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Samuel P. Newton

University of Idaho College of Law, samnewton@uidaho.edu

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**GIVING TEETH TO STATE CONSTITUTIONS:
USING HISTORY TO ARGUE UTAH'S
CONSTITUTION AFFORDS GREATER
PROTECTIONS TO CRIMINAL DEFENDANTS**

SAM NEWTON

Since the 1970s, state courts have been much more willing to use their State constitutions to guarantee fundamental rights.¹ While the United States Supreme Court “dominated the development of constitutional law” for decades in the mid-twentieth century, in some measure because State courts were “part of the societal problem,” today, “a single courageous state,” as Justice Louis Brandeis put it, “may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.”² States have recently used their constitutions to experiment with gay marriage, marijuana regulation, and capital punishment, among many other issues.³

¹ Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS LAW REV. 707, 708 (1983); John Dinan, *The Past, Present, and Future Role of State Constitutions*, in GUIDE STATE POLIT. POLICY 19 (Richard G. Niemi & Joshua J. Dyck eds., 2013). One scholar has argued that state constitutions, which are much longer and have been amended more often, fill in the gaps from the “incomplete” federal constitution. Donald S. Lutz, *The United States Constitution as an Incomplete Text*, 496 ANN. AM. ACAD. POL. SOC. SCI. 23 (1988). Indeed, as Justice Story put it, the States can exist without the national government, but the national government cannot without them. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION, at 370 § 511 (1873) (“the State governments are, by the very theory of the Constitution, essential parts of the general government. They can exist without the latter, but the latter cannot exist without them.”); G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS (2000).

² *New State Ice Co. v. Liebman*, 285 U.S. 262, 310 (1931) (Brandeis, J., dissenting); Pollock, *supra* note 1, at 711. Justice Brennan was the strongest advocate for this approach. William J. Brennan Jr, *State Constitutions and the Protection of Individual Rights*, HARV. LAW REV. 489 (1977); William J. Brennan Jr, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 NYU LAW REV. 535, 548 (1986) (the Supreme Court’s “contraction of federal rights and remedies on grounds of federalism should be interpreted as a plain invitation to state courts to step into the breach.”).

³ See generally, John Dinan, *Policy Provisions in State Constitutions: The Standards and Practice of State Constitution-Making in the Post-Baker v. Carr Era*, 60 WAYNE LAW REV. 155 (2014); Rosalie L. Pacula et al., *Words Can Be Deceiving: A Review of Variation among Legally Effective Medical Marijuana Laws in the United States*, 7 J. DRUG POLICY ANAL. 1 (2014); David Blake & Jack Finlaw, *Marijuana Legalization in Colorado: Learned Lessons*, 8 HARV. LAW POLICY REV. 359 (2014); Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA LAW REV. 74 (2015); Ernest A. Young, *Exit, Voice, and Loyalty as Federalism Strategies: Lessons from the Same-Sex Marriage Debate*, 85 UNIV. COLO. LAW REV. 1133 (2014); EVAN GERSTMANN, SAME-SEX MARRIAGE AND THE

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Unlike the federal constitution, which has rarely been amended, State constitutions have followed Thomas Jefferson’s adage that because “the earth belongs always to the living generation,” they ought to be amended every few decades.⁴ State courts see the vast majority of criminal defendants and have significantly more opportunities to protect a defendant’s rights and to restrain government abuses of power.⁵ One judge congratulated “state judges who have resumed their historic role as the primary defenders of civil liberties and equal rights.”⁶

But advocates must first raise state constitutional claims in those courts. A law school curriculum, with its much stronger focus on federal law, may not adequately prepare lawyers to think in terms of their individual state constitutions. “[W]e must have the assistance of able counsel who present thoughtful arguments predicated not only on the United States Constitution but also on state constitutions.”⁷ Lawyers should not assume state courts are unwilling to interpret their constitutions differently and should provide state courts with compelling reasons to deviate from the federal interpretations.

I will use the example of one state—Utah—in which an exploration of its unique history shows how an advocate might use its constitution to argue for greater protections for a criminal defendant. The Utah Constitution contains several unique provisions and the Utah courts have demonstrated a keen willingness to create a separate body of state constitutional law,

CONSTITUTION 3–5, 168–70, 202–12 (2017); Daniel O. Conkle, *Evolving Values, Animus, and Same-Sex Marriage*, 89 INDIANA LAW J. 27 (2014). *People v. Anderson*, 493 P.2d 880 (Cal. 1972); *District Attorney for the Suffolk District v. Watson*, 411 N.E.2d 1274 (Mass. 1980); *People v. LaValle* (NY 2004); *Rauf v. State* (Del. 2016). After courts in California and Massachusetts invalidated the death penalty, voters in both states amended their constitutions to allow for the punishment. See *State v. Young*, 853 P.2d 327, 401 (Utah 1993) (Durham, J. dissenting); JOSEPH R. GRODIN ET AL., THE CALIFORNIA STATE CONSTITUTION 46–47 (2015).

⁴ Dinan, *supra* note 1, at 21.

⁵ Robert M. Howard et al., *State Courts, the US Supreme Court, and the Protection of Civil Liberties*, 40 LAW SOC. REV. 845, 846 (2006) (state courts, relying on state constitutions “can offer enhanced protection for civil liberties beyond the baselines established by a federal constitution and a national court.”); Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. LAW REV. 1141, 1148–49 (1984); Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. LAW REV. 1, 20 n. 109 (2017); Constance Baker Motley, *Civil Rights-Civil Liberties Litigation in the US Supreme Court: Are the State Courts Our Only Hope*, 9 HARV. BLACKLETTER J. 101, 104 (1992) (“For expansion of existing rights or new views of various rights, many litigants have recently turned to state courts for a more receptive judicial ear.”); James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEORGETOWN LAW J. 1003, 1006 (2002) (arguing that robust use of state constitutions can not only check abuses of power from the state government but “to resist abuses of power by the national government itself.”).

⁶ J. Skelly Wright, *In Praise of State Courts: Confessions of a Federal Judge*, 11 HASTINGS CONST. LAW Q. 165, 165, 188 (1983).

⁷ Pollock, *supra* note 1, at 721.

repeatedly inviting counsel to brief and argue state constitutional issues.⁸ Often, lawyers fail to provide historical arguments to support these arguments, preventing the courts from availing themselves of these opportunities.⁹

History provides fertile ground to support state constitutional claims. Utah is no exception. For criminal defendants in particular, Mormons, who comprised most of the state constitutional delegates, were targeted over several decades with wide-scale and abusive polygamy prosecutions. More than perhaps any other delegation in constitutional history, Utah's constitutional framers were acutely aware of governmental abuses of power in criminal prosecutions. They wrote a strong constitution to protect against those problems from happening again.

While there are numerous potential avenues of exploration, in this article I will give three specific examples to illustrate how unique aspects of Utah history could be used to argue that its state constitution provides greater protections to its citizens than Americans receive under the United States Constitution: 1) Utah's constitution requires a defendant to be present at all court hearings; 2) Utah's constitution creates a robust right to a fair and impartial jury drawn from a fair cross-section of the community; and 3) Utah's constitution requires that the mentally ill should be treated rather than simply incarcerated.

To further this end, I suggest criminal law practitioners should be more willing to review publications like the *Utah Historical Quarterly* (or their local historical publications) and to consult their State history books or the state constitutional debates in order to present similar claims to their state courts.

One should support a state constitutional claim with multiple pieces of information. The Utah Supreme Court uses four primary methods to interpret its own constitution: the plain language of the text itself, the historical context when the provisions were drafted, judicial interpretation, and the "particular attitudes and traditions within a state."¹⁰ These four

⁸ See e.g., *State v. Earl*, 716 P.2d 803, 806 (Utah 1986) ("It is imperative that Utah lawyers brief this Court on relevant state constitutional questions."); *State v. Bobo*, 803 P.2d 1268, 1272 (Utah Ct. App. 1990) ("Until such time as attorneys heed the call of the appellate courts of this state to more fully brief and argue the applicability of the state constitution, we cannot meaningfully play our part in the judicial laboratory of autonomous state constitutional law development.") (overruled on other basis) (internal citation omitted); Laura Dupaix, Linda Jones, and Christina Jepson Schmutz, *Interpreting Rules and Constitutional Provisions*, Utah B.J., March/April 2008, at 29, 32 ("For over twenty years, the Utah Supreme Court has pressed litigants to raise constitutional issues under our state constitution, particularly in criminal cases . . .").

⁹ James A. Gardner, *Autonomy and Isomorphism: The Unfulfilled Promise of Structural Autonomy in American State Constitutions*, 60 WAYNE LAW REV. 31, 34 (2014).

¹⁰ Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example*, 1993 UTAH REV 751, 775-80 (1993).

