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Clark Memorandum: Spring 1996

J. Reuben Clark Law Society

J. Reuben Clark Law School

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Clark Memorandum

J. Reuben Clark
Law School
Brigham Young
University
Spring | 1996



Rex E. Lee
1937–1996

c o n t e n t s



2
In Memoriam
Rex E. Lee
Richard Wilkins



6
The Ethical
Professional
Constance K. Lundberg



26
The Man
Behind the
Bow Tie:
Edward L. Kimball



14
Selected Letters, Part Two
Woody Deem



40

Driving
Ms. Burns
Lovisa Lyman



32
So Let It Be Written
Lovisa Lyman

20
The Best Season
Aileen H. Clyde



44 Memoranda

If It Is Broken, Fix It, *Kevin J. Worthen*, Book Review
Law School Ranks High
Bruce C. Hafen Called to First Quorum of Seventy
National Chair Honored with Appointment
Letters

In Memoriam Rex E. Lee



1986



1988

Richard Wilkins

Rex.¹ The name, in Latin, means “King.” And he was.

I first met Rex E. Lee in 1975. I was an undergraduate journalism student on the staff of *BYU’s Daily Universe*. He was dean of the new Law School, temporarily housed at the St. Francis Catholic School. I had been assigned to interview Rex about the new Law School building, then under construction across the street from the Wilkinson Center.

When I arrived for my scheduled appointment, the door to Rex’s office was open. He was talking energetically on the

phone, his feet propped up on one corner of a utilitarian-looking desk, and the office walls rang with the rapid-fire rhetoric (punctuated with sweeping hand gestures, broad grins, almost random guffaws, and the occasional semi-stutter) so characteristic of Rex. As he stood to pace behind his desk, the phone now pressed to his ear with his shoulder, he saw me standing outside and waved me into the office. That was my first step into Rex’s charged and incredibly engaging world.

When he got off the phone, Rex greeted me like he already knew me and quickly

took control of the interview. He zestfully explained that “a law school education” was “different” from other academic pursuits because it taught one “to think like a lawyer.” He launched into a brief, but impassioned, evaluation of something called “Socratic Method.” He took a set of blueprints from the corner of his office, rolled them across his desk, and pointed out how “well thought out” the new building was. (The students would have study carrels *in the library*, their “homes away from home.” The classrooms would have tables, not desks, because “law students use *lots* of books and take *lots* of notes.” The classrooms themselves, moreover, would wrap around the professors “to facilitate Socratic questioning.”)

As the interview ended, Rex rolled up the blueprints, leaned across his desk, looked straight in my eyes, and said—quite earnestly—“You know, you’re a bright young man. You ought to consider coming to law school.” I was surprised (and somewhat embarrassed) by the comment, because the last question still rumbling around in my befuddled mind was “Just what does Socrates have to do

with ‘thinking like a lawyer’ and ‘horse-shoe-shaped classrooms?’” Of course, after being described as “bright,” that question went unasked. (And probably just as well, considering how the first year of law school “matured” my opinion of the old Greek.) But one thing was quite clear as I left Rex’s office that day: *this* man loved the law, loved people, loved life, and loved his role in all of it.

This man loved the law.

About 18 months later, I entered the J. Reuben Clark Law School to learn to think like a lawyer. Rex had infected me with his enthusiasm for a life in the law and had issued a challenge. Accordingly, I set about meeting that challenge. In a simple interview, Rex—the King—had changed me immeasurably for the better.

I am not alone. His resumé (which would make any monarch blush) reveals that, during his reign, Rex improved innumerable lives. He did so by establishing himself as one of the country’s finest lawyers, organizing a nationally



1973.



1989

recognized law school, serving a celebrated term as the nation's premiere Supreme Court advocate, and distinguishing himself as president of one of the largest private universities in the United States. But there was more to this man than an exceptional resumé; pervading and undergirding all of his achievements was an absolutely central devotion to his family and his God.

Rex graduated first in his class from the University of Chicago Law School in 1963. From law school he went to Washington, DC, to serve as law clerk to Byron White, associate justice of the United States

the simple expedient of refusing to take "No" for an answer.⁴ Rex was similarly enthusiastic in his recruitment of students. The invitation he extended to an awed student journalist in 1975 was not unique; when Rex saw promising student talent he would promptly issue a summons to join with him in the exhilarating challenge of creating a superb law school.⁵ The energy and sense of mission that coursed through the early years of the J. Reuben Clark Law School had Rex E. Lee as their principal headwater.

Rex's unique service was hardly limited to the Law School. He served the entire

important lesson I try to pass on to my own students: "It is not enough to do the right thing. You must do the right thing the right way."

Because of his unwavering commitment to and respect for the rule of law, Rex suffered substantial political opposition during his tenure as solicitor general. But he also built a unique and enduring reputation as a man committed to principle, not mere politics. Recently, the current assistant attorney general in charge of the Department of Justice's Office of Legal Counsel, Walter Dellinger, visited Brigham Young University's campus as an invited lecturer. Although Mr. Dellinger's political opinions are almost certainly in tension with some views held by Rex when *he* was at the Department of Justice, Mr. Dellinger

Rex. The name, in Latin, means "King." And he was.

Supreme Court. From Washington, DC, he returned to his home state of Arizona, where, as a partner in the Phoenix law firm of Jennings, Strouss & Salmon, he established himself as a lawyer of incredible promise. Within four years of graduating from law school (and before he had even taken a single deposition in any lower-court civil proceeding) Rex argued his first case in the United States Supreme Court.⁶ But, as was true throughout his life, Rex, even early on, was never blinded by his own brilliance. He assured me, more than once, that his first argument was "a disaster"; "perhaps the worst oral argument ever given."⁷ If so, it was a transgression for which he more than amply atoned.

In 1972 Rex left his burgeoning legal career to become the founding dean of the J. Reuben Clark Law School at Brigham Young University. Rex's selection as dean was more than a happy accident. It was providential. Rex's acceptance of that invitation, moreover, was characteristic of his entire life. Rex knew, better than anyone I have ever known, that "when ye are in the service of your fellow beings ye are only in the service of your God" (Mosiah 2:17).

Rex went about setting up the Law School with the same conviction and drive that caused his spoken words, not only to rush torrentially forth, but sometimes to bump into each other. In record time he collected a superbly talented faculty by

nation, first as an assistant attorney general in charge of the Civil Division in the United States Department of Justice from 1975 to 1976, and then as solicitor general of the United States from 1981 to 1985. As solicitor general, Rex had the incredible opportunity to focus entirely on the legal effort he enjoyed most: briefing and arguing cases in the United States Supreme Court. Supreme Court briefs and arguments were vital nourishment for Rex's legal soul. (Indeed, at the time of his death, as he lay in a hospital bed, he was preparing to argue his 60th case before the Court). Rex flourished as solicitor general.

However, as those who have lived life fully well know, flourishing is often the result not of perfect conditions but of overcoming circumstances that are less than ideal. Rex faced more than his share of adversity as solicitor general. Throughout his legal career, Rex was the consummate "lawyer's lawyer." He knew the law. He understood the law. And most important, he respected the law. When political forces within the Department of Justice pushed for positions that could not be supported within the boundaries of existing precedent, Rex held firm. He told me something during his most difficult days as solicitor general that is the most

nevertheless held Rex in high regard. During luncheon remarks, he described Rex as a monument to the best traditions of the legal profession. Rex, he stated, was "solicitor general in the grand tradition." The entire nation has benefitted from Rex's commitment to that heritage.

