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Search and Seizure and the Utah Constitution: The Irrelevance of the Antipolygamy Raids

*Paul G. Cassell**

I. INTRODUCTION

In a recent article, Tracey E. Panek provides an interesting and scholarly recounting of the antipolygamy raids before Utah's entry into the Union.¹ The article, however, jumps beyond conclusions about this period of time and contains a brief suggestion that the antipolygamy raids may have had a permanent effect on Utahns in influencing the drafting of the Utah Constitution. After reviewing the antipolygamy raids, Panek suggests that the "members of the 1895 Utah Constitutional Convention understood from first-hand experience the necessity of adopting safeguards against unreasonable search and seizure."² And the Convention in fact added a provision to the Utah Constitution, article I, section 14, that prohibited unreasonable searches and seizures.

From this sequence of events—the antipolygamy raids followed by the adoption of a Utah search and seizure provision—one might be tempted to argue that the Utah prohibition of unreasonable searches and seizures was intended to create a broad protection against law enforcement abuses rather than to simply track the then-prevailing law. Panek concludes her article by suggesting that the delegates to the Convention were "[i]ntent on securing future inhabitants from

* Assoc. Prof. of Law, Univ. of Utah College of Law. This article explores in more detail historical themes mentioned in Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example*, 1993 UTAH L. REV. 751. I appreciatively acknowledge the helpful comments of Professors Ronald N. Boyce and Jean Bickmore White and the tireless reference work of the librarians at the University of Utah College of Law. This Article was supported by the University of Utah College of Law Research Fund.

1. Tracey E. Panek, *Search and Seizure in Utah: Recounting the Antipolygamy Raids*, 62 UTAH HIST. Q. 316 (1994).

2. *Id.* at 317.

the experiences of the antipolygamy raids” and that Utahns wanted to “cling more firmly to the very principles overrun by corrupt officials.”³ Kenneth Wallentine (among others) has more explicitly made this connection, arguing that “[a]gainst this history of unprecedented federal judicial abuse, arises a theory that the search and seizure provision in the Utah Constitution was included as a deliberate, considered act, rather than part of a wholesale importation of constitutional language.”⁴

This inference, if correct, might have great practical significance. In recent opinions, the Utah Supreme Court has suggested that interpretation of the Utah Constitution may be greatly influenced by the historical events surrounding the drafting of the Constitution.⁵ The court has even called on Utah’s lawyers to provide more historical materials in their briefs before the court.⁶ If the historical interpretation proffered by Panek, Wallentine, and others is correct, the court might interpret expansively the prohibition of unreasonable searches and seizures and create a concomitant restriction on the ability of modern-day law enforcement to fight crime. Defense attorneys in Utah’s courts are now frequently making such claims on behalf of their clients.

The inference, however, is unsupported and unsupportable. To infer that the search and seizure provision in the Utah Constitution arose from the history of antipolygamy raids is to commit the logical fallacy of *post hoc ergo propter hoc*. A more careful reading of the full historical record reveals that there is no substantial connection between these events. Utah’s search and seizure provision appeared in drafts of the Utah

3. *Id.* at 334.

4. Kenneth R. Wallentine, *Heeding the Call: Search and Seizure Jurisprudence Under the Utah Constitution, Article I, Section 14*, 17 J. CONTEMP. L. 267, 278-79 (1991). Wallentine relied on research by Panek in reaching his conclusions. *Id.* at 267 n.**, 276 n.64.

5. *See, e.g.*, *Society of Separatists, Inc. v. Whitehead*, 870 P.2d 916, 921-29 (Utah 1993) (concluding that “a page of history is worth a volume of logic” and examining events surrounding Utah’s admission to statehood to interpret state constitutional prohibition of expending public money to support religious exercise) (internal citation omitted); *KUTV v. Conder*, 668 P.2d 513, 521 (Utah 1983) (examining court decisions “in the period prior to and contemporaneous with the adoption of Utah’s Constitution” to interpret Utah free speech provision).