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methods would be helpful in interpreting any state constitution, given their comprehensiveness.

Of course, “the first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms and intention of the parties,” which often involves interpreting the text itself.¹¹ Constitutions are not drafted in a vacuum and, as this article demonstrates, an advocate can educate a court about the context of a given constitutional provision. But even if the language is vague, or the provision lacks historical context, a lawyer can also look to how the state’s courts have dealt with the issue, or how the state’s traditions or history have handled the problem.

In this article, I will use all four methods of analysis to support the first example. In the two sections to follow, for sake of length, I will more generally lay out the claims without using all four methods, with the added proviso that all four methods should be utilized, as much as possible, in presenting a state constitutional claim to a court.

I. UTAH’S CONSTITUTION REQUIRES A DEFENDANT TO BE PRESENT AT ALL HEARINGS IN HIS CASE.

The Utah Constitution and its history support a contention that defendants need be present during all hearings in the case. Thus, a defendant’s rights are violated whenever proceedings are conducted in his absence.

A. *Plain Language*

The plain language of Utah’s Constitutional provision differs from that of the Sixth Amendment. The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”¹² The Utah Constitution, by contrast, gives an additional right: “In criminal prosecutions the accused shall have the right to appear and defend in person . . .”¹³ The federal constitution contains no provision giving a defendant the right “to appear and defend in person.” The federal constitution restricts its application to witness testimony, while Utah’s Constitution provides the additional right for a defendant to be present throughout the entire trial “in person.” Thus, the plain language of Utah’s

¹¹ 1 Joseph Story, *Commentaries on the Constitution of the United States* section 400, at 305 (5th ed., Little, Brown & Co. 1905) (1891). *See also*, 1 Thomas M. Cooley, *Constitutional Limitations* 124 (8th ed. 1927) (“the object of construction, as applied to a written constitution, is to give effect to the intent of the people adopting it.”); *American Bush v. City of South Salt Lake*, 2006 UT 40, ¶ 10, 140 P.3d 1235; *American Fork City v. Cosgrove*, 701 P.2d 1069, 1072 (Utah 1985).

¹² U.S. Const. Amend. VI.

¹³ Utah Const. Art. I, § 12.

Constitution requires a defendant's presence during any portion of his case. A court's decision to conduct proceedings without the defendant could be grounds for a new trial. This includes jury selection, witness testimony, jury instructions or even answering a jury's questions.

B. *Historical Evidence of the Framers' Intent*

Beyond the plain language of a particular constitutional provision, the court should consider "historical evidence of the framers' intent," "our state's particular traditions, and the intent of our constitution's drafters."¹⁴ Utah's constitutional framers profoundly distrusted government and therefore sought to protect defendants from abuses which took place when judicial proceedings occurred behind closed doors.

By the late 1880s, the Utah Territory was religiously, politically, and economically polarized. Congress's anti-polygamy legislation left much of the Mormon leadership imprisoned or in hiding. The federal government seized church properties and threatened to take their temples too. Church members were understandably bitter.¹⁵

In this time of turmoil, Mormons in particular were upset at judicial proceedings which occurred "behind closed doors" without "a line of pleading or record, nor a word of counsel or client."¹⁶ They complained that judges would go "outside of the record" to convict people of crimes.¹⁷ For example, prosecutors called Brigham Young's polygamy case at a time when "he was sick and it was bitter winter weather," even though he "had been given to understand that his case would not be called until the spring term of court."¹⁸ Mormons felt that the judge and prosecutor rigged the proceeding to occur without Young and his counsel.¹⁹ In another case, the court refused to allow a defendant to testify in his own defense.²⁰ Mormons, or even their sympathizers, were also excluded from jury service.²¹

¹⁴ *American Bush*, 2006 UT 40, ¶¶ 11-12 (quoting *West v. Thomson Newspapers*, 872 P.2d 999, 1013 (Utah 1994)).

¹⁵ JEAN B. WHITE, *THE UTAH STATE CONSTITUTION: A REFERENCE GUIDE* 7 (1998).

¹⁶ EDWARD WILLIAM TULLIDGE, *HISTORY OF SALT LAKE CITY* 567, 574 (1886).

¹⁷ *Id.* at 570.

¹⁸ JOSEPH FIELDING SMITH & CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *ESSENTIALS IN CHURCH HISTORY: A HISTORY OF THE CHURCH FROM THE BIRTH OF JOSEPH SMITH TO THE PRESENT TIME* (1922), with INTRODUCTORY CHAPTERS ON THE ANTIQUITY OF THE GOSPEL AND THE "FALLING AWAY," 558-59 (1922).

¹⁹ *Id.*

²⁰ JoAnn W. Bair & Richard L. Jensen, *Prosecution of the Mormons in Arizona Territory in the 1880s*, 19 ARIZ. WEST 25, 34 (1977).

²¹ ROSA MAE MCCLELLAN EVANS, *JUDICIAL PROSECUTION OF PRISONERS FOR LDS PLURAL MARRIAGE: PRISON SENTENCES, 1884-1895* 47 (1986) (BRIGHAM YOUNG UNIVERSITY. DEPT. OF HISTORY).

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Over twenty years after Utah became a State, Mormons still bitterly recalled that period:

The petty officers and the judges of the courts carried on a reign of terror in their determination to stamp out the practice of plural marriage, and it appeared that the greatest crime in the world was for a man to acknowledge honestly that he was the husband of more than one wife, and that he diligently and faithfully supported them and their children; while for the libertine and the harlot there was protection by officers of law.²²

As the church put it, judges and prosecutors boasted that Mormon polygamists “would be convicted with or without evidence before the courts.”²³ One scholar commented that these trials “portended extremes which would sometimes turn prosecution into persecution” and that the trials became “ruthless” and “extreme.”²⁴ A Declaration of Grievances and Protest sent by territorial officials to President Grover Cleveland complained that, “[t]rial by jury in the Territories is no longer a safeguard against injustice to a Mormon accused of crime.”²⁵ The methods employed in prosecuting polygamists were “difficult to justify” and denied “basic American rights and freedoms, *without trial*, to the large nonpolygamous majority of the Mormon population in order to bring the offending minority within the law”²⁶

It is in this context that a group of 107 delegates, all Mormon except for 29, met in 1895 to draft the State constitution.²⁷ The constitutional delegates were aware of what they deemed to be a “judicial crusade,” where people were tried and convicted under an array of unjust procedures, often in their absence and often without evidence.²⁸

The framers’ detailed discussion on Article I, section 12 at the constitutional convention reflects that the delegates were concerned, particularly given their frustration with recent quasi-judicial proceedings, that criminal defendants have a right to attend their entire trial.

While discussing Article I, section 11, one of the delegates, Mr. Anderson, proposed adding the language that “no person shall be barred from

²² SMITH & SAINTS, *supra* note 20, at 596.

²³ *Id.* at 605.

²⁴ GUSTAVE OLOF LARSON, THE “AMERICANIZATION” OF UTAH FOR STATEHOOD 110 (Huntington Library publications, 1971).

²⁵ *Id.* at 126.

²⁶ *Id.* at 276.

²⁷ WHITE, *supra* note 17, at 9.

²⁸ James B. Allen, “Good Guys” vs. “Good Guys”: Rudger Clawson, John Sharp, and Civil Disobedience in Nineteenth-Century Utah, 48 UTAH HIST. Q. 154, 156 (1980); LARSON, *supra* note 26, at 76, 105, 109, 117, 213, 235, 278.

prosecuting or defending himself before any tribunal in this State by himself . . .”²⁹ Mr. Anderson explained that “the amendment that I offered should prevail, because I think that this is a constitutional right that should be guaranteed to every citizen if he so desires.”³⁰ Another delegate, Mr. Varian, said that by confining the amendment to civil cases, “it might be held *to prevent his appearance* in criminal cases. It is just as important and necessary to include it here.”³¹ Mr. James responded that section 12 provided the remedy they contemplated. “[A]nother section does provide that *he shall appear* in criminal cases,” Mr. James Stated. Mr. Anderson added, “[t]he next section [section 12] provides for criminal cases.”³² The delegates then discussed the pros and cons of self-representation and one’s right to defend oneself.³³ Mr. Cannon later responded, “I think that everyone should have the right to appear and defend his property as well as to defend his person.”³⁴

When the discussion moved to section 12, one of the delegates proposed eliminating the requirement that a defendant “meet the witnesses face to face” with the words, “to be confronted by the witnesses against him.”³⁵ Two delegates vigorously opposed the amendment:

[This amendment] strikes out one of the greatest safeguards there is to a citizen. Now if a person or witness had the opportunity of having his deposition taken in some far off county, or some far off state, why a witness under these conditions is likely to testify to anything. I think that the accused should have the right of having the witness confront him and then the jury can tell whether he is telling the truth or not. I think that if we would authorize the taking of depositions, it would take away one of the greatest safeguards that there is guaranteed by our Constitution.³⁶

The second delegate also opposed it on grounds that prosecution testimony could be conducted in the defendant’s absence:

[The amendment] will permit prosecutions, or the Legislature to authorize the prosecution in criminal cases to

²⁹ OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION: ASSEMBLED AT SALT LAKE CITY ON THE FOURTH DAY OF MARCH 1895, TO ADOPT A CONSTITUTION FOR THE STATE OF UTAH 304-05 (1898).

