# Statement by Ross C. "Rocky" Anderson,

# Attorney for Terry Mitchell

# Regarding the Opinion of the Utah Supreme Court

# In *Mitchell v. Roberts*

June 11, 2020

## Factual Background

In 1980, fifteen-year-old Terry Mitchell was jogging and walking in Liberty Park with a female Caucasian friend and their two male African American friends, Ted Fields and David Martin. Infuriated by what he saw as "race-mixing," Joseph Paul Franklin, a serial killer striving to begin a race war (his victims included Vernon Jordan and Larry Flynt, who had published photos of mixed-race couples and was paralyzed by the attack), opened fire on Ted and David with a sniper rifle, killing them and injuring Terry with shrapnel.

As the criminal case was developed against Franklin, Terry was introduced to Richard Roberts, an ambitious young prosecutor who was brought in from Washington, D.C., by the Department of Justice to try the case. Roberts interviewed Terry, a critical eyewitness, in private and groomed her for his sexual exploitation of her using his position of power as cover for his abuse against her. During the trial against Franklin, Roberts admittedly had sex with Terry,[1] who was then sixteen.

Prior to meeting Richard Roberts, Terry was repeatedly victimized, including through incest and a violent rape just months prior to Franklin's murder of her two friends. Roberts knew about all of that.

Decades later, in 2016, Terry was finally able to seek accountability for Richard Roberts, who was then Chief Judge of the Federal District Court for the District of Columbia.

Fortunately (it seemed) for Terry, the Utah Legislature paved the way for child sex abuse survivors who require many years before being able to bring a lawsuit

[1] The tape recording can be heard here: https://kutv.com/news/local/recorded-phone-conversation-between-judged-alleged-victim-released

against their perpetrators. The bill, 2016 H.B. 279,[2] sponsored by Ken Ivory, was passed into law and included the following message:

> (1) The Legislature finds that:
> (a) child sexual abuse is a crime that hurts the most vulnerable in our society and destroys lives;
> (b) research over the last 30 years has shown that it takes decades for children and adults to pull their lives back together and find the strength to face what happened to them;
> (c) often the abuse is compounded by the fact that the perpetrator is a member of the victim's family and when such abuse comes out, the victim is further stymied by the family's wish to avoid public embarrassment;
> (d) even when the abuse is not committed by a family member, the perpetrator is rarely a stranger and, if in a position of authority, often brings pressure to bear on the victim to insure silence;
> (e) in 1992, when the Legislature enacted the statute of limitations requiring victims to sue within four years of majority, society did not understand the long-lasting effects of abuse on the victim and that it takes decades for the healing necessary for a victim to seek redress;
> (f) the Legislature, as the policy-maker for the state, may take into consideration advances in medical science and understanding in revisiting policies and laws shown to be harmful to the citizens of this state rather than beneficial; and
> (g) the Legislature has the authority to change old laws in the face of new information, and set new policies within the limits of due process, fairness, and justice.

That bill created a window of time during which victims of child sexual abuse could bring their claims against the individual perpetrators, even if the previous statute of limitations had expired.

Terry filed a lawsuit against Richard Roberts in the United States District Court for the District of Utah, citing the new law. Through his battery of lawyers—including Steptoe and Johnson, the firm recently fired by University of Michigan because of the firm's representation of Jeffrey Epstein and Roman Polanski (charged with raping a 13-year-old girl)—sought dismissal of the lawsuit, claiming the Utah

[2] The text of that bill is available at https://le.utah.gov/~2016/bills/static/HB0279.html.

Legislature did not have the power to revive claims previously barred by a prior statute of limitations.

The federal court then certified that question to the Utah Supreme Court ***three years ago***, in June of 2017. Now, nearly four years after Terry filed her lawsuit, and three years after the case was before the Utah Supreme Court (and more than two years after the matter was argued before the Court), Terry and other survivors of child sexual abuse across Utah have been deprived of any remedy—and the perpetrators have escaped any accountability.

**Statement of Terry Mitchell's Legal Counsel, Rocky Anderson, Regarding Today's Opinion by the Utah Supreme Court**

On behalf of all the child sex abuse victims who have been deprived of any justice by the opinion of the Utah Supreme Court in *Mitchell v. Roberts*, issued today, and on behalf of those who are committed to the separation of power between the three branches of government, we find this decision to be an **outlandish example of judicial activism disguised as a purportedly "conservative" application of an "originalist" interpretation of Utah's Constitution**.