6. *See, e.g.*, *State v. Earl*, 716 P.2d 803, 806 (Utah 1986) (encouraging attorneys to brief the court on “relevant state constitutional questions”); *see also* Christine M. Durham, *Employing the Utah Constitution in the Utah Courts*, 2 UTAH B.J., Nov. 1989, at 25, 26-27.

Constitution well before the antipolygamy raids. It was simply copied as a standard provision found in the federal Fourth Amendment and many other state constitutions. Moreover, such an approach ignores competing traditions in the state—particularly concern for effective law enforcement and reconciliation among various religious traditions—that are more important in analyzing the drafting of the Utah Constitution.

II. THE CONVERGENCE OF ARTICLE I, SECTION 14 AND THE FOURTH AMENDMENT

Article I, section 14 of the Utah Constitution provides:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.⁷

The impetus for this provision can be traced back to well before the start of the antipolygamy raids. The Constitution of the State of Deseret, drafted sometime in 1849,⁸ provided in its "Declaration of Rights" section that "[t]he people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures."⁹ The draft constitution of 1862 contains identical language.¹⁰ Both of these constitutions were drafted before Congress adopted the first federal prohibition of polygamy, the Morrill Antipolygamy Act, in 1862.¹¹

Little independent consideration of search and seizure principles is evident in the next Utah Constitutional Convention, held in 1872. The Convention used the Nevada Constitution of 1864 as a principle reference work. More than 120 copies of the Nevada Constitution were printed and distributed to the delegates to Utah's 1872 Convention.¹² It

7. UTAH CONST. art. I, § 14.

8. For one account of the drafting history of this document, see Peter Crawley, *The Constitution of the State of Deseret*, 29 B.Y.U. STUD. 7 (Fall 1989).

9. CONST. OF THE STATE OF DESERET, art. VIII, § 6.

10. DRAFT CONST. OF 1862, art. II, § 5.

11. 12 Stat. 501 (1862). For a discussion of the Morrill Antipolygamy Act and the events leading to its passage, see Orma Linford, *The Mormons and the Law: The Polygamy Cases* (Part I), 9 UTAH L. REV. 308, 308-15 (1964).

12. Martin B. Hickman, *Utah Constitutional Law* 49 (1954) (unpublished

appears that Utah's Draft Constitution of 1872 simply incorporated Nevada's search and seizure guarantee. Like the Nevada Constitution, the Draft Constitution forbade "unreasonable *seizures and searches*." The Draft Constitution also provided that no warrants shall issue "but *on* probable cause" specifying "the place *or places* to be searched, and the *person or persons*, and *thing or things*, to be seized."¹³ The italicized language precisely tracks the Nevada Constitution, but not the standard Fourth Amendment formulation. The important point for present purposes, however, is that the drafters of the proposed Utah Constitutions incorporated search and seizure provisions for the Utah "Bill of Rights" in 1849, 1860, and 1872. This was well before the antipolygamy raids began in earnest because, as Panek notes, "[t]he Poland Act of 1874 paved the way for polygamy convictions" and raids were heaviest in the period 1884 to 1889.¹⁴

Even during the period of heavy raids, rather than strengthen the search and seizure provision, the drafters of Utah's Constitution continued to follow existing law. The Draft Constitution of 1882 contains a search and seizure provision almost identical to the Fourth Amendment.¹⁵ Aside from capitalizations and commas, it differs only in using the singular "warrant," "on" probable cause rather than "upon," and the awkward and repetitive formulation "place or places to be searched, and the person or persons, and thing or things to be seized." The Draft Constitution of 1887 is identical, with the exception of cleaning up the last phrase to make it follow the Fourth Amendment exactly—"place to be searched, and the persons or things to be seized."¹⁶ In 1895, the final version of the search and seizure section was altered only slightly. Compared to the 1887 version, article I, section 14 uses the

Ph.D. dissertation, University of Utah).

13. DRAFT CONST. OF 1872, art. I, § 18 (emphasis added) (following NEV. CONST. art. I, § 18).

14. Panek, *supra* note 1, at 317, 319. For an excellent general description of the polygamy raids, see EDWIN B. FIRMAGE & RICHARD C. MANGRUM, ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 1830-1900, 125-260 (1988).