³⁰ *Id.* at 305.

³¹ *Id.* (emphasis added).

³² *Id.* (emphasis added).

³³ *Id.* at 305-06.

³⁴ *Id.* at 306.

³⁵ *Id.*

³⁶ *Id.*

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take depositions of witnesses who are not present, who may be absent in some other state or absent in some other county, and if that loophole was thrown open, I do not see that there would be any safety for any man to have a trial and have a fair defense. I do not believe that a man could have a fair defense unless his witnesses were compelled to be in attendance where he could have the chance to cross-examine. . . . I think that witnesses should be compelled to be in court and there testify before him [I]n my opinion the only way to have a fair trial is to have the witnesses face to face with the defendant and allow him to have a chance to cross-examine.

Even though one delegate supported the amendment, the convention rejected it. While the amendment had to do specifically with the right of cross-examination, the delegates did not further discuss section 12's requirement of "appear and defend in person." However, it is clear that the legislature did not want legal proceedings occurring in the defendant's absence. They wanted an entire criminal proceeding to occur while the defendant was present. Clearly, therefore, the constitutional delegates preserved in Article I, §12 a defendant's constitutional right to be present during all of the proceedings against him.

Thus, both the history and context of Utah's constitution show the delegates insisted criminal proceedings occur only when the defendant was present. They saw this as a guarantee of liberty and certainly a way to protect against the closed-prosecutions many of them had personally experienced.

C. Judicial Interpretation

Article I, §12 was "modeled on the Washington State Constitution of 1889."³⁷ The "appear and defend" provision also occurs in several state constitutions.³⁸ While few cases have construed these provisions as to a

³⁷ WHITE, *supra* note 17, at 39–40; OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION, *supra* note 31, at 310.; Martin B. Hickman, *Utah Constitutional Law* 72 (1954) (unpublished Ph.D. dissertation, University of Utah) ("The constant appeal to the authority of other states is one of the most striking impressions one gains from reading the debates."); Brad C. Smith, *Comment, Be No More Children: An Analysis of Article I, Section 4 of the Utah Constitution*, 1992 Utah L. Rev. 1431, 1454 ("Apparently, the drafters of the 1895 Utah Constitution sought to find model constitutions that were current and that would prove acceptable to Congress.").

³⁸ *E.g.*, Ariz. Const. art. II, § 24 ("In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel."); Ark. Const. art. 2, § 10 (heard by himself and counsel); Cal. Const. art. 1, § 13 (appear and defend in person and with counsel); Colo. Const. art. II, § 16 (appear and defend in person and by counsel or both); Del. Const. art. 1, § 7 (heard by himself and his counsel); Fla. Const. art. 1, § 16 (heard in person, by counsel

defendant's right to be present, the cases appear to uniformly hold that trial proceedings which occur outside the defendant's physical presence violate these state constitutions. In an 1883 Missouri case, prior to Utah's use of the same language from Missouri's constitution, a defendant objected that he was absent during part of the litigation on his motion for new trial. The Supreme Court of Missouri, reversing the conviction and remanding for a new trial, said that the defendant's absence was critical under its State constitution:

The accused demanded his right, under the constitution, to be present, not at the trial in the technical narrow sense of the statute, . . . *for the constitution has no such restricted meaning, but to appear and defend throughout the proceeding against him*, which is pending in the trial court until the determination of the cause by the rendition of a judgment. If the court could refuse to permit the accused to be present, with equal propriety it could exclude his counsel. The constitution does not declare that either may appear, but "that the accused shall have the right to appear and defend in person, and by counsel." He has the right to be there to make suggestions to his counsel, or, if he desire, to argue the motion to the court. *It is a constitutional right*, but if neither guaranteed by constitution nor by statute so reasonable a request as that of a prisoner on trial for his life or liberty, to be present at any important step in his cause, should be granted.³⁹

The court emphasized that this constitutional provision created a right to be present that was not limited to the trial, but to any part of the proceeding.

In an early North Dakota case, during deliberations, the court called jurors back into the courtroom and, without the defendant or counsel present, read back to them portions of the testimony. This violated the State constitution (that used the same language as Utah's constitution). The court said,

The defendant had the constitutional right to be present and defend in person and with counsel during the whole of the

or both); Idaho Const. art. 1, § 13 (appear and defend in person and with counsel); Mass. Const. pt. 1, § 13 (fully heard in his defense by himself, or his counsel, at his election); Neb. Const. art. 1, § 11 (appear and defend in person or by counsel); Okla. Const. art. 2, § 20 (heard by himself and counsel); Wash. Const. Art 1 § 22 (appear and defend in person and by counsel).

³⁹ *State v. Hoffman*, 78 Mo. 256, 259-60 (1883) (emphasis added).

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trial. The proceeding complained of was a part of the trial. The jury was in the box. The judge was upon the bench, and ordered the court stenographer to read the testimony of a witness, to which the jury listened and after retiring returned the verdict of “guilty.” It was a plain violation of the statute, *and of the constitutional rights of the defendant.*⁴⁰

In a later North Dakota case, the court responded to a jury question with both counsel present, but in the defendant’s absence.⁴¹ The court also found this procedure to violate its State constitutional provision of one’s right to appear and defend in person: “[W]e conclude that Smuda had a constitutional right, under our state constitution, to be present in person during the proceedings involving the jury request and court response thereto and that right was violated.” *Id.* at 168.⁴² In an early New York case, the court found that a jury view of the scene conducted without the defendants “was a denial of the [state] constitutional rights of the defendants ‘to appear and defend in person’ during a part of the trial. The right of a party to be present at every part of the trial,” the court said, “is absolute.”⁴³

Therefore, multiple courts have held that this state constitutional provision prohibits the court from conducting proceedings without the defendant.

Utah decisions also support this view of article I, §12. The Utah Supreme Court has stated that article I, §12 “guarantees the right of an accused to appear and defend in person against any cause against him.”⁴⁴ The court interpreted Rule 17 of the Utah Rules of Criminal Procedure as “implement[ing] the [state] constitutional right” at trial.⁴⁵ The rule quotes the

⁴⁰ *State v. Schasker*, 60 N.D. 462, 235 N.W. 345, 346 (1931) (emphasis added).

⁴¹ *State v. Smuda*, 419 N.W.2d 166, 167 (N.D. 1988).

⁴² The court found the error harmless, but said “[t]his would be a different case if there had been an open court communication between the judge and the jury without Smuda’s personal presence. In that event, Smuda’s constitutional confrontation rights would have been implicated and his absence may very well have resulted in prejudice to him.” *Smuda*, 419 N.W.2d at 168. *See also* *People v. Teitelbaum*, 163 Cal. App. 2d 184, 207, 329 P.2d 157, 172 (1958) (a defendant’s right to “appear and defend, in person” under the State constitution is violated when “he is prevented from being present during the presentation of matters before the triers of fact or such other times as his absence would thwart a fair and just hearing”).

⁴³ *People v. Hartnett*, 124 Misc. 418, 421, 208 N.Y.S. 246, 250 (Co. Ct. 1925); *see also* *People v. Rosen*, 81 N.Y.2d 237, 246, 613 N.E.2d 946, 950 (1993) (defendant’s “State constitutional right” to appear and defend was violated when trial court denied him the opportunity to be present during sidebars when he represented himself).

⁴⁴ *State v. Anderson*, 929 P.2d 1107, 1109-10 (Utah 1996).

⁴⁵ *Id.*

state constitutional provision, which further details, that a defendant “shall be personally present at trial”⁴⁶

The Utah Supreme Court has construed the “appear and defend” provision. In 1903, the court stated,

The provisions in [the State Constitution] which guaranty the accused, in a criminal action, the right to “appear and defend in person and by counsel,” and “to be confronted by the witnesses against him,” were designed to protect every person accused of crime against judgment of condemnation without a hearing in open court, *or by secret trial*.⁴⁷

The court also said that the clause is implicated when the act involves the “taking of evidence” or is “a part of the trial.”⁴⁸ Thus, defendants have a state constitutional right to be “personally present” when any of the proceedings of the trial were conducted. If this right is violated, a defendant should be entitled to a new trial, since a violation amounts to structural error.