Today, the Utah Supreme Court has arbitrarily carved out from its long-standing due process standards the absolute protection of people accused of child sex abuse under a prior, unreasonably short statute of limitations, contrary to the clearly stated intentions of the Utah Legislature.

This decision is directly contrary to the intention of the drafters of Utah's Constitution, as articulated by Robert Baskin, former Chief Justice of the Utah Supreme Court:

> [A] statute must be enforced by the court in accordance with the intention of the legislature. When . . . the intention is expressed by unambiguous language, the intention so expressed must prevail, and cannot be changed by extrinsic matters.
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> > "The intention of the legislature being plainly expressed so that the act, read by itself or in connection with other statutes pertaining to the same subject, is clear, certain and unambiguous, the courts have only the simple and obvious

> duty of enforcing the law according to its terms." (Sutherland, State Const., 237)[3]

In reaching the alarming result in this case, **the Utah Supreme Court has mischaracterized the intention of the people involved in drafting and ratifying the Utah Constitution and the long-standing law in Utah, which has made clear that if the Legislature makes clear its intention to apply a statute retroactively, the courts must respect that intention.**

**Well-established due process standards** have been developed by the courts, including the Utah Supreme Court, over many years. Shockingly, **this decision wholly abandons those standards in favor of an absolute, vague, outdated, almost universally discarded "vested rights" theory**, tying the hands of the Legislature to take measures to correct its own mistakes in enacting a prior statute of limitations that deprived so many child sex abuse victims of any justice—and allowed perpetrators to avoid legal accountability.

Second, the **participants at Utah's constitutional convention referred to "vested rights" as only real property rights and contract rights**, including corporate charters. **Never did the participants at Utah's constitutional convention refer to anything like a defense under a statute of limitations as a "vested right."**

As Edward S. Corwin, stated (in an article ignored by the Utah Supreme Court in its opinion in this case, as it ignored so much else that did not fit its alarming conclusion):

> **[O]ne [right] only, and that in but a limited sense, was protected by the doctrine of vested rights**, the right namely of one who had already acquired some title of control over some particular piece of **property, in the physical sense**, to continue in that control. **All other rights, however fundamental, were subject to limitation by the legislature . . . .**[4]

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[3] R.N. BASKIN, REMINISCENCES OF EARLY UTAH 18 (1914).

[4] Edward S. Corwin, *Basic Doctrine of American Constitutional Law*, MICH. L. REV. 247, 272, 275 (1913–14) (emphasis added).

Third, and perhaps most importantly—also ignored by the Utah Supreme Court in the *Mitchell* opinion—is **the recognition by Utah's highest courts, both before and after the ratification of Utah's Constitution, as well as the United States Supreme Court, that *all rights* are subject to interference by the legislative branch if not arbitrary and for legitimate governmental purposes.**

> It is customary for all governments to provide for the protection of **vested rights,** ***subject, however, to such disposition of these rights as the legislature may make in the public interest*** *and normally the question as to what inures to the public interest is for the legislature to determine finally.*[5]

The informed delegates to the Utah Constitutional Convention understood that **the due process clause was not intended to absolutely prevent deprivations of life, liberty, or property, but, rather, to protect against arbitrary government action**.

**Before ratification of the Utah Constitution, the interpretation of the Due Process Clauses of the Federal Constitution, which served as the model for Utah's Due Process Clause, established that the Legislature had the power to enact a non-arbitrary statute reviving previously time-barred claims if it served a legitimate legislative purpose.**

- The U.S. Supreme Court recognized in 1806 that, **even if a statute applied retroactively would "divest vested rights"** and appear "unreasonable" or "obviously improper," **it would be applied retroactively if "it contained express words to that purpose**."[6]

- Again, in 1834, the United States Supreme Court made it clear that "vested rights" could be impaired by the legislative branch if doing so was not arbitrary:

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[5] Charles G. Haines, *Judicial Review of Legislation in the United States and the Doctrines of Vested Rights and of Implied Limitations on Legislatures*, 2 TEX. L. REV. 257, 288 (April 1924).

[6] *United States v. Heth*, 7 U.S. (3 Cranch) 399, 414 (1806 (Cushing, J.).