15. DRAFT CONST. OF 1882, art. I, § 16. In my earlier article, I inaccurately described the search and seizure provisions in the 1882 and 1887 constitutions, reporting that the Nevada formulation continued through those years. See Cassell, *supra* note *, at 802.

16. See DRAFT CONST. OF 1887, art. I, § 19.

word "upon" rather than "on" (tracking the Fourth Amendment) and uses the singular "person or thing to be seized."

In support of my interpretation that article I, section 14 parrots the Fourth Amendment or a similar state provision, I have canvassed other state constitutions. None of them appears to follow exactly the diction of the Utah Constitution. For example, New York is sometimes cited as a foundation for the Utah Constitution, particularly in light of Joseph Smith's residence there.¹⁷ However, New York did not adopt a constitutional prohibition against unreasonable searches and seizures until well after the Utah Constitution was adopted.¹⁸ Many of the Mormon leaders had experience with the Illinois government from their time in Nauvoo and used the Illinois Constitution as a source for the Deseret Constitution of 1849, a precursor to the Utah Constitution.¹⁹ But the Illinois provision does not appear to be the model for article I, section 14.²⁰ Other constitutions from the Northwest, many of which were adopted shortly before the Utah Constitutional Convention, have also been suggested as sources for provisions in the Utah Constitution,²¹ but article I, section 14 does not seem to trace its lineage directly to any of them. Search and seizure provisions that differ, albeit slightly, from the Utah provision are found in the constitutions of Idaho, Montana, North Dakota, South Dakota, and Wyoming.²² Since the drafters of the Utah Constitution simply adopted the federal Fourth Amendment formulation, it is difficult to argue that the Utah provision should be more broadly interpreted.

Further confirmation of this point is provided by the framers' apparently deliberate decision not to adopt other, more expansive versions of the search and seizure protection. In particular, the drafters did not adopt the broad protection of personal privacy found in article I, section 7 of the Washington Constitution, which provides: "No person shall be disturbed in

17. See John J. Flynn, *Federalism and Viable State Government—The History of Utah's Constitution*, 1966 UTAH L. REV. 311, 323.

18. See N.Y. CONST. art. I, § 12 (adopted Nov. 8, 1938).

19. See Hickman, *supra* note 12, at 42-44.

20. See ILL. CONST. OF 1818, art. VIII, § 7 (wording of search and seizure provision is substantially different from Utah's).

21. See Hickman, *supra* note 12, at 72.

22. See IDAHO CONST. OF 1889, art. I, § 17; MONT. CONST. OF 1889, art. III, § 7; N.D. CONST. OF 1889, art. I, § 18; S.D. CONST. OF 1889, art. VI, § 11; WYO. CONST. OF 1890, art. I, § 4.

his private affairs, or his home invaded, without authority of law." In drafting this provision, the Washington Constitutional Convention of 1889 specifically declined to adopt the wording of the Fourth Amendment, preferring a broader formulation.²³ The decision of the Utah Constitutional Convention of 1895 not to incorporate the Washington formulation cannot be ascribed to the drafters' ignorance of events there, as they used the Washington Constitution as a source for Utah constitutional provisions.²⁴ The decision not to follow the Washington approach is significant because it confirms that delegates to the Utah Constitutional Convention were not looking to create expansive protections in this area.

So far my analysis rests solely on the texts of the various search and seizure provisions. What of the available drafting records from the Utah Constitutional Convention of 1895? The records, so far as one can discern, imply that the provision was prosaic. On March 25, 1895, the Convention heard the proposed provision. The records of the Convention reveal only that "[s]ection 14 was read and passed without amendment."²⁵ The fact that the provision did not engender any discussion suggests that it was unoriginal and, therefore, uncontroversial.