D. Particular Attitudes and Traditions Within a State

The Utah Supreme Court has also suggested courts look to “our state’s particular traditions” in determining the intent of a particular constitutional provision.⁴⁹ In 2013, the Chief Justice of the Utah Supreme Court told the state legislature that Utah’s courts are “regarded as one of the most transparent court systems in the country.”⁵⁰ “Our courts need to be welcoming to all,” he said, adding that we must make “sure our courts are like a big tent, with its flaps wide open, with room for everyone, not like a walled fortress accessible only to the few.”⁵¹

Transparency and openness, however, can only occur when a defendant is present during the criminal proceedings against him. The courts cannot be fair, transparent, and open when the defendant is not present when jurors discuss the case with the court or it takes evidence. The defendant,

⁴⁶ Utah R. Crim. P. 17. The rule differentiates a death penalty case from other cases, in effect stating that a defendant’s absence in a death penalty case *prevents* the case from being tried and from a judgment entering. According to the rule, the trial begins from the reading of the charge to the rendering of the verdict. *Id.* at (g) – (o).

⁴⁷ *State v. Mortensen*, 26 Utah 312, 73 P. 562, 572 (1903) (emphasis added).

⁴⁸ *Id.* at 571.

⁴⁹ *American Bush*, 2006 UT 40, ¶¶ 11-12 (quoting *West*, 872 P.2d at 1013).

⁵⁰ Remarks by Chief Justice Matthew B. Durrant, 28 January 2013, 2013 General Session of the Sixtieth Legislature (available at <https://perma.cc/G8EZ-RCWX>).

⁵¹ *Id.* at 9.

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who has constitutional rights at stake, must be the first to observe what happens with her case.

Utah courts have allowed judicial proceedings to occur in a defendant's absence, even in the most serious of cases.⁵² Illustrating the need for fully raising state claims with the courts, the Utah Supreme Court refused to address a capital defendant's argument that his absence from court proceedings violated the Utah Constitution because the issue was not adequately briefed. The defendant did not "offer any analysis of this constitutional provision to support his argument" and because he "provided us with no argument to consider," the court declined to "address his state constitutional claim."⁵³

Utilizing all four bases of constitutional analysis, a defense attorney could easily justify claiming that her client has a right under the state constitution to be present during any portion of his case.

II. UTAH'S CONSTITUTION SUPPORTS DRAWING A JURY FROM THE POPULATION AT LARGE AND NOT EXCLUDING THOSE WHO DISTRUST THE GOVERNMENT OR WHO ARE SYMPATHETIC TO THE DEFENDANT.

Defendants could argue under Utah's constitution that their jury panels need to be more representative of the population at large. The vast majority of Mormon constitutional delegates had experienced deprivations of the right to fair and impartial juries. Because of their concerns, Utah's constitutional framers created a constitutional provision that more significantly protects a defendant's right to an impartial jury than the federal counterpart. That constitutional provision demands a fair cross-section of the community be in the jury box.

In the nineteenth century, Mormons "challenged too many American norms to be left alone" and "were unsuccessful in convincing the American public that Utah was not a hive of lasciviousness and tyranny."⁵⁴ In criminalizing polygamy, one Representative, Lawrence M. Keitt of South Carolina, criticized that a federal bill attacking Mormon polygamy jeopardized the right to a fair trial: "Are you prepared to start the Government upon this crusade against manners and morals? Are you willing to substitute the sword for trial by jury, and to carry out, by flame and

⁵² See *State v. Gunter*, 2013 UT App 140, ¶ 25, 304 P.3d 866 (finding harmless error where trial occurred in defendant's absence and citing Art. I § 12 of the Utah Constitution).

⁵³ *State v. Maestas*, 2012 UT 46, ¶ 55 n.38, 299 P.3d 892.

⁵⁴ MATTHEW BURTON BOWMAN, *THE MORMON PEOPLE: THE MAKING OF AN AMERICAN FAITH* 124, 141 (2012).

violence, an indictment against a whole community?”⁵⁵ As Representative McClelland put it, a jury from the Mormon community would not convict their fellows:

This is the whole extent of the remedy proposed by the committee’s bill—a bill which assumes and relies upon the Mormons—polygamists themselves, to execute its provisions. Does not everyone know that the Mormons will not enforce such a law against themselves? That a grand jury of polygamists will not indict a polygamist? And that a petty jury of polygamists will not convict a brother polygamist.⁵⁶

Congress’s solution to this problem became simple: remove Mormons from jury service because of their predisposition to acquit.⁵⁷ When the United States Congress proposed giving “authority to the federal marshal to select all jurors” in criminal cases in Utah and even “eliminated trial by jury in cases involving polygamy,” Brigham Young, the territorial governor “was outraged.”⁵⁸ Writing to Utah’s territorial delegate in Washington, Young asserted:

He might have added to it that no Mormon shall be allowed to vote on any occasion whatever, nor hold office in Utah or in any Territory, or State of the Union.

I have a proposition to make to [the Senator who proposed the bill] and all such men. When my old [servant] has been dead one year, if they will wash their faces clean they may kiss his —.

I hold all such men in the greatest contempt and fear not their wicked deeds.⁵⁹

While that particular bill did not pass, a few years later, Representative Shelby M. Cullom succeeded in proposing a bill that “place[d] in the hands of the U.S. marshal and U.S. attorney responsibility

⁵⁵ EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, *ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830-1900*, at 135 (2001).

⁵⁶ *Id.* at 136 (citing *Congressional Globe* 1860, 1514).

⁵⁷ H.R. 3097, 43d Cong. (1874); *Clawson v. United States*, 114 U.S. 477, 478, 5 S. Ct. 949, 949, 29 L. Ed. 179 (1885).

⁵⁸ LEONARD J. ARRINGTON, *BRIGHAM YOUNG: AMERICAN MOSES* 363 (1986); JAMES B. ALLEN & GLEN M. LEONARD, *THE STORY OF THE LATTER-DAY SAINTS* 351 (2nd ed. ed. 1992).

⁵⁹ ARRINGTON, *supra* note 60, at 363–64.

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for selecting jurors.”⁶⁰ Five-thousand Mormon women gathered in the Salt Lake Tabernacle and held a “massive ‘indignation meeting’” to protest the bill.⁶¹

When President Ulysses S. Grant sent Chief Justice McKean to Utah “with instructions to root out polygamy by strictly enforcing the law,” McKean took it upon himself to aggressively use the power of the courts to stamp out the practice.⁶² McKean said God “has called upon me” that “whenever or wherever I may find the Local or Federal laws obstructing or interfering therewith, by God’s blessing I shall trample them under my feet.”⁶³

“Increasingly harsh federal legislation outlawed polygamy, disenfranchised the Mormon faithful, *kept believers off juries*, and ultimately disincorporated the church.”⁶⁴ Mormons called this period a “judicial reign of terror” and defended their right to an unbiased jury.⁶⁵

The Mormon predicament in the West paralleled in many respects the situation the early colonists in America faced with regard to England. Most colonists were very loyal to England but strenuously objected to what they felt were serious deprivations of their constitutional rights as Englishmen, including the right to jury trial by their peers, the right to an independent judiciary, and the right to self-rule. . . . The Mormons tried to protect their rights against federal encroachments, and issues involving jury trials, and independent judiciary, and self-rule were raised again in the Utah Territory.⁶⁶

Once prosecutors put the law into practice, as people predicted, convictions were hard to come by. Federal officials “found that gaining convictions in front of a Mormon jury was remarkably difficult,” given jurors’ sympathies to the religious doctrines.⁶⁷ Federal judges attacked pro-Mormon juries by using a territorial statute that allowed the marshal to summon jurors. Removing Mormons from jury service made indicting them much easier as Judge McKean found:

⁶⁰ H.R. 1089, 41st Cong. § 12 (1870); *Id.* at 364.

⁶¹ *Id.*

⁶² ALLEN & LEONARD, *supra* note 60, at 353.

⁶³ EDWARD WILLIAM TULLIDGE, LIFE OF BRIGHAM YOUNG: OR, UTAH AND HER FOUNDERS 420–21 (1876).

⁶⁴ FIRMAGE & MANGRUM, *supra* note 57, at 128 (emphasis added).

⁶⁵ BRIGHAM HENRY ROBERTS & JOHN TAYLOR, THE LIFE OF JOHN TAYLOR: THIRD PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 311 (1892).

⁶⁶ FIRMAGE & MANGRUM, *supra* note 57, at 128.

⁶⁷ BOWMAN, *supra* note 56, at 143.