Rex, of course, was committed to more than the law. He was deeply committed to his family. I once commented to Rex's son Mike that I was surprised that Rex had any family life at all. Mike seemed taken aback by the remark. "We never felt deprived," Mike said, "because when Dad was home, he was home. He played with us, supported us, taught us, and loved us. Moreover, Dad never relied upon that old canard that 'it is not the quantity but the quality of time that counts.' Dad spent not just quality time but quantity time. He never excused his absence from the family. He was *with* the family." The steady hand at the helm of the law was also on the oars at home.

The steadiness that pervaded Rex's home life characterized his relationship with God as well. Carolyn Brammer, Rex's confidential assistant at the Department of Justice, both when he was assistant attorney general and solicitor general, noted that when she first met Rex:

The thing that stood out in my mind the most was that he had this inner peace. At that time, I did not know about the Mormon Church or what LDS meant. All I knew was that while others were scurrying around and, in some instances, spinning their wheels, there was Rex, steady as a rock.

After Rex left the Department of Justice as assistant attorney general, he called Carolyn at home “and asked me to do him a favor—he then changed that to ‘let me do you a favor’”:

He asked me if he could have the Mormon missionaries stop by. When I spoke with my husband, he said “if this were anyone but Rex Lee, I would say no. But go ahead and tell him to have them stop by. You know, we’ll never get rid of them.” Within the year we were baptized and eventually we were sealed in the temple, with Rex and his wife, Janet, by our sides. Personally, he inspired me to be better than I ever thought I could be. Spiritually, he showed me by example how “to walk the walk,” as the kids today might say.

Rex never stopped “walking the walk.” After resigning as solicitor general, he returned to Provo and BYU in 1986. Shortly thereafter, he was diagnosed with a serious—and rapidly developing—cancer. But, following an exceptionally difficult year of medical treatment and therapy, Rex (and all of us) were granted a miraculous reprieve. He recovered, for a time, his strength. During that extraordinary period of health, he was named president of Brigham Young University. As president he set a new standard for openness and access, meeting regularly (and individually) with faculty and students on important issues facing the university. Rex served the university community with distinction from July 1989 until December 1995, just two and one-half months before his Father in Heaven called him home.

The last time I saw my friend was in the Utah Valley Regional Medical Center. Rex recognized me as I stood outside the door to his room in the Intensive Care Unit. As he had nearly 20 years ago, he waved me into the room. He couldn’t pace. He was too frail to stutter. He was even too weak to display his usual broad smile, but he still

grinned. And he pulled me down to him to mouth the words, “I love you.” I told him, then, with all the conviction of a breaking heart that I loved him, too. I told him that there were hundreds more, many of whom will read these words, who loved him as well. Then I had to leave, because tears were too close. Rex, my regal friend, deserved not tears but a celebration of all the riches he had bestowed upon me and so many others.

The rapid-fire voice, punctuated by sweeping gestures, ample smiles, random guffaws, and an occasional semi-stutter, that voice I heard for a first time as a senior journalism student, is now stilled. But the echoes ring on. They ring on in the lives of thousands of law students who, like me, have had the blessing of attending



the J. Reuben Clark Law School. They ring on in a country strengthened by Rex E. Lee’s unwavering devotion to the rule of law. They ring on in the lives of his wife, sons and daughters, who will emulate the example set by a loving husband and father. They ring on, as well, for all those who have been touched by the steady, genuine devotion displayed by a man who knew not only that he was a son of God, but that we are all brothers and sisters. Rex’s voice is silent, but his influence will never be stilled.

Rex means King. Long live the King.

NOTES

1. Although I worked with Rex E. Lee for nearly 20 years, I generally stood too much in awe of the man to address him simply as “Rex.” When I was a student at the Law School in 1977, he was “Dean Lee,” at the Solicitor General’s Office he was “General Lee,” and when we worked together again at BYU in the late 1980s he became “President Lee.” Rex, of course, never demanded such formality. I simply felt that addressing him by his various titles was appropriate. It was only during the last few years of our association, and at his urging, that I began to use his first name. In this short memorial, I write his name without titles, not out of disrespectful familiarity, but because—at least for me—the most important title he ever held was that of “friend.”

2. *Lassen v. Arizona Highway Department*, 385 U.S. 458 (1967).

1995†

3. I know, however, that the above assertion is not true. *My* first argument in the Court was clearly the worst in that institution’s history.

4. Just ask Professor Carl Hawkins, whom Rex repeatedly described as the “centerpiece” of the new faculty.

5. Any list of the students who flocked to J. Reuben Clark Law School at Rex’s personal invitation would be hopelessly underinclusive. I have heard stories, from more Law School graduates than I can remember, detailing how they enrolled at Rex’s personal prompting. And the stories come from more than just graduates. A successful Provo businessman who *did not* attend law school has proudly recounted to me how Rex urged him to learn to “think like a lawyer.”



The Ethical

Professional

Consecration in

the Workplace

by Constance

K. Lundberg

I AM OFTEN ASKED, ALTHOUGH THERE WAS SOME RESPITE DURING PRESIDENT HUNTER'S TERM, HOW I CAN BE A LAWYER AND BE MORAL, ETHICAL, OR RAISE MY HEAD IN CIVILIZED COMPANY. AS AN ENVIRONMENTAL LAWYER I HAVE BEEN ACCUSED, WITHIN A SINGLE WEEK, OF KILLING CHILDREN WHO LIVED IN

the same community with one of my "smoke stack" clients and also of killing families who might have accidents on a road the Department

of Transportation couldn't expand because I was suing to stop the construction. Clearly, at least in the minds of my self-appointed critics, lawyers do get away with murder.

Believe it or not, when I was in school, the morality of lawyers was not a major issue. Lawyers were the champions who brought German and Japanese war criminals to justice, who stood between innocent blacks and hate-driven lynch mobs, who tried to make corporate America accountable for the essentially unrestrained contamination of our air, water, and soils.

In my high school and college years, questions of morality surrounded other professions:

- Nuclear physics was a morally questionable profession. We agonized over the conflict between J. Robert Oppenheimer and Edward Teller. Was the Hiroshima bombing a morally justifiable act? Was the United States foreign policy of mutually assured destruction viable or a death sentence to the world? The Committee of Concerned Scientists began while I was in high school. I was thrilled that there were scientists that were not, as most seemed to me, moral ciphers.

- Doctors and medical researchers were in the ethical spotlight. Tennessee Williams wrote a play and film script focusing on the immorality of indiscriminate prefrontal lobotomies. Disclosures in the aftermath of World War II raised the specter of human subject experimentation, and we learned

that forced sterilization had been an American practice for 50 years.

- State government was the *bete noire* of my generation. It was crabbed, counterproductive, and regressive. State and local government meant the Scopes trial and George Corley Wallace stirring hate against the lone black child, Sharlane Hunter, who was escorted to school each day by u.s. marshals to protect her life. Bull Connor, turning the water hoses of Birmingham on civil rights demonstrators was the symbol of states' rights, which meant segregation, Jim Crow, lynching, third-rate education, and economic exploitation of the poor.

Publicly perceived heroes and villains change with varying political currents. You cannot assure yourself morality or an ethical life by category, by associating with an "ethical" discipline or profession. So how can we identify and follow the pathways of righteousness Monday through Saturday? I address the special challenges of morality among the professions since our common challenges are greater than our differences.