This conclusion is strengthened by other indications in the records of the Convention, which strongly suggest that the drafters' main concern in writing provisions dealing with law enforcement and criminal procedure was to track prevailing law—not to create some new, expansive protections against perceived law enforcement abuses. The best indication of the drafters' approach comes from the discussion surrounding the general criminal procedure provision in the Utah Constitution, article I, section 12. The section contains a standard list of protections for suspects in criminal cases, including the rights to counsel, to confront witnesses, to have compulsory process to secure witnesses, and to a speedy public trial. Much of the language for article I, section 12 was taken straight from the Washington Constitution,²⁶ a recently adopted provision that was probably regarded as the "state of the art" in standard

23. See THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION: 1889, at 497 (Beverly P. Rosenow ed. 1962).

24. See 2 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE UTAH CONSTITUTIONAL CONVENTION 1125 (1898) (Star Printing Co. 1898) [hereinafter UTAH CONSTITUTIONAL CONVENTION].

25. 1 UTAH CONSTITUTIONAL CONVENTION, *supra* note 24, at 319.

26. Compare, WASH. CONST. art. I, § 22 with UTAH CONST. art. I, § 12.

criminal procedure formulations.²⁷ Much of the language in the Washington provision tracks almost verbatim the provisions in the federal Bill of Rights and many state constitutions.²⁸

The drafting history confirms that this textual coincidence between the Utah and other state formulations is no accident. The most detailed discussion in the Convention records concerns the confrontation clause, which provides a useful illustration of the point. As originally proposed at the Convention, the amendment would have guaranteed the accused the right “to meet the witnesses against him face to face.”²⁹ On March 23, 1895, William Van Horne proposed to amend the confrontation provision by adding to it the phrase “except where evidence by deposition may be authorized by law.”³⁰ Charles Varian then opposed the amendment because “[t]he provisions of this section are substantially those in every constitution, I believe. They have received judicial interpretation and construction for many years”³¹ Varian went on to explain that court cases had authorized the use of depositions at trial where the defendant had cross-examined the witness and the witness was dead or beyond the reach of process. Varian concluded with a plea to avoid disturbing existing law:

Why not leave it as it is? Why not leave it within the ancient landmarks, so that every lawyer and every layman may know just what this does mean? Judicial decision after decision, all in one line, particularly have determined the meaning of this language as the committee have reported it here. Why should we stray away and put something in there that will tend to bring about and will doubtless bring about this confusion and conflict in interpretation?³²

Immediately following Varian’s speech, the proposed amendment was rejected.³³ After the rejection, the next speaker was David Evans, who explained his vote: “[T]hese are

27. The Washington Constitutional Convention met in 1889.

28. See generally U.S. CONST. amends. IV, V, VI; BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE 203-04 (1991).

29. 1 UTAH CONSTITUTIONAL CONVENTION, *supra* note 24, at 311.

30. *Id.* at 306.

31. *Id.*

32. *Id.* at 307-08.

33. *Id.* at 308.

ancient landmarks and should not be disturbed, because they go directly to the protection of the individual liberty and protection of the citizen, but we cannot go too far in the interest of the men charged with crime."³⁴ Later the delegates briefly returned to the confrontation language, making it conform even more closely to existing texts. Without extensive discussion, the delegates changed the phrase "to meet the witnesses against him face to face" to "to be confronted by the witnesses against him," the phrasing that appears in the United States Constitution.³⁵

The same intent to track prevailing law is evident in discussion of another part of article 1, section 12, the provision providing that "[i]n no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed."³⁶ David Evans proposed amending this language by striking the words "before final judgment."³⁷ Thomas Maloney urged rejection of the proposed amendment, explaining

The committee on . . . declaration of rights knew what they were doing when they made the report. They were fifteen good men—men who knew their business and this article now is copied word for word from the declaration of rights of the state of Washington. . . . I hope both [this] amendment[] will be voted down and that we will sustain the committee's report. It comes from Washington and other states, which have this same language in their declaration of rights.³⁸

The proposed amendment was defeated.³⁹

In recent opinions the Utah Supreme Court has recognized the drafters' intent to remain inside "ancient landmarks." In *American Fork City v. Crosgrove*,⁴⁰ for example, the court refused to extend rights for criminal defendants under Utah's self-incrimination clause⁴¹ beyond those contained in the

34. *Id.*

35. *Id.* at 311. For a discussion of the meaning of the Utah Confrontation Clause in light of this drafting history, see Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. ___, ___ (forthcoming).