For near twenty years the Mormon leaders packed the Grand and Petit juries of the United States Courts with their tools and instruments. But within a few months past we have decided against this system . . . to recognize only the U.S. Attorney and the U.S. Marshal as the proper officers of our courts. One of the consequences is that we have already indicted for capital offenses ten or twelve Mormons—some of them bishops and other influential men in the Mormon establishment.⁶⁸

Mormons complained that Judge McKean's practices resulted in "packed juries of pronounced anti-Mormons, chosen to convict the Church leaders."⁶⁹ John Taylor, future president of the church, believed these tactics showed that "the government of the United States is at war" with the church itself and that it would "end in disaster to the liberties of the people."⁷⁰ Taylor counseled the faithful, in a published letter, to submit, despite the injustice:

Let them pack juries fresh from houses of ill-fame to try you on virtue. Never mind, it is their virtue that suffers, not yours. Let them try you for living with and protecting your wives and providing for your children; fidelity and virtue are not crimes in the eyes of the Almighty, only in theirs.⁷¹

In the meantime, the Mormon-dominated territorial legislature responded by empowering Utah's probate courts with general jurisdiction over criminal cases, giving probate judges, not the territorial marshal, control over the drawing of jury lists. When an appeal over the jury selection procedure reached the United States Supreme Court, the Court held that Judge McKean in his "efforts to purge juries of Mormons and secure the conviction of polygamists" had "improperly ignored Utah's jury selection procedures."⁷² Particularly, the Supreme Court found that because Congress had approved the Organic Act creating the territory, it silently acquiesced to the territorial legislature's authority to determine jury selection.⁷³

Mormons were elated at the victory. One-hundred and thirty indictments were quashed and given that the federal marshal could not draw jury lists, "no juries were summoned" and "Utah's judicial system was

⁶⁸ FIRMAGE & MANGRUM, *supra* note 57, at 145.

⁶⁹ ROBERTS & TAYLOR, *supra* note 67, at 312.

⁷⁰ *Id.* at 312–13.

⁷¹ *Id.* at 316.

⁷² FIRMAGE & MANGRUM, *supra* note 57, at 138.

⁷³ *Clinton v. Englebrecht*, 80 U.S. 434, 441, 446, 20 L. Ed. 659 (1871).

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effectively paralyzed.”⁷⁴ An editorial in the *Deseret News* exulted that the decision constituted “a virtual declaration by the highest authority in the land that no portion of the people of the United States—however abhorrent their religious faith—can be deprived of their liberties except by due process of law.”⁷⁵

However, Utah’s non-Mormon governor was not happy with the decision. “Under the law as laid down by the Supreme Court,” he complained in a letter to President Ulysses Grant, “a Mormon Marshall will summon a Mormon jury to try Mormon criminals, each, and all, of whom regard their duty to the Church as above the law.” It would make the law a farce, he claimed, and “makes the Mormons very jubilant, arrogant, [and] insolent . . .” The court’s decision, he decried, allowed “more than twenty murderers in Salt Lake City alone, who committed some as dark and diabolical crimes as darken the annals of human depravity . . . to be turned loose upon the community.”⁷⁶

President Grant took the governor’s protest to Congress. In his State of the Union address, he asserted that “it is absolutely necessary that Congress provide the courts with some mode of obtaining jurors.” Grant wanted convictions:

[I]n order to prevent the miscarriage of justice and to maintain the supremacy of the laws of the United States and of the Federal Government, [it is necessary] to provide that the selection of grand and petit jurors for the district courts, if not put under the control of federal officers, shall be placed in the hands of persons entirely independent of those who are determined not to enforce any act of Congress obnoxious to them

I am convinced that so long as Congress leaves the selection of jurors to the local authorities it will be futile to make any effort to enforce laws not acceptable to a majority of the people of the Territory, or which interfere with local prejudices or provide for the punishment of polygamy or any of its affiliated vices or crimes.⁷⁷

Congress responded with the Poland Act, which allowed the United States marshal and territorial marshal to prepare a list of 200 persons, each

⁷⁴ FIRMAGE & MANGRUM, *supra* note 57, at 146.

⁷⁵ *Id.*

⁷⁶ *Id.* quoting; ROBERT DWYER, *THE GENTILE COMES TO UTAH: A STUDY IN RELIGIOUS AND SOCIAL CONFLICT (1862-1890)* 86 (1941).

⁷⁷ UNITED STATES CONGRESS, CONGRESSIONAL EDITION 361–62 (1873).

officer drawing alternate names.⁷⁸ In effect, the Act “nullified *Englebrecht* by creating a new jury selection process aimed at limiting Mormon control . . .”⁷⁹ Mormons bristled that the act denied them representation on juries under the new regime, saying that the “Gentile population—at the time but an insignificant minority of the inhabitants of Utah—was given equal representation on the juries with the overwhelming majority of the people.”⁸⁰

John Taylor, church president, asserted these trials were conducted under the auspices of “packed grand juries with unanimous alacrity [to] do the bidding of over-zealous prosecuting attorneys.”⁸¹ Taylor continued,

And there, in this ignominious position, [the defendant] stands with every person who might possibly be his friend, excluded from the jury, without the possibility of a fair trial by his peers, not one of the panel being in the least sympathy with himself; by such people this unfortunate young gentleman has to be tried, judged, prosecuted, proscribed and condemned . . .⁸²

Under this new act, Mormons arranged a test case, confident that the Supreme Court would again invalidate the politically manipulative attempts to secure convictions. Their confidence was wrongly placed. A half-Mormon, half-non-Mormon jury convicted George Reynolds of polygamy. On appeal, the Supreme Court affirmed the conviction, reasoning in part that jurors could be properly excluded for their belief in polygamy.⁸³ *Reynolds* opened the door to a broad series of future abuses of the jury system in Utah.

In his 1879 State of the Union Address, President Rutherford B. Hayes said that because of Mormons’ disobedience to the law, “the enjoyment and exercise of the rights and privileges of citizenship in the Territories of the United States may be withheld or withdrawn” from them. The next year, Hayes again recommended that “the right to vote, hold office, and sit on juries in the Territory of Utah be confined to those who neither practice nor uphold polygamy.”⁸⁴ Congress responded to Hayes’ call with the Edmunds Act, which allowed current and former polygamists, or those who believed in it, even those who remained silent when questioned, to be

⁷⁸ 2 Cong. Rec. 4475, 5415, 5417 (1874).

⁷⁹ FIRMAGE & MANGRUM, *supra* note 57, at 148–49.

⁸⁰ ROBERTS & TAYLOR, *supra* note 67, at 319.

⁸¹ *Id.* at 375.

⁸² *Id.*

⁸³ *Reynolds v. United States*, 98 U.S. 145, 157, 25 L. Ed. 244 (1878).

⁸⁴ RUTHERFORD B. HAYES, LETTERS AND MESSAGES OF RUTHERFORD B. HAYES, PRESIDENT OF THE UNITED STATES: TOGETHER WITH LETTER OF ACCEPTANCE AND INAUGURAL ADDRESS 260, 319 (1881); FIRMAGE & MANGRUM, *supra* note 57, at 160.

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excluded from jury service, which essentially eliminated every faithful church member.⁸⁵

Senator Wilkinson Call of Florida lodged an objection to the Edmunds bill when it was debated in the Senate, which Mormons quoted in their official publication, the *Millennial Star*. According to Senator Call, the bill imposed a religious test that deprives one of a fair trial:

If there be anything sacred in the history of American jurisprudence and American liberty it is that a person charged with crime shall have a fair and an impartial jury of his peers, and not by a packed jury selected of men known to be opposed to him and prejudiced against him, and a religious test imposed upon them for their qualification as jurors.⁸⁶

Despite Call's objection, the Edmunds Act passed Congress. Consequently, the federal government convicted more than 1,000 polygamists before Mormons officially renounced the practice.⁸⁷ Mormons continued to complain that "juries were packed to convict" and that a Mormon "accused of violation of the anti-polygamy laws" was forced to stand "before a jury of his avowed political and religious enemies."⁸⁸

The United States Supreme Court rejected multiple challenges to the jury selection procedure, reasoning that jurors could be disqualified for their belief, even non-practice, of polygamy. The court upheld a statute which allowed a juror to be excluded "for the existence of a state of mind . . . which leads to a just inference, in reference to the case, that he will not act with entire impartiality."⁸⁹ The Court also agreed that excluding someone for his religious belief was permissible:

It needs no argument to show that a jury composed of men entertaining [a belief in polygamy] could not have been free from bias or prejudice on the trial for bigamy, of a person who entertained the same belief, and whose offence consisted in the act of living in polygamy.⁹⁰

⁸⁵ Edmunds Act, ch. 47, 22 Stat. 30 (1882) (repealed 1983); FIRMAGE & MANGRUM, *supra* note 57, at 161.

⁸⁶ 52 THE LATTER-DAY SAINTS' MILLENNIAL STAR, 139 (1890) (Congressional Record 13 [1882]:1211).

