cases from examination under Rule 56. In addition, the *Gilmore* opinion uncritically adopted Justice Durham's expansive view of the possible sources of an implied employment contract,[33] again treating her plurality opinion as if it were a holding of the higher court.

IV. CONCLUSION

Brown and *Berube* substantially change Utah employment law. Under *Brown*, an employer who discharges an employee in a "procedurally defective" manner may be liable for both back pay and front pay, even if the employer had cause for the termination or even if no cause were required. The changes wrought by the *Berube* decision are far broader. Justice Durham opined that the decision "will not eliminate the at-will construction of most employment contracts."[34] Indiscriminate acceptance and application of certain language in the Durham opinion, however, could have precisely that result. For example, if an implied employment contract claim may be based on the expansive array of grounds set forth in Justice Durham's opinion, it is unclear in what circumstances recognition of such a contract would ever be improper.[35] More fundamentally, if the existence of an implied contract were always a matter for the jury, no such claim, no matter how unfounded, could be resolved short of trial. If juries alone can determine the existence and content of implied employment contracts, and are free to draw upon such sources as "practices of [a] particular trade or industry" and "other circumstances,"[36] the resolution of implied contract claims will become case specific and unpredictable.

Justice Zimmerman refused to recognize an implied covenant claim in the employment context on the grounds that it would lead to unpredictable results and give juries "a license" to determine what an employer's duty to an employee must be and to impose "their version of the duty, after the fact, on virtually any employer."[37] If courts adopt the view that only juries can determine the existence of implied employment contracts and are free to do so on virtually any grounds, that criticism could apply equally to the implied contract claim recognized in *Berube*.

[1] 104 Utah Adv. Rep. 3 (1989).
[2] 603 P.2d 790 (Utah 1979).
[3] *Id.* at 792.
[4] *Id.*
[5] *Rose v. Allied Development Co.*, 719 P.2d 83 (Utah 1986); *Bruno v. Plateau Mining Co.*, 747 P.2d 1055 (Utah App. 1987).
[6] 850 F.2d 631 (10th Cir. 1988)
[7] *Id.* at 633.
[8] *Id.*
[9] 636 P.2d 1063.
[10] Because the issue of the manual's status as an employment contract was not appealed, the Utah Supreme Court expressed no opinion on the issue. 603 P.2d at 1065.
[11] 636 P.2d at 1065.
[12] *Id.* at 1067.
[13] 850 F.2d at 634.
[14] *Id.*
[15] 104 Utah Adv. Rep. at 15-16.
[16] *Id.* at 16.
[17] *Id.* at 10; 16.
[18] *Id.* at 10, 11.
[19] *Id.* at 11.
[20] *Id.* at 11.
[21] *Id.* at 16.
[22] *Id.* at 15.
[23] *Id.* at 17.
[24] *Id.*
[25] *Id.* at 18.
[26] *Id.* at 11.
[27] *Id.* at 14, 18, citing *Beck v. Farmer's Insurance Exchange*, 702 P.2d 795, 801 (Utah 1985).
[28] *Id.* at 9-10, 16.
[29] *Id.* at 12-13.
[30] *Id.* at 16-17.
[31] 110 Utah Adv. Rep. 51.
[32] *Id.* at 51; *see also* 52.
[33] *Id.* at 52.
[34] 104 Utah Adv. Rep. at 12.
[35] One case in which an implied contract clearly would not be recognized is where an express contract covering the subject already exists because "[a]n implied-in-fact promise cannot, of course, contradict a written contract term." *Id.* at 11.
[36] *Id.* at 11.
[37] *Id.* at 17.

Watson and Atonio: Toward a New Theory of Disparate Impact

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I. INTRODUCTION

Spurred by the racial violence of the 1960s, Congress enacted the Civil Rights Act of 1964, Title VII of which provides that:

> It shall be an unlawful employment practice for an employer:
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
>
> (2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.[1]

Two apparently different theories for establishing employment discrimination have evolved in the years since the enactment of Title VII. The first of these, disparate treatment, focuses on the intent of the employer to discriminate.[2] In order to establish a prima facie case of disparate treatment, the plaintiff must meet the test set forth in *McDonnell Douglas Corp. v. Green*,[3] and show:

> (i) that be belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications.[4]

Once that prima facie case has been established, then the burden shifts to the employer "to articulate some legitimate, non-discriminatory reason for the employee's rejection."[5] However, the ultimate burden of persuading the trier of fact that the employer had the discriminatory intent necessary for liability under Title VII remains with the plaintiff at all times.[6]

Under the disparate impact theory, on the other hand, no proof of discriminatory intent is necessary. The Supreme Court established in *Griggs v. Duke Power Co.*,[7] that a plaintiff may still establish liability when the employer uses employment practices that are "fair in form, but discriminatory in operation."[8] Once the plaintiff establishes the discriminatory impact of the employment practice, typically through statistical evidence, unless the employer can establish a "manifest relationship" between the employment practice and the employment in question,[9] the Supreme Court has held that such "built-in headwinds" for minorities are unacceptable.[10] While some commentators disagree that Congress intended Title VII to bar unintentional discrimination,[11] the oft-cited *Griggs* opinion and its progeny give continuing vitality to the doctrine. In addition, the EEOC Uniform Guidelines state that impact analysis should apply to "any measure, combination of measures or procedure used as a basis for any employment decision. Selection procedures include...physical, educational and work experience requirements through informal or casual interviews."[12]

Until recently, liability under this disparate impact theory has been imposed by the Court for non-job-related criteria such as a high school diploma requirement,[13] height and weight requirements,[14] written aptitude tests[15] and other objective selection criteria. In order for a plaintiff to prevail when subjective practices were at issue, she had to prove a case of disparate treatment.[16]

The Supreme Court's decision in *Watson v. Fort Worth Bank & Trust*,[17] that subjective employment selection criteria may be analyzed under a disparate impact theory, has cast a long shadow over what appeared to be a well-settled area of law. The future interpretation of *Watson* is sure to have far-reaching effects on employees and employers alike. However, what that interpretation may be remains somewhat of a mystery. The Court unanimously held that subjective employment practices may be analyzed according to the disparate impact theory, but beyond that basic holding, there was no majority opinion. Justice O'Connor, author of the opinion of the Court and of a plurality opinion joined by Justices Rehnquist, White and Scalia, set forth what appears to be a revolutionary new evidentiary standard for disparate impact cases. Justice Blackmun, in a separate concurrence joined by Justices Brennan and Marshall, agreed with portions of O'Connor's opinion, but disagreed strongly with her suggestion that the burden of proof in disparate impact cases should stay with the plaintiff at all times.[18] Justice Stevens also filed a concurring opinion, stating that it was inappropriate to purport to establish evidentiary standards in that particular factual contest.[19]

The *Watson* case left unanswered some important questions concerning the fate of the disparate impact theory. First and foremost is the question of who will bear the ultimate burden of proof. Other significant concerns are what level of proof is required of the plaintiff to establish a prima facie case, and the relationship between the alleged discriminatory practice and the job at issue. Will the plaintiff simply have to show a statistical disparity or will the specific practice which causes the disparity need to be pinpointed? The Supreme Court has recently heard oral argument in *Atonio v. Wards Cove Packing Co.*,[20*] a case which may well resolve much of the uncertainty about *Watson*. The two questions on which certiorari was granted are, first, whether statistical evidence which only shows a concentration of minorities in unskilled jobs may be used to establish the disparate im-

pact of hiring practices for skilled jobs, when the hiring for the skilled jobs is done outside of the work force and minorities are not underrepresented in the jobs at issue. The second question presented is whether the Ninth Circuit improperly allowed the employees to challenge the cumulative effect of a broad range of employment practices under the disparate impact theory.

How might *Atonio* affect disparate impact analysis? Assuming that the Court will be required to rule on who bears the ultimate burden of proof, the biggest question is whether it will be O'Connor's or Blackmun's view that will prevail. As the Ninth Circuit appears to accept Blackmun's view of the burden of proof,[21] the resolution of this issue should be very interesting indeed. Justice Kennedy, who did not participate in the *Watson* case, may well determine which way the Court will go. It is likely that Kennedy will lean more toward O'Connor's view than Blackmun's, suggesting perhaps that disparate impact theory is in for an overhaul. However, this paper will suggest that a compromise between the two differing views would be most likely to continue to guard employees in protected categories from discriminatory practices, without encouraging the use of quotas or placing an insurmountable burden on employers.

II. AFTER WATSON, DISPARATE IMPACT UNDER CLOSE SCRUTINY

The Court in *Watson* manifested its intention to preserve disparate impact analysis.[22] Nevertheless, if the plurality in *Watson* is able to become a majority in *Atonio*, the practical application of the disparate impact theory is likely to be drastically changed. A majority of the Court supported O'Connor's statement that "the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."[23] However, it appears that Justice O'Connor's idea of how that premise should be analyzed in practice differs greatly from the view espoused by the concurring Justices.

* This case, *Atonio v. Wards Cove Packing Company, Inc.*, 57 L.W. 4583 (1989), was decided (June 5, 1989) after completion and submittal of this article. Justice White's majority opinion held that the mere showing that non whites are underrepresented in at-issue jobs is not sufficient. In order to establish a prima facie case of disparate impact, the employee must demonstrate that the statistical disparity complained of is the result of a specified employment practice which has a significantly disparate impact. The Court further held that once a prima facie case has been established, the burden of production shifts to the employer to show a legitimate business justification. However, the ultimate burden of persuasion remains with the employee at all times. If he or she fails to meet that burden, the employee may still prevail by showing alternatives that reduce the disparate impact of the employer's practices, provided such alternatives are equally effective in light of costs and other burdens.

Justice White's opinion was joined by Justices Rehnquist, O'Connor, Scalia and Kennedy. Justices Stevens and Blackmun filed dissenting opinions in which Justices Brennan and Marshall joined.

A. The majority opinion

Justice O'Connor begins Section II of her majority opinion with a fairly benign summary of how the disparate treatment theory works. She states that "the distinguishing features of the factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used."[24] This does not imply that O'Connor sees no difference between the two theories; she frankly acknowledges their inevitable differences, yet continues, "we think it is [in]appropriate to hold a defendant liable for unintentional discrimination on the basis of less evidence than is required to prove intentional discrimination."[25] Taken at face value, these statements do not seem overly bold or controversial. However, they may shed some light on future interpretations of the disparate impact theory if indeed Justice O'Connor's view prevails in *Atonio*.

> "...some qualities cannot be measured accurately by objective procedures..."

Prior to *Watson*, each of the Court's disparate impact decisions involved standardized employment tests or objective criteria. Therefore, the Court had never been faced with the question of whether disparate impact analysis should apply to employment decisions based on subjective criteria.[26] Subjective practices have traditionally been analyzed by the Supreme Court under a disparate treatment theory,[27] while the Courts of Appeals were in direct conflict with each other on whether or not disparate impact analysis could properly be applied to subjective criteria.[28] Certiorari was granted in *Watson* apparently to resolve that conflict. In order to do so, the Court's opinion states that it must determine "whether the reasons that support the use of disparate impact analysis apply to subjective employment practices, and whether such analysis can be applied *in this context* under workable evidentiary standards."[29]

The majority in *Watson* concluded that "disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests," because, "in either case, a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices."[30] The Court based its ruling that such practices are properly subject to disparate impact analysis on the realization that the disparate impact theory might well be abolished if employers are allowed to avoid liability by merely incorporating subjective criteria into their employment decisions.[31] However, having reached the conclusion that disparate impact analysis may apply to subjective criteria, the Court divided sharply on the remaining issue of what evidentiary standards should be applied.

B. Justice O'Connor: New context requires new standards

Justice O'Connor takes special note of the employer's fear that if disparate impact is applied to subjective criteria, plaintiffs will be able to establish a prima facie case "through the use of bare statistics,"[32] while employers will have to justify the "business necessity" of any and perhaps all challenged practices to avoid liability.[33] She notes further that some qualities cannot be measured accurately by objective procedures and that indeed "success at many jobs in which such qualities are crucial cannot itself be measured directly,"[34] and therefore, since such practices are impossible to eliminate and prohibitively expensive to litigate, the employers' only alternative will be to adopt surreptitious quota systems in order to ensure that no plaintiff can establish a statistical prima facie case."[35] Justice O'Connor also states that "it is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance,"[36] and that in addition, "it would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces."[37]

O'Connor relies heavily on the language of Title VII which states that:

> Nothing contained in [Title VII] shall be interpreted to require any employer...to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by an employer...in com-

parison with the total number or percentage of persons of such race, color, religion, sex or national origin in any community, state, section or other area, or in the available work force.[38]

O'Connor asserts that "if quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted."[39] Because that result would clearly be contrary to the intent of Congress that Title VII not promote the use of quotas, O'Connor concluded that "today's extension of disparate impact analysis calls for a fresh and somewhat closer examination of the constraints that operate to keep that analysis within its proper bounds.[40]

In short, Justice O'Connor's point seems to be that disparate impact should apply to subjective and objective criteria alike, but that to avoid making it easier for plaintiffs to prove unintentional discrimination than intentional discrimination and, equally important, to avoid encouraging the use of quotas, so emphatically rejected by Congress and by prior Supreme Court holdings,[41] the broad expansion of the current disparate impact theory merits some change in the traditional burden of proof.

The first step in O'Connor's "fresh" approach is for the plaintiff to identify the specific procedure which he alleges is discriminatory.[42]. Once that practice has been identified, "the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group."[43] Courts are not required to assume that such evidence is reliable. O'Connor would allow the employer to rebut that prima facie case by impeaching the reliability of plaintiff's statistical proof or the probative weight which it should be given.

The defendant need only meet its burden of showing that its employment practices are "based on legitimate business reasons" in order to shift the burden to the plaintiff to show that other, less discriminatory means would be equally effective.[44] In addition, the plurality felt that the employer would be able to more easily meet its burden in cases involving subjective criteria, because higher deference to the employer's discretion would be allowed since the courts are "generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."[45] Thus, by making the standard of proof sufficiently high in disparate impact cases, in the plurality's view, employers will be protected from frivolous suits and will not have to resort to the use of quotas.[46]

C. **Justice Blackmun: Traditional disparate impact analysis requires that the defendant bear the burden of proof once the plaintiff has established a prima facie case**

The thrust of Justice Blackmun's concurrence is that contrary to what the plurality said about the allocation of burdens for proving and rebutting disparate impact claims, "a plaintiff who successfully establishes [a] prima facie case shifts the burden of *proof*, not production, to the defendant to establish that the employment practice in question is a business necessity."[47] Justice Blackmun took issue with the plurality's conclusion that the ultimate burden of proof in disparate impact cases remains with the plaintiff at all times, asserting that such a standard is a "near-perfect echo" of the Court's past disparate treatment analysis and "turns a blind eye to the crucial distinctions between the two forms of claims."[48]

Justice Blackmun "...stressed that the difficulty which courts might face must not be used to allow employers to avoid liability..."

Emphasizing that disparate treatment challenges focus on the employer's discriminatory intent, while disparate impact cases focus on the effect of a business practice, Justice Blackmun justifies the different burdens because in his view the *McDonnell Douglas* factors only give an inference of the intent necessary for disparate treatment analysis, whereas the disparate impact of an employment practice is *directly* established by a prima facie showing of a significant statistical disparity.[49] Therefore, Blackmun accepts the proposition that an employer faced with a disparate treatment claim may escape liability by offering any legitimate, non-discriminatory justification but refuses to accede to the plurality's disparate impact rationale, claiming that "[s]uch a justification is simply not enough to legitimize a practice that has the effect of excluding a protected class from job opportunities at a significantly disproportionate rate."[50]

Blackmun's supposition is that in order for an employer to avoid liability under the disparate impact theory, it must establish the business necessity of the criteria at issue. To qualify as a business necessity, "an employment criterion must bear more than an indirect or minimal relationship to job performance."[51] And even having met that standard, the practice may still submit the employer to liability, according to Justice Blackmun, "if the plaintiff persuades the court that other selection processes that have a lesser discriminatory effect could also suitably serve the employer's business needs."[52]

The plurality's suggestion that an employer might find it easier to establish a "manifest relationship" when subjective criteria are used rather than standardized tests was also unsatisfactory to Blackmun, who felt that suggestion might prove to be misleading. In his view, it remains the employer's obligation to persuade the court of the business necessity through one of the various methods available to establish a link between procedures and performance.[53] "And while common sense surely plays a part in this assessment, a reviewing court may not rely on its own, or an employer's, sense of what is 'normal' as a substitute for a neutral assessment of the evidence presented."[54] While Blackmun was willing to recognize that whether or not an employer will find subjective practices easier to justify is difficult to analyze "in the abstract," he stressed that the difficulty which courts might face must not be used to allow employers to avoid liability by simply articulating "vague, inoffensive-sounding subjective criteria."[55] To do so would "disserve Title VII's goal of eradicating discrimination in employment" and the lesson from *Griggs* that "employment practices 'fair in form, but discriminatory in operation' cannot be tolerated under Title VII."[56]

D. **Justice Kennedy, the swing vote.**

The battle lines appear to be clearly drawn between the plurality and concurring opinions in *Watson*. Thus, Justice Kennedy's position as the latest appointee to the Supreme Court has increased significance. What his opinion will be remains unclear, but it appears that he will lean toward the plurality's view. This result would be logical, based on two decisions in which he participated while on the Ninth Circuit Court of Appeals, and on the position he accepted in the recent case of *Patterson v. McLean Credit Union*, voting with the members of the *Watson* plurality to reconsider *Runyon v. McCrary*.[57]

In the first of the Ninth Circuit cases in which Kennedy participated, *Peters v. Lieu-*

allen,[58] the Court allowed disparate impact analysis to be applied to subjective criteria, but held that on the facts of the case, the plaintiff had not established a prima facie case.[59] A key provision from that decision is that the plaintiff in a disparate impact case is required to show the effect of the allegedly discriminatory practices on the defendant employer's work force.[60] This appears to tie in with the first question which was granted *certiorari* in *Atonio*; namely, whether the plaintiffs may use statistics not directly related to the jobs at issue in order to establish a prima facie case. A literal interpretation of the holding in *Peters v. Lieuallen* would seem to indicate that the use of such statistics would not suffice to prove the employer's liability.