J. R. R. Tolkien wrote *The Lord of the Rings*, a trilogy of morality in troubled times in a fantasy feudal world. In *The Two Towers*, (volume 2 of the trilogy), Eomer, a warrior of one country, speaks to Aragorn, a stranger, a warrior hero on a quest from another land.

"The world is all grown strange. . . . How shall a man judge what to do in such times?"

*"As he ever has judged," said Aragorn. "Good and ill have not changed since yesterday; nor are they one thing among Elves and Dwarves and another among Men. It is a man's part to discern them, as much in the Golden Wood as in his own house."*¹

So if we must judge good and ill the same, whether among elves, dwarves, lawyers, physicists, or musicians, how do we judge? What is the hallmark of an ethical professional?

The ethical professional is a servant and a steward, using her knowledge, wealth, power, and position in service of her God and her fellowman. Paraphrasing Moses' farewell sermon to the Israelites, in a speech entitled "How to Get Rich," Hugh Nibley wrote:

The first rule, and one never to be forgotten, is that everything you have or ever will have, individually and collectively, is a gift from God, something that he blesses you with, has blessed you with, or will bless you with—you owe it all to him. . . . Throughout the book [of Deuteronomy], the refrain is repeated at the end of almost every pronouncement: You must do this in recognition of your dependence to God, because first and foremost he has given you your lives, he rescued you from Egypt, and he redeemed you—that is, he paid the price for you that you could not pay yourself.²

As King Benjamin taught, we cannot withhold from one another a portion of all God has given, when he has asked us to give, since all we have is his.³ The rich man in the account in Luke did not understand this first rule. He said he kept the commandments from his youth, but Jesus said, "Yet lackest thou one thing: sell all that thou hast, and distribute unto the poor, and thou shalt have treasure in heaven: and come, follow me." The man was "very sorrowful: for he was very rich."⁴

In the scriptures, consecration has two forms. One can consecrate himself, his time, talents, and service. King David called the people to build the temple: "And who *then* is willing to consecrate his service this day unto the Lord?"⁵ Or one can consecrate one's wealth, as Christ commanded the rich man, and as saints did in the primitive Church and in the early days

Illustration by Brant Day

of the latter-day Church. Both forms of consecration are partial obedience to the first commandment, as explained by Moses in Deuteronomy. Both forms require both giving and receiving. Again, Dr. Nibley explains the offerings required of the Israelites:

The great gathering and feasts, whose strict observance makes up such an important part of the old law, all have the same purpose, to remind the Israelites that everything they had was a free gift from God. In holding these solemn conferences "you and yours—sons, daughters, servants, . . . strangers, orphans, widows must all come together and rejoice and be happy," as one big happy family. That is the spirit in which this must be done, and that is the spirit of the law of consecration and the United Order. "Remember that thou wast a bondman in Egypt"—if some are slaves, all are slaves. This is to show where we stand with each other and the Lord.⁶

How does this translate into your lives as professionals? First, you must share your gifts—knowledge, skill, talents—with others in need, whether or not they can pay for your services. Lawyers and doctors have professional obligations to provide service *pro bono publico*—for the good of the public. Does this mean you oppress the poor until 4:00 Friday afternoon and then spend one hour giving nonreimbursed service to a poor person? I think not. Neither do I think it means providing service to the poor only when someone else (Legal Services, Medicare, the Peace Corps) pays you to do so.

You should, of course, pay all your tithes and offerings. Your donations to the Church do not discharge your obligations to support community service organizations, ranging from the food bank to the opera, with your donations, time, and efforts. You have a special obligation, I think, to use your professional skills and income as a stewardship to repay those whose contributions gave you those skills. Whether you graduated from a private school like BYU or a state-supported school, you should replenish, with generous interest, the resources that supported your education—scholarships, income, tuition subsidies, library resources, etc.

Those of us with multiple degrees may not be able to support all our alma maters to the same level, but the principle of repaying, for the benefit of the next generation, what we received from past generations is a good starting point.

When I think of our obligation to train future generations in our profession, I think of musicians. I know few musicians unwilling to spend time and energy helping young musicians grow. An example for me is that of a young musician in Utah with a promising career as a concert pianist. He was stricken with a nerve disease that ended his career as a pianist, but not his vocation. He began a chamber music group that has grown and now has several records and tapes and a regular concert season. This year, his third season, Grant Johannesen, the concert pianist and former head of the Cleveland Institute, came to Utah to appear as a guest artist with the group. I thought, as I watched this young man conducting the silver-haired, gracious master musician, how committed Johannesen is to the future of his profession. He drastically reduced his performing career to serve as director of the Institute, because it is the obligation of musicians to help the next generation, and here he was, gently and elegantly, helping a young conductor through the use of his name, his talents, and his subtle, unseen assistance in teaching the conductor how to accompany a soloist. It was the equivalent of a senior litigator from a national firm coming to Utah to sit at counsel table with a young lawyer in a major trial, coaching, but not trying the case himself.

Beyond the obligation to use your skills and position to pay for your own education debts and for the benefit of any in need, there are constraints on how a professional functions. If it is your intent to sell apples or clean streets, your obligation is to work hard, do your job well, and give a full day's work for a full day's pay. A true professional has other obligations. The original professions were the Church, medicine, and law. We have added others, to the irritation of some members of the original three. I define a profession as one where specialized higher education and a specific code of acceptable conduct and responsibilities are recognized by a legal or

societal monopoly to give the service for which the professional is trained. I once did research on the chartering of professional licensing organizations. I learned that almost the first thing engineers, social workers, psychologists, librarians, and others did in establishing themselves as professionals was adopt codes of ethics.

What should those ethics include? Thomas L. Shaffer, a legal ethicist, identifies four roles for lawyers. For Shaffer, these are counseling roles. For me, counseling is when the lawyer interacts with his client in the full gamut of their professional relationship. The superficial elements of each of these roles will be used by any lawyer at one time or another. The question is not the facial elements of the roles, but the nature of the relationship underlying them—that determines whether the representation is ethical.

1. THE GODFATHER. "[T]he godfather controls the action and serves the interests of his client, the godchild. Don Corleone, as his son Michael says, is a 'man who is responsible for other people.' Also . . . the godfather acts without regard to the harm his action causes to other people. Godfather lawyers either decide what their clients' interests are, without consulting their clients, or they persuade their clients to accept lawyers' views on what their interests are. They pursue client interests with their own 'technical' devices, without much interest in their clients' moral reservations."⁷

In President Ezra Taft Benson's famous conference address on April 1, 1989, he spoke about the sin of pride and how it affects our relationships.

[A] major portion of this . . . sin . . . is enmity toward our fellowmen. We are tempted daily to elevate ourselves above others and diminish them.

The proud make every man their adversary by pitting their intellects, opinions, works, wealth, talents, or any other worldly measuring device against others.⁸

Lawyers in the godfather role use their intellects, opinions, and skills against their opponents in the guise of being an advocate for their clients. In reality, like the lead character in the movie *The Godfather*, the

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Benson

godfather lawyer establishes and maintains her own power, in her case, over both opponents and clients. In the elevated status of godfather, the lawyer no longer needs to interact with her client or her opponents—their concerns are irrelevant. She pretends to serve the interests of the client, whose reality she has denied. This pretense is no less acceptable if she deludes herself as well as others.