> [I]t is clear that **this court has no right to pronounce an act of the state legislature void**, as contrary to the constitution of the United States, **from the mere fact that it devests antecedent vested rights** of property. The constitution of the United States does not prohibit the states from passing retrospective laws generally; but only ex post facto laws . . . relat[ing] to penal and criminal proceedings which impose punishments or forfeitures, and not to civil proceedings which affect private rights retrospectively.[7]

- At the Constitutional Convention, Delegate Kimball quoted from the "sinking fund cases" as follows: "The United States cannot any more than a state interfere with private rights **except for legitimate governmental purposes**."

- The **Utah Territorial Supreme Court noted that "vested rights" are protected only from arbitrary deprivations**.[8] In 1888, the Supreme Court of the Territory of Utah held that an amended statute changing the term of a county treasurer's office from four years to two years would be applied only prospectively in relation to someone who had a **vested right** to serve two more years, but **solely because the Legislature had not expressed its intention that it be applied retroactively**. The Court expressly stated that ***"[t]he legislature had the power to have said so,"*** but it did not.[9]

- One year after the Utah Constitution was ratified, the Utah Supreme Court considered a claim that the due process clause was violated by allowing for less than a 12-person jury. The Utah Supreme Court stated—again, just one year after the Utah Constitution was ratified—that "**[due process] permits the deprivation of life, liberty, or property according to law, not otherwise. It shields such rights from arbitrary power**."[10]

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[7] *Watson v. Mercer*, 33 U.S. (8 Pet.) 88, 110 (1834).

[8] *United States v. Tithing Yard and Offices*, 34 P. 55, 58 (Utah 1893) (emphasis added).

[9] *Farrell v. Pingree*, 16 P. 843, 844–45 (Utah 1888) (emphasis added).

[10] *State v. Bates*, 47 P. 78, 79 (Utah 1896) (emphasis added).

Today, the Utah Supreme Court ignores that controlling statement of the law, which reflects the original understanding of the due process clause in Utah's Constitution. Certainly, if due process "permits the deprivation of life, liberty, or property" so long as the legislation is not "arbitrary," it permits the Utah Legislature to revive previously time-barred claims of child sexual abuse.

- The revival of the antiquated "vested rights" doctrine to permit the courts to frustrate the intentions of the legislative branch is **an extreme example of judicial activism**, particularly insofar as **the traditional due process "rational basis" test is ignored**, in favor of an absolute rule in favor of the application of a statute of limitations defense against victims of child sex abuse, that **goes far beyond even the due process protections for discrimination on account of sex, race, and religion, the right of parenting, and the right to travel**.

- The consensus among legal scholars is that **the "vested rights" doctrine**, which primarily **applied only to rights in real property**, has basically **disappeared in American jurisprudence**.

> The classic nineteenth-century doctrine of vested rights was often described in terms of the distinction between legislative and judicial power . . . . **Little is left of the once basic doctrine**. **Congress has substantial authority to change the future legal consequences of past events**. That authority extends to the consequences of many past events that created property rights."[11]

**The omission of a provision in the Utah Constitution prohibiting the retroactive revival of a claim time-barred under a prior statute of limitations demonstrates that the drafters and participants in the ratification of the Utah Constitution did not intend that the Legislature be prohibited from reviving such claims if there were a legitimate public purpose for doing so.**

[11] John Harrison, *Legislative Power and Judicial Power*, 31 CONST. COMMENTARY 295, 296, 307 (Summer 2016) (emphasis added) (footnote omitted).

- The Utah Supreme Court has previously noted that "[w]hen looking at the plain language, **we . . . deem all omissions to be purposeful**."[12]

- The drafters of Utah's Constitution had access to all other state constitutions, many of which generally prohibited retroactive statutes or specifically prohibited the state legislature from reviving rights or remedies which had become barred by statutes of limitations.[13] **The drafters of Utah's Constitution chose to leave such a provision out of Utah's Constitution, including only a prohibition against retroactive *criminal* laws in the *ex post facto* provision of Utah's Constitution.**

[12] *Colosimo v. Gateway Comm. Church*, 2018 UT 26 ¶ 46, 424 P.3d 866 (emphasis added).

[13] *See* COLO. CONST. art. II, § 11; GA. CONST. of 1877, art. I, § III, para. II; IDAHO CONST. art. XI, § 12; MO. CONST. of 1875, art. II, § 15; N.H. CONST. art 23; OHIO CONST. art. II, § 28; TENN. CONST. art. 1, § 20; TEX. CONST. art. 1, § 16.