Kennedy himself wrote the opinion in the second Ninth Circuit case dealing with disparate impact and subjective criteria. In that case, *Am. Fed. of S., C., & Mun. Emp. v. State of Wash.*,[61] Kennedy actually cited with approval the decision in *Atonio* prior to rehearing, holding that "disparate impact analysis is confined to cases that challenge a specific, clearly delineated employment practice applied at a single point in the job selection process."[62] He emphasized that the complexity of the problem made it inappropriate for disparate impact analysis. The Court held that such a system is simply "not the type of specific, clearly delineated employment policy contemplated by *Dothard* and *Griggs*; such a [system]...does not constitute a single practice that suffices to support a claim under disparate impact theory."[63] Kennedy's disapproval of broad-scale attacks on employment practices therefore appears to tie in with O'Connor's view in *Watson* that the plaintiff must identify the specific employment practices that are responsible for the statistical disparity,[64] and weighs in favor of the employer in *Atonio*, who asserts that allowing the plaintiffs to present a prima facie case by attacking the cumulative effect of several subjective criteria is improper.

In addition to the Ninth Circuit cases in which he joined, Kennedy's role in the decision to reconsider *Runyon v. McCrary*[65] also sheds some light on the possible position which he might assume in *Atonio*. The significance of the decision to rehear *Runyon* is twofold. First, while one decision is not enough to justify a generalization, it does give an early indication of the conservative direction toward which Justice Kennedy is leaning. Second, it indicates a willingness to reconsider at least some past precedents and, while this remains to be seen, since Kennedy's ultimate opinion of whether *Runyon* should be overruled or not is unknown, perhaps a willingness to analyze such precedents from a more conservative point of view. Both of these factors, especially when viewed together with his prior decisions involving disparate impact, demonstrate that at the very least he appears to agree more with Justice O'Connor than with Justice Blackmun, thus greatly increasing the probability that O'Connor's view, or a slight modification of it, will prevail in *Atonio*.

While such a result would surely make many employers happy, the impact it would likely have on disparate impact analysis should be more closely scrutinized by the Court prior to its establishing what amounts to a brand-new standard in a fairly well-established area of the law. Should the approach accepted by the Court really be as "fresh" as that suggested by Justice O'Connor? Or, for that matter, as traditional as that set forth by Justice Blackmun? O'Connor's approach applied in practice may substantially diminish the use of the disparate impact theory for civil rights plaintiffs, while Justice Blackmun's may overlook the potential encouragement of quotas and fail to take into consideration the difficulties employers would face if their subjective selection criteria were subject to precisely the same standard applicable to objective criteria. For instance, the plaintiffs in *Atonio* are faced with a difficult situation under O'Connor's view because of the fact that the employment criteria that they are contesting are so discretionary that to pinpoint a specific cause for the allegedly discriminatory impact may prove to be impossible. On the other hand, if Blackmun's approach that simply showing a significant statistical disparity is sufficient to shift the burden of persuasion to the defendant, then employers may be faced with an unbearable amount of litigation.

"...employers should use validated, objective selection procedures whenever they exist and are economically practical."

Perhaps the best approach would be somewhat of a compromise between the two, with a stiff burden for the plaintiff initially, then a shift of the burden to the defendant, with a lesser, although not insignificant, burden of showing business necessity or a manifest relationship between the criterion and job performance. Such a relationship could be shown by a number of methods, including a demonstration of the need for subjective criteria in making employment decisions, accompanied by procedures designed to diminish the possible effects of personal discriminatory bias.

III. A POSSIBLE RESOLUTION OF *ATONIO* AND THE BURDEN OF PERSUASION DILEMMA UNDER DISPARATE IMPACT ANALYSIS

A. Establishing a prima facie case—specification of the discriminatory criteria

After *Watson*, in order to establish a prima facie case of disparate impact, the plaintiff should be required to identify the specific practices responsible for the alleged statistical disparities. However, the amount of specificity required has not been determinatively settled. *Albemarle Paper Co. v. Moody*[66] held that a prima facie case is established when the plaintiff shows that "a particular job requirement or standard of selection operates to select applicants for hire or promotion in a pattern significantly different from that of the pool of applicants."[67] The Supreme Court added in *Dothard v. Rawlinson* that the plaintiff must show "a significantly adverse or disproportionate impact on persons of a [protected class], produced by the employers facially neutral acts or practices."[68] Other courts have held that in cases where the employment criteria are such that employees are unable to determine which practice is causing the effect, a "statistically significant disparity between promotions of blacks and similarly situated whites" is all that is required to shift the burden of proof to the employer.[69] In *Powers*, the Court's rationale was that requiring plaintiffs to pinpoint at the outset the cause of the disparity "allows subtle barriers to continue to work their discriminatory effects, and thereby thwarts the crucial national purpose that Congress sought to effectuate in Title VII."[70] In addition, the Court stated that "employees are unlikely to be aware of every method by which their employer selects persons for promotion, and yet the employer will be fully aware of what went into its decision."[71] That argument is a fair one in situations where the criteria are so discretionary that no one criteria can be pinpointed; therefore, part of the suggested compromise should include an exception to the general rule requiring the plaintiff to specify the precise criterion in such circumstances.

However, if the Court accepts the prop-

osition that any significant statistical disparity suffices to establish a prima facie case, "the disparate impact test would put on employers the burden of demonstrating the business necessity of each facet of their employment decisions, even if the plaintiffs could demonstrate no disparate impact caused by some of those facets."[72] Faced with such a heavy burden of proof, employers may well feel that the use of quotas is required, in order to avoid the threat of ruinous litigation. The Court should abstain from encouraging such practices to the extent possible.

In addition, as Justice O'Connor stated in *Watson*, "preferential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution."[73] In circumstances such as those in *Atonio*, where use of an affirmative action plan would be prohibited,[74] the simple assertion of a statistical imbalance should hardly constitute a prima facie case of disparate impact. Employers should not be forced to choose between ensuring that they will not be liable for discrimination based on disparate impact and a possible constitutional violation. Due to the possibility of reverse discrimination suits if employers use quotas, the Court should do all in its power to give employers a workable standard. Therefore, more than a simple statistical disparity should be required in order to establish a prima facie case of disparate impact.

B. **Causation as an element of the prima facie case**

The employees in *Atonio* have requested the Court to allow them to cite the cumulative effect of a number of employment practices (such as word-of-mouth recruitment, separate hiring channels for unskilled and skilled jobs, rehire policies and the lack of objective criteria)[75] as the cause of the statistical disparity that they declare exists. They base their claim on statistics comparing the number of minorities in unskilled jobs with the number of minorities in the upper-level skilled jobs at issue. Such job segregation statistics are simple and easy to use and therefore might serve Title VII's prophylactic aim; however, allowing such statistics to set the standard would almost certainly require employers to adopt quotas and thus should not be favored. In addition, despite some circuit court holdings which would likely allow such practices taken together to establish a prima facie case,[76] simply challenging all subjective hiring criteria should not be sufficient to meet the burden placed on Title VII plaintiffs. Once the plaintiff has identified a specific employment practice as being discriminatory, the plaintiff must also show (by statistical proof) that the disproportionate exclusion of applicants in a protected group was caused by the practice in question. In other words, "the statistical disparities must be sufficiently substantial that they raise such an inference of causation."[77]

The plaintiffs in *Atonio* should not be allowed to use the racial imbalance between the upper- and lower-level jobs to establish a prima facie case without proving that the practice actually had an impact on the jobs at issue. Without evidence of causation, an employer should not be required to show the business necessity of every practice which the employees allege might have combined with others to cause the imbalance. If such a standard were imposed, in a situation such as in *Atonio*, where minorities were overrepresented in the lower-level jobs, while (arguably) not underrepresented in the upper-level jobs at issue, the employer might elect to simply reduce the number of minorities in lower level jobs to correct the imbalance (e.g. Wards Cove could have insisted that the union representing the unskilled workers send only 10 percent minority workers.)[78] Or, in situations where it is not possible for an employer to reduce the number of minorities in lower-level jobs, to avoid liability, the employer may feel that a quota in the upper-level jobs is required, again subverting the intent of Title VII.[79]

C. **Burden of persuasion for the business necessity requirement**

The burden of establishing business necessity under the disparate impact theory has traditionally been on the employer, who must show that the employment practice has a "manifest relationship" to the employment in question. However, the plurality in *Watson* lowered that standard to be more of a burden of production—the employer must only show that the employment practices "are based on legitimate business reasons."[80]

In order to ensure that the disparate impact theory will not in essence be abolished, the burden of persuasion, contrary to O'Connor's position in *Watson*, should shift to the employer after the employee establishes a prima facie case. Nonetheless, as O'Connor's plurality rightfully asserts, employers are more competent than the courts to restructure business practices. Therefore, despite the shift in the burden, the level of proof required should be lower than under traditional disparate impact analysis, though not so low that it loses all significance. Courts should consider disparate impact claims on a case-by-case basis, balancing the amount and type of evidence proferred by the plaintiffs, with the employer's justifications and efforts to avoid the use of discriminatory biases in hiring and promotion decisions.

IV. SUGGESTIONS FOR EMPLOYERS ON AVOIDING LIABILITY

The following suggestions should aid employers in their attempt to avoid liability under Title VII disparate impact analysis. In addition, many of these factors could be among those that courts consider when determining whether or not an employer has met his burden of persuasion.

First, employers should use validated, objective selection procedures whenever they exist and are economically practical. Although beginning to implement such procedures may be a difficult and often an expensive venture, for employers subject to large numbers of employment discrimination suits the cost may be worthwhile if the employer is called upon to defend the criteria. For instance, in the *Watson* case, the bank might have been able to avoid liability if it had utilized one of the validated procedures which exist for evaluating entry level banking positions.[81]

Another factor which courts might consider, and a question which employers should ask themselves, is whether the challenged requirement (or any employment requirement, if the employer is looking for ways to avoid liability) is "essential to the core function of the job."[82] Employers should re-evaluate their selection and promotion criteria frequently, and keep an eye on the racial imbalance in their work force. Some courts have focused on "the extent of the employer's effort to rethink the necessity of the job's requirements in light of their discriminatory impact."[83] As the Fourth Circuit Court of Appeals stated in *Robinson v. Lorillard Corp.*, "it should go without saying that a practice is hardly 'necessary' if an alternative practice better effectuates the intended purpose or is equally effective but less discriminatory."[84] Therefore, in order to avoid being unable to establish the business necessity of employment practices, those practices must be reviewed often. Obviously, this could become a major hassle for many employers, particularly small businesses. The size of the company, the type of criteria, the strength of the plaintiff's case and the need for subjective criteria should all be considered by the Court, along with the defendant's argument that the alternatives are either too expensive or overly burdensome.

When it is necessary for employers to utilize subjective selection procedures, either due to the lack of objective criteria or the impracticability of validation, they should take careful steps to minimize the possibility of discrimination. Vague qualifications provide no safeguards to prevent discrimination and therefore should not be

considered sufficient by courts or employers.[85]

Employers should be encouraged to apply their necessarily subjective criteria as objectively as possible. This can be done by requiring supervisors and assessors to record their observations and impressions "regularly and systematically."[86] In some instances, those recorded scores may be subject to validation procedures as well, but even when that is not possible, "such recorded observations provide a sounder basis for assessment by a reviewing court than unrecorded or haphazard observations, where it is not even clear whether the supervisors are following the same standards or any standards at all."[87]

The Court in *Watson* recognized that unchecked discretion alone is not enough to raise an inference of discriminatory conduct.[88] However, it recognized that the problem with subconscious stereotypes and biases remains. If such an "undisciplined system" has the same effects as intentional discrimination, disparate impact analysis will apply.[89] Thus, to be safe, employers should actively try to control for the biases of those who implement their selection procedures. An employer may still not be able to avoid liability if the statistics show a great disparity, but in marginal cases, "a well-designed rating system might will make the difference."[90] For example, safeguards such as written evaluation criteria, automatic review procedures and opportunities for further review if an employee is dissatisfied with his evaluation combine to protect employees from bias.[91] In order to alleviate the plaintiff's burden of having to specify what practice is causing the disparity, employers should not only be required to keep records, but to inform their employees of what type of information the records contain. It should also be emphasized that under disparate impact theory, the employer should be required to justify only the use of the subjective criteria, not the actual choices. Those choices, if purposefully discriminatory, fit within disparate *treatment* analysis.

Finally, if the employer has a history of past discrimination and the work force remains imbalanced, an affirmative action plan, carefully tailored, should be implemented. Employers should not rely on their lack of discriminatory animus to help them avoid liability. Those who do not intend to discriminate, but in effect *do*, are meant to be covered by Title VII, even though that may sound unfair, so employers must take steps to protect themselves.[92]

V. CONCLUSION

The Supreme Court in *Watson* opened the door toward a new approach to disparate impact analysis. The conflict between the views of Justice O'Connor and Justice Blackmun has yet to be resolved; however, the *Atonio* case allows the Court an opportunity to answer some long-standing questions. How far the Court will go toward establishing boundaries for disparate impact analysis, clarifying the role of statistics and determining how to allocate the burdens of proof is unknown.

The Court should analyze carefully the arguments proposed by both Justice O'Connor and Justice Blackmun and devise a standard for disparate impact which will protect the rights of employees without imposing too heavy of a burden on employers. A number of factors, including the use of objective criteria when possible and protection against bias in the application of necessarily subjective practices, should be considered and weighed in the balance when determining whether a defendant has met its burden. Implementation of those factors *before* suit is brought is one means through which employers can more fully protect themselves for liability under Title VII.

[1] 42 U.S.C. Sect. 2000e-2(a) (1982).
[2] *See*, Teamsters v. United States, 431 U.S. 324, 335, n. 15 (1977).
[3] 411 U.S. 792 (1973).
[4] *Id.* at 802.
[5] *Id.*
[6] Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).
[7] 401 U.S. 424 (1971).
[8] *Id.* at 426.
[9] Connecticut v. Teal, 457 U.S. 440, 446 (1982).
[10] *Griggs*, 401 U.S. at 432.
[11] Gold, *Griggs Folly: An Essay on the Theory, Problems and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 Indus. Rel. L.J. 429, 492 (1985). "Contrary to what the Supreme Court said in *Griggs*, the evidence shows that Congress did direct the thrust of the Act to the motivation behind employment practices."
[12] 29 C.F.R. Sect. 1607.16(Q) (1985).
[13] *Griggs*, 401 U.S. 424 (1971).
[14] Dothard v. Rawlinson, 433 U.S. 321, 331-2 (1977).
[15] Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).
[16] *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).
[17] 108 S. Ct. 2777 (1988).
[18] *Watson*, 108 S. Ct. at 2792 (Blackmun, J., concurring).
[19] *Id.* at 2797 (Stevens, J., concurring). Note that Justice Blackmun also found that "the plurality need not have reached its discussion of burden allocation and evidentiary standards to resolve the question presented. I, however, find it necessary to reach this issue in order to respond to remarks made by the plurality." *Id.* at 2792, n. 2 (Blackmun, J., concurring).
[20] 810 F.2d 1477 (9th Cir. 1987) (en banc), *cert. granted in part*, 108 S. Ct. 2896 (1987).
[21] *Atonio*, 810 F.2d at 1485-6.
[22] 108 S. Ct. at 2786.
[23] *Id.* at 2785.
[24] *Watson*, 108 S. Ct. at 2785.
[25] *Id.* at 2785 (internal cites omitted).
[26] *Id.* at 2786.
[27] *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (discretionary decision not to rehire); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) (hiring based on personal knowledge and recommendations).
[28] *See*, Atonio v. Wards Cove Packing, 810 F.2d 1477, 1480 (9th Cir. 1987) (note 1 contains a summary of the various positions on the issue taken by the different Circuit Courts of Appeals.)
[29] 108 S. Ct. at 2786.
[30] *Id.*
[31] *Id.* at 2786-87.
[32] *Watson*, 108 S. Ct. at 2787.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*, citing her opinion in Sheet Metal Workers v. EEOC, 478 U.S. 421, 489 (1986) (O'Connor, Jr., concurring in part and dissenting in part).
[37] 108 S. Ct. at 2787.
[38] 42 U.S.C. Sect. 2000e-2(j).
[39] *Watson*, 108 S. Ct. at 2788.
[40] At this point, Justice O'Connor added a footnote explaining that unlike Justices Stevens and Blackmun *(See, supra*, n. 19.) she felt that "this congressional mandate [against quotas] requires in our view that a decision to extend the reach of disparate impact theory be accompanied by safeguards against the result that Congress clearly siad it did not intend." *Watson*, at 2788, n. 2.
[41] *See, e.g., Watson*, 108 S. Ct. at 2786-7; Albemarle Paper Co. v. Moody, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring in the judgment).
[42] *Watson*, 108 S. Ct. at 2788.
[43] *Id.* at 2788-89.
[44] *Id.* at 2790.
[45] *Id., quoting* Furnco Construction Co. v. Waters, 438 U.S. 567, 578 (1978).
[46] *Id.* at 2791.
[47] 108 S. Ct. 2792 (Blackmun, J., concurring).
[48] *Id.* at 2792-3.
[49] *Id.* at 2793-4.
[50] *Id.* at 2794.
[51] *Id.*
[52] *Id.* at 2795.
[53] *Id.* at 2795-6 (citing examples such as the results of studies, the presentation of expert testimony and prior successful experience as ways to legitimize a claim of business necessity).
[54] *Id.*
[55] *Id.* at 2796-7.
[56] *Id.*
[57] 56 L.W. 3735 (1988).
[58] 746 F.2d 1390 (9th Cir. 1984).
[59] *Id.* at 1392.
[60] *Id.*
[61] 770 F.2d 1401 (1985).
[62] *Id.* at 1405, *citing* Atonio v. Wards Cove Packing Co., 768 F.2d 1120, 1130 (9th Cir. 1985).
[63] *Id.* at 1406.
[64] 108 S. Ct. at 2788.
[65] 427 U.S. 160 (1976) (holding that Sect. 1981 prohibits racial discrimination in the making and enforcement of private contracts).
[66] 422 U.S. 405 (1975).
[67] *Id.* at 425.
[68] 433 U.S. 321, 329 (1977).
[69] Powers v. Alabama Dept. of Educ., 854 F.2d 1285, 1293 (11th Cir. 1988) (dismissing O'Connor's opinion in *Watson* as a plurality and relying on Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985).
[70] *Id.* at 1293.
[71] *Id.* at n. 13.
[72] Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1489 (9th Cir. 1987) (Sneed, J., concurring); *See also*, Pouney v. Prudential Insur. Co. of Amer., 668 F.2d 795, 801 (5th Cir. 1982).
[73] 108 S. Ct. at 2788; *See, e.g.*, Wygant V. Jackson Bd. of Educ., 476 U.S. 267 (1986).
[74] *See*, Johnson v. Transportation Agency, 94 L.Ed. 615, 631, n. 10 (1988) (unconstitutional to implement affirmative action plan without past history of discrimination).
[75] *Atonio*, 810 F.2d at 1487 (Sneed, J., concurring).
[76] *See, e.g.*, Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984); Powers v. Alabama Dept. of Educ., 854 F.2d 1285 (11th Cir. 1988).
[77] *Watson*, 108 S. Ct. at 2789 (plurality).
[78] *See*, Atonio v. Wards Cove Packing Co., Petition for Writ of Certiorari.
[79] *Id.*
[80] 108 S. Ct. at 2790.
[81] Rose, *Subjective Employment Practices: Does the Discriminatory Impact Analysis Apply?*, 25 San Diego L. Rev. 63, 90 (1988).
[82] Eichner, *Getting Women's Work That Isn't Women's Work: Challenging Gender Biases in the Workplace Under Title VII*, 97 Yale L.J. 1397, 1413 (1988).
[83] *See, e.g.*, Rogers v. Int'l Paper Co., 510 F.2d 1340, 1345-6 (8th Cir. 1975) (bias in employment must be guarded against by employer) *vacated and remanded on other grounds*, 423 U.S. 809 (1975).
[84] 444 F.2d 792, 798, n.7 (4th Cir. 1971).
[85] Rowe v. GMC, 457 F.2d 348, 358-9 (5th Cir. 1972); *See also*, Greenspan v. Auto. Club of Mich., 495 F. Supp. 1021, 1035-8 (Mich. 1980) (informal selection process criticized where supervisor in position to exercise discretion).
[86] Rose, *supra* note at 90.
[87] *Id.* at 90-91.
[88] *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2779, 2786 (1988).
[89] *Id.* at 2786-7.
[90] Schlei & Grossman, Employment Discrimination Law 201 (2d ed. 1983).
[91] EEOC v. E.I. du Pont de Nemours and Co., 445 F. Supp. 223, 249 (Del. 1978).
[92] *See*, Dee, *Disparate Impact and Subjective Employment Criteria Under Title VII*, 54 U. Chi. L. Rev. 957, 978 (1987).