The double tragedy of the godfather role is that the professional overrides the client's moral reservations, but can leave her own at the door, arguing that she is merely pursuing the client's agenda, not her own. This is the classic defense of the scientist. "I am not a policy maker, I am a scientist. It is the politician's job to decide what to do with my work." This means there is no moral dialogue at any time in the representation.

Clients do not necessarily want a godfather lawyer. One third of all divorces granted in the United States never become final. Lawyers in my acquaintance comfort themselves with the often repeated observation that clients in family matters really don't know what they want. I suggest that the lawyers don't know what the clients *really* want and, as godfathers, deliver what they know how to deliver without inquiring too closely. If clients in one-third of the cases have the determination to extricate themselves from their lawyers' imposed solutions, how many more are divorced because they do not have the will or ability to fight back?

2. THE HIRED GUN. The hired gun, or client-centered counselor, focuses on the desires of the client. "The lawyer should not act in ways that would influence the client's choice. The lawyer should be 'neutral' and 'nonjudgmental.'"⁹ Shaffer points out the limitations of the hired gun, though literature is replete with examples. One example from recent pulp fiction is *The Firm*. In that book, an entire law firm surrenders moral autonomy to the mob and becomes owned by it. Autonomy is no virtue to be sought. By allowing clients moral autonomy, the right to make moral judgments

with no controls and to have those judgments implemented unquestioningly, we are consigning clients to hell—people, as described by C. S. Lewis, "on the outskirts of a city who continually move further and further away from one another."¹⁰

Our own values and beliefs support the idea that we exist as part of a community. The autonomous model is unacceptable to a Christian, particularly a Mormon Christian, either as client or as lawyer. In addition, the hired gun model requires the professional to accept the moral code dictated by the client. This model is surely as unacceptable to a lawyer. But I think it equally unacceptable to a doctor counseling a



pregnant-out-of-wedlock woman or terminally ill patient, a psychologist counseling a suicidal patient, a businessman whose partner wants to engage in predatory pricing, or a government scientist when a general is suggesting testing nuclear weapons in populated areas.

3. THE GURU. Shaffer's lawyer as guru is an appealing role for those of us from a proselyting background. Shaffer quotes Judge Clement Haynsworth in a speech to a law school graduating class:

[The lawyer] serves his clients without being their servant. He serves to further the lawful and proper objective of the client, but the lawyer must never forget that he is the master. He is not there to do the client's bidding. It is for the lawyer to decide what is morally and

legally right, and, as a professional, he cannot give in to a client's attempt to persuade him to take some other stand. . . . During my years of practice, . . . I told [my clients] what would be done and firmly rejected suggestions that I do something else that I felt improper."

Philosopher Martin Buber advocated what he called I-thou relationships. We should approach others as moral human beings capable of moral dialogue. However, he felt that professional relationships were rarely a source for moral counseling. The professional looks at the client and sees, not a *thou*, another person, but an *it*. "The sides are too unequal:

'I see you *mean* being on the same plane, but you cannot. . . . [T]he situation . . . may sometimes be tragic, even more terrible than what we call tragic.' Not only tragic, he said, but, for the professional, also morally perilous. Professionalism is an invitation to arrogance."¹²

The guru is arrogant. Here, as in the godfather role, the professional dictates to the client. The difference is that the godfather gets what the client says he wants with no consideration for moral judgments the client might make. He is paternalistic and controlling. The guru makes moral judgments for the client and in essence says to him, "This is what you should do/want." It is another form of paternalism and, like the first, leaves the client out of the equation. This role has the same pitfalls as the godfather, or the father-knows-best model of professional behavior, but this model has one additional problem: By removing the client from the moral dialogue, the professional as guru denies the client his free agency.

4. THE FRIEND. Shaffer says the godfather wants client victory, the hired gun wants client autonomy, and the guru wants client rectitude. He proposes a fourth model, one more difficult to follow and less likely to achieve its goal: the lawyer as friend. His goal is client goodness.

The model that we advance for the lawyer who is concerned with the goodness of the client is the lawyer as friend. We are not sug-

gesting that the lawyer can become a friend to every client, but that the lawyer and client should deal with moral issues that arise in representation in the way that friends deal with moral issues. Our point of view here does not turn on friendship as a bit of good luck, but on being like a friend—as a counseling skill. . . . A friend is concerned with the other as a person. In Martin Buber's terms, a friend treats the other as a "thou" rather than an "it." Or, in Kant's terms, perceives the other as an end and not merely as a means to some other end.³

By friend, Shaffer means Aristotle's definition of friendship in *Nicomachean Ethics*: "Friends must enjoy one another's company, they must be useful to one another, and they must share a common commitment to the good."⁴

Why is commitment to goodness important? Consider the constellation of professional problems surrounding the family. One in 10 women lives in an abusive situation. The statistics for children are similar. Separation of the family may or may not eliminate the abuse—as we all know from news accounts, separated partners often return with violence and devastation. However, regardless of the abuse, 20 percent of children in Utah live below the poverty line, most children in single-head-of-household families. National statistics are worse.

If you are a lawyer, doctor, psychologist, nurse, social worker, or teacher representing one of the partners or the children in a troubled family, the model becomes a critical issue. Will you help those children, that family, if you seek victory of one member of the family over the others, or autonomy for your client from the rest of her family? Will externally imposed rectitude alter the internal dynamics of the family or leave the family in as great a distress as ever but give the professional a self-satisfied feeling?

Imagine that you are the lawyer contacted by the husband of a family in town. He is making \$1,500/month and has a wife and three children ages 1, 3, and 5. He says he has had it with the marriage. The children have no discipline and are always crying and whining. His wife, of whom he speaks in ugly and derogatory terms, is nagging, he says, and getting uppity. She is

turning the kids against him. She does not work—has a high school diploma but no particular skills and is unlikely to get more than minimum wage in any job, unlikely to get enough to pay for child care while she works. Her mother is an interfering old witch. The bishop stuck his nose into things that weren't any of his business. The man wants to be free, to get out of the marriage, to get enough of the \$1,500/month to live on (all of it if he can). If you listen carefully, what do you hear from this man? He is poor. His family lives in poverty. Divorce or separation will make it impossible for

token, Paul didn't get a nice, clean, well-behaved BYU ward in Corinth. He thanked God he didn't baptize the Corinthians, because they are so quarrelsome.⁵ He found the Corinthians carnal, envying, and full of strife and division.⁶ They were greedy, withholding support for missionary work and for the Church, but providing for themselves.⁷ What did Paul find in these quarrelsome and sinful Corinthians? He found them epistles from God, written on the fleshy tables of his heart.⁸

As professionals, you will minister to the needy, the weary, those who are falling



HE NEVER SPOKE DIRECTLY OF GOD, OR THE SAVIOR, BUT HE BROUGHT THEIR SPIRIT INTO A ROOM THAT HAD, MOMENTS BEFORE, BEEN FILLED WITH A SPIRIT OF ANGER AND CONTENTION.

the family to live without assistance. It seems probable that there is abuse in the home. There may be a support system for the wife—mother, Church leaders—but it is unlikely. It is equally unlikely that there is much support for the husband. How do you become a friend in this case? How do you establish a moral dialogue? The fact that you are handling this case *pro bono* should make it easier, but probably won't. Charity clients are more likely to be defensive and hostile than grateful.