⁸⁷ LEONARD J. ARRINGTON, GREAT BASIN KINGDOM: AN ECONOMIC HISTORY OF THE LATTER-DAY SAINTS, 1830-1900, at 359 (1993).

⁸⁸ ROBERTS & TAYLOR, *supra* note 67, at 378.

⁸⁹ *Miles v. United States*, 103 U.S. 304, 26 L. Ed. 481 (1880).

⁹⁰ *Id.* at 309.

However, according to two contemporary legal scholars, the Court in this opinion “brushed aside” the idea that jurors, even those who sympathize with a party or a party’s position, such as one Mormon juror who admitted he could convict the defendant if he violated the law, can still serve, so long as the juror commits to follow the law.⁹¹

The crusade did not abate. Prosecutors went so far as to prosecute Mormons for perjury who failed to fully admit their alleged biases in jury selection.⁹² In the Idaho territory, Mormons were automatically barred from all jury service, even though the law excluded so many Mormons that “juries could not be selected.”⁹³

In three decades of conflict (1862-1892), Congress clearly failed to change Mormons’ attitudes. For thirty years, Mormons’ civil rights “were thrust aside with little of the serious reflection that should have been accorded each interest. Even those unsympathetic to the Mormons might note, as a few reflective observers of the time did, that the practice of neglecting individual rights can become a habit that affects everyone’s rights.”⁹⁴

Mormons—who comprised the vast majority of the Utah Constitutional delegates—experienced governmental abuses of power targeting the very composition of the jury box. When the government could not secure the convictions it wanted from local juries, it packed those juries with a non-Mormon minority who were already predisposed to convict. This smacked contemporaries as a great injustice—one that they intended to fix with their new State constitution.

Thus, when the Utah Constitutional Convention began, delegates clearly envisioned protecting one’s right to a fair and impartial jury. To them, the jury should be composed of a random cross-section of community members, not those predisposed to convict. So long as even one juror from the community rejected the prosecution, then the government could not secure a conviction.

One delegate, in speaking of Article I, section 10, called the jury “a time honored institution.”⁹⁵ He added that they should ensure “the time-honored system of the jury might remain unchanged.”⁹⁶ Another delegate commented on the importance of keeping the jury system intact and representative of the whole people, particularly noting abuses the Mormons had recently experienced:

⁹¹ FIRMAGE & MANGRUM, *supra* note 57, at 228.

⁹² See *United States v. Brown*, 6 Utah 115, 21 P. 461, 461-62 (1889).

⁹³ FIRMAGE & MANGRUM, *supra* note 57, at 230.

⁹⁴ *Id.* at 259–60.

⁹⁵ OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION, *supra* note 31, at 258.

⁹⁶ *Id.* at 259.

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I do not believe that the jury system is a work of barbarism in any sense. I believe it has been a part of the bulwark of human liberty from the days in which our English forefathers battled for human rights down to the present time.

It is the only branch of the judicial system which is in touch with the people. It is the only voice that the people have in the administration of justice; it is the only security that the common people have. It is the jury drawn from the body of the people, who, in times past, have stood out against the aggressiveness of courts and executive, in defense of liberty, and for the protection of human rights.

...

I fear, Mr. Chairman, that this tendency *in the last few years* toward the abolishment of the entire jury system comes from certain influences; from certain quarters, which are in the nature of things antagonistic to the rights of the people.⁹⁷

The delegate then emphasized that the jury should fairly represent the people of the community from which the defendant is drawn.

I would not put a word either in the Constitution or upon the statute book that would in any degree would impair the efficiency of the jury system, against the will of a single citizen of the commonwealth when he is brought into court there, either as a plaintiff or as a defendant, that he be given the right which his father had and their fathers before him, to demand under the Constitution the right that he has that his claim should be decided by twelve men *coming from his own people, in touch with humanity, and representing its thought*, and that he should be given all the protection that he ought to have. . . . [B]ut when you come to a trial jury, that last safeguard, that last barrier, that has always stood and always will, I believe, between the people and oppression whether of executive power or of corporate wealth; I say, when we come to that, we should act slowly, and wait, I think, long before we invade in the slightest degree or particular.⁹⁸

The delegates were concerned that juries should have diverse viewpoints:

⁹⁷ *Id.* at 260 (emphasis added).

⁹⁸ *Id.* at 261 (emphasis added).

Men's minds are constituted differently. No one man thinks as his neighbor does. Take any twelve men on this floor, no one will give exactly the same reason for his judgment that another man will give. Now, sir, the experience of men, the experience of courts, have taught us that where there are twelve men together, twelve different minds reasoning upon the same proposition, they will arrive at a better conclusion

The verdict then will express the opinion of twelve men; the twelve men will have different reasons for their views; each man will have his own reason, and it seems to me that this is a thing that we should follow.⁹⁹

The jury system took on religious significance for the delegates. One delegate said it represented “the sacred judge—the Savior of mankind and His twelve apostles.”¹⁰⁰ Another said it represented the twelve tribes of Israel.¹⁰¹ Another delegate commented on the concerns people of the time felt about juries, particularly that the jury system was the only institution that would protect them against this recent history of governmental abuses of power:

[T]he people are still clinging to that right of trial by jury; they have an affection for it; they feel that as this government is constructed and as the pressure is growing stronger and stronger every day against them and their acts, and this [is] *one of the last holds that they have*, it is upon the jury that they rely, not upon the court.¹⁰²

The State needed to “maintain[] such a tribunal which is standing between the great aggressions of the age of this great civilization of to-day, and the rights and liberties of the people,” he said. The delegates should “look on and try to learn from experience” that it would be a “dangerous proposition” to limit the right to a jury trial.¹⁰³

Delegates repeatedly saw the jury system as inviolate.¹⁰⁴ One delegate told the group that “there is no question in the mind of any

⁹⁹ *Id.* at 275.

¹⁰⁰ *Id.* at 280.

¹⁰¹ *Id.* at 280, 286.

¹⁰² *Id.* at 281 (emphasis added).

¹⁰³ *Id.* at 282.

¹⁰⁴ *Id.* at 259, 260, 278, 288, 289, 291 (“bulwark between the individual and the state”; “time honored system”; “bulwark of liberty”; “time honored system”; “bulwark of human liberty”).

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gentleman on this floor as to the sacredness of the institution of the jury.”¹⁰⁵ “All of us have grown to manhood under it,” he argued, “and have looked back through the history of the past and rejoiced in it.”¹⁰⁶

Another delegate, Mr. Bowdle, emphasized the importance of letting the community be the conscience and the check on the government:

[T]he people have more confidence in the opinions of their fellows, with whom they are in direct touch and sympathy, than they have in the courts. The jury comes right down side by side with the litigant. They are in some sense *in sympathy with the litigant*, not in an unfair or undue sense, but they know more his wants, they know more nearly what the justice that is at stake is. Very often a court gets this kind of an idea. He starts out a little bent in one direction, and all earth and heaven cannot turn him from that bend and he goes right on in that direction. . . . Those twelve men will look at the thing from as many different standpoints [Y]ou cannot say with all due deference to the courts that they are at all times fair. And that is the feeling of the people. The feeling of the people is, we cannot always trust them—as you increase the power of the court, you increase the feeling in the minds of the people.¹⁰⁷

Utah’s constitutional delegates had witnessed a lengthy period of unjust and stacked prosecutions. They were concerned that juries should fairly represent a cross-section of the community and not be composed of people who were pre-disposed to convict a defendant.

Based on the framers’ intent, one could argue in a capital case that death qualification for every juror (that each be willing to impose the death penalty) violates Utah’s constitution. “In theory, at least, the capital jury is supposed to act as the conscience of the community, introducing community standards into the administration of the death penalty.”¹⁰⁸ Death qualification “compromises the representativeness of the group of prospective jurors” in a way that it no longer “decide[s] the case the way the community would” by skewing the jury toward imposing death.¹⁰⁹ Even jurors who oppose the punishment should be allowed to serve under the framers’ vision. Instead, like the concerns which were expressed in the Mormon polygamous passage,

¹⁰⁵ *Id.* at 289.

¹⁰⁶ *Id.* at 289–90.

¹⁰⁷ *Id.* at 292–93.

¹⁰⁸ Craig Haney, *Death by Design: Capital Punishment As a Social Psychological System* (2005), 106.

¹⁰⁹ *Id.*

jurors in capital cases are selected based on their predisposition to convict and sentence one to death.

Additionally, one could argue that juries need to reflect the demographics of the community in terms of race, gender, and other classifications, and that they include people with opposing viewpoints. Utah's constitutional framers intended that jurors not be excluded from serving, even if they sympathize with a defendant. Utah's constitution, particularly article I, section 10, demands that juries represent a fair cross-section of the community.