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Affirmative Action: What Must a "Remedial" Program Remedy?

By Dan R. Waite

I. INTRODUCTION

Alice waited till the eyes appeared and then nodded. "It's no use speaking to it," she thought, "till its ears have come, or at least one of them." In another minute the whole head appeared. . . The cat seemed to think that there was enough of it now in sight and no more of it appeared.

"Who are you talking to?" said the King, coming up to Alice and looking at the cat's head with great curiosity.

"It's a friend of mine—a Cheshire cat," said Alice. . .

"Well, it must be removed," said the king very decidedly, and he called to the queen, who was passing at the moment, "My dear! I wish you would have this cat removed!"

The queen had only one way of settling all difficulties, great or small. "Off with his head!" she said without even looking round.

[A great dispute ensued between the king, queen and royal executioner as to whether the Chesire cat could be beheaded.]

The executioner's argument was that you couldn't cut off a head unless there was a body to cut it off from. . .

The king's argument was, that anything that had a head could be beheaded. . .

The queen's argument was that if something wasn't done about it in less than no time, she'd have everybody executed. . .[1]

Who was right? Can a Cheshire cat appearing with only a head be beheaded?

A somewhat analogous problem has recently been discussed by the Supreme Court regarding the prerequisites of an employer implementing a "remedial" affirmative action program. The problem, simply stated, is: Can an employer implement "remedial" affirmative action, which is designed to remedy the effects of past discrimination, if the employer never acted in a discriminatory manner? In the last 10 years, the Court has addressed this problem at least five times[2] and has answered "yes" on two occasions (i.e., an employer *can* implement affirmative action notwithstanding no showing of discrimination by the employer) and "no" on three (i.e., an employer *cannot* implement affirmative action in the absence of evidence that *he* discriminated). This essay will review these cases, suggest a ground for reconciling them and recommend an alternative approach for resolving these problems when they arise in the future.

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One important caveat first. There are many important factors that are vital to determining whether a given affirmative action program will be found valid that are beyond the scope of this paper. For example, this paper will neither discuss nor analyze the level of scrutiny the Court applies to any given affirmative action classification, the impact of a court-order to remedy past practices and the differences in the level of scrutiny an employment scheme is given depending on whether the preferential treatment is extended at the hiring, promotion or layoff stage. While this paper will focus primarily on the necessity of an employer to make a showing of prior discrimination, the reader should be aware that these other issues are very much a part of the calculus used to determine the validity of an affirmative action program.

II. BACKGROUND

The following cases provide the background for a discussion on affirmative action plans. The selected cases are not meant to represent an exhaustive compilation of affirmative action decisions. Rather, the selected cases are included for one of two reasons: (1) the case incorporates most of the relevant concerns of an earlier decision and was selected simply because it represents a more recent statement by the Court; or (2) the case significantly and relevantly added to the then existing base of affirmative action law.

The facts and procedural history of each case will be detailed in this section. Additionally, relevant portions of the Court's analysis will be discussed in later sections.

A. Title VII Cases

United Steelworkers v. Weber[3]*—("Weber")*

The United Steelworkers of America and the Kaiser Aluminum & Chemical Corp. entered into a collective bargaining agreement that covered the terms and conditions of employment at 15 Kaiser plants. The agreement included an affirmative action plan designed to eliminate the conspicuous racial imbalances in Kaiser's almost exclusively white work force. The affirmative action plan provided for on-the-job training programs to teach both black and white unskilled production workers the skills necessary to become craft workers. Fifty percent of the openings in these in-plant training programs were reserved for the black employees.

The *Weber* controversy centered on the operation of the affirmative action plan at Kaiser's plant in Gramercy, La., where less than 2 percent of the skilled craft workers at the plant were black even though the work force in the area was approximately 39 percent black.

The first training class at the Gramercy plant consisted of seven black and six white craft trainees. Mr. Weber was a white production worker with more seniority than any of the seven blacks selected, but less seniority than the six white trainees.

Mr. Weber brought a class action suit in federal district court claiming that the affirmative action program granted a preference to junior black employees at the expense of senior white employees and, therefore, resulted in discrimination in violation of Title VII. Both the District Court and the Fifth Circuit Court of Appeals agreed. The Supreme Court, however, did not agree and

reversed.

Johnson v. Transportation Agency[4]*—("Johnson")*

In 1978, the Santa Clara District Board of Supervisors unilaterally adopted an affirmative action plan. Pursuant to this plan, the Transportation Agency could take into consideration the sex of an employee when promoting within job classifications where women were substantially underrepresented in proportion to their representation in the county labor force. The official reason given for the affirmative action was that the "mere prohibition of discriminatory practices is [neither] enough to remedy the effects of past practices [nor] to permit attainment of an equitable representation of minorities, women and handicapped persons."[5]

In the Skilled Craft Worker category, none of the 238 positions were held by women.

In December 1979, the agency announced a vacancy for the promotional position of road dispatcher, which is within the Skilled Craft Worker category. Twelve employees applied, including Diane Joyce and Paul Johnson. Nine of the applicants, including Joyce and Johnson, were deemed qualified for the job and were interviewed by a two-person panel. Based on these interviews, Johnson tied for second with a score of 75, while Joyce ranked next with a score of 72.5. A second interview was conducted by three male agency supervisors, who ultimately recommended that Johnson, the male candidate, be promoted.

Joyce was apprehensive of possible prejudice against her because she had experienced difficulties with two of the three men on the final panel. Joyce therefore contacted the affirmative action officer and voiced her concerns. Accordingly, the affirmative action officer recommended to the agency director that Joyce get the promotion. After some deliberation, the director concluded that the promotion would be given to Joyce.

After receiving a right-to-sue letter from the Equal Employment Opportunities Commission, Johnson sued under Title VII and won in federal district court. The Ninth Circuit overturned the trial court's decision and on appeal, the Supreme Court affirmed the Ninth Circuit.

B. **Fourteenth Amendment Cases**

Wygant v. Jackson Board of Education[6]*—("Wygant")*

In the 1968-69 school year, when black students made up 15.2 percent of the student body, black teachers accounted for only 3.9 percent of the teaching staff in Jackson, Mich. The Jackson chapter of the NAACP filed a complaint with the Michigan Civil Rights Commission charging discriminatory hiring practices. The Commission's investigation substantiated the allegations and the Jackson School Board accordingly took steps to hire more black teachers. Even though recruitment efforts were successful, layoffs became necessary just two years later. Since the layoffs were based on seniority, many of the newly hired black teachers were laid off, i.e., much of the gain made by the recruitment effort was lost.

The following year, racial tensions in the school system grew. A new contract was adopted which provided, inter alia, that should layoffs become necessary again, "at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff."[7]

Layoffs, in fact, became necessary again. Accordingly, the contract was implemented whereby some white teachers were laid off while other black teachers, with less seniority, were retained. Laid-off white teachers sued, claiming a violation of the Equal Protection Clause of the Fourteenth Amendment.

"Can an employer implement 'remedial' affirmative action, which is designed to remedy . . . part discrimination if the employer never . . . discrimin[ated]?"

Relying on *Weber*, the district court granted the Board's motion for summary judgment. The Sixth Circuit affirmed. The Supreme Court reversed.

United States v. Paradise[8]*—"Paradise")*

For nearly four decades, the Alabama State Police had not hired a single black trooper. In 1972, the federal district court imposed a hiring order and enjoined the Police Department from engaging in further discriminatory hiring or promotion practices. Seven years later, however, there were still no blacks at any upper level of the department. After four more years passed, two consent decrees and several unfulfilled promises by the department to develop an acceptable promotion scheme, the Court ordered that "for a period of time," at least 50 percent of future promotions to the office of corporal must be black. This order was effective (1) so long as there were sufficient numbers of qualified black troopers, AND (2) until blacks constituted 25 percent of the trooper force, OR (3) until the department developed and implemented an acceptable promotion plan.[9]

The United States appealed the Court's order on the ground that it violated the Equal Protection Clause. Both the Eleventh Circuit and the Supreme Court affirmed the court order.

City of Richmond v. J.A. Croson Co.[10]*—("City of Richmond")*

In *City of Richmond*, the city adopted a Minority Business Utilization Plan. The plan required general contractors who were awarded city construction contracts to subcontract at least 30 percent of the dollar amount to one or more "Minority Business Enterprises" (MBEs).

Although the plan declared that it was "remedial" in nature, it was adopted after a public hearing at which no evidence was presented indicating the city had directly discriminated on the basis of race in awarding contracts. Further, no evidence was presented indicating general contractors, who had been awarded city contracts, had discriminated against minority subcontractors. The evidence which was presented included a statistical study showing that while the city's population was 50 percent black, less than 1 percent of its construction contracts had been awarded to minority businesses in recent years.

Pursuant to the plan, the city adopted rules providing that the 30 percent set-aside requirement could be waived whenever the general contractor showed qualified MBEs were either unavailable or unwilling to participate.

After the plan had been implemented, the city of Richmond issued an invitation to bid on a project for the provision and installation of plumbing fixtures at the city jail. J.A. Croson Company, a mechanical plumbing general contractor, received bid forms. Croson determined that in order to meet the 30 percent set-aside requirement, an MBE would have to supply the plumbing fixtures. Accordingly, Croson contacted five or six MBEs who were potential suppliers. None of the MBEs, however, expressed an interest in the project. On the day bids were due into the city, Croson again telephoned a group of MBEs. This time a local MBE indicated an interest to participate in the project. Relying on the MBE's commitment to expedite to bid to Croson, Croson submitted its bid to the city.

When the city opened the sealed bids, Croson was the only bidder. After a week had passed, the MBE had still not submitted

its bid to Croson because of credit problems with its suppliers. Accordingly, Croson petitioned the city for a waiver of the 30 percent set-aside. Upon learning of Croson's waiver request, the MBE contacted a fixture manufacturer, received a price quotation and submitted a bid to Croson which was 7 percent higher than market price. On the same day, the MBE contacted the city, identified itself as an MBE and indicated it could supply the fixtures specified in the city jail contract. Accordingly, the city denied Croson's waiver request and gave them 10 days to submit the appropriate forms.

Croson repetitioned the city indicating the prohibitive cost of the MBE's bid and asked the city to either (1) allow Croson to raise their bid commensurately; or (2) grant them the waiver. The city declined to do either and, in fact, indicated they had decided to rebid the project.

Croson brought a suit alleging the plan was unconstitutional under the Fourteenth Amendment's Equal Protection Clause. The district court upheld the plan. Relying on *Wygant*, the Fourth Circuit reversed the district court. The Supreme Court affirmed the Fourth Circuit.

III. WHOSE DISCRIMINATION CAN AN EMPLOYER REMEDY?

In evaluating the validity of remedial affirmative action schemes, different members of the Court have placed varying emphasis on a series of factors.

A. Societal Discrimination v. Actual Employer Discrimination

Generally, the most important factor relied on when determining the validity of an affirmative action program has been whether the challenged action was implemented in response to prior illegal acts of discrimination. Alternatively, some affirmative action schemes are implemented in response to the effects of societal discrimination. Societal discrimination exists when minorities are underrepresented not because the employer deliberately discriminated against them, but rather because of society's long history of discrimination against minorities.[11]

Prior to 1979, the Court upheld employment preferences under Title VII of the Civil Rights Act of 1964[12] only when the action was meant to remedy an employer's proven past acts of discrimination.[13] In 1979, however, the Court addressed for the first time the question whether Title VII permits private employers to implement an affirmative action program without any evidence of prior illegal discrimination by the employer. In *Weber*,[14] the Court construed Title VII to permit such affirmative action, requiring only the prerequisite of a "manifest" statistical imbalance in the representation of minorities in a "traditionally segregated job categor[y]."[15]

Arguably, the Court went even further in approving societal discrimination as an appropriate basis for implementing an affirmative action program when the Court decided *Johnson*.[16] Whereas in *Weber* one could at least point to discrimination by the union to explain the absence of blacks in the craft force, there was no such explanation in *Johnson*. Indeed, not only was there no showing of prior discrimination, the district court affirmatively found that the agency had not discriminated. Thus, *Weber* and *Johnson* taken together would seem strong precedent for the proposition that an employer can unilaterally implement a minority preference scheme whenever the employer can show a statistical disparity disadvantageous to the minority class. This assumption, however, is not entirely valid.

The Court has decided a pair of cases which hold that societal discrimination is *not* an acceptable predicate for implementing a voluntary affirmative action program. In *Wygant*,[17] is the plurality declared: "so-

cietal discrimination, without more, too amorphous a basis for imposing a racially classified remedy."[18] This rejection of *Weber* was likewise echoed by a plurality in the recent *City of Richmond* decision.[19]

In *City of Richmond*, the District Court found that the city's set-aside plan remedied the present effects of past discrimination in the national construction industry. However, Justice O'Connor, writing for a majority of the Court, declared:

> [A] general assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy... While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia... [A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.[20]

In a concurring opinion, Justice Scalia stated he would require even more than the majority before validating a voluntary affirmative action program:

> In my view, there is only one circumstance in which the states may act by race to "undo the effects of past discrimination": where that is necessary to eliminate their own maintenance of a system of unlawful racial classification. If, for example, a state agency has a discriminatory pay scale compensating black employees in all positions at 20 percent less than their non-black counterparts, it may assuredly promulgate an order raising the salaries of "all black employees" by 20 percent.[21]

Justice Scalia therefore disagreed with the majority who would allow race-conscious affirmative action by a proven past offender. Rather, Justice Scalia would only allow what he calls "race-neutral remediation."[22] Under this approach, not only would the employer be compelled to show a history of discriminatory practices, but the employer would also have to identify its victims and limit any remedial action to those identified victims.

In arriving at their conclusions, both the majority and Justice Scalia felt compelled to construe the language of the Equal Protection Clause literally. That is, the clause declares that the equal protections of the law shall not be denied to "any person"; regardless of whether that person is part of a minority or sits squarely in the majority.

The dissenters in *City of Richmond* essentially felt the majority invalidated the city's plan for failing to show the patently obvious, i.e., Richmond, the heart of the old Confederacy, had a well-documented history of racial discrimination.[23] In other words, striking down the city's plan penalized them for not producing evidence on a fact everyone knew to exist.

Thus, we have the classic confrontation. Some members of the Court feel societal discrimination is clearly sufficient to validate a voluntary affirmative action scheme, while other members of the Court feel just as vigorously that a more specific and individualized showing is required. Section IV of this paper suggests a way for resolving this conflict.

B. Contemporaneous Findings of Discrimination

It appears clear, after *City of Richmond*, that six members of the current Court feel an employer must make an adequate showing of prior discrimination before using racial classifications to remedy such discrimination.[24] If so, exactly when must such a showing of past discriminatory practices be made? Must the predicate finding be made contemporaneous with or before the employer implements the preferential program. Alternatively, can the employer procrastinate such finding until the program is attacked in court?

Likewise, how formal must the finding be to validate the program? Must the finding be tantamount to the employer declaring itself guilty of actually having violated the Equal Protection Clause (or Title VII); or can they be less profound?[25]

The Court most recently, in *City of Richmond*, answered the question of when the factual showing of prior discrimination must be made:

> While the states and their subdivisions may take remedial action *when they possess evidence* that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity *before* they may use race-conscious relief.[26]

Thus, if taken at face value, it will not be sufficient that an employer acted from a "hunch" or for altruistic purposes and then, when challenged in court, supports his action with evidence. Rather, employers must have a firm basis for their action and must have the evidence in hand *before* implementing race-based affirmative action programs.

As to the formality of the showing, Justice O'Connor, in *Wygant*, argued that prior discrimination can be demonstrated by showing a gross statistical disparity between the percentage of minorities in the employer's work force and the percentage of qualified minorities in the relevant labor pool.[27] Further, Justice O'Connor argued that while particularized findings are allowed, they should not be required because of the legal risks attendant with requiring such findings.[28] As she explained, if public employers were required to make particularized findings of past discrimination, they would be "trapped between the competing hazards of liability to minorities if affirmative action is not taken to remedy apparent employment discrimination and liability to non-minorities [on a reverse discrimination claim] if affirmative action is taken."[29]

Thus, it appears that while an employer must have a firm basis for concluding he engaged in prior discrimination, before taking any affirmative action to remedy that discrimination, the employer need not declare himself in violation of Title VII or the Equal Protection Clause. The employer can simply show that a manifest statistical imbalance exists between the percentage of minorities in the employer's work force and the percentage of qualified minorities in the relevant labor pool.

IV. IS THERE/SHOULD THERE BE A TITLE VII—EQUAL PROTECTION CLAUSE DISTINCTION?

A possible ground for reconciling the *Weber/Johnson—Wygant/City of Richmond* dichotomy is that the former are Title VII cases while the latter are Equal Protection Clause cases and that the obligations under Title VII are less restrictive than those required under the Constitution. An examination must be made, then, to determine what the controlling test(s) is/are. Further, if the Court does review some affirmative action programs differently than others, should the distinction exist?