Here is the real challenge of the consecration of a profession. It is so easy to be moral in the abstract; so much harder in the dirty, raging, hate-filled reality that is muttering and swearing a blue streak in your office. Moses didn't get nice, clean, well-educated, upper-middle-class Hebrews. He got illiterate, superstitious slaves. As he reminded them in Deuteronomy, they were not the chosen people because they were more pure, more upright than others. But from these people came the seeds of the people of the covenant—they preserved the scriptures through war and pestilence. Finally, they were the family of the Savior. By the same

by the wayside. The whole do not come to the healer. If you wish to share a common commitment for the good, as described by Shaffer and Bellah, after Aristotle, you will have to look carefully. And it will not be enough to say it is a miracle of God that good could come from such people. They are the children of God, and you have consecrated your time and talents to serve them, to bring them into goodness.

How do you do that? Not as one young LDS associate in my very gentele law firm did. He stayed isolated in his office and increased the isolation by putting a very large painting of Moroni burying the gold plates on the wall in his office. Perhaps he could have created a greater division by putting a sign on his door reading "Desolation of Dragons," but I doubt it. Paul came to know the Corinthians. He listened to their quarrels, their concerns, their contentions. He scolded and upbraided them. But ultimately, he accepted them as God's children and looked for their strengths. Then he saw them as God's recommendation to him.

I spent a lot of time traversing the intellectual no-man's-land between the requirements of my clients and the demands made upon them by government representatives or by opponents in the community. I learned that people often do not know what they want or need. Like children, their demands may be tokens or talismans for other unidentified and misunderstood needs. It takes patient and careful listening to hear the needs behind the demands. What does the young, confused father need?

One of my students, faced with a similar problem in a class assignment, showed his capacity as a representative of Christ, as well as a creative problem solver, when he sought out educational opportunities for the young man. He counseled him about the need to expand his capacities, asking about his willingness to take classes, seek additional training, and enter counseling. He gently explored the problems of dividing a pittance among two households. He explored ways to reduce family tensions, provide greater face with in-laws. He reached out to the young man and found the pain and need within him. From there he was able to suggest meaningful solutions.

Often it also takes the good fortune of a person well prepared to instinctively react to challenges that appear in the process. Atticus Finch is a hero in *To Kill a Mockingbird* because of who he is. He is successful, not in the trial, where he fails, but in his instinctive act of courage and defiance before the lynch mob.¹⁹ You can probe an apparently insoluble problem for months, even years; but you must understand it—and the capacities of your client—to see the light eking through a small crack in the opposition and know it suggests a solution acceptable to both parties. This understanding comes, I suggest, from love. “A good man out of the good treasure of the heart brings forth good things: and an evil man out of the evil treasure bringeth forth evil things.”²⁰

I came to understand friendship and love in problem-solving from the man who is now my husband. He was the head of environmental control for U.S. Steel in the western United States. I was his lawyer—outhouse counsel, as we sometimes laugh-

ingly called it. He was committed to keeping Geneva Steel open and operating. I do not ask you to agree with him but to understand him. He felt a stewardship for each of the 4,500 employees of the plant. He worried about their families, their homes, their debts, and their children. Those were not institutional concerns in Pittsburgh. The plant operated under a constant shadow of threatened closure.

We were negotiating with EPA for new standards that would allow the plant to operate while meeting EPA established clean air standards. The standards we wanted would work if Geneva employees did every maintenance and repair procedure that was required. Much trust was necessary, however. It was difficult and cumbersome for EPA to enforce the standards. During a discussion with the agency about trust, agency representatives protested that it was difficult to trust the plant when employees were shutting down the pollution control equipment then in place to save the \$56,000/month of power bills that came when the equipment operated. This fact was unknown to me and to the Pittsburgh representatives. Pandemonium broke loose. The senior USX official from Pittsburgh threw the EPA representatives out of their own meeting, held in their offices. I sat with my head in my hands saying, “You can go to jail for this. People go to jail for this.” The Pittsburgh people were having a contest to see who could come up with the foulest and most profane epithets for the Geneva operators, one of whom was literally backed up against a wall grinding his teeth.

Boyd finally found a small window of quiet in the uproar and said, “You just have to understand . . .” and proceeded to make sure we did. He did not say the operators were right or justified. He just said they were human, doing their best under frightening and trying circumstances. That day I saw that a professional, operating with understanding and love, acts as the Savior's representative on earth. He mediates with the judge. He does not pretend things are other than they are, but places them in their true context. Like Paul, he found a recommendation from God written in the fleshy tables of the heart. He never spoke directly of God, or the Savior, but he brought their

spirit into a room that had, moments before, been filled with a spirit of anger and contention.

I believe that is the way consecration figures in our professional lives. It is not an artificial or externally imposed thing. But, by bringing understanding and love to our contacts with others—clients, opponents, judges—we can share those things most sacred to us—the spirit of the Savior, the eternal concepts of Christ's love and the atonement—not through preaching, but through demonstration, not by announcement, but by letting others feel its sweetness and peace. I believe that we cannot perform immoral acts and pursue unethical courses if we remain true to that spirit as we bring it to our daily service.

Notes

1. J. R. R. Tolkien, *The Two Towers*, Lord of the Rings 2 (New York: Ballentine, 1965) 15.
2. “How to Get Rich,” *Approaching Zion*, The Collected Works of Hugh Nibley 9, ed. Don E. Norton (Salt Lake City: Deseret Book, 1989) 178, 179–180.
3. Mosiah 4:21.
4. Luke 18:22–23.
5. 1 Chronicles 29:5.
6. Nibley 181.
7. Thomas L. Shaffer & Robert F. Cochran Jr., *Lawyers, Clients, and Moral Responsibility*, (St. Paul: West, 1994) 8. (Shaffer originally defined the four lawyer roles in *On Bring a Christian and a Lawyer*).
8. Ezra Taft Benson, “Beware of Pride,” *Ensign*, 19 May 1989: 4–6.
9. Shaffer 19.
10. See C. S. Lewis, *The Great Divorce* (New York: Macmillan, 1946) qtd. in Shaffer 28.
11. Shaffer 35–36.
12. See Martin Buber, *I and Thou*, trans. Kaufman (1942) qtd. in Shaffer 37.
13. Shaffer 45.
14. Robert N. Bellah, et al., *Habits of the Heart: Individualism and Commitment in American Life* (1985) 115 qtd. in Shaffer 45.
15. 1 Corinthians 11:14–15.
16. 1 Corinthians 3:3.
17. 1 Corinthians 4:10–14.
18. 2 Corinthians 3.
19. See Thomas L. Shaffer, “Christian Lawyer Stories and American Legal Ethics,” *Mercer L. Rev.* 33 (1982): 890.
20. Matthew 12:35.



Woody Deem, teacher extraordinaire. He came from a poor family, excelled in college, only to graduate (with a Phi Beta Kappa) key broke and with no job prospects. Failing to follow his dean's advice to marry a rich widow, he joined the CCC, matching wits with the system for a year. Education came in handy, as he found his niche as a clerk, putting him in possession of powers that made his life much easier (See "Woody Deem: Selected Letters, Part 1," Clark Memorandum, Fall 1995). But come summer he turned down a scholarship at Duke Law School to take on work in Washington as assistant to a senator and as Capitol guard. That work would pay his living expenses and allow him to attend law school at Georgetown University.

W o o d y D e e m

Selected Letters

W a s h i n g t o n , D . C .

■ The keen mind, the playful wit, the commitment to hard work,

the generous spirit, and the broad knowledge that he brought to teaching at BYU were evident back in his law school days. Those qualities developed and were adapted to changing circumstances, but they were already discernible in letters to a friend while Woody worked his way through law school.