III. UTAH'S CONSTITUTION REQUIRES THE STATE TO TREAT ITS MENTALLY ILL RATHER THAN INCARCERATING THEM.

Utah also has a unique history in caring for its mentally ill and its Constitution, particularly the unnecessary rigor clause, require greater protections for these persons when they are incarcerated.¹¹⁰

Unnecessary rigor provisions existed in state constitutions as early as 1796.¹¹¹ Utah's provision was adopted in 1896, about the time four other states adopted similar provisions.¹¹² Unnecessary rigor provisions "came out of the Prison Reform Movement of the 1800s, whereby people sought to make prisons more humane."¹¹³ "[M]any states thought a commitment to humanizing penal laws and the treatment of offenders to rank with other principles of constitutional magnitude . . ."¹¹⁴ "Unnecessary rigor" does not focus on the "conditions of punishment," nor does it limit itself to shackles, balls and chains—the provision "protects persons charged with crime from ill or unjust treatment at all times."¹¹⁵

¹¹⁰ "Persons arrested or imprisoned shall not be treated with unnecessary rigor." Utah Const. art I, § 9.

¹¹¹ *Sterling v. Cupp*, 625 P.2d 123, 128 n. 11 (Ore. 1981) (citing Tenn. Const. 1796, art XI, § 13 in volume 9 at 148 (1979)). See Richard S. Frase, *Cruel and Unusual Punishment: Litigating Under the Eighth Amendment: Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. Pa. J. Const. L. 39, 65 (2008).

¹¹² Utah Const. art I, § 9. The other four states use slightly different language: "No person arrested, or confined in jail, shall be treated with unnecessary rigor." Ind. Const. art. I, § 15; Or. Const. art. I, § 13; Tenn. Const. art. I, § 13; Wyo. Const. Art. I, § 16. See Scott C. Sandberg, *Developing Jurisprudence on the Unnecessary Rigor Provision of the Utah Constitution*, 1996 UTAH L. REV. 751, 752-53 (1996).

¹¹³ Symposium, *The Legal Status of Nonhuman Animals*, 8 ANIMAL L. 1, 56 (2002). Unnecessary rigor provisions "reflect a widespread interest in penal reform in the states during the post-Revolutionary decades." *Sterling*, 625 P.2d at 128. Tennessee has interpreted the clause to require prisoners to be guaranteed safety and humane treatment. *Raedle v. Townsend*, 1987 Tenn. App. LEXIS 3172, 1987 WL 7721 at *3 (Tenn. Ct. App. 1987) (Franks, J., concurring).

¹¹⁴ *Sterling v. Cupp*, 625 P.2d 123, 128 (Ore. 1981).

¹¹⁵ *Id.* at 129 (citing *Bonahoon v. State*, 178 N.E. 570, 571 (Ind. 1931)).

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In Utah, the unnecessary rigor provision came at a time in which many Utahns exhibited vast frustrations with abusive criminal convictions and sentencing proceedings.¹¹⁶ Congress criminalized polygamy, resulting in the incarceration of thousands of Mormon men, many of whom saw the criminalization and resulting penalties as particularly onerous.¹¹⁷ The federal government's "zealous enforcement" of polygamy prosecutions "led to allegations of disproportionate sentences for Mormon polygamists in comparison to criminals convicted of other crimes."¹¹⁸ Mormons' recent recollection of polygamy-based incarcerations "undoubtedly . . . contributed to the early protections afforded convicts in Utah."¹¹⁹

The memory of past injustices, real and perceived, may have influenced the Mormon delegates attending the constitutional convention to approve the inclusion of the unnecessary rigor clause.¹²⁰

According to the Utah Supreme Court, the unnecessary rigor provision "on its face" is "broader than" the Eighth Amendment and provides greater protections to defendants.¹²¹ Prisoners are protected against "unnecessary abuse" or "treatment that is clearly excessive or deficient and unjustified"¹²²

"The unnecessary rigor clause of the Utah Constitution protects persons arrested or imprisoned from the imposition of circumstances on them during their confinement that demand more of the prisoner than society is

¹¹⁶ THOMAS G. ALEXANDER, *MORMONISM IN TRANSITION: A HISTORY OF THE LATTER-DAY SAINTS, 1890-1930*, at 6–15 (1986). Mormons were told in seeking statehood that "you are a mere handful of people; 150,000 against 50 or 60 millions, and those millions have made up their minds that polygamy shall be exterminated." *Id.* at 129. *See generally*, SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* 222 (Studies in legal history, 2002); EDWARD L. LYMAN, *POLITICAL DELIVERANCE: THE MORMON QUEST FOR UTAH STATEHOOD* (1986); LARSON, *supra* note 26..

¹¹⁷ *See* James B. Hill, *History of Utah State Prison 1850-1952*, at 92 (1952) (unpublished M.S. thesis, Brigham Young University); RICHARD S. VAN WAGONER, *MORMON POLYGAMY: A HISTORY* 115–23, 255 (2nd ed. 1989). Mormons remained defiant against anti-polygamy efforts: "Mormonism will never be destroyed until it is destroyed by the guns of the United States Government . . . with cannons of the biggest bore, thunder into them the seventh commandment" *Id.* at 116.

¹¹⁸ James G. McLaren, *The Meaning of the "Unnecessary Rigor" Provision in the Utah Constitution*, 10 B.Y.U.J. PUB. L. 27, 34-35 (1996).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 39-40.

¹²¹ *State v. Bishop*, 717 P.2d 261, 267 (Utah 1986); *State v. Lafferty*, 2001 UT 19, ¶ 73, 20 P.3d 342.

¹²² *Bott v. Deland*, 922 P.2d 732, 737 (Utah 1996); *see also State v. M.L.C.*, 933 P.2d 380, 385 (Utah 1997) ("the clause applies to abusive treatment of prisoners or arrestees.").

entitled to require.”¹²³ The applicability of Utah’s unnecessary rigor clause is determined on a case-by-case basis.¹²⁴ The provision is “self-executing,” meaning that it “prohibits specific evils that may be defined and remedied without implementing legislation.”¹²⁵

Utah’s unnecessary rigor provision could be read to prohibit the execution of the mentally ill or even to prevent their arrest or incarceration. To avoid mistreating those with mental disabilities, the provision could be read to require sentences to be crafted with their specific needs in mind, and to require the state to find alternative, non-punitive care for them.¹²⁶

Utah has a long tradition of treating the mentally ill with special care. “It was likely that the need to care for mentally ill persons in Utah had existed since pioneers first came west in 1847.”¹²⁷ In 1852, the territorial legislature granted county probate courts the authority to handle their affairs.¹²⁸ “In early Utah, the ill and defective were the concern first of the immediate family only, one’s ‘own folks.’”¹²⁹ Importantly, “care of the mentally ill gradually was recognized as a community problem.”¹³⁰ As evidence “of active interest” in the mentally ill, in 1869, Salt Lake City, “then a struggling community of only about 12,000 people, led out in the establishment of the first mental hospital in the state.”¹³¹ The Salt Lake City hospital was “established as a place for the use and treatment of the sick, also for the treatment and safekeeping of insane or idiotic persons.”¹³² This Salt Lake City hospital was said to be a “‘marvel for its cleanliness and for the super medical attention each patient received.’”¹³³ One grand jury noted that the hospital, while clean and surrounded by orchards and gardens, also took care of its residents: “patients were clean and well provided with clothing

¹²³ *Dexter v. Bosko*, 2008 UT 29, ¶ 17, 184 P.3d 592.

¹²⁴ *Id.* at ¶ 17; *State v. Russell*, 791 P.2d 188, 190 (Utah 1990).

¹²⁵ *Bott*, 922 P.2d at 737.

¹²⁶ Marie Gottschalk, *Cell Blocks & Red Ink: Mass Incarceration, the Great Recession & Penal Reform*, 139 DAEDALUS 62 (2010); Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s* (2011); Jacques Baillargeon et al., *Psychiatric Disorders and Repeat Incarcerations: The Revolving Prison Door*, 166 AM. J. PSYCHIATRY 103 (2009); Dora M. Dumont et al., *Public Health and the Epidemic of Incarceration*, 33 ANNU. REV. PUBLIC HEALTH 325 (2012).

¹²⁷ Janina Chilton, *Reflections: A Photographic Essay of the Utah State Hospital*, 78 UTAH HIST. Q. 134, 135 (2010).

¹²⁸ Elizabeth D. Gee, *Justice for All or for the “Elect”? The Utah County Probate Court, 1855-72*, 48 UTAH HIST. Q. 130 (1980); Christine Fraizer, *The Utah State Training School: Its Founding and Development*, 73 UTAH HIST. Q. 267 (2005).