What is the controlling test? Some of the Justices approve the use of race- or gender-based affirmative action plans only when designed to compensate "identifiable victims" of employer discrimination but never to benefit non-victims.[30] Other Justices allow the use of race or sex preferences to compensate both "identifiable victims" and non-victims, but only in particularly outrageous situations and even then only when the remedy is not excessive.[31] Still other Justices allow the use of race or sex preferences to benefit non-victims where a manifest imbalance in a traditionally segregated job category is shown and the remedy is temporary, designed to eliminate the mani-

fest imbalance and does not infringe on the legal rights of the non-minority.[32] Finally, there are Justices who allow the use of race- or sex-based preferences when non-victims are compensated for "societal discrimination" and the remedy is designed to eliminate statistical imbalances in job categories.[33]

In short, it is clear the Supreme Court has not decided on a single controlling test for all types of affirmative action schemes. This section will suggest a test the Court should adopt when examining the validity of affirmative action plans and will conclude that the test should be the same for all challenges, whether under Title VII or the Equal Protection Clause.

A. **Title VII Should Not Require More Than the Equal Protection Clause**

Johnson[34] presented a challenge to a voluntary affirmative action plan under Title VII. In finding the plan valid under Title VII, the Court asserted that Title was not likely meant to be more restrictive than the constitution.[35] Further, the majority rejected Justice O'Connor's assertion that a public employer's obligations are identical under both Title VII and the Constitution. Therefore, it can be fairly concluded that the *Johnson* majority believed Title VII constraints are less restrictive, e.g., than under the Constitution.

The *Johnson* majority's analysis, however, is inappropriate.[36] Analysis of a public employer's conduct using only a statute allegedly less restrictive than the Constitution serves little precedential purpose since a public employer must also satisfy constitutional requirements.[37]

Since the *Johnson* majority believed Title VII was less restrictive than the Constitution, the opinion offers no guidance to public employers as to whether their affirmative action plans are valid under the Equal Protection Clause. Two alternative approaches suggested by Justice O'Connor and Justice Scalia would have provided the guidance lacking in the majority's opinion.[38]

Justice O'Connor asserted that *Weber* (Title VII) and *Wygant* (Equal Protection Clause) sought to resolve the same conflicting concerns. This assertion implies that the Constitution and Title VII are not only equally restrictive of public employers, but also that a public employer's efforts to remedy discriminatory practices would be analyzed most efficiently using the *Wygant* criteria.[39] Justice O'Connor concluded that a prima facie case under Title VII would satisfy *Wygant's* "firm basis" requirement and thereby justify affirmative action. Consequently, Justice O'Connor suggested that there is no reason to apply different standards under Title VII and the Constitution; i.e., they are coterminous.[40]

Had the *Johnson* majority applied this analysis, any affirmative action scheme which was valid under Title VII would likewise be valid under the Constitution.[41]

Justice Scalia's dissent suggested a different analysis which the Court might have applied. Justice Scalia observed that Title VII's plain language unambiguously prohibits any and all discrimination in employment practices. That is, the statute prohibits discrimination against the majority race just as much as it prohibits discrimination against racial minorities. On the other hand, the Constitution does permit affirmative action when such a plan can pass strict judicial scrutiny. Therefore, he reasoned, Title VII places a *greater* restriction on public employers than does the Constitution.[42] Because Title VII requires more than the Constitution, Justice Scalia urged the *Johnson* Court to overrule *Weber* and to apply more restrictive standards by which discriminatory conduct should be scrutinized.[43] The majority, however, rejected this suggestion and in fact relied on *Weber*.

> "...the Supreme Court has not decided on a single controlling test for all types of affirmative action schemes."

Because the *Johnson* majority arguably chose an ineffective approach, the case provides no concrete guidelines by which public employers may avoid constitutional liability when implementing affirmative action programs. The Court could have adopted Justice O'Connor's view that Title VII and the Constitution are coterminous and thereby determine the *Wygant* standards would apply to future affirmative action programs implemented by public employers. Alternatively, the majority could have agreed with Justice Scalia's assertion that Title VII is more restrictive than the Constitution and therefore create more restrictive guidelines by which future government employers could survive Title VII attack. Instead, the Court set limited standards which are arguably useful only to public employers whose problems and programs closely match those in *Johnson*.[44]

B. **Validating Tests Under Title VII and the Equal Protection Clause Should Be Synonymous**

When any type of affirmative action plan is challenged, regardless of whether the challenge is under Title VII or the Equal Protection Clause, the controlling test should be the same. The test should be a two-pronged inquiry: (1) is there a sufficient demonstration of intentional discrimination by the employer, and (2) is the affirmative action plan narrowly tailored, in light of other alternatives, to eliminate the discrimination.[45]

The employer can satisfy the first prong of the suggested test by producing evidence of a "firm basis" for concluding that the employer has intentionally engaged in past or present discrimination. Alternatively, the employer could show he used policies or practices which have left uncorrected past discrimination or which have a present discriminatory effect. To avoid the predicament Justice O'Connor detailed in *Wygant*,[46] this evidence should not require a specific employer admission of discrimination. Further, the employer should not be required to identify the specific victims of prior discrimination.[47]

The second prong of the test can be satisfied only if the affirmative action scheme is designed to eliminate the employer's identified discrimination, is temporary and provides for goals that have "safety valves," and does not infringe on the employee's contractual or Title VII rights.[48]

Both prongs of the suggested test will now be discussed in greater detail, focusing on the interplay of the test between equal protection and Title VII challenges.

1. First Prong of Proposed Test—The Showing of Discrimination
   a. Equal Protection

Voluntary affirmative action programs developed to remedy race discrimination should not be upheld unless there is a showing that the racial preferences are justified by a compelling governmental interest.[49] The role model theory[50] and general societal discrimination should not be considered "compelling" governmental interests such as would justify a racial classification because these reasons are unrelated to remedying prior intentional discrimination.[51]

In *Wygant*, Justice O'Connor argued that an employer can demonstrate his purpose to remedy prior discriminatory practices by a particularized, contemporaneous finding of discrimination or by "information" which gives the public employer a "sufficient basis" for concluding that remedial action is necessary.[52] The public employer's "information" can be demonstrated by showing a statistical disparity between the percentage

of minorities in the employer's work force and the percentage of qualified minorities in the relevant pool.

Justice O'Connor arguably softened this position in *City of Richmond*. A critical reading of Part V of the plurality decision leads one to conclude the Court may no longer require the employer to show evidence of direct discrimination by that employer:

> Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the city of Richmond had evidence before it that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. . . Under such circumstances, the city could act to dismantle the closed business by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria. In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.[53]

Thus, a governmental actor, such as the city of Richmond, arguably could act to remedy the effects of discrimination of someone other than itself (e.g., the construction industry), if it can show that it was a "passive participant" in such discrimination. In other words, though the governmental actor did not participate in the discriminatory practices directly, if it can show that it acquiesced in the discriminatory action, then it can validly act to remedy the direct actions of those who did discriminate.[54]

The begging question, then, is whether this "passive participant" doctrine should be available in the Title VII context. If Title VII obligations are less restrictive than or coterminous with the Constitution, as this paper concludes, then no reasons exist as to why the "passive participant" doctrine could not/should not apply in the Title VII context as well.

b. Title VII

Voluntary affirmative action programs are justified by the existence of a "manifest imbalance" that reflect an underrepresentation of blacks or women in traditionally segregated job categories.[55] Although the imbalance must be "manifest," it need not be as gross or direct as is necessary to support a prima facie pattern or practice claim.[56]

Justice O'Connor argued in *Johnson* that while no contemporaneous findings of actual discrimination need be shown, the employer must have had a "firm basis" for believing that remedial action was required.[57] Such a "firm basis" can be demonstrated, for both constitutional and Title VII purposes, by a statistical disparity sufficient to support a prima facie pattern or practice claim of discrimination under Title VII.[58] In Justice O'Connor's opinion, *Wygant* (equal protection case) and *Weber* (Title VII case) are consistent with each other because affirmative action was permitted only as a remedial tool to eliminate actual or apparent employer discrimination or the lingering effects of such discrimination.[59]

c. Discussion

As the composition of the Court changes, there is serious question as to whether discrimination in Title VII actions can be shown by a manifest statistical imbalance without some showing of the employer's active or passive discrimination.[60] For equal protection purposes, a showing of a manifest statistical imbalance, without a showing of the employer's active or passive discrimination, will not constitute a sufficient showing of discrimination.[61] The critical question, therefore, is what evidence must be shown to provide a reasonable basis for the employer's conclusion that affirmative action is appropriate in the context of voluntary affirmative action.

"The fundamental focus . . . should be whether there exists some evidence of actual part or present discrimination . . ."

1) Factual Predicate of Employer's Intentional Discrimination

The fundamental focus for both equal protection and Title VII affirmative action inquiries should be whether there exists some evidence of actual past or present discrimination by the specific employer. This focus serves as the correct backdrop for determining whether the employer had a reasonable basis for implementing affirmative action. This focus also serves as the correct framework for determining whether an affirmative action remedy is narrowly tailored in light of the circumstances.[62]

The necessary factual basis for a voluntary plan could include a reasonable employer self-analysis which demonstrates one or more employment practices that *may* leave uncorrected the effects of prior discrimination or that *may* result in disparate treatment of members of a protected class. This self-analysis need not reveal a violation of Title VII nor require an admission by the employer of such a violation. One commentator has suggested[63] that the self-analysis should pattern the guide promulgated by the Equal Employment Opportunity Commission in its Regulation 1608.4(a)-(c), Guidelines on Affirmative Action,[64] without proof of discrimination by a demonstration of adverse impact. Following these guidelines would establish a standard for determining whether a factual basis of discrimination *may* exist for both Title VII and equal protection purposes.

2) A Showing of Adverse Impact is Not Sufficient to Establish a Factual Basis of Discrimination

The concept of adverse impact should have no place in demonstrating discrimination for either equal protection or Title VII purposes when affirmative action is the remedy. Absent some showing of the employer's intentional discrimination, statistics alone are not a dispositive demonstration of intentional discrimination in equal protection cases. Therefore, since adverse impact cannot prove intentional employer discrimination, and since intentional discrimination must be shown, a remedy based solely on adverse impact statistics should not be sufficient to justify a remedial affirmative action plan.[65]

This author recognizes that eliminating statistical evidence as proof of the employer's intentional discrimination is a controversial suggestion. Justice O'Connor's *City of Richmond* opinion, however, may provide the basis for a common ground. Perhaps, the "bridge" which will bring together both those who feel societal discrimination is sufficient and those who feel actual discrimination is required is Justice O'Connor's "passive participant" doctrine. That is, while pure societal discrimination would still not validate an affirmative action scheme, neither would a prior factual finding of discrimination by the employer be required. Rather, if the employer showed that it merely acquiesced in the discrimination of another, this acquiescence could be bootstrapped into some form of "constructive discrimination" by the employer, sufficient to satisfy the first prong of this proposed test.

The employer can show his passive participation by demonstrating (1) he was aware of the discrimination; (2) he was in a position, because of control, influence,

etc., to discourage the discrimination; and (3) he did nothing to discourage the discrimination.

3) Conclusion

To justify affirmative action, the employer's self-analysis should reveal at least one employment practice that *may* leave the effects of the employer's prior discrimination uncorrected or that *may* result in disparate treatment of unidentified members of the preferred class. Neither statistics of a manifest imbalance alone nor general societal discrimination can constitute a sufficient showing of discrimination for either Title VII or equal protection purposes in the affirmative action context because such evidence does not focus on the employer's intentional discriminatory actions.[66] However, the employer who shows it "passively participated" in the discrimination of another will be deemed to have shown intentional discrimination such as will satisfy the first prong of this test.

2. Second Prong of Proposed Test—The Remedy

a. Equal Protection

Under *Wygant* [67] and *City of Richmond*,[68] a remedy is appropriate when the means chosen are narrowly tailored to achieve a compelling state interest in eradicating present or correcting past discrimination.

b. Title VII

An affirmative action program is appropriate under *Weber* [69] and *Johnson*[70] if:

1. The purpose of the plan is directed toward correcting a manifest imbalance in the work force in traditionally segregated job categories.
2. The plan does not unduly infringe upon the rights of the previously-preferred class.
3. The plan does not pose an absolute bar to the advancement of the previously preferred class.
4. The plan is temporary and will be discontinued when a representative work force is attained.

c. Discussion

Assuming an appropriate showing of discrimination for affirmative action, the test for a valid equal protection affirmative action remedy should be identical to the test for a valid Title VII affirmative action remedy.[71] To be valid, the program must be "narrowly tailored" in light of the available alternatives. This has come to mean:

1. That the remedy must be designed to eliminate identified present or to correct past employer discrimination.
2. The remedy must be temporary and provide for goals that have "safety valves."
3. The remedy must not infringe on the employee's Title VII rights or expectation interests.

1) Remedy Must Be Designed to Eliminate the employer's Discrimination

The validity of an affirmative action program which is designed to eliminate an employer's discrimination depends on the severity of the employer's discriminatory conduct.[72] The Court should require, in both Title VII and equal protection cases, that the affirmative action scheme be narrowly tailored to effectuate the goal of eliminating the employer's past or present discriminatory conduct. While identified victims should be made whole, the remedies for unidentified victims could be weaker. Alternatives such as redesigning job descriptions and providing special training may be sufficient when specific victims are not identified.[73]

2) Remedy Must Be Temporary and Have Flexible Goals

An affirmative action program is temporary when it is designed to cease once the goal is reached. In other words, the program must be designed to "attain" a balanced work force and not to "maintain" it once the balance has been achieved.[74]

The employer, however, must be sure that his stated "goal" is not in fact a "quota" because many members of the Court abhor quotas. Most Justices, however, permit flexible goals that provide for "safety valves." That is, a flexible program might provide for modification or suspension in the event that there are not qualified minorities in the available relevant labor pool. A goal, therefore, would be considered an invalid quota when a fixed percentage of hirings or promotions is required by a fixed end date,[75] and no "safety valves" are provided.[76]

3) Remedy Must Weigh the Competing Interests of the Non-Minority and Minority Employees

A proposed affirmative action will not be deemed "narrowly tailored" if it infringes on the Title VII rights of a non-minority employee or another interested party. Also, the proposed remedy will not be deemed "narrowly tailored" if it infringes on a valid expectation interest (i.e., the expectation that one will not be laid off to provide a job for a minority).[77]

The Title VII test set out in *Weber* [78] mandates that affirmative action programs not unnecessarily burden the interests of white employees. For example, a valid affirmative action plan cannot require the hiring of unqualified blacks or create an absolute bar to the advancement of white employees. The equal protection test of *Paradise*[79] also reflects this theme by requiring that the remedy impose no unacceptable burden on white promotion applicants. The remedy can delay, but cannot completely bar, the promotion of white employees. Also, the equal protection remedy may not require the layoff or discharge of whites and may not require the hiring of unqualified blacks over qualified whites. For both Title VII and equal protection purposes, therefore, if the proposed remedy is tailored so that the employee's statutory rights and expectation interests are not infringed, it meets the third condition of the remedy prong of the suggested test.

d. Conclusion

Assuming an appropriate showing of discrimination, the test for a valid equal protection affirmative action remedy should be identical to the test for a valid Title VII affirmative action remedy. The remedy must be "narrowly tailored" in light of the alternatives, which means that it: (1) must be designed to eliminate past or to correct identified present discrimination of the employer; (2) must be temporary and provide for goals that have "safety valves;" and (3) must not infringe on the employee's Title VII rights or expectation interests.[80]

V. CONCLUSION

Presently, for an affirmative action plan to be valid under the Equal Protection Clause, an employer must show that he either presently engages in discriminatory conduct or that he engaged in such action in the past and that its effects exist today. This factual finding is vital to the validity of an employer's affirmative action scheme and must be determined *before* implementing affirmative action.

The current status of Title VII affirmative action challenges is that a showing of general societal discrimination or a manifest statistical imbalance in the work force is sufficient of justify implementing an affirmative action program. Those Justices who support this rationale do so because they believe the restraints under Title VII are less than those under the Equal Protection Clause. Other Justices, however, believe that the restraints under Title VII and the Equal Protection Clause are the same. Still other Justices believe that the restraints of Title VII are greater than those under the Equal Protection Clause because while the plain language of Title VII prohibits discrimination of any kind, the Equal Protection Clause does allow some discrimination when such action can pass strict scrutiny muster. Because this disagreement exists, the Court needs, but does not have, a controlling test for all types of affirmative action challenges.

This paper suggests the controlling test for both Title VII and equal protection challenges should involve an identical two-

pronged inquiry: (1) is there a sufficient demonstration of intentional discrimination by the employer; and (2) is the remedy "narrowly tailored," in light of other alternatives, to eliminate that discrimination.

The discrimination prong, for both Title VII and equal protection purposes, can be demonstrated by evidence of a firm factual basis that one or more employment practices may leave uncorrected the effects of the employer's prior discrimination or may result in disparate treatment to members of the protected class. This factual basis cannot be demonstrated by statistics which show that a challenged policy or practice has an adverse impact. Neither can the necessary factual basis be demonstrated through evidence of societal discrimination. On the other hand, this factual predicate can be shown through Justice O'Connor's *City of Richmond* "passive participant" doctrine. That is, if the employer can show it acquiesced in the discrimination of another, such will be sufficient to satisfy the discrimination prong of the test.

The remedy prong can be satisfied, for both Title VII and equal protection purposes, only if the remedy is "narrowly tailored" in light of other reasonable alternatives. A "narrowly tailored" remedy is one which is designed to eliminate the identified discrimination of the employer, is temporary, provides for goals (not quotas), includes "safety valves" and does not unreasonably infringe upon the employee's Title VII rights or expectation interests.

When affirmative action has been designed to meet this two-pronged test, the employer can truly say he is remedying the effects of his own discrimination. Thus, the affirmative action plan which satisfies these two prongs should be approved by the Court, regardless as to whether the challenge is brought under Title VII or the Equal Protection Clause.

[1] L. Carroll, *Alice in Wonderland*, 101-106 (emphasis omitted).
[2] *See* discussion of cases *infra*, sections II(A) and (B).
[3] 443 U.S. 193 (1979).
[4] 480 U.S. 616 (1987).
[5] *Id.*, 480 U.S. at 620.
[6] 476 U.S. 267, *reh'g denied*, U.S. , 106 S. Ct. 3320.
[7] *Id.* at 270.
[8] 480 U.S. 149 (1987).
[9] Subsequently, the department promoted eight blacks and eight whites under the court's order, and submitted an acceptable promotion plan, at which time the 1-for-1 order was suspended. *Id.* at 165.
[10] U.S. , 109 S. Ct. 706 (1987).
[11] J. Choper, *Continued Uncertainty as to the Constitutionality of Remedial Racial Classifications: Identifying the Pieces of the Puzzle*, 72 Iowa L. Rev. 255, 263 (1987).
[12] 42 U.S.C. Sect. 2000e *et. seg.*, (1982). The Act provides in pertinent part:

> It shall be an unlawful employment practice for an employer—(i) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin. . .