Illustration by Chris Gall

If you knew Woody, you'll never forget. If you did not, more's the pity. —Edward L. Kimball

P

A

R

T

23 4th N.E. Apt. #2
Washington, D.C.

Dear Lorene, December 19, 1937

...

Congress is fast becoming the butt of all jokes around here. All last week they held late sessions; one night they stayed until ten. More than half of the people who work in the capitol building have to stay each evening until Congress is out, without the opportunity of going out to supper. As a result, about seven thirty or eight o'clock, spirits begin to lag and invective against the legislature runs high. Last night on his way to the barber shop to get a hair cut while they were calling roll upstairs a congressman left word that I should give him a ring if they called for a vote on the floor before he got back. Whenever the session runs past seven the wives of congressmen all dolled up for the evening start stringing in to take their seats in the gallery to wait until the man of the house gets through to take them out. A beacon light burns in the dome when a night session occurs and that brings several hundred visitors up from the city with the result that we have a regular madhouse around here. Last night, an old chap who looked like a farmer came in with a fierce expression on his face declaring that he had come to shoot it out with Congressman Moore, who happens to have been dead for some six years. The old boy was convinced we were merely hiding him and raised quite a storm. Finally in desperation we called the station wagon and sent him away. The charge was drunkenness, but it must have worn off in a hurry, because they turned him loose and he came right back up. He didn't have a gun so it's still a mystery as to how he intended to shoot it out. When the Wage and Hours Bill was recommitted Friday evening, one white-haired congressman with a New England accent came down the hall snorting, "Humph! So the South still rules the House!" After he had gone, one filthy rebel turned to another and said, "That's one time those damned Yankees had to admit they were licked." This last was in fun, I think.

The foreign affairs committee is very seriously investigating the Sino-Japanese situation. One night one of the boys who works in the committee rooms smuggled out some snapshots that had just arrived

from the war zone. The horrors shown there make one's blood run cold. There was one picture of a street filled with the bodies of Chinese defenders. All the clothing that could be used had been stripped from their bodies, and in many places these nude mangled forms were piled three and four deep. The chap who brought them explained that they get several hundred such snapshots every time the mail from the China Clipper comes in. It is inconceivably that any civilized nation could do the things that Japan is doing without being utterly demoralized.

When the British ambassador came up to the capitol last week, several of the gang engaged his English chauffeur in a discussion of the general situation over there. The most surprising information he offered was that the British opinion, so far as he knows it, is distinctly against Edward the VIII. This fellow claims that he was once a guard at one of the royal residences where he had the opportunity of observing Edward, whom he called everything but a gentleman. It may be propaganda, but since then the opinion has been voiced by other Britishers.

...

The night before Thanksgiving, I attended a dance given by the legal fraternity that I have pledged. (I still don't remember the name of it, but it's good orthodox Greek.) It was very different from the parties we used to have out home. Everyone brought his liquor with him, and ordered more at the hotel, so that the tables were fairly littered with national brands and before the evening was over, some of the novel steps in the Big Apple were wholly unintentional. . . .

One night a woman stopped at my desk to wait for someone. When our conversation ran to the war in the Orient, she told me that her husband was in the World War. He claims that several generals ordered their men over the top after they knew that an armistice was about to be declared, and that they did this in the hope of gaining a few more feet of ground and thus gain promotion and decoration for themselves. She was very bitter, declaring that a son of hers would go to no war, save it were one to defend American homes from invasion.

Shortly after that, as I sat here studying, someone tapped me on the shoulder, and pointing to a young man across the hall, said, "See that boy? Handsome, ain't he? He's well built and healthy. He'll look even better in a uniform. I used to look like that before the war—and when war is done with him, he'll look like me—or worse?" When I turned to stare in amazement at the man who had addressed me, I found him to be a horrible cripple, one leg off at the knee, a hand off at the wrist, nose and one eye gone and a livid scar running the length of one cheek. He laughed at my discomfiture and shambled off.

Sincerely,
Woodruff

Dear Lorene,

[January 1938]

...

You should be glad you aren't here in Washington to have your faith in democracy shaken. Some of the goings on in the Senate rival slapstick comedy. Then in the House they're discussing the appropriation bill which covers so many items that nobody knows anything about it. There aren't more than half a dozen congressman on the floor most of the time. They come in when there is a discussion of some department they are interested in and then leave until time for a vote. Things have just stopped happening. There is little hope of getting anything besides the appropriation bill passed before they adjourn early in the spring to go home for the campaign.

...

I made my first arrest yesterday. There is an ordinance in our police regulations that prohibits dogs and cats in the building. In walked a large gray tom cat, and in the interest of law and order there was nothing else to do but arrest him, which I promptly did. Then when I called the guard room for the squad car, I was told that it was out of gas. When I asked for suggestions, the sergeant told me to raffle the cat off to the highest bidder. Several congressmen stopped to pet him, and finally one of them offered to take him into the restaurant for a bit to eat and that's the last I saw of him.

But now, I must get back to lessons.
Sincerely,
Woodruff

Dear Lorene,

March 20, 1938

...

And the people in the building are for the most part very interesting. There is one job here, a door job for one of the committees, that has been in one Negro family ever since before the Civil War, and, because of the meritorious service of the founder of the family, it probably will remain so for many generations yet to come. In the Senate post office, there is a very charming lady who captivates everyone. People go out of their way to buy stamps at that station. Her husband was Georgia congressman who died in office, penniless after a life of unselfish public service. This position is by way of tribute to his memory. One of the engineers got his job during Teddy Roosevelt's administration and has remembered all of the scandal of the interim. Every now and then he pauses and regales me for a couple of hours. One of the guides here, a rather old lady, lost a husband and two sons in the World War; as a result, war has become a hideous institution in her mind. There is a clerk on the House side, who has a mania for clothes and spends all his income on finery. He has a Texas summer outfit, broad hat, high heels, etc., then he has several outfits with swallow tail coats, collars that call for scarfs instead of mere ties. At the moment he's deeply bothered because the news boys refuse to deliver a paper to his office, claiming that they don't even do that for congressmen unless they get paid extra. The list could go on indefinitely.

...

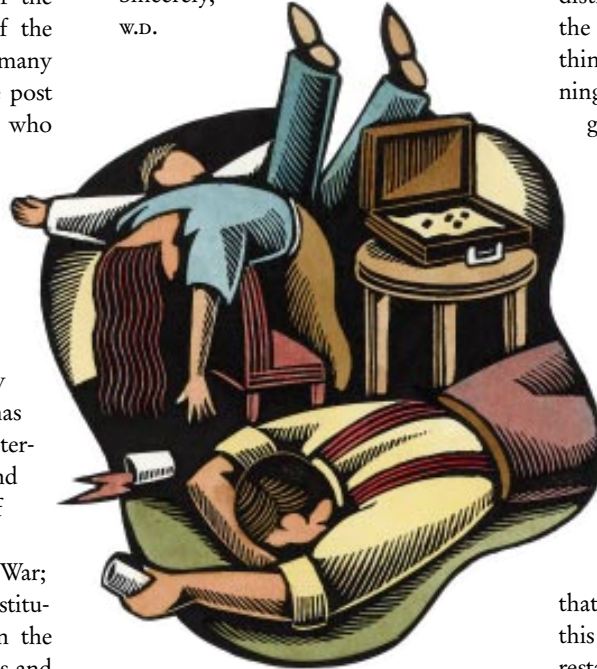
Last Sunday, I joined a law fraternity. The list of celebrated lawyers that are now fraternity brothers is quite breathtaking. Among them is the district attorney for the District of Columbia, who spoke at the banquet.