36. UTAH CONST. art. I, § 12.

37. 1 UTAH CONSTITUTIONAL CONVENTION, *supra* note 24, at 310.

38. *Id.* at 310-11.

39. *Id.* at 311.

40. 701 P.2d 1069 (Utah 1985).

41. UTAH CONST. art. I, § 12.

federal self-incrimination provision.⁴² The lead opinion by Justice Durham cited as authority the speech from Charles Varian quoted above and explained that “if any intent can be derived from the proceedings of Utah’s Constitutional Convention, it is that the framers intended the privilege to have the same scope that it had under similar constitutional provisions, which was the scope it had at common law.”⁴³

Convergence with existing law is a feature not only of the criminal procedure portions of the Utah Constitution, but other parts as well. As Professor Flynn has commented, with only slight exaggeration, “it is impossible to say that the Utah Constitution of 1896 was drafted by Utahns for Utah.”⁴⁴ Instead, “the convention borrowed heavily from earlier Utah constitutions and other state constitutions.”⁴⁵ Martin Berkeley Hickman’s often-cited doctoral thesis on Utah constitutional law reaches the same conclusion, noting that “[t]he constant appeal to the authority of other states is one of the most striking impressions one gains from reading the debates.”⁴⁶ Resort to other existing authority is hardly surprising in view of Congress’ direction in the Enabling Act of July, 1894, that, to be acceptable, “the constitution shall be republican in form . . . and not be repugnant to the Constitution of the United States.”⁴⁷

The Enabling Act also explains one other provision of the Utah Constitution that is sometimes cited as proof that the drafters were concerned about abusive searches. Article III of the Utah Constitution provides that “[n]o inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship.”⁴⁸ Noting that the section “is unique insofar as it proscribes disturbance of person or property,” Ken Wallentine has argued that this section is “evidence of the drafters’ acute sensitivity to freedom from

42. U.S. CONST. amend. V.

43. *American Fork City*, 701 P.2d at 1073; accord *KUTV, Inc. v. Conder*, 668 P.2d 513, 521 (Utah 1983).

44. Flynn, *supra* note 17, at 324.

45. *Id.* at 323.

46. Hickman, *supra* note 12, at 72.

47. Enabling Act of July, 1894, ch. 138, § 3 (1894).

48. UTAH CONST. art. III.

searches of home and property."⁴⁹ Wallentine also notes that Article III "had no predecessor in earlier constitutions."⁵⁰

Wallentine's argument is flawed: article III appears in the Constitution drafted in 1895 because of congressional direction, not Convention deliberations. The Enabling Act of 1894 required that the Utah Constitution contain various provisions, including at the top of Congress' prescribed list (presumably to protect non-Mormons): "First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship: *Provided*, That polygamous or plural marriages are forever prohibited."⁵¹ The Utah Constitutional Convention simply adopted this language in Article III, and added the introduction that it "shall be irrevocable without the consent of the United States and the people of this State."⁵² Thus Article III shows little about the intent of Utah's drafters other than compliance with congressional specifications.⁵³

III. CONCERN FOR AN EFFECTIVE CRIMINAL JUSTICE SYSTEM

The drafters of the Utah Constitution had another reason for avoiding different and expansive rights for criminal defendants. They knew that with Utah's entry into the Union, the state's citizens would assume responsibility for the day-to-day administration of the criminal justice system and would soon need to prosecute crimes effectively in state courts. The antipolygamy raids could be seen as the peculiar creature of rule by unelected federal outsiders. As Panek recounts, the federal government was responsible for creating and enforcing the antipolygamy regime in the Utah territory.⁵⁴ Congress passed the Poland Act, the Edmunds Act, and the Edmunds-Tucker Act to confer power on federal law enforcement agents. The U.S. Marshal and his deputies conducted the antipolygamy raids. The United States Attorney prosecuted the resulting cases. These federal enforcement efforts were conducted

49. Wallentine, *supra* note 4, at 280.

50. *Id.*

51. Enabling Act of July, 1864, ch. 138, § 3 (1894).

52. UTAH CONST. art. III.

53. *See Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 928 (Utah 1993) (recounting the history surrounding Enabling Act).