Id. at Sect. 2000e-2(a).
[13] *See*, Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978): [W]e have never approved preferential classifications in the absence of proved constitutional or statutory violations. *Id.* at 302.
[14] *See Weber, supra* note 3.
[15] *Id.*, at 208-09.
[16] *See Johnson, supra* note 4.
[17] *See Wygant, supra* note 6.
[18] *Id.*, at 276 (plurality opinion).
[19] *City of Richmond,* U.S. at , 109 S. Ct. at 723.
[20] *Id.*, U.S. at , 109 S. Ct. at 723.
[21] *Id,* U.S. at , 109 S. Ct. at 737 (Scalia, J., concurring) (emphasis and citations omitted).
[22] *Id.*, U.S. at , 109 S. Ct. at 738 (Scalia, J., concurring in the judgment).
[23] *Id.*, U.S. at , 109 S. Ct. at 739 (Marshall, J., dissenting).
[24] The Chief Justice and Justices White, Stevens and Kennedy joined part III-B ("an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.") of Justice O'Connor's majority opinion. The sixth vote comes from Justice Scalia's concurring opinion who, arguably, would require more to validate an affirmative action program than would the majority.
[25] *See*, A. Morris, *Developing Standards for Affirmative Action*, 32 W. Educ. L. Rep. 883, 890 (1986).
[26] *City of Richmond,* U.S. at , 109 S. Ct. at 727 (emphasis added).
[27] *Wygant*, 476 U.S. at 292, 106 S. Ct. at 1856.
[28] *Id.*, 476 U.S. at 291, 106 S. Ct. at 1855-56.
[29] *Id.*
[30] Rehnquist, J., in Local 28 of the Sheet Metal Workers' International Ass'n v. E.E.O.C., 106 S. Ct. 3019 (1986); Scalia, J., in *City of Richmond, supra* note 10, U.S. at , 109 S. Ct. at 735-39.
[31] White, J., and O'Connor, J., in *Local 28*, both of whom dissented arguing that the remedy of a quota there was excessive.
[32] Brennan, J., Marshall, J., Blackmun, J., White, J., in *Weber*. Brennan, J., Marshall, J., Blackmun, J., Stevens, J., in *Johnson*.
[33] *See, Lally-Green, Affirmative Action: Are the Equal Protection and Title VII Tests Synonymous?*, 26 Duq. L. Rev. 295, 297 (1987).
[34] *See supra* note 4.
[35] *See, Johnson*, 480 U.S. at 628 n. 6, 107 S. Ct. at 1450 n. 6 (statutory Proscription not intended to reach that of the Constitution).
[36] Note: Professor Wood, when we rework this paper for publication, we will probably want to include something along the lines of the following material which we were talking about. This material is what I cut from my rough draft after talking to you in the stairway:

> The *Johnson* majority's analysis, however, is inappropriate for two reasons. First, the Court's analysis is wrong because a federal statute cannot validate governmental conduct which the Constitution forbids. That is, a *public* employer's affirmative action plan may be subject to both Title VII and Equal Protection Clause challenges. Because the Constitution's supremacy mandate is so strong, it requires a statute "be read with the presumption that Congress did not intend to authorize conduct that is prohibited by the Constitution." *Bushey v. New York State Civil Serv. Comm'n*, 733 F.2d 220 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117, 1121 (1985) (Rehnquist, J., dissenting) (citing *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-01 (1979)). Arguably, therefore, if a public employer's affirmative action scheme is valid under Title VII, according to *Weber*, yet invalid under the Constitution, according to *Wygant*, the program must fail. Note: *Civil Rights—Title VII—Public Employer May Consider Gender to Promote Employee Without Violating Title VII of Civil Rights Act of 1964 When Enforcing a Valid Affirmative Action Plan*, 19 St. Mary's L.J. 455, 465 (1987).

[37] *Id.* at 465-66.
[38] *Compare, Johnson*, 480 U.S. at 647-57, 107 S. Ct. at 1460-65 (O'Connor, J., concurring, Title VII coterminous with Equal Protection Clause), *with Id.*, 480 U.S. at 657-677, 107 S. Ct. at 1465-76 (Scalia, J., dissenting, Title VII more restrictive than Equal Protection Clause).
[39] *See, Johnson*, 480 U.S. at 650-51, 107 S. Ct. at 1462.
[40] *Id.* 480 U.S. at 652, 107 S. Ct. at 1463.
[41] Note, *supra* note 36, at 466.
[42] *See, Johnson*, 480 U.S. at 664, 107 S. Ct. at 1469 (Scalia, J., dissenting).
[43] *Id.*, 480 U.S. at 670, 107 S. Ct. at 1472 (Scalia, J., dissenting).
[44] *See*, Note, *supra* note 36, at 467-68.
[45] *See*, Lally-Green, *supra* note 33, at 355.
[46] See *supra* notes 28 and 29.
[47] Lally-Green, *supra* note 33, at 355.
[48] *Id.* at 356.
[49] In fact, the Supreme Court mandated the "compelling interest" strand of the proposed test in *City of Richmond*. See *City of Richmond,* U.S. at , 109 S. Ct. at 727.
[50] *Wygant*, 476 U.S. at 274-77, 106 S. Ct. at 1847-49. In *Wygant*, one of the justifications for giving black school teachers preference when determining who to layoff was that black school children needed to see proper role models. If black teachers were laid off first (last hired—first to go), the black students would not have role models to inspire them. Justice Powell, writing for the majority, rejected this theory reasoning that it had no logical stopping point. *Id.*, 106 S. Ct. at 1847. Further, Justice Powell commented that the theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices because a small percentage of black teachers could be justified by a small percentage of black students. *Id.*, 106 S. Ct. at 1847-48.
[51] *Id.*
[52] *Id.*, 106 S. Ct. at 1855-56.
[53] *City of Richmond,* U.S. at , 109 S. Ct. at 729 (citations omitted).
[54] This notion was also alluded to in Part II of Justice O'Connor's opinion (another part of the decision which carried only a plurality of the Court):

> Thus, if the city could show that it had essentially become a *"passive participant"* in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system.

City of Richmond, U.S. at , 109 S. Ct. at 720 (emphasis added).
[55] *Weber*, 443 U.S. at 209-10 and *Johnson*, 480 U.S. at 631-36, 107 S. Ct. at 1452-54.
[56] *See, Johnson*, 480 U.S. at 636, 107 S. Ct. at 1454; *see also, City of Richmond,* U.S. at , 109 S. Ct. at 724 (O'Connor, J., Part III-B of the opinion which carried a majority of the Court).
[57] *Johnson*, 480 U.S. at 649-51, 107 S. Ct. at 1461-62.
[58] *Id.*
[59] *Id.*
[60] The cases reflect fundamental difference among the Justices as to the requisite showing of discrimination. For example, Justice O'Connor consistently emphasizes that the record must reflect a "firm basis" or "legitimate factual predicate" of the employer's intentional discrimination. Justices Blackmun, Brennan and Marshall maintain that discrimination is shown under Title VII if statistics indicate a "manifest imbalance in traditionally segregated job categories." Justices Rehnquist, Scalia and White require a showing of actual, intentional discrimination and only permit a remedy for identified victims. *See*, Lally-Green, *supra* note 33, at 362.
[61] Washington v. Davis, 426 U.S. 229 (1976).
[62] Lally-Green, *supra* note 33, at 362.
[63] *Id.*
[64] Guidelines On Affirmative Action, 44 Fed. Reg. 4422 (1979), 29 C.F.R. Sect. 1608.

> Sect. 1608.4 Establishing affirmative action plans.
>
> An affirmative action plan or program. . . shall contain three elements: reasonable self-analysis; a reasonable basis for concluding action is appropriate; and reasonable action.
>
> (a) *Reasonable self-analysis.* The objective of a self-analysis is to determine whether employment practices do, or tend to, exclude, disadvantage, restrict or result in adverse impact or disparate treatment of previously excluded or restricted groups or leave uncorrected the effects of prior discrimination, and if so, to attempt to determine why. There is no mandatory method of conducting a self-analysis. The employer may utilize techniques used in order to comply with Executive Order No. 11246, as amended, and. . . [Revised Order 4], or related orders issued by the Office of Federal Contract Compliance programs or its authorized agencies, or may use an analysis, the employer. . . should be concerned with the effect on its employment practices of circumstances which may be the result of discrimination by other persons or institutions. *See*, Griggs v. Duke Power Co., 401 U.S. 424 (1971).
>
> (b) *Reasonable basis.* If the self-analysis shows that one or more employment practices: (1) Have or tend to have an adverse effect on employment opportunities of members of previously excluded groups, or groups whose employment or promotional opportunities have been artificially limited, (2) leave uncorrected the effect of prior discrimination, or (3) result in disparate treatment, the person making the self-analysis has a reasonable basis for concluding that action is appropriate. It is not necessary that the self-analysis establish a violation of Title VII. This reasonable basis exists without any admission or formal finding that the person has violated Title VII, and without regard to whether there exists arguable defenses to a Title VII action.
>
> (c) *Reasonable Action.* The action taken pursuant to an affirmative action plan or program must be reasonable in relation to the problems disclosed by the self-analysis. Such reasonable action may include goals and timetables or other appropriate employment tools which recognize the race, sex or national origin of applicants or employees. It may include the adoption of practices which will eliminate the actual or potential adverse impact, disparate treatment or effect [of] past discrimination by providing opportunities for members of groups who have been excluded, regardless of whether the persons benefited were themselves the victims of prior policies or procedures which produced the adverse impact or disparate treatment or which perpetuated past discrimination.

[65] Lally-Green, *supra* note 33, at 364-65.
[66] Lally-Green, *supra* note 33, at 366.
[67] *Wygant*, 106 S. Ct. at 1852.
[68] *City of Richmond, supra* note 10.
[69] *Weber*, 443 U.S. at 208-09.
[70] *Johnson*, 107 S. Ct. at 1455-57.
[71] In fact, one commentator suggests that not only should the tests be the same, but an analysis of the relevant cases reveals that the tests, as applied by the Court, are the same. See, Lally-Green, *supra* note 33, at 369-77.
[72] Lally-Green, *supra* note 33, at 371.
[73] *Id.*
[74] See *Johnson*, 480 U.S. at 639, 107 S. Ct. at 1456.
[75] *See, Local 28*, 106 S. Ct. at 3059 (O'Connor, J., dissenting).
[76] *See*, Lally-Green, *supra* note 33, at 373.
[77] *See, Wygant, supra* note 6.
[78] 443 U.S. at 208, *see, Johnson*, 107, S. Ct. at 1455 (O'Connor, J., concurring in part and dissenting in part).
[79] 107 S. Ct. at 1073-74.
[80] Lally-Green, *supra* note 33, at 376-77.

Bar Commission Highlights

At the regularly scheduled meeting of the Board of Bar Commissioners held at the Utah Law and Justice Center on April 28, the following reports were received and actions taken:

1. Approved the minutes of the March 31 meeting.

2. Received the monthly report of the Executive Director, noting the successful culmination of the 1989 Law Day and Law Related Education programs, certifying the re-election of Bar Commissioner Jeff Thorne, reviewing a videotape of the Law and Justice Center prepared for a presentation at the ABA Annual Meeting and approving a resolution authorizing President Kasting to urge Congress to increase funding for the Legal Services Corporation.

3. Authorized the Executive Committee to finalize necessary contracts for the development of office space in the lower level of the Law and Justice Center.

4. Received the monthly report of the Young Lawyers Section, noting participation by Section representatives at an ABA meeting in Memphis, approving the publication of an article in the *Bar Journal* to solicit comment on a proposal to grant a vote to the Young Lawyers Section Representative on the Bar Commission and otherwise noting the continued valuable contribution by the officers and members of the Section to the Bar.

5. Received the monthly Budget and Finance Committee Report, with preparations under way for the 1989-90 budget.

6. Received monthly report of President Kasting on various official communications on behalf of the Bar. Ratified the action of the Executive Committee authorizing the renewal of the Blue Cross/Blue Shield Health Insurance Plan for members of the Bar. Noted progress being made in the appointment of members to the MCLE Board and final changes having been made in the proposed rule for the New Lawyer CLE Program. Noted that the Supreme Court had granted the Bar's Petition for Rule Change regarding the Lawyers Helping Lawyers Program on the specific question of confidentiality, subject to a possible additional comment period. Received a proposal from the Washington State Bar regarding a proposed postage stamp commemorating "Women in the Law" and approved a motion to endorse the proposed stamp project. A further motion was approved to authorize lobbying the Congress on behalf of proposed pay increases for federal judges.

7. Approved final wording in a document entitled "A Lawyers Pledge to Professionalism," with a caveat that by passing the pledge the Bar Commission does not intend to vary the Rules of Professional Conduct.

8. Received report of the Judicial Council Liaison noting further developments in the judicial poll project.

9. Received the monthly admissions report, approving candidates to sit for the May attorney exam, approving a petition for an MPRE waiver and granting certain petitions for reinstatement.

10. Received the monthly report of the Office of Bar Counsel, approving or otherwise reviewing disciplinary matters as are otherwise reported in the *Bar Journal*.

11. Received the report of the Associate Director on the 1989-90 Mid-Year and Annual meetings as well as the Jack Rabbit Bar Convention.

12. Received a report of the Delivery of Legal Services Committee proposing a fund-raiser for the Legal Services for the Homeless Project.

13. Approved the selection of the Law and Justice Center for the 1990 Mid-Year Meeting, with a post-convention CLE symposium to be held in Scottsdale, Arizona.

14. Received a report on pending litigation and reviewed the status of all active litigation matters.

15. Nominated Philip Fishler and Brent Wilcox to the Tort and Insurance Reform Task Force.

16. Voted to deny the request for financial support by the Delivery of Legal Services Committee on a dinner/dance fund-raising project, urging that the committee consider alternative forms of fund-raising for the project.

17. Appointed Terrie McIntosh to the Ethics and Discipline Committee Screening Panel to replace Dale Kimball who has become Committee chair.

18. Approved awards to be given at the Annual Meeting for Distinguished Lawyer for Service to the Bar, Pro Bono Lawyer of the Year, Pro Bono Law Firm of the Year, Appellate Court Judge of the Year, District Court Judge of the Year, Circuit Court Judge of the Year and Juvenile Court Judge of the Year as well as the Lawyer of the Year.

19. Approved a resolution to have a committee develop proposed rules and/or policies regarding Bar Commission meeting procedures in the handling of confidential information.

At the regularly scheduled meeting of the Board of Bar Commissioners on May 19, the following reports were received and actions taken:

1. Approved the minutes of the April 28 meeting.

2. Received the montly report of President Kasting and the Executive Committee, noting various matters in progress. Approved final version of the new Pledge of Professionalism. Nominated the Honorable Sherman Christensen to receive the ABA Medal Award. Appointed Gary McKean and Craig Madsen to the newly formed Commission on State Justice Courts.

3. Received the montly report of the Executive Director, noting his presentation before the National Conference on Professional Responsibility regarding Utah's Apprenticeship Project; and the status of a grant to create a model neighborhood dispute resolution center.

4. Received and welcomed George Buckley, ABA Field Service Representative, who had participated in the annual Bar Leader Training Conference earlier in the day.

5. Received the Admissions Report, approving routine MPRE timing waiver petitions, noting an interim study report on admissions rules and procedures, acted on two petitions, approved two reinstatements and filled appointments to the Bar Examiner Review Committee.

6. Received and approved the report of the Bar-Law School Relations Committee.

7. Received a status report on pending litigation.

8. Received and deferred action on the report of the Utah Law and Justice Center Art Committee.

9. Approved proposal for completion of additional office space in the lower level of the Center to house the Law-Related Education program and for other uses.

10. Received a report from the Bar liaison to the Judicial Council on activities of the Council.

11. Received and acted upon the monthly report of the Office of Bar Council, the public matters for which are reported in this issue. Approved Ethics Opinion 91.

12. Received the report of the Lawyer Benefits Committee, approving three new member benefit programs. These include a group purchase FAX program, a credit card fee collection system and a fee collection

service program; all to be kicked off at the Annual Meeting.

13. Received the report of the Young Lawyers Section, approving a fund-raising effort for the hosting of an event in conjunction with the National Child Abuse Conference, designating the Section program on the Bicentennial of the Bill of Rights as the official Bar program and recognizing the recent appointments of Section members to national committees of the ABA-YLD.

14. Received and reviewed the monthly report of the Budget and Finance Committee. Approved a new format for future budgets.

At the June 16 meeting, the following actions were taken:

1. Approved the minutes of the May 19 meeting.

2. Received the monthly report of President Kasting and the Executive Committee, with status reports on various pending matters previously highlighted.

3. Received the monthly report of the Executive Director, commending the success of the recent Jack Rabbit Bar meetings at Snowbird, noting the appointment of the MCLE Board, approving a decision to renew the Apprenticeship Program in 1990, noting the nomination of the Tuesday Night Bar Program to receive the ABA's Harrison Tweed Award for outstanding programs which extend legal services to the poor, and noting the filing of a grant application by the Delivery of Legal Services Committee for a legal services to the homeless project.

4. Received the monthly Admissions Report, approving certain reinstatements, approving the results of the May attorneys bar examination, approving applications to set for the July bar examination, granting a petition for hearing for a readmission applicant and approving routine MPRE timing waiver petitions.

5. Received the monthly report of the Office of Bar Counsel, approving seven private reprimands, acting on public discipline matters as reported elsewhere in this issue.

6. Received the report of the Unauthorized Practice of Law Committee and authorized the filing of a declaratory action related to the scope of authority of independent insurance adjusters.

7. Received a status report on pending litigation.

8. Approved final language of the Bar policy on pro bono legal services, to be published in the next issue of the *Journal*.

9. Reviewed the status of the Bar's legislative information program.

10. Received and reviewed a report of recommended changes and additions to published Bar policies. Added several modifications and set final review for July meeting.

11. Received report of Young Lawyers Section, including review of the achievements of the Section for the year.

12. Received the monthly report of the Budget and Finance Committee, reviewed FY88 Audit Report and proposed FY90 Budget. Final action on budget deferred to July meeting.

A full copy of the minutes of these and other meetings of the Board of Bar Commissioners is available for inspection by members of the Bar and the public.

Discipline Corner

ADMONITIONS

1. An attorney was admonished for violating Rule 1.4(a) for failing to timely and adequately communicate with his client that he did not intend to represent her; the client believed the attorney was proceeding on her behalf.