Lawyers, I fear, are a bit snobbish. They have their own jokes that aren't the least bit funny to one not steeped in the learning of the law. To them history is a series of great law cases, most of which they know by name and quote them quite frequently. It follows that the truly great men of the world have all been lawyers. We have their pictures framed and hung in the halls of the Law School. In front of my desk is a portrait of Lord Mansfield who is so much more important than Columbus that there is no comparison.

Lord Mansfield added an element to the law that no other man could possibly have added and maintained. There are dozens of them. To be quite frank, I hadn't heard of one of them before I started law school. ...

Sincerely,

w.D.



Dear Lorene,

July 2, 1938

...

School, of course, finally came to an end—with a smash up, rather than a bang, to be quite truthful. The examinations that they handed out to us were more like thunderbolts. In each class we would read over the examination and then laugh heartily before settling down to the miserable business of discovering some word in the question that we could nail on to and write about. One of the profs boasted, that on the basis of the examination he gave, he could flunk the whole class with not the least difficulty. From personal experience, I can say that he was probably right. Marks will be out in about a month, but the apathy that has developed is surprising. I'm quite sure now that if I flunked in everything, it would call forth only a sigh!

Just at the commencement period, we had the annual law club banquet. There it was my rare honor to sit across the table from Justice Butler of the Supreme Court. His has been a very interesting and eventful life. For more than forty years he has

been the personal friend of the men who are counted as most important in the nation. His greatest sport is to tell story after story of the events of recent history, lending the touches that will probably never get into the history books. It was my distinct pleasure to be elected secretary of the law club for next year. Very interesting things are in store. We are tentatively planning to get up a tournament of intercollegiate debating with the other law colleges here in the District, and perhaps with some a little more distant.

"Dead, by Gad, every one of them!" Then, did he call an ambulance or a doctor? No, he exclaimed, "I must get a picture of this!"

The adjournment of Congress was characteristically colorful, as all of them are. (This makes three for me.) But times are changing.

Heretofore, it has been the capitol police that really got things going in fine style. But this year, the captain issued orders to the restaurants in the capitol not to sell liquor of any description to the police until after midnight. Even the congressmen remarked upon how tame this celebration was compared with some others that we have had. Early in the afternoon, the congressmen started coming in prepared to sit to the bitter end. All of them practically made their train and plane reservations, and accordingly brought their luggage down with them and stacked it in the halls. The place closely resembled a baggage depot. Then, it came time for the discussion of an important bill in the House. Upon investigation, it was discovered that the bill had not yet returned from the printers, so a recess was called during which the gentlemen had liquid refreshments and talked baseball or cursed the printer. From my vantage point in the lower hall, I could get a bird's eye view of things as they came and went. One congressman sauntered in and over to the elevator. Another one asked him where he was going. He looked all around and then exclaimed in a stage whisper loud enough for everyone to hear, "I'm going up to the chamber to help steal some more of the people's money. Come on up, it's lots of fun!" Then someone in the Senate

pulled a filibuster that bade fair to last for a week! Things went wild in the House, and some of the things that were said about senators were most amazing, but things broke up in the Senate and they were all out around ten. . . .

In the senator's office, we continue to be one big delightful family. . . . Not long ago as I was laboring over the files, one of the girls flitted past and gave my suspenders a resounding flip. Without thinking, I rewarded her with a howl that rattled the windows. Out in the other room, interviewing the secretary, were some important people from New York. The secretary realized that she had either to explain or to set their minds at ease. The thought of explaining any of the antics of that crowd made her shudder, so she merely called, "Woody, take that dog out for some air!"

At another time, we were cleaning out the closet when we came upon an old brief case lying in a dark corner covered with inches of dust. Upon examination, it turned out to be the brief case that the senator took with him on his trip to the Philippines and the Orient some four years ago. We opened it and sorted the stuff, saving what should have been filed four years ago and discarding the rest. In the very bottom, we found a little package with strange Egyptian writing all over it. Then the secretary remembered that the senator had cautioned no one to touch the brief case, and this must be the reason. The gentlemen in the crowd insisted that it wouldn't be cricket to open the package, but the girls were fairly being eaten alive with curiosity. When he saw that he could do nothing to prevent them, the clerk curtly announced that he was going for lunch and that he hoped that, whatever it was in the package, it would kill them. The venture smacked of adventure, so I stayed. Upon opening the box, we first pulled out a long paper of instructions apparently, these also being written in Egyptian. Together we pored over them to make out a translation. The only Egyptian that any of us knew was what one ordinarily picks up on the streets of an American city, but by and by we concluded that water at last was called for. Then we opened the little packages wrapped in tinfoil to discover strange smelling black cubes! "Opium," someone exclaimed. We all dashed into the small lavatory opening off the office to see what would happen to the stuff when

one of the tablets was dissolved in a glass of water. The water immediately took on an amber color and began to give off a strange fragrance! Just then someone knocked on the door of the office, and one of the girls dashed out to answer it. It turned out to be a group of the personal friends of the senator here in Washington on a visit. He had told them to drop in at the office and meet the gang. They could hear us talking excitedly so it was of no use for the girl to say she was there alone. So she carefully opened the door and slid into the crowded lavatory to explain the predicament we were in. There was only one practical solution and that we did! Opening the door, very casually, we filed out one by one doing our best to put over the impression that it was nothing unusual for the entire office force to repair to the lavatory for a tête-à-tête! Then we confused the visitors with conversation and hoped they'd forget. Once they were gone, back we dashed to examine the experiment. The tablet had dissolved and the substance in the glass was now a murky black color with little beads of oil floating on the surface. The next test was to discover the reaction upon the human anatomy, so we drew straws to see who should taste it. The unfortunate young lady discovered that it was nothing more nor less than coffee, very stale coffee, and unsweetened. What a let down! But we could still give the clerk the scare of his life! Accordingly, we watched for him, and as soon as we spied him sauntering across the park, we took the ominous little box and dropped it near the door. Each one of us took one of the little black cubes and then draped ourselves over the furniture in attitudes that impressed us as being expressive of violent death. We even shuddered at the sight of each other. The clerk, taking his cues excellently, paused at the door, picked up the box, noting it was empty, smelled it and then surveyed the room again, exclaiming, "Dead, by Gad, every one of them!" Then, did he call an ambulance or a doctor? No, he exclaimed, "I must get a picture of this!" While he was in the next room preparing his camera, the young lady who had frozen herself in a death writhe across the desk concluded that her lovely figure would not be displayed to good advantage there and accordingly picked herself off the desk and draped gracefully over the dictio-

nary stand. Our little farce ended in a fiasco when the clerk and the stenog got into a heated argument about whether or not it was fair for a corpse to move! If the drama of life were not everywhere so absorbing as it is that office now and then, there would be no need for the writers of thrill stories!

. . .

Sincerely,
Woodruff

Dear Lorene, September 13, 1938

. . .