54. Panek, *supra* note 1, at 317.

without regard to local sensibilities.⁵⁵ With the disappearance of these religiously-influenced prosecutions dictated by Washington, D.C., the framers of the Utah Constitution—both Mormon and non-Mormon—would have seen little need to adopt provisions that would increase the burdens on their own state criminal justice system.

This sentiment is suggested, for instance, in a petition signed by 22,626 women of Utah and sent to Congress in 1876:

We ask to be relieved from the unjust and law-breaking officials forced upon us by the Government, and that we may have the jurisdiction of our own courts and the selection of our own officers, as we had in the past, *when our cities were free from dram-shops, gambling-dens, and houses of infamy.* As mothers and sisters, we earnestly appeal to you for help, that our sons may be saved from drunkenness and vice and our daughters from the power of the seducer⁵⁶

A later Epistle of the First Presidency expressed grave concern about polygamy prosecutions but also noted “[t]here are now in the city some 6 Brothels, 40 Tap Rooms, a number of Gambling Houses, Pool Tables and other disreputable concerns, *all run,*” the Epistle noted, “by non-Mormons.”⁵⁷ Citizens concerned about ridding their cities of “dram shops, gambling-dens, and houses of infamy” or brothels, tap rooms, and gambling houses were not likely to make prosecution of those crimes more difficult.

These concerns about crime were consistent with the prevailing mood in the country at large. As Professor Lawrence M. Friedman has noted, in the later part of the nineteenth century,

a new set of fears replaced fears of “tyranny:” fear of the criminal. To the dominant segments of society, the organs of state posed no threat to American legal order. Rather, the threat came from *defendants*—the “dangerous classes,” which included “rural criminals, urban criminals, rural paupers, urban paupers, and tramps.”⁵⁸

55. See GUSTIVE O. LARSON, *THE “AMERICANIZATION” OF UTAH FOR STATEHOOD* 302 (1971) (describing “vindictive carpetbag methods” of law enforcement).

56. H.R. Misc. Doc. No. 42, 44th Cong., 1st Sess. 1-2 (1876) (emphasis added).

57. *Epistle of the First Presidency of the Church of Jesus Christ of Latter-Day Saints*, in *DESERET NEWS*, Apr. 14, 1886, at 196.

58. Lawrence M. Friedman, *State Constitutions and Criminal Justice in the Late Nineteenth Century*, 53 *ALB. L. REV.* 265, 271-72 (1989).

As a result, criminal justice reform generally "focused on ways to control and eliminate crime, rather than on ways to protect the accused."⁵⁹

While apprehension about crime was national in scope, it was particularly pronounced in the western states, which responded with so-called "frontier justice."⁶⁰ Generally speaking, "[f]rontiersmen found technical errors thwarting substantial justice repugnant."⁶¹ Shortly after their arrival in Utah, the Mormon pioneers established rules for a judiciary for the State of Deseret. The pioneers addressed the subject of legal technicalities bluntly, providing that: "It shall be the duty of the [Supreme] Court to . . . in no case suffer technicalities to frustrate the ends of Justice."⁶² Likewise, local justices of the peace were instructed "to execute justice without respect to persons or favor, or the technicalities of the law."⁶³

This strand of Utah tradition has sometimes been characterized as "mountain common law." This vibrant phrase was rescued from the dustbin of history by Kenneth L. Cannon II's article.⁶⁴ The article recounts the celebrated defense of Howard Egan, who was charged with killing a man who had "seduced" his wife in pre-statehood Utah. Attorney and Mormon Apostle George A. Smith successfully defended Egan before the jury by telling them to look "for justice instead of some dark, sly, or technical course." He made several references to this "mountain common law" in his closing.⁶⁵

59. *Id.* at 272.

60. See WAYNE GARD, *FRONTIER JUSTICE* (1949); cf. W. EUGENE HOLLON, *FRONTIER VIOLENCE: ANOTHER LOOK* 216 (1974) (decrying the "tendency to over-emphasize the violent side of the frontier").