2. For failing to adequately communicate the status of the client's bankruptcy matter and for failing to communicate the possible jurisdictional problems caused by the client's moving out of the state, an attorney was admonished for violating Rule 1.4(a). The sanction was mitigated by the attorney's willingness to refund the retainer at the request of the Screening Panel.

3. For failing to inform the clients that the attorney had received a Notice of Denial of Claim and for failing to adequately supervise the attorney's support staff with the result that the Denial was placed in the file without being brought to the attorney's or the clients' attention, an attorney was admonished for violating Rule 1.4(a).

4. For violating Rule 4.2, an attorney was admonished for communicating directly with an opposing party who the attorney knew was represented by counsel by sending a statutory bad check letter pursuant to a default on a promissory note which was part of divorce negotiations. The sanction was mitigated by the fact that the attorney in good faith believed that the promissory note matter was separate from the divorce matter and that the opposing party's divorce counsel would not necessarily have also been counsel on the promissory note default.

5. An attorney was admonished for violating DR 6-101(A)(3) for neglect for failing to timely pursue an uncontested divorce matter by failing to serve the divorce complaint when it became obvious that the opposing party was unwilling to sign the appropriate documents and then permitting the first divorce filing to be dismissed for lack of prosecution.

6. An attorney was admonished for violating Rules 8.4(c) and 1.13(b) for failing to adhere to the language of a medical lien form which required the attorney to disburse monies directly to the doctor and for failing to follow through in disbursing those monies after representing to Bar Counsel that the attorney would do so.

7. For failing to adequately communicate the nature and scope of the attorney-client relationship and the attorney's intent not to file a civil rights action, an attorney was admonished for violating Rule 1.3.

8. For failing to attach witness fees to a subpoena, and for the attorney's inappropriate and unprofessional response to the complaint filed with the Office of Bar Counsel, an attorney was admonished for violating Rules 4.4, 8.4(c) and 8.4(d).

PRIVATE REPRIMANDS

1. For violating Rule 1.4(d), an attorney was privately reprimanded for failing to return the client's files for approximately one month, when the attorney was aware that the client had arranged a meeting with subsequent counsel; the client's matter was ongoing.

2. For completely failing to communicate with his client for a period of approximately four months after being retained in an estate matter, an attorney was privately reprimanded for violating Rule 1.4(a). The sanction was aggravated by the fact that the attorney obtained certain original deeds and other title documents from the client, which documents have mysteriously disappeared from the attorney's office and which the attorney has been unable to locate.

3. An attorney was privately reprimanded for violating Rule 1.3 for neglect of a legal matter by failing to appear at a sentencing hearing that had been reset to accommodate the client and for violating Rule 1.4(a) for failing to adequately communicate with the client by failing to contact the client for approximately one month after the sentencing hearing to explain the attorney's absence and the status of the case.

4. An attorney was privately reprimanded for violating Rule 1.3 for neglect of a legal matter by failing to timely set a hearing to finalize the client's uncontested divorce and for violating Rule 8.4(c) for conduct involving dishonesty by promising to complete the matter by a date certain or refund a portion of the retainer and subsequently failing to perform such work or to tender the promised refund.

5. For violating DR6-101(A)(3) for ne-

glect of a legal matter, an attorney was privately reprimanded for failing to respond to the client's numerous telephone calls and written requests for case status reports, and for failing to comply with the client's requests that the attorney forward copies of all correspondence.

6. For failing to respond to the client's written and telephonic requests for status reports and for copies of all correspondence for approximately nine months, for failing to inform the client of the date of a pre-trial hearing, and for failing to inform the client that the attorney could not attend the pre-trial hearing and would be sending an associate, an attorney was privately reprimanded for violating DR 6-101(A)(3).

PUBLIC REPRIMANDS

1. On May 1, 1989, Robert J. DeBry was publicly reprimanded by the Utah Supreme Court, based on Mr. DeBry's consent to such discipline, for violating DR 5-103(B) by advancing monies to certain clients for purposes other than actual litigation costs, i.e., living expenses. Although Mr. DeBry defended his conduct by asserting that he could advance such monies as a humanitarian gesture, he ceased to make such advances when informed by the Ethics and Discipline Committee of the Utah State Bar that his interpretation of the rule was incorrect.

Ethics Opinion 91 Attorney's Retaining Liens

The Board of Bar Commissioners at their meeting on May 19, 1989, adopted the following formal ethics opinion respecting attorney's retaining liens on client files.

ETHICS ADVISORY OPINION COMMITTEE
Request No. 91

Issue

Is it ethically proper for an attorney to retain a client's file and other papers and documents belonging to the client, because the client has refused to pay the attorney's fees?

Opinion

The Utah Rules of Professional Conduct permit attorneys to exercise a common law retaining a lien to papers and documents belonging to the client, because the client has not paid the attorney's fees, when either the attorney has been wrongfully discharged by the client or has withdrawn from the representation for good cause. Attorneys are cautioned, however, that withdrawal must be accomplished in a manner that is consistent with the other requirements of Rule 1.14.

Analysis

Utah Rule of Professional Conduct 1.14(d) provides that an attorney withdrawing from representation may retain papers relating to the client to the extent permitted by other law. Because several Utah cases do recognize a common law attorneys' retaining lien, use of the lien cannot be regarded as per se improper under Rule 1.14.

In the specific case for which this opinion is requested, the firm has a regular practice of invoking a common law retaining lien to secure unpaid attorneys' fees and unreimbursed expenses, when the attorney either has been wrongfully discharged by the client or has withdrawn for good cause. In April 1986, the attorneys undertook to represent clients in a real estate matter; suit was filed in May 1986. In July 1987, the attorneys withdrew from the representation, allegedly because the clients unreasonably failed to follow their advice, failed to pay agreed-upon fees, and failed to reimburse costs and expenses as agreed. Both at the time of the withdrawal and in November 1987, the clients demanded return of their file and documents. The attorneys denied the request until the clients paid their bill. The lawsuit is pending. The clients complained to the Bar about the attorneys' refusal to release their file and about another matter. On January 15, 1988, Bar Counsel instructed the attorneys that they should release the clients' file immediately because the lawsuit was pending. The attorneys have requested this advisory opinion from the Bar about the propriety of their policy of invoking the retaining lien.

Under the Utah Code of Professional Responsibility, Bar Counsel has taken the position that even in cases of proper withdrawal or wrongful discharge, the attorney is required to return the client's file and papers within a reasonable time, no matter what other circumstances exist. DR 2-110(A)(2) provides that in all cases of withdrawal, the lawyer must take "reasonable steps to avoid foreseeable prejudice to the rights of his client, including...delivering to the client all papers and property to which the client is entitled..." In addition, DR 7-101(A)(3) prohibits the lawyer from intentionally prejudicing or damaging the client and DR 9-102(B)(4) requires the lawyer to promptly deliver to the client any "properties in the possession of the lawyer which the client is entitled to receive."

Under the Utah Rules of Professional Conduct, effective January 1, 1988, when representation is terminated, the lawyer "shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled . . . The lawyer may retain papers relating to the client to the extent permitted by other law." (Rule 1.14(d)) ABA Informal Opinion 86-1520 likewise concludes that whether attorneys may assert retaining liens is a matter to be determined under state law. Informal Opinion 86-1520 also cautions, however, that while representation continues, the lawyer must act with reasonable diligence (see Utah Rule of Professional Conduct 1.3); withdrawal must be otherwise proper; and the lawyer on withdrawal must take appropriate steps to protect the client's interests generally.

Several earlier Utah cases recognize the attorney's common law retaining lien on files, records and client's papers, even in the course of ongoing litigation. *Flake v. Frandsen*, 578 P.2d 516 (Utah 1978); *Midvale Motors v. Saunders*, 442 P.2d 938 (Utah 1968). These cases caution, however, that the retaining lien may be invoked only when the lawyer is wrongfully discharged or withdraws for good cause. *Midvale Motors v. Saunders*, 442 P.2d at 940. During the representation, the attorney is at all times required to act with reasonable diligence in representing the client. See Utah Rule of Professional Conduct 1.3.

The attorneys' practice of invoking the retaining lien, therefore, is ethically proper only when the attorneys are wrongfully discharged by the client or withdraw for good cause under Utah Rule of Professional Conduct 1.14.

In adopting this opinion, the Board has also recommended that a Petition for Amendment of Rule 1.14 be filed with the Utah Supreme Court to clarify the attorney's duty to the client in returning documents and papers upon termination of representation.

In the United States District Court for the District of Utah

AMENDMENT TO RULES OF CIVIL PRACTICE

Upon consideration by the undersigned judges of this Court, Rule 5(g) of the Rules of Civil Practice of this Court is amended to read:

(g) Oral arguments on motions. Requests for oral arguments on motions shall be granted only at the discretion of the Court. The Court, on its own initiative may set any motion for oral argument or hearing. If oral argument is to be heard, the motion shall be promptly set for hearing. Otherwise, motions shall be submitted and determined on the written memoranda of the parties.

This Rule shall be effective on May 1, 1989, upon approval of all judges of this Court.

Dated this 26 day of April, 1989.

Bruce S. Jenkins—Chief Judge
United States District Court

David K. Winder
United States District Judge

J. Thomas Greene
United States District Judge

David Sam
United States District Judge

Aldon J. Anderson—Senior Judge
United States District Court

Litigation Section Sponsors Successful Program at Annual Meeting

During the last few years, the Litigation Section of the Utah State Bar has been a sponsor of programs at Mid-Year and Annual meetings. This year was no exception. The section sponsored a two hour program on the first day of the annual meeting at Sun Valley featuring Professor James W. McElhaney.

Professor McElhaney is the Joseph C. Hostetler Professor of Trial Practice and Advocacy at Case Western Reserve University School of Law. He gave more than 300 Bar members pointers on the picture method of trial advocacy, direct and cross-examination and opening statements.

Professor McElhaney is one of the most widely read authors on the art of effective trial advocacy in America.

During the Awards Luncheon, the Litigation Section was recognized for its generous participation in stimulating programs made available to all members of the Bar.

1990 Mid-Year Meeting in Salt Lake Followed by CLE Symposium in Arizona

The Bar's Mid-Year Meeting, held in St. George during the last three years, has outgrown the meeting facilities in Utah's Dixie. Although St. George hotels are rapidly building additional convention and guest rooms, they will not be completed in time for the 1990 meeting.

In order to provide a combination of current continuing legal education and winter get-away, the Mid-Year Meeting will be held in Salt Lake City at the Utah Law and Justice Center, and will be followed by a post-convention symposium at Inn at McCormick Ranch in Scottsdale, Arizona.

The Mid-Year Meeting will begin Wednesday afternoon, January 17, at the Law and Justice Center with a half-day of CLE presentations. In the evening, a reception and dance will be held at the center in honor of Utah's senior attorneys.

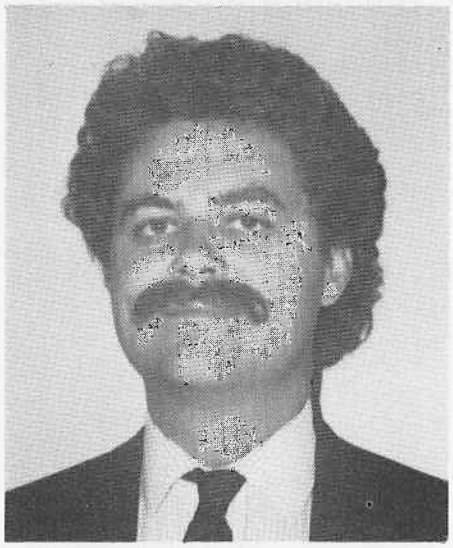
The CLE program, business meeting and awards presentation will continue at the Law and Justice Center on Thursday from 8:00 a.m. until 3:00 p.m.

For those wishing to take advantage of the Arizona sun, the post-meeting CLE symposium will begin in Scottsdale on Friday, January 19, beginning at 8:00 a.m. Arrangements are being confirmed for group air travel at reduced rates for departure on Thursday afternoon and return to Salt Lake City on Sunday afternoon, January 21.

The Inn at McCormick Ranch in Scottsdale offers a full range of outdoor activities, including golf, tennis, swimming and horseback riding. The meetings are scheduled in the mornings with free afternoons.

Meeting information will be covered in future issues of the *Bar Journal*, and all Bar members will receive registration material in early fall.

CASE SUMMARIES



By William D. Holyoak

NOTE: *On March 17, 1989, the Utah Supreme Court issued one of its most important decisions in the last several years. The decision,* Berube v. Fashion Centre, Ltd., *771 P.2d 1033 (Utah 1989), held that the employment at will doctrine was subject to exceptions and that a terminated employee could sue on the basis of a contract implied in fact. The Berube decision is discussed in detail elsewhere in this issue of the* Bar Journal *and is therefore not included in these case summaries.*

WRONGFUL PREGNANCY

The United States District Court for the District of Utah certified two questions of law to the Utah Supreme Court:

1. Does a claim for "wrongful pregnancy" resulting in the birth of a normal, healthy child as a result of an unsuccessful sterilization procedure performed by a physician give rise to a tort claim for damages under the laws of the State of Utah?

2. In the event a tort claim for "wrongful pregnancy" is recognized by the laws of the State of Utah, what is the appropriate measure of damages?

The Court first distinguished a claim for "wrongful pregnancy" from claims for "wrongful birth" and "wrongful life." In the Court's words:

> "Wrongful pregnancy"...refers to those cases where parents bring a claim on their own behalf for the monetary and emotional damages they suffered as a result of giving birth to a normal and healthy but unplanned and unwanted child. Such actions are usually based upon a negligently performed or counseled sterilization procedure or abortion, or negligence in preparing or dispensing a contraceptive prescription.
>
> "Wrongful birth," on the other hand, refers to the cause of action whereby parents claim they would have avoided conception or terminated an existing pregnancy by abortion but for the negligence of those charged with, among other things, prenatal testing or counseling as to the likelihood of giving birth to a physically or mentally impaired child. "Wrongful life" is the corresponding action by or on behalf of an impaired child alleging that but for the medical professional's negligence, the child would not have been born to experience the pain and suffering associated with his or her affliction or impairment.

The Court noted that a claim for wrongful pregnancy is recognized by the vast majority of jurisdictions and that the rationale of the majority view is in accord with established principles of negligence theory and Utah's general law regarding proof of malpractice.

The Court then rejected the defendant's argument that Utah Code Sect. 78-11-23 through Sect. 25 (Utah's Wrongful Life Act) preclude a claim for wrongful pregnancy. The Court noted that the "plain language of the legislation evidences that it seeks to address so-called wrongful life and wrongful birth actions and issues." The Court concluded that "an action based on wrongful pregnancy is a valid cause of action in this state."

The Court then turned to the issue of damages. Plaintiff sought recovery for (a) the medical expenses incurred during her pregnancy and the birth of the child and in having a hysterectomy performed after the birth of the child, (b) emotional pain and suffering as well as emotional trauma during and after the pregnancy, and (c) the anticipated costs of rearing and educating a healthy child.

The main opinion, written by Chief Justice Hall and joined by Justice Stewart, responded as follows:

> Applying [the] general rule and principles involved in the majority view to the factual scenario of this case, we now conclude that the following damages are recoverable, if proven:
>
> (1) any medical and hospital expenses incurred as a result of the physician's negligence, including the costs of the initial unsuccessful sterilization operation, prenatal care, childbirth, postnatal care and any increased costs for a second sterilization operation if obtained;
>
> (2) compensation for the physical and mental pain and damage suffered by the mother as a result of the pregnancy and subsequent childbirth and as a result of undergoing the sterilization operation(s) and during a reasonable recovery period after the above;

(3) wages necessarily lost by the mother and/or the father of the child related to the above; and

(4) punitive damages, if applicable.

Justice Hall's opinion then discussed four theories of recovery concerning the more difficult issue of whether damages may also be recovered for the ordinary costs of raising a normal and healthy child—the non-recovery theory, the full recovery theory, the benefits rule and the limited damages view, which is the majority rule. Justices Hall and Stewart subscribed to the majority rule.

The other three justices wrote separately. Justices Durham and Zimmerman each agreed with the majority that a claim for wrongful pregnancy exists in Utah. They differed, however, on the issue of damages. Justice Zimmerman would adopt the unadulterated "benefits rule" which allows parents to recover "all damages incurred and expenses resulting from the birth of an unplanned child, subject to having such amounts offset by the pecuniary and/or non-pecuniary benefits which parents will experience from their parental relationship with a normal and healthy child."

Justice Durham would adopt the "benefits rule," but would not permit the jury to consider counter-balancing benefits that the parents might derive from bearing or raising a child.

Justice Howe's separate opinion dissented from the remainder of the Court on the first question. He indicated from that he would not recognize a "wrongful pregnancy" action in Utah, stating that "the birth of a normal, healthy child is not a civil wrong for which the law will provide a remedy because there are no damages." *C.S. v. Nielson,* 767 P.2d 504 (Utah, 1988).

JUDGE DISQUALIFICATION

Following an unfavorable ruling by a trial judge, the defendant in a class action suit filed a motion to disqualify the judge. At trial, the judge made the following comments just before ruling:

THE COURT: I'll share the benefits of my decision with you at this point.

I'll expose my biases and my prejudices and be very frank with you.

I think there are some substantial kinds of policy things that have really caused me great trouble and trauma. As I've indicated earlier, and no objection was interposed, I was a customer of Prudential Federal Savings & Loan Association [the defendant] and paid without default for 25 years at 4.75 percent...and I computed that out and I thought, why, those robbers, they are charging me twice what I'm borrowing from them, and that's unfair.

THE COURT: I think I've made general comments throughout that I have cussed financial institutions, and customers do simply because they see inherent injustice about that. And my perspective today, after 23 years, has passed, has become much, much different at the end of the 23 years. Far before that, I could see the cost of money was markedly greater, and that I would be a damn fool to prepay. So I paid faithfully every month for 25 years, and not a day sooner or a day later. And I'm just commenting generally in terms of unjust or whatever. The tension is between that to be gained and that to be lost, I suppose, in my eyes. And I have a feeling that class actions are a form of champerty and maintenance and that the one who substantially gains is the lawyer or the expert. [The plantiff] stands to gain little, except he has struck a blow for freedom, I suppose, in the form that the consumer has achieved balance.

The judge then ruled from the bench in plantiff's favor and awarded damages of $134.70.

Thirty-nine days after the decision was announced, Prudential raised its first formal objections to the judge's qualifications to hear the case by filing a motion for disqualification. The motion was assigned to another judge who ruled that, although the trial judge had no actual bias, there was an appearance of bias. He therefore ordered the trial judge disqualified on the basis of an appearance of bias.