¹²⁹ Charles R. McKell, *The Utah State Hospital: A Study in the Care of the Mentally Ill*, 23 UTAH HIST. Q. 298 (1955).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 300.

¹³³ *Id.* at 303.

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and bedding. The food was good and seemed to be sufficiently distributed, to judge from the healthy appearance of all patients.”¹³⁴ In fact, “[p]atients who progressed sufficiently [the director] took into his own home where, under the care of his wife Elizabeth Riter Young, ‘a good percentage’ reportedly recuperated fully or enjoyed long remissions.”¹³⁵

Not only did Salt Lake City provide a hospital, but territorial legislation also criminalized any “unnecessarily harsh, cruel or unkind treatment” against the mentally ill.¹³⁶ “As the people grew in social consciousness, they began to realize that the ill and maladjusted not only were a liability to the family, the community, and the county, but to society as a whole. The next step was for this common social problem to be tackled by the larger unit, the state.”¹³⁷ Territorial Governor George L. Woods asked the legislature in 1872 to create a hospital for the mentally ill:

We ought to have an asylum for the insane. *Humanity requires it.* There is no public institution where these poor unfortunates can be kept. I should fail to do my duty were I to omit to urge you to take such steps immediately as will meet this great public want.¹³⁸

The next governor, George W. Emery made a similar plea:

We need a Territorial Asylum for the insane, which will afford this class of unfortunate people proper treatment, at the public expense unless they are possessed of sufficient means to defray the necessary charges attending their care. Such an institution *is indispensable* in every State and Territory and should be under the control of a skillful physician, who has had experience in treating this class of patients. *Humanity and wise government, alike, seem to require of us such a provision,* and I suggest some action be taken by you looking to the establishment of such an institution even if it be on a limited scale, though adequate to the present wants of our people.¹³⁹

¹³⁴ *Id.* at 304.

¹³⁵ *Treating Mental Illness in Pioneer Utah*, HIST. BLAZER 4–5 (1996).

¹³⁶ McKell, *supra* note 131, at 305; UTAH ET AL., THE REVISED STATUTES OF THE STATE OF UTAH IN FORCE JAN. 1, 1898, at 910 (1898) (Title 75, Chapter 34, Section 4273).

¹³⁷ McKell, *supra* note 131, at 299.

¹³⁸ *Id.* at 301 (emphasis added).

¹³⁹ *Id.* at 302 (emphasis added).

As early as 1880, the territorial legislature responded to their governors' calls and authorized the construction of a hospital in Provo, what is now the Utah State Hospital.¹⁴⁰ In doing so, the legislature believed "the territory should provide a suitable place for the safe-keeping of insane persons, and also provide for their care and comfort as far as possible."¹⁴¹ The Territory and counties were to split the costs of caring for patients if they could not afford their care.¹⁴² In fact, Superintendent Dr. Walter Pike told the governor in 1888 that the hospital sought to use non-violent means if at all possible:

We have endeavored to carry out the "non-restrain" principle as far as possible, consistent with the safety of the patients, but have found ourselves obliged to make use of some restraint to prevent patients, while violent, from harming their fellow patients. We endeavor to get along with as little display of restraint in any form, as possible.¹⁴³

The hospital's first report to the Legislature, in 1885, made serious claims that it sought the betterment of the mentally ill:

The Legislative Assembly of 1880 provided for the erection of the asylum, and made an appropriation intended to be as a foundation for a home for the insane. Prior to that time, and until the opening of the asylum, a number of our unfortunate fellow beings, suffering from that most terrible human maladies, mental derangement, *were cared for in places unfit for human beings, and were destitute of comforts and remedial treatment*, and were only restrained from doing actual violence to those about them. All citizens cognizant of the condition of these unfortunates looked forward with pleasure to the completion of this institution. . . .

The building has been modeled on a *scale of philanthropy* worthy of a great and good people, and commensurate with the wealth and population of the Territory; embraces all the improvements, conveniences and appointments of a modern asylum, so far as completed, requisite to promote restoration to those bereft of reason, whose recovery may be hoped for;

¹⁴⁰ Chilton, *supra* note 129, at 135.

¹⁴¹ McKell, *supra* note 131, at 305.

¹⁴² *Id.* at 308.

¹⁴³ Chilton, *supra* note 129, at 140.

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and to extend comfort and happiness, so far as possible, to those whose mental alienation is irremedial and hopeless.¹⁴⁴

In 1889, George Sutherland, United States Supreme Court justice, serving as a member of the board of directors of the hospital, commented that while crowded, the institution was “in most excellent condition.” The hospital needed more room, he insisted, and “[t]o refuse it in the future is to be guilty of grossly criminal neglect on the part of those having the power to provide for it.”¹⁴⁵

In fact, the hospital, rather than the jail or prison, was used primarily to treat criminals who suffered from mental impairments. As one director lamented, even for serious criminals, the hospital resembled a jail cell:

It is usually necessary in any institution caring for insane criminals to have a small, very strong section for a few desperate men. The unhappy feature in this institution is that the little handful of men in this ward may never get out of doors from one year’s end to the next. We plan better for captive tigers.¹⁴⁶

In 1886, the hospital’s pharmacy contained pills, herbs, whiskey, wine, rhubarb and ginger, which were all used in various treatments as was hydrotherapy, which included the use of saline baths, hot, and cold packs.¹⁴⁷

Although the hospital used what modern eyes would see as more controversial measures, such as convulsive or shock therapy, it was “recognized that such devices were not conducive to either sleep or conservation of energy, and their use was abandoned in favor of hydrotherapy and sedatives, or other restraints supposedly more humane and effective . . .”¹⁴⁸

Superintendent Walter Pike believed that steady employment “would occupy [patients’] mind[s]” and was one “one of the most powerful aids to treatment,” consequently the mentally ill worked making items such as mattresses and furniture, while also participating in occupations such as sewing, farming and construction.¹⁴⁹

In the 1920s and 30s, efforts led by the Relief Society of the Church of Jesus Christ of Latter-day Saints, Rotary International, the Lion’s Club and the Utah State Board of Health resulted in the creation of a school called

¹⁴⁴ McKell, *supra* note 131, at 309 (emphases added).

¹⁴⁵ *Id.* at 310.

¹⁴⁶ *Id.* at 313 (quoting Dr. Samuel Hamilton’s report of 1937).

¹⁴⁷ Chilton, *supra* note 129, at 138, 140–41.

¹⁴⁸ McKell, *supra* note 131, at 310.

¹⁴⁹ *Id.* at 148.

the Utah State Training School for those with mental illnesses.¹⁵⁰ Dr. George L. Wallace, Director of the National Committee on Mental Hygiene visited Utah and urged the creation of an institution. “It behooves Utah to take intelligent self-interest in this problem of providing an institution for feeble-minded. It is not altogether a question of state pride; the social and economic cost to our State of neglecting to train this class is mounting rapidly.”¹⁵¹

“When medications were developed in the 1950s that were considered safer and more effective than earlier treatment modalities, nearly all of the other forms of therapies were discontinued.”¹⁵² In October 1951, the Superintendent Dr. Owen P. Heninger, commenting on outdated treatment techniques, told the Welfare Commission that “[t]here may have been some excuse for the neglect of past years when society knew no better, but future generations will not be so generous in their evaluation unless advantage is taken of the knowledge now available.”¹⁵³ Starting in the 1960s, dozens of community mental health centers opened.¹⁵⁴

Both the historical context underlying Article I, §9, as well as Utah’s unique traditions, show that Utah has long sought to treat and care for the mentally ill in a humane manner. Utah has willingly taken on the burden to care for and provide for the mentally ill in a kind and non-punitive manner.

The unnecessary rigor clause, thus, requires Utah to find and provide non-punitive treatment for the mentally ill rather than incarceration.

CONCLUSION

As the above three examples illustrate, Utah’s history and its constitution provide a richly fertile ground in which to seek to protect criminal defendants’ rights. Criminal law attorneys should use their own state’s unique history to better craft state constitutional arguments before their courts.

Lawyers should see the immense value in educating judges on their state’s history. Judges are well-intentioned, but that intent can be misused. As Justice Louis Brandeis said, “[e]xperience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men [and women] of zeal, well-meaning but without understanding.”¹⁵⁵ Through lawyers’ efforts, courts can understand their own unique history and

¹⁵⁰ Fraizer, *supra* note 130, at 269–73.

¹⁵¹ *Id.* at 269.

¹⁵² Chilton, *supra* note 129, at 145.

¹⁵³ *Id.* at 153.

¹⁵⁴ *Id.* at 136.

¹⁵⁵ *Olmstead v. United States*, 277 U.S. 438, 479, 48 S. Ct. 564, 572–73, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting).

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experience, so that they too, can protect a defendant's, as well as all of our, liberties.