61. GORDON M. BAKKEN, *ROCKY MOUNTAIN CONSTITUTION MAKING, 1850-1912* 27 (1987) (referring specifically to Arizona Constitutional Convention); see Richard M. Brown, *Violence and Vigilantism in American History*, 173, 186 in *AMERICAN LAW AND CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES* (Lawrence M. Friedman & Harry N. Scheiber eds., 1988) ("Deficiencies in the judicial system were the source of repeated complaints by frontiersmen. They made the familiar point that the American system of administering justice favored the accused rather than society. The guilty, they charged, utilized every loophole for the evasion of punishment.").

62. *ORDINANCE TO PROVIDE FOR THE ORGANIZATION OF THE JUDICIARY OF THE STATE OF DESERET* § 9 (1850).

63. *Id.* § 30.

64. Kenneth L. Cannon II, *"Mountain Common Law": The Extralegal Punishment of Seducers in Early Utah*, 51 *UTAH HIST. Q.* 308, 310-17 (1983).

65. *Id.* at 312 (citing G.D. Watt, *Indictment for Murder*, *DESERET EVENING NEWS*, Nov. 15, 1851, at A2).

This desire for effective law enforcement even led Utahns to occasionally resort to unlawful measures to ensure that "justice was done." Professor Larry R. Gerlach has provided the most detailed information on this subject, explaining that eleven men were lynched in Utah before statehood, a number equalling the authorized judicial executions during the period.⁶⁶ Again the Utah history in this area fits within a national context. As Cannon explains, "[t]hough by no means universally approved of in nineteenth-century America, extralegal violence was clearly condoned by many Americans, especially those living in the southern and western parts of the country."⁶⁷ Let me make clear that my point here is not to in any way approve extra-legal measures taken by Utahns before statehood. Vigilantism has produced many terrible tragedies in Utah as well as elsewhere in the country. I am suggesting only that an accurate interpretation of the historical record must note that justice for perceived criminal wrongdoers is a strong tradition in the state. Given the historical concern for effective law enforcement, one must approach with caution an interpretation of Utah's search and seizure provision that gives decisive importance to sympathy for criminal defendants in polygamy prosecutions.

IV. RELIGIOUS CONCILIATION AFTER THE END OF THE RAIDS

With the announcement of the Woodruff Manifesto in 1890⁶⁸ and the corresponding end of the antipolygamy raids, a period of religious reconciliation developed in Utah that must be considered in any complete historical analysis of events leading to the Utah Constitutional Convention in 1895.⁶⁹ Professor Jean Bickmore White's recent article is an important contribution in filling what has been an area in need of historical analysis.⁷⁰ As suggested in the article's title—"Prelude to Statehood: Coming Together in the

66. Larry R. Gerlach, *Ogden's "Horrible Tragedy": The Lynching of George Segal*, 49 UTAH HIST. Q. 157, 159-60 (1981).

67. Cannon, *supra* note 64, at 327.

68. 6 BRIGHAM H. ROBERTS, *A COMPREHENSIVE HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS* 220 (1930) (discussing the announcement of the end of the practice of polygamy).

69. Panek's article extends only through events in 1889. Panek, *supra* note 1, at 316.

70. Jean B. White, *Prelude to Statehood: Coming Together in the 1890s*, 62 UTAH HIST. Q. 300 (1994).

1890s"—Utah moved beyond the divisiveness of the antipolygamy raids in ways that can only be regarded as "striking." State-funded schools were established in 1890 as an alternative to sectarian public education. The Chamber of Commerce in Salt Lake City began to integrate Mormon and non-Mormon economic interests under the motto of "no politics or religion in the Chamber." On the political front, in 1891 the Mormon leadership disbanded the People's party, and the development of a traditional, Republican/Democrat, two-party system was encouraged.⁷¹ As Professor White concludes,

[t]he "new Utah" that arose out of the Americanization process of the 1890s was built on a troubled past by bridging deep divisions along political, social, economic, and religious lines. Bringing two competitive cultures close enough together to make statehood possible was not an easy task, but it was accomplished by men and women who cared more about the promise of the future than about nursing old wounds of the past.⁷²