On appeal, the Supreme Court ruled that Prudential's motion to disqualify was not timely. The Court then considered whether the trial judge, on his own motion, should have recused himself. The Court concluded that the trial judge "is, at most, a potential member of an alleged class... If any existing certified classes are expanded to included [the trial judge] or any new class were certified that included him, [the trial judge] would have to disqualify himself from further proceedings." *Madsen v. Prudential Federal Savings & Loan Association,* 767 P.2d 538 (Utah, 1988).

VICARIOUS LIABILITY—EMPLOYER'S LIABILITY FOR ACCIDENT ON EMPLOYEE'S WAY HOME

A district manager for a life insurance company worked in Salt Lake City and lived in Provo. His duties included supervising salesmen and marketing annuities. One evening on his way home, he was involved in an automobile accident in which another person was seriously injured. A jury found the employee negligent and liable for 30 percent of the $1.6 million damage award. The trial court ruled that the employee as a matter of law was within the scope of his employment at the time of the accident and, therefore, that his employer was vicariously liable. The Supreme Court reversed, stating: "As a general rule, an employee is not acting within the course and scope of his employment when he is traveling in his own automobile to and from work."

The Court noted that this rule has been applied in workers' compensation cases in Utah and concluded that the so-called "coming and going rule" should be extended to third-party negligence claims. The Court ruled that the fact that the employee intended to make sales calls from his home that evening did not alter the result. In conclustion, the Court stated:

> We hold that the "coming and going rule" is applicable in cases involving third-party negligence claims. Where a third party is seeking to hold an employer vicariously liable, the employee must be in the "course and scope of his employment," that is, he must be acting to benefit his employer and subject to his control.

Whitehead v. Variable Annuity Life Insurance Co., 101 Utah Adv. Rep. 24 (February 2, 1989).

VICARIOUS LIABILITY—EMPLOYER'S LIABILITY FOR EMPLOYEE'S SEXUAL MISCONDUCT

The issue decided by the Utah Supreme Court in this case was, "Whether improper sexual contact between a therapist and a patient falls within the scope of the therapist's employment."

Defendant was employed as a therapist at Salt Lake County's Intensive Treatment Unit, a mental health facility. He worked extensively with plaintiff, a patient who had gone to the clinic seeking help. During a six-week period, the therapist met frequently with his patient in therapy and counseling sessions. On two occasions, the therapist and patient engaged in sexual conduct.

At trial, the therapist admitted "that his conduct fell below the standard of care exercised by social workers in the community." The jury found that the therapist was 50 percent negligent, and County 40 percent and the patient 10 percent. The trial court also found that the County was vicariously liable under the doctrine of respondeat superior for the therapist's negligence.

The County appealed, arguing "that [the therapist's] sexual misconduct was outside the scope of his employment and that the County was therefore not liable under the doctrine of respondeat superior."

The Court explained that Utah case law focuses on three criteria for determining when the conduct of an employee falls within the scope of employment.

> First, an employee's conduct must be of the general kind the employee is employed to perform...
>
> Second, the employee's conduct must occur within the hours of the employee's work and the ordinary spatial boundaries of the employment...
>
> Third, the employee's conduct must be motivated, at least in part, by the purpose of serving the employer's interest.

The Court determined that, although the therapist's misconduct took place within the hours and spatial boundaries of his employment, the conduct was not of the kind the therapist was employed to perform nor was it intended to further the County's interest. The conduct served "solely the private and personal interest of [the therapist]," and was not motivated by the purpose of serving the County.

The Court cited support from other jurisdictions that have held that, as a matter of law, sexual misconduct of an employee is outside the scope of employment. The Court concluded, "[W]e hold that reasonable minds could not disagree with the conclusion that the sexual contacts in this case were not within the scope of [the therapist's] employment," and reversed the trial court's holding of vicarious liability. *Birkner v. Salt Lake County,* 771 P.2d, 1053 (Utah, 1989).

EFFECTIVE DATE OF AMENDMENT TO ARTICLES OF INCORPORATION

On June 18, 1984, the shareholders of In-Tec International (U.S.A.), Inc. a Utah corporation, approved a 20-1 reverse split of In-Tec's issued and outstanding shares. Articles of Amendment reflecting this change were not filed by In-Tec with the state until December 21, 1984. In the meantime, In-Tec's board of directors issued 20,000 shares of In-Tec stock to Sharon Owen as compensation for accounting services.

In-Tec (after changing its name to Seed Products International, Inc.) later challenged Owen's ownership of the shares and argued, alternatively, that if she owned the shares, they should be converted to 1,000 shares based on the reverse split.

The Utah Business Corporation Act provides in Section 16-10-59:

> Upon the issuance of the certificate of amendment by the Division of Corporations and Commercial Code, the amendment shall become effective and the articles of incorporation shall be deemed to be amended accordingly.

In-Tec relied on this provision in support of its argument that the stock amendment did not become legally valid until it was filed with the state in December. Thus, Owen's stock was issued prior to the reverse stock split.

The Court of Appeals concluded, however, that "In-Tec's" failure to timely file an amendment reflecting the reverse split is not sufficient to render the split ineffective until the date of filing." The Court concluded that, notwithstanding the provision in the Utah Business Corporation Act, filing is required to make an amendment effective only if the amendment fundamentally alters the character of the corporation or enhances or diminishes the scope of its powers. Finding that the amendment merely reduced the total shares of outstanding stock, the Court ruled that the amendment was effective on the day the In-Tec shareholders approved the stock split. The court also added "we do not believe that the purpose of the filing statute is to permit a corporation to protect itself from its own lack of diligence." *Seed Products Intern., Inc. v. Owen,* 768 P.2d 973 (Utah Ct. App., 1989).

AGREEMENT TO PROVIDE INSURANCE NOT SUBJECT TO STRICT CONSTRUCTION

On January 5, 1985, John Pickhover was killed when a sign at a Smith's Food King in Sandy, Utah, fell on him. The sign had been installed by Marveon Inc. in 1978. Young Electric Sign Company ("YESCO") acquired all of Marveon's assets in 1981. The Purchase Agreement between the parties included the following provision:

> [YESCO] agrees...to provide, at its expense, insurance coverage adequate to fully protect [Marveon] against property damage...or personal injury or death claims arising out of the ownership, maintenance, use, service, transportations [sic] or installation of [signs] in a minimum amount of One Million Dollars ($1,000,000.00).

YESCO failed to provide the insurance coverage. The trial court ruled that Marveon was entitled to indemnification from YESCO for up to $1 million. YESCO argued on appeal that under Utah law, an indemnity contract purportedly requiring one party to assume responsibility for the financial consequences of another's negligence must be strictly construed against such coverage, absent clear and unequivocal language. The Court of Appeals, after concluding that the Tenth Circuit improperly interpreted Utah law in a prior case, concluded:

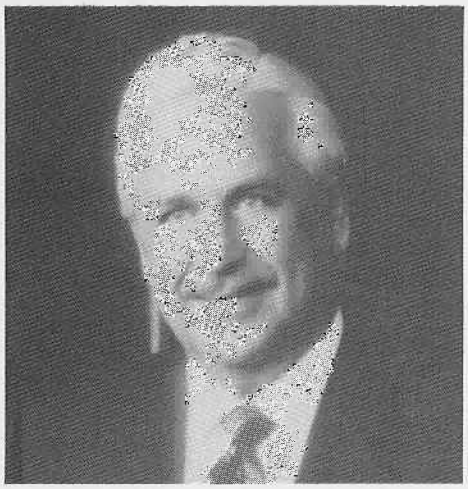
> We hold that the [strict construction] rule applies only to indemnity provisions where the indemnitee seeks indemnification for the consequences of its own negligence. If a party contractually agrees to purchase insurance for another, the agreement is to be construed under general contract principles and, if the insurance is not obtained, the party is liable for breach of contract.

Pickhover v. Smith's Management Corporation, 771 P.2d 664 (Utah Ct. App., 1989).

Lawyer of the Year, Nine Other Awards Presented by Utah State Bar at Annual Meeting

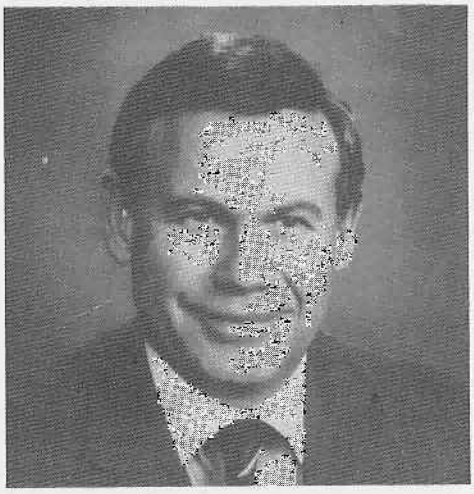
The Lawyer of the Year Award was presented to Salt Lake City attorney Donald B. Holbrook at the 59th Annual Meeting of the Utah State Bar. Four other attorneys, four judges and one law firm were also honored by the Bar.

The 10 are recipients of awards presented at the Annual Meeting which featured a keynote address by The Honorable Harold G. Christensen, former Deputy Attorney General of the United States and Past President of the Utah State Bar.



LAWYER OF THE YEAR
DONALD B. HOLBROOK

Mr. Holbrook is president of Jones, Waldo, Holbrook & McDonough, a Utah law firm with offices in Salt Lake City, St. George and Washington, D.C. He has served as president of the Salt Lake County Bar Association and of the Alumni Association of the University of Utah College of Law. Mr. Holbrook served his first term on the Board of Bar Commissioners of the Utah State Bar in 1954 as a Young Lawyers' Representative. He has been a Bar Commissioner since 1982. Mr. Holbrook has been a member of the Utah State Board of Regents since 1965, and has served as chairman. He has also been chairman of the board of Ballet West and a board member of the Utah Opera.



DISTINGUISHED LAWYER
FOR SERVICE TO THE BAR
RANDON W. WILSON

Mr. Wilson is a member of the law firm of Jones, Waldo, Holbrook & McDonough, where he practices corporate and cooperative law in their Salt Lake City office. He is a member of the firm's executive committee. During the last year, he was chairman of the Utah State Bar's Lawyer Benefits Committee which administers the Bar's professional liability insurance, health and accident insurance, disability insurance and various member benefit programs. Mr. Wilson is a director of the Sunnyside East Neighborhood Association and a member of the University of Utah Research Park Advisory Committee.

APPELLATE COURT
JUDGE OF THE YEAR
HON. REGNAL W. GARFF JR.

Judge Garff was the first presiding judge of the Utah Court of Appeals when it was created in 1987, serving a two-year term. Prior to this appointment, he was a member of the Utah Juvenile Court and served three terms as presiding judge. He also served three terms as president of the Utah Council of Juvenile Court Judges. In addition to teaching and writing, Judge Garff has been active in community affairs, particularly as it relates to family law, child custody, juvenile delinquency and crime. He chaired a State of Utah committee which established a residential treatment center for emotionally disturbed adolescents.

DISTRICT COURT
JUDGE OF THE YEAR
HON. SCOTT DANIELS

Judge Daniels was appointed to the bench in 1982. He is serving his second term as presiding judge of the Third Judicial District, comprising Salt Lake, Summit and Tooele Counties. He is president of the American Inns of Court I, co-chairman of the Governor's Commission on Victims and a member of the Commission on Criminal and Juvenile Justice. Prior to becoming a judge, he was a trial lawyer with the Salt Lake City law firm of Snow, Christensen & Martineau. Judge Daniels teaches constitutional law in the M.P.A. program at the University of Utah. Since 1975, Judge Daniels has been a member of the Fee Arbitration Committee of the Utah State Bar.

CIRCUIT COURT
JUDGE OF THE YEAR
HON. W. BRENT WEST

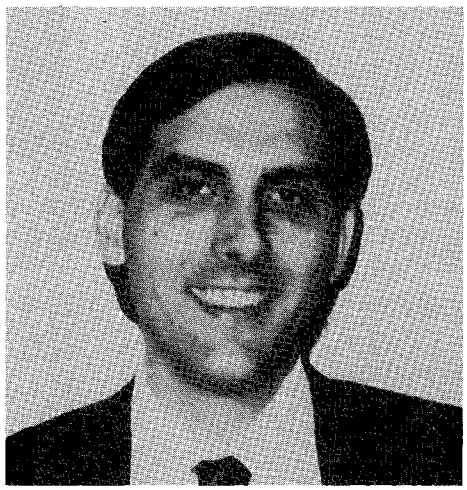
Judge West is presiding judge for the Second Circuit Court in Ogden. He was an assistant Odgen City Prosecutor for three years and Chief Prosecutor for Ogden for three years before being appointed to the Circuit Court Bench in April 1984 by Governor Scott Matheson. He has served on the Common Court Boundaries Committee and the Warrant's Task Force. Judge West is presently a member of the Utah Task Force on Gender and Justice, chairman of the Uniform Bail Schedule Committee and a member of the Circuit Court Board of Judges.

JUVENILE COURT
JUDGE OF THE YEAR
HON. L. KENT BACHMAN

Judge Bachman was appointed to the Second District Juvenile Court in August 1977 by Governor Scott Matheson. He is currently the presiding judge in the Second District serving Weber, Davis and Morgan Counties. Prior to his appointment to the bench, he was a deputy Weber County Attorney and chief deputy city attorney for Ogden City. He was also a commissioner for the First District Juvenile Court from 1969 to 1971. Judge Bachman is currently a member of the Utah Judicial Council and the Board of Juvenile Court Judges, which he chaired in 1986.

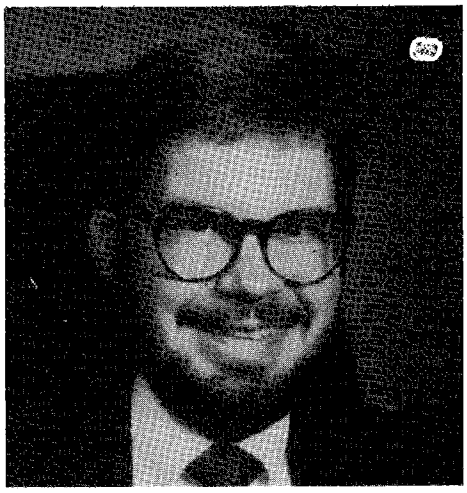
PRO BONO
LAW FIRM OF THE YEAR
FABIAN & CLENDENIN

The Salt Lake City law firm of Fabian & Clendenin receives the award of Pro Bono Law Firm of the Year for the high percentage of firm members who participated in the pro bono law program throughout the year. Firm members are currently serving in a wide variety of pro bono legal capacities, including service to Utah Legal Services. Civic and non-profit organizations have and continue to benefit from the firm's pro bono counsel, including the Utah Endowment for the Humanities, the Utah Heritage Foundation, the Nature Conservancy, Salt Lake Acting Company and Tracy Aviary. The firm also provides pro bono representation in the area of immigration and naturalization, employment discrimination and civil rights.



DISTINGUISHED PRO BONO
SERVICE AWARD
WALKER KENNEDY III

The award for providing an exceptionally high level of pro bono service was presented to Salt Lake attorney Walker Kennedy, who is a member of the law firm of Woodbury, Jensen, Kesler & Swinton. His practice concentrates on creditors' rights bankruptcy litigation. He volunteers his time and legal expertise as a judge pro tem in the Small Claims Court in the Fifth Circuit Court, and is pro bono legal counsel for the Salt Lake Association of Community Councils. Mr. Kennedy is also an active participant in the Utah Legal Services Volunteer Lawyer Pro Bono Practice Program.



OUTSTANDING YOUNG
LAWYER OF THE YEAR
J. STEPHEN MIKITA

The Young Lawyers Section of the Utah State Bar annually presents an award to the Outstanding Young Lawyer of the Year. This year, the award is presented to Stephen Mikita, assistant attorney general in the Utah Attorney General's Office, where he is counsel for the Utah Department of Health. He is past editor of the *Barrister* and is

chairman of the Utah State Bar's Committee on Lawyers Helping Lawyers, a program which assists lawyers and judges experiencing substance abuse or psychological or emotional problems. He is also chairman of the Ad Hoc Committee on Lawyer Trust Accounts for the Bar. Mr. Mikita was recently appointed by the Mayor to serve on the Salt Lake Winter Games Organizing Committee.

TRIAL LAWYER OF THE YEAR
WAYNE L. BLACK

The American Board of Trial Advocates annually presents an award to a trial lawyer, this year honoring Wayne L. Black as Trial Attorney of the Year for the State of Utah. Mr. Black is of counsel to the Salt Lake City firm of Callister, Duncan & Nebeker. He has tried approximately 2,500 jury trials and has argued or presented over 300 cases to the Utah Supreme Court, the United Stated Tenth Circuit Court of Appeals and the United States Supreme Court. In 1987, he was named in the book *The Best Lawyers in America* in the field of personal injury litigation.

MCLE Board Appointments

The Utah Supreme Court has announced its appointments to the new Utah State Board of Continuing Legal Education (MCLE Board). The Board appointees are as follows:

Jon J. Bunderson, Brigham City
Brian R. Florence, Ogden
Daniel M. Allred, Salt Lake City
Paul N. Cotro-Manes, Salt Lake City
Tim Dalton Dunn, Salt Lake City
Cecelia M. Espenoza, Salt Lake City
Elizabeth M. Haslam, Salt Lake City
Kevin A. Howard, Salt Lake City
Robert D. Merrill, Salt Lake City
Anne Milne, Salt Lake City
Arthur H. Nielsen, Salt Lake City
Douglas J. Parry, Salt Lake City
Richard A. Rappaport, Salt Lake City
R. Phil Ivie, Provo
Floyd W. Holm, Cedar City

Construction Law Section to Reorganize

A meeting of section members and others interested in joining the Construction Law Section will be held at 5:00 p.m. on September at the Utah Law and Justice Center, 645 S. 200 E., Salt Lake City, Utah. The agenda will include an election of officers for 1989-90 and discussion of various activities, projects and educational programs. Please RSVP to Paige Holtry by September if you plan to attend.

Salt Lake Attorney Suffers Losses in House Fire

Salt Lake City attorney John F. Clark and his family suffered enormous losses in a tragic house fire in April. Members of the Bar who wish to provide their assistance to the Clark family may contact Ms. Bobbie Dunn, receptionist at the Salt Lake City law firm of Sessions & Moore, 359-4100.

Claim of the Month

ALLEGED ERROR AND OMISSION

Attorney failed to have defendant served within two years, resulting in dismissal of his client's lawsuit.

RESUME OF CLAIM

Client, a contractor, had received a $25,000 loan from a bank. When his subcontractor failed to perform, the project collapsed and client defaulted on the loan. The Insured attorney defended client in a suit brought by the bank. Further the Insured was named as co-counsel in a suit by the client against the subcontractor. Three years later, when a settlement of the case against the client was negotiated, Insured attorney learned the client's case against the subcontractor had been dismissed for failure to serve defendant subcontractor. Client now sues Insured attorney for malpractice.

HOW CLAIM MIGHT HAVE BEEN AVOIDED

Insured, instead of assuming that co-counsel was actively pursuing the case against the subcontractor, should have more actively followed the case and made certain service had been properly made upon the defendant.

Claim of the Month furnished by Bayly, Martin & Fay-Continental, Inc. administrator—Utah State Bar Professional Liability Program.

MEMBERS OF THE UTAH BAR

YOU SHOULD MAKE YOUR RESERVATIONS PROMPTLY TO ATTEND THE
10TH CIRCUIT JUDICIAL CONFERENCE OF THE UNITED STATES
(60th Anniversary)

Santa Fe, New Mexico
September 6, 7 and 8, 1989

Conference Desk—Hilton of Santa Fe

Speakers
Justice Byron R. White
Supreme Court of the United States

Honorable Kenneth W. Starr
Solicitor General of the United States

Panel Discussions
Sanctions in Federal Practice
Recent Decisions of the 10th Circuit

Utah Panelists Include
Honorable Monroe G. McKay
U.S. Court of Appeals Judge
Honorable Stephen H. Anderson
U.S. Court of Appeals Judge
Honorable David K. Winder
U.S. District Judge
Robert S. Campbell Jr., Esq.

Write to or call **NOW**: Office of Circuit Executive
10th Circuit Court of Appeals
U.S. Courthouse
Denver, CO 80294
(303) 844-4118
(Accommodations Limited)

Recent Changes in the Appellate System

By Associate Chief Justice Richard C. Howe

The 1980s have brought many significant changes to Utah's judiciary. Full state funding of circuit and district courts, a more active Judicial Council and Court Administrator's office, and significant increases in salaries and retirement benefits are just a few. Since this writer serves in the appellate end of the judiciary and since space will not permit discussion of all advancements made in recent years, this article will point out the dramatic changes which have occurred at the appellate level.

In 1972, a study by the Legislature which I was honored to chair as speaker of the house reflected that while District Judges had been gradually added through the years as Utah's population grew, nothing had been done to increase appellate capacity. The Utah Supreme Court was expanded from three to five justices in 1917 and had continued to operate much the same in succeeding years. The legislative study concluded that something soon would have to be done to handle the ever-increasing number of appeals.

In about 1978, Justice Richard Maughan approached the Constitutional Revision Commission of which I was then a member and requested a constitutional amendment to allow the creation of an intermediate court of appeals. He reported that while the Supreme Court had increased its number of law clerks and had added a central staff to assist the Court, it was continually falling behind in scheduling cases for argument. The situation was not unlike that which confronted Moses when he sat "from morning unto evening" to judge disputes between the Israelites which he led. Exodus 18:13. His father-in-law, Jethro, advised him:

> The thing that thou doest is not good. Thou wilt surely wear away, both thou, and this people that is with thee; for this thing is too heavy for thee; thou art not able to perform it thyself alone.

Moses took his advice and appointed judges under him to judge minor matters, and reserved for himself only "every great matter."

The Constitutional Revision Commission took this request as an opportunity to study and propose revisions to the entire Judicial Article of the Utah Constitution (Article VIII) which had remained virtually unchanged from its 1985 adoption. This proved to be an exciting experience because of the great steps forward which were made. Some of the most notable were:

1. While Utah judges had been selected on a non-partisan basis since 1951, nominating commissions were mandated and the Governor's appointments were subjected to Senate approval.

2. Judicial retention elections were provided for where each new appointee, and sitting judges at the end of their terms, were required to face the electorate for approval and retention in office, but without running against an opponent.

RICHARD C. HOWE graduated from the University of Utah Law School. He served as law clerk for Chief Justice James H. Wolfe of the Utah Supreme Court. He had his own practice for 26 years, was a member of the Utah House of Representatives for 12 years and Speaker of the House for two of those years. He was also a member of the Utah Senate for six years and past chairman of the Salt Lake County Merit Commission and Utah Bar's Board of Bar Examiners. For 10 years, he was a member of the Utah Constitutional Revision Commission. As a former city judge, he was appointed to the Supreme Court in 1980 and appointed Associate Chief Justice in 1988.

3. The Supreme Court and the District Court retained their constitutional status, and the Legislature was given the authority to creat other courts, both of record and not of record. Appeals from the District Court were no longer required to be heard by the Supreme Court, but an appeal from a trial court was guaranteed. Justice of the Peace Courts lost their constitutional status, but courts not of record were required to be established by the Legislature.

4. The method of selection of the Chief Justice of the Supreme Court was changed. No longer was it the justice who had but two years remaining on his term. Instead, the Legislature was given the right to provide by statute for the selection of the Chief Justice, which it did by giving the Court the right to elects its Chief for a four-year term. Provision was also made in that statute for the election of an Associate Chief Justice to serve a two-year term. The Court was also given the right in the amendment to sit in divisions.

5. The Supreme Court was given the authority to answer questions of state law certified to it by a federal court.

6. The Supreme Court was given authority to govern the practice of law, including admissions and discipline. Also, to adopt rules of procedure and evidence which may be amended by a two-thirds vote of the members of each house of the Legislature.

7. A Judicial Conduct Commission was created, with power to recommend to the Supreme Court the censuring, suspension or removal of any judge.

The amendment to Article VIII was adopted by the electorate in November 1984. Subsequent enabling legislation established the Court of Appeals, comprised of seven judges to sit in panels of three. That Court began hearing cases in March 1987. The effect of the Court of Appeals on the appellate system can best be demonstrated by the following statistics: In 1988, the average length of time between the filing of the last brief in that Court and the date of oral argument was three and a half months, and the average time thereafter for a decision was 92 days. In January 1987, the Supreme Court had 477 cases awaiting oral argument. Today, it has 55 and the Court of Appeals has 137. The Supreme Court has adopted the goal that by January 1990, it will have disposed of its backlog of cases under advisement which were built up prior to the creation of the Court of Appeals. This will place the Supreme Court on a more current basis.

In conclusion, changes in the appellate system in the early 1980s will for years to come ensure that justice is not denied because it has been delayed.

New Officers Elected for Young Lawyers Section

The Young Lawyers Section of the Utah State Bar announces the election of new officers for 1989-90. By majority vote of the Section members, consisting of all licensed Utah attorneys under 36 years of age or, if over 36, practicing law six years or less, Richard A. Van Wagoner of Snow, Christensen & Martineau was elected President-elect. Larry R. Laycock of Snow, Christensen & Martineau, was elected Secretary of the Section; and Keith A. Kelly of Ray, Quinney & Nebeker was elected Treasurer.

At the State Bar annual meeting in Sun Valley, Idaho, these officers will begin their one-year term of office, and Jonathan K. Butler of Parsons, Behle and Latimer will advance from President-elect of the Section to President.

The new officers will soon announce appointments to the Section's Executive Council for 1989-90, including committee chair assignments for the following standing committees: Needs of the Elderly; Needs of Children; Community Services; Awards; Bridge the Gap; Publications; Lawyer's Compensation; Law-related Education; Law Day; Public Relations; Membership Support; Bicentennial of the Bill of Rights; Tuesday Night Bar; and Long-Range Planning.

Completing their terms as Section officers are Jerry D. Fenn of Snow, Christensen & Martineau as President; Jonathan K. Butler as President-elect; David J. Smith, Secretary; and Ryan E. Tibbitts of Snow, Christensen & Martineau, Treasurer. Mr. Fenn will continue on the Executive Council for another year as Immediate Past-President, replacing Stuart W. Hinckley of Watkiss & Campbell.

Liberty Bell Award Presented to Lawrence L. Burton

Lawrence L. Burton was presented the Liberty Bell Award at the Law Day luncheon held May 1, 1989. The Liberty Bell Award is presented annually by the Young Lawyers Section to a non-lawyer who has fostered a greater appreciation and understanding of our laws and contributed to the effective functioning of our institutions of government. Mr. Burton was selected to receive this award because of his substantial influence in our community through a variety of educational activities related to law and government.

Mr. Burton is an American history instructor at Thomas Jefferson Junior High School in the Granite School District. Throughout his professional life, Mr. Burton has greatly contributed to the educational and political systems of this state. For over 20 years, he has developed and carried out "You Were There" programs to educate his students about the U.S. Constitution. Mr. Burton also organized a constitutional convention for educational purposes which divided his students into 16 delegations, each having its unique economic, geographic and political interests. The student delegates are required to research and debate constitutional issues, vote on common laws and, eventually, compose a constitution that is comparable to the U.S. Constitution.

Mr. Burton has also created a "Constitutional Bowl" for his students which has become a districtwide competition. Bowl team members must be prepared to answer over 1,000 constitutional questions submitted by participating schools. In his educational pursuits, Mr. Burton has been directly instrumental in educating approximately 4,000 students about state and federal government and constitutional law.

In addition to his educational duties with the Granite School District, Mr. Burton has contributed incalcuable hours of service to various organizations in our community, including the presentation of lectures on the subject of constitutional law, assistance with the Boy Scouts of America program as it relates to citizenship in the nation and other education-related lectures on the history of the Constitution.

The Young Lawyers Section congratulates Lawrence L. Burton for being selected to receive the Liberty Bell Award, and thanks him for his dedicated service to our community and our system of government.

Young Lawyers Section Receives the Freedom Shrine Award

Richard Hamp, chairperson of the Law Day Fairs, received the Freedom Shrine Award at the Law Day luncheon held on May 1, 1989, at the Law and Justice Center. Hamp organized the statewide program in which laypersons met attorneys in their local malls for educational and generalized information. This year was the first for such a widespread effort to acquaint the general public with young lawyers in their communities and to provide a forum for questions. The shrine, which was presented by The Exchange Club of Salt Lake, now belongs to the Young Lawyers Section of the Bar and consists of traveling exhibits about the Declaration of Independence, the U.S. Constitution and other significant historical documents about freedom. Hamp is a 1983 graduate of the University of Utah Law School and a Salt Lake City prosecutor.

Local Lawyers Involved in Big Brothers/ Big Sisters Program

There are many volunteers among the ranks of local lawyers who serve the community through the Big Brothers/Big Sisters program of Greater Salt Lake. The program is designed for a one-on-one friendship between an adult mentor and a child who needs help through the challenges of growing up. These children, however, face challenges of extraordinary proportions. Current statistics compiled by the local agency are illustrative. According to Executive Director L. Scotti Davis, "70 percent of the children we serve come from families with alcohol or drug abuse problems, 30 percent have been sexually abused, 32 percent have experienced physical abuse and 76 percent live in families whose income is below poverty level."

The 1980 census indicates that in the Salt Lake area alone, over 25,000 children live with a single parent. Big Brothers/Big Sisters of America has done studies in cities across the United States and Canada that

estimate one-quarter of these youth are in need of their services—which equates to approximately 700 children in this community alone. The organization is presently serving over 400 children.

Many citizens in the legal realm are conviced that juvenile problems are better curtailed at the pre-delinquent stage. Big Brothers/Big Sisters is attempting to start early by providing a child from a single-parent home with a volunteer whose role as friend guides and directs the child. Each match is carefully screened by trained professionals such as social workers and case workers, and is monitored as the friendship develops. Each volunteer must commit to the relationship for a minimum of one year and devote four to five hours per week to the match.

Jeffrey Eisenberg of Ray, Quinney & Nebeker has been a big brother for two years until recently when his little brother grew up and the mother remarried. "My dad had been a big brother when I was 6 or 7 years old, and I recall positive memories of doing things with him and his 'little.' " Charlotte Miller of Watkiss & Campbell encouraged Eisenberg to become involved in the program. She has had a "little" for three years—the girl is almost a part of the family. Her little sister was in a non-typical living environment and the relationship with Charlotte has had a huge impact on her.

Many attorneys in the Salt Lake area believe they can make a difference such as Jan Henrie of Kimball, Parr, Crockett & Waddoups; Pat Casey of Parsons, Behle & Latimer; and Gary Doctorman of Parsons, Behle & Latimer. Doctorman sums it up well, "The reward is not a line on your resumé. It's knowing you're helping facilitate the continuation of an agency that does so much good for children, volunteers and their families. Look and find out if you're affecting one person's life and making it better. That's all the reward you need."

Andrew Morse of Snow, Christensen & Martineau is board president of the program in the Greater Salt Lake area. "There are many ways to serve without being a 'big.' Some firms have given substantial donations—Ray, Quinney; Snow; Jones, Waldo; and the former Biele, Haslam & Hatch," he said. Other people participate in Bowl for Kids' Sake (an annual bowl-a-thon whose contributions support 50 percent of the non-profit agency's budget).

To get involved, please contact Big Brothers/Big Sisters of Greater Salt Lake, 1415 S. Main Street, Suite 105, Salt Lake City, UT 84115, (801) 487-8101.

CLE CALENDAR

BETTER, EARLIER SETTLEMENTS THROUGH ECONOMIC LEVERAGE

A live via satellite seminar. The knowledge and application of economics to personal injury claim and lawsuit handling is the key to achieving better, earlier settlements. Economics drives personal injury: The injured, the attorneys, the carriers and the insurance-paying public are all motivated by the question, "What's in it for me?" This program is designed to give the players the answers to that question by exploring the economics of personal injury claim and lawsuit handling. You'll discover the effect of time and costs on individual claims and hear from industry leaders how economics affects the different parties to a claim. The results are practical settlement strategies using economic information. This includes a simple formula for determining the basic settlement value of any personal injury claim. Using economic leverage to control the direction of negotiations, you can clearly improve your settlement position and the outcome of each and every case you handle.

Date: August 22, 1989
Place: Utah Law and Justice Center
Fee: $160
Time: 8:00 a.m. to 3:00 p.m.

COPING WITH ENVIRONMENTAL ENFORCEMENT AND COMPLIANCE UNDER THE NEW ADMINISTRATION

A live via satellite seminar. Environmental enforcement and compliance have become a major issue for American business in terms of dollars as well as image. Issues such as acid rain, hazardous waste cleanup and radioactive waste sites have never been more crucial. This seminar will focus on the areas of air, water and waste management. For each area, two or more faculty members will develop in substantial detail the major topics of interest, thereby providing in-depth coverage of the most significant issues facing industry and the private practitioner. This program is aimd at house counsel, private practitioners, government attorneys and allied professionals.

Date: September 12, 1989
Place: Utah Law and Justice Center
Fee: $160
Time: 8:00 a.m. to 3:00 p.m.

LENDER LIABILITY: OFFENSIVE AND DEFENSIVE STRATEGIES

A live via satellite seminar. This full-day course will survey lender liability problems from the perspective of the plaintiff, defendant and potential parties of interest. Discussion will cover current developments, practice and case law. Specific topics will include, among others:

- Fraudulent transfer claims
- Misleading fairness opinions
- Good faith issues in and out of bankruptcy
- Enforcement of guarantees
- RICO
- Unconscionable provisions in loan documents

This intermediate level program will be helpful for attorneys practicing in the corporate, banking, bankruptcy, commercial and litigation areas.

Date: September 26, 1989
Place: Utah Law and Justic Center
Fee: $160
Time: 8:00 a.m. to 3:00 p.m.

DEVELOPMENTS IN THE MECHANICS LIEN AND NOTARY LAWS

The Real Property Section of the Utah State Bar presents a half-day seminar on developments in Utah mechanics lien and notary laws. The seminar will discuss recent statutory changes as well as developments in case law.

Date: October 10, 1989
Place: Utah Law and Justice Center
Fee: To be announced
Time: 8:45 a.m. to 12:15 p.m.

TRIAL OF A COMMERCIAL CASE: LITIGATING AND DEFENDING UNDER ARTICLES 2 AND 9 OF THE UCC

A live via satellite seminar. How secure you are—in litigating under Articles 2 and 9—of your knowledge of the rights of the various parties, what's different and unusual about litigating under Article 9, and what is the full scope of Article 2? How about remedies and presuit considerations? Are you totally confident that you are doing all you can do to prepare the case for presentation, to present a prima facie case, to give effective cross-examinations and closing arguments. This program will be especially beneficial to commercial lawyers, but anyone who handles any aspect of litigating any case involving secured creditors or sales and desires to step years ahead in experience should consider attending this program.

Date: October 24, 1989
Place: Utah Law and Justice Center
Fee: $160
Time: 8:00 a.m. to 3:00 p.m.

TAXATION OF S CORPORATIONS AND PARTNERSHIPS—A PRACTICAL COMPARATIVE ANALYSIS

A live via satellite seminar. This program will provide a thorough discussion of the factors that should be considered in choosing whether to form a business as a partnership or an S corporation and in operating the business after one of these forms is selected. Recent changes in the tax laws have enhanced the attractiveness of using a form of business entity that is not subject to federal income tax. In the past, new businesses were ordinarily conducted by regular corporations, and partnerships and S corporations were used only in special circumstances. The Tax Reform Act of 1986 has reversed the presumption. Under present law, it ill normally be desirable to use a partnership or an S corporation. The tax rules governing these "flowthrough" entities are often complex, but practitioners will have to master them to advise their clients effectively. The program will be of interest to attorneys, accountants and all of those who advise closely held businesses.

Date: October 31, 1989
Place: Utah Law and Justice Center
Fee: $160
Time: 8:00 a.m. to 3:00 p.m.

CLE REGISTRATION FORM

DATE	TITLE	LOCATION	FEE
☐ Aug. 22	Better, Earlier Settlements Through Economic Leverage	L & J Center	$160
☐ Sept. 12	Coping With Environmental Enforcement and Compliance Under the New Administration	L & J Center	$160
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Applicants for the position must have successfully completed the requirements for a J.D. or L.L.B. degree at an accredited law school.

Applicants must have a minimum of three years' experience in either a private or public sector organization in an administrative or professional position *and* a minimum of three years' experience in a position with substantive *mid-level* management responsibilities for a total minimum experience requirement of six years.

Interested and qualified applicants are invited to submit a cover letter, education and employment history and/or completed SF 171 and any relevant supporting documentation to the address listed below. The position will remain open until filled. Applicants selected for interview will be contacted by the Court. The Court is unable to reimburse any travel or other costs incurred by applicants pursuant to being interviewed for the position.

Reply to: United States District Court, 204 U.S. Courthouse, 350 S. Main Street, ATTN: CDC, Salt Lake City, UT 84101-2180.

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A concise supplement to Zillman's Utah Tort Law is available July 1 from the University of Utah College of Law. The Supplement contains new state and federal court decisions and the work of the 1989 Utah Legislature relevant to tort law in Utah. The Supplement is current to June 9, 1989.

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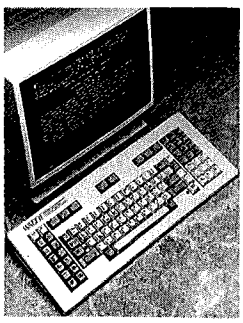

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