The Utah Constitution was a product of this new spirit of cooperation among different religious traditions. Both Mormons and non-Mormons joined in a celebration at the Saltair resort when President Cleveland signed the Utah statehood bill in July 1894.⁷³ In November they elected both Mormons and non-Mormons to draft the state constitutional provisions; 28 non-Mormon delegates were elected among the 107 delegates to the Constitutional Convention.⁷⁴ Those who would, in effect, resurrect religious animosities and give them an important role in the drafting of the Constitution⁷⁵ miss this prevailing spirit. Professor White has captured this sense nicely in explaining that the Convention realized that its task was

71. See LARSON, *supra* note 55, at 290 ("Religious differences yielded to new political alignments which often pitted church leaders against each other and found former enemies side by side on important issues.").

72. *Id.* at 315; see also *id.* at 274 (stating that the years following the manifesto "witnessed a rapid improvement in Mormon-Gentile relations").

73. Stanley S. Ivins, *A Constitution for Utah*, 25 UTAH HIST. Q. 95, 100 (1957).

74. *Id.*

75. See, e.g., Wallentine, *supra* note 4, at 279 (arguing for broad search and seizure construction because in various Utah constitutional conventions "[t]he large majority of delegates were prominent Mormon religious leaders, of the sort likely to share the views of the church leadership, and in any event, faithfully espouse the official position").

to produce a document that [would] be accepted by various and conflicting groups in their own time, and still survive in years to come.

In 1895, Mormons and non-Mormons, Republicans and Democrats, sat down together to complete the last task remaining before finally attaining statehood. . . . It was not because they stood above the events of their times but because they understood them so well that they were determined to succeed.⁷⁶

Those who would interpret Utah's search and seizure provision by reference to the antipolygamy raids would not have fared well in arguments to the Convention's delegates. How would they explain their position to non-Mormon delegate Charles S. Varian, who apparently voted for article I, section 14? As U.S. Attorney, Varian aggressively prosecuted many polygamists,⁷⁷ but was far and away the most active (and perhaps the most influential) of all of the delegates.⁷⁸ They would also need to explain their views to Convention President John Henry Smith, who throughout his life—particularly during the Convention—made it his business to cultivate friendships among the non-Mormons and to attempt to reach a consensus that transcended religious boundaries.⁷⁹

V. CONCLUSION

In light of these historical considerations, it seems hard to argue that the antipolygamy raids caused the drafters of the

76. Jean B. White, *The Making of the Convention President: The Political Education of John Henry Smith*, 39 UTAH HIST. Q. 350, 368 (1971).

77. Ivins, *supra* note 73, at 100; see *Indignation Over Deputies Doings*, DESERET NEWS, Jan. 27, 1886, at 27 (describing prosecution by Varian).

78. Ivins, *supra* note 73, at 113-14; see also *Sanipoli v. Pleasant Valley Coal Co.*, 86 P. 865, 868 (Utah 1906) (relying on colloquy involving Varian to determine meaning of constitutional provision); *Another Busy Day*, DESERET NEWS, Mar. 5, 1895, at 5. Apparently, attorney David Evans, who had served as an Assistant U.S. Attorney under Varian from 1887-91, also voted for article I, section 14.

79. See generally White, *supra* note 76, at 368-69. White cites, among other sources, Smith's obituary by the SALT LAKE TRIBUNE, Oct. 14, 1911, that noted his efforts at "broadmindedness" and explained "he did not obtrude his polygamy." White has also reviewed a number of church leaders' diaries dealing with this period of time and does not recall seeing any connection of search and seizure issues raised by the antipolygamy raids with the drafting of the 1895 Constitution. Letter from Jean Bickmore White, Emeritus Professor, Utah State Univ. to Paul G. Cassell, Professor, Univ. of Utah College of Law (Feb 15, 1995) (on file with author).

Utah Constitution to adopt an expansive protection against unreasonable searches and seizures in article I, section 14. Unexciting though it may be to those interested in searching for new (and heretofore undiscovered) rights, the best reading of article I, section 14, is that it was simply designed to track prevailing law and provide Utahns with the protections generally available in most other states. As we approach the Constitution's centennial, this interpretation is most faithful to the farsighted intentions of its framers.