My personal problem is one that I fear will never be completely solved. Four, no, five years ago when I first went down to Occidental, I met a charming young lady by the name of Floy. The first glance rather put me out to the count and I immediately made inquiries as to any attachments the girl might have. A friend offered the information that she was engaged to be married and happily so. As chance would have it we had four classes together, lived only two miles apart, entered the same activities at college, and spent much of our time together. However, it was merely a grand friendship—it could never be anything more because our worlds were so widely separated. Her romance went on the rocks in the course of a year and a half. This last summer, shortly after I arrived in California, she and I discovered that we were in love. Our greatest difference is religion. She doesn't belong to any church, but takes an active part in a seminar discussion group who have studied the scriptures intently and arrived at the novel conclusion that Christ was a mere man in every regard, that there was no pre-existence, and no life after death, that the apostles undoubtedly stole the body and concocted the story of the resurrection to comfort them in their disappointment. Mormonism means more to me than it ever has in the past. How we are ever going to reach a compromise is a deep dark mystery. . . .

An interesting experience was a dinner with Communists of the "There comes a revolution and the working man will eat cake" variety. The communists denounce the prejudice of the capitalists when in truth they are even more prejudiced. They swear by statistics without bothering to remember who compiled the statistics or

what was included or left out, and that reminds me of a quotation from Mark Twain to the effect that there are two kinds of lies—Damned lies, and statistics. My main criticism of the communists that I met is that they are too idealistic.

... A pal from law school just dropped in to impress upon me the injustice of it all. He's the happy go lucky sort without a care in the world. Because Criminal Law was taught exclusively on Saturday mornings, this chap managed to get in for the second hour half a dozen times or so during the year and came off with a grade of 88. Poor me, dumb bunny that I am, studied like a trouper, rose religiously every Saturday and managed to pull down an 89!

Regards to the family.
Sincerely,
Woodruff

2222 Eye St. N,W,
Washington, D.C.

Dear Mrs. Smith, December 3, 1939

Whew! How strange it seems! And I suppose the next question should be, "How is Mr. Smith?" ...

Things here have happened breathlessly since last I wrote to you, so breathlessly in fact, that whenever something was through happening, it took all my time resting up for something else. I've had three different jobs, one for a whisky firm. (I was not a taster.) Last summer, I assisted one of the profs at law school in the task of writing a case book on labor law. It was an Herculean task taking about sixteen hours per day of every day including Sundays and holidays. Consequently, I managed to get home about two nights per week just long enough to change clothes and then dash back out. That job lasted until school started. When the book was finished I rated a line in the preface that may come in handy when I start looking for a job next spring.

At the moment I'm working for the House Committee investigating the National Labor Relations Board. It is by far the most interesting work I have ever done, and there is no limit to its possibilities, except a time limit. Our investigation has to be completed by the first of February. And what

experience. One learns to smell out a clue from among a thousand sheets of paper. Last evening at the District Bar Association dinner, the assistant general counsel for the board had a table next to ours, which gave us a chance to get acquainted. He's a likeable chap but there were members of his staff who glowered at us occasionally. Already the newspaper columnists have torn into us. You might watch the papers there for editorials on the committee. I have to confess that I was the cause of one of the tirades. Some editor in Philadelphia came out with a lingo about the committee hiring a raft of Georgetown seniors to evaluate the work of one of the most capable of the government bureaus. It so happens that I am the only law student on the committee; the others are all attorneys, several of them are attorneys of some standing.

At law school, I was selected to be on the Law Journal staff. That is an experience in itself. It is difficult to imagine that one small law journal should present such a tremendous task. We have a staff meeting every week, at which someone loses his sense of humor and a miniature war gets started. At the moment a smart little fellow of pinkish outlook is goading me for what he considers my capitalistic tendencies. It does help one to keep awake for the tedious two-hour session, however. One of my articles has been printed thus far, and I have another to come out in the January issue, if and when I finally get it finished. I've been at the library all afternoon working on it. However, the more difficult task is getting other fellows to work on the journal.

...

Last spring, my political friends in the law fraternity started the machine going and presto, I was elected to the presidency. ...

It's an excellent gang of fellows, quite the best legal fraternity in the country and ours is the largest and most active chapter in the fraternity. There's only one difficulty. The fraternity over the years has acquired the reputation of being able to throw beer parties that have no equal. This year, I was on the phone here at the apartment making final arrangements for the first beer party of the season, when one of the roommates brought in a couple of missionaries on their way home from Europe. You can imagine his mortification! ...

And this reminds me that there has been a change of roommates since last I wrote to you. ... The one roommate who is not a Utahn is a little chap from Pennsylvania. He's most likeable, brilliant, energetic, athletic, and thinks very deeply. Since he and I are the only ones in the apartment who don't have girl friends, we've knocked around quite a bit together. The association has proved very invigorating for me. He has very little of a positive religion and is deeply skeptical of mine, which has added incentive to my resolution to live my religion in such a way that it will be convincing both to me and to my associates. ...

This has been very choppy and not very communicative, but even so there are fifty pages of equity to read ere sleep overtakes us.

Forgive this long delay, my regards to Mr. Smith and to the family,
Sincerely,
Woody

In 1940 Woody graduated at the top of his class, worked briefly for the Reconstruction Finance Corporation and the National Association of Manufacturers, and then for Uncle Sam as a lawyer buck private. After a colorful military career (told inimitably in the biographical sketch appended to *Criminals Are Stupid: A Tribute to Woody Deem* [J Reuben Clark Law School, 1990]) Woody returned to Washington to work for Ernest Wilkinson's law firm.

At 33 he married Norrie Dolvin, a pretty red-haired Marine sergeant, and they moved to California, where he served as a prosecutor for 22 years. He and Norrie adopted eight children (the agency would not give them more); their swimming pool was open to the neighborhood. He served as bishop four years, Scoutmaster five, counselor in the stake presidency nine. And during a two-year break in his career as a prosecutor, he taught at the Church College of Hawaii—Chinese and drama!

In 1973, almost 60, he accepted the challenge to teach at the new BYU Law School. As one of the original faculty he helped give the school its character and contributed to its growing excellence. There was no one more devoted to the importance of practical training and no one more committed to help students individually.

The good humor, keenness, and optimism that show through in his letters of college days stayed with him to the end.



The

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Season

Aileen H. Clyde

Second Counselor in the General Relief Society Presidency
of The Church of Jesus Christ of Latter-day Saints

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This address was given at the J. Reuben Clark Law School Fireside, November 12, 1995.

I want to express my need for the spirit to attend us since I want to speak to you informally about personal and scriptural reflections on that great gift, the gift of the Spirit, in our lives. By its power we can be unified collectively, and by its power we can be magnified individually.

When Elaine L. Jack was called as general Relief Society president in April 1990 and Chieko Okazaki and I joined her as counselors, our first need was to find spiritual unity as we combined our diverse experiences in order to represent, for a time, the women of the Church.

President Jack was born in the shadow of the Cardston Temple, grew up in Canada, and then came to the University of Utah. She married her husband Joe, and they went east where he did his training as a surgeon. After living in New York and Alaska, they settled in Salt Lake City.

President Okazaki was born of Japanese parents in Hawaii. She converted from Buddhism. No member of her family has since joined the Church. She married Ed Okazaki (who died suddenly in 1992), but he was not a member of the Church then. She had faith that because he was such a good man, the Spirit would work on him. Within a year after marriage, he did join the Church.

I was born and reared in Springville, Utah. My husband, Hal, and I met there in high school. I still go to some effort (by commuting to and from Salt Lake City) to sleep there. I studied and taught at BYU. While I've made many forays away from Utah County, I know its furrows, valleys, hillsides, and cirques by what they feel like to the feet and what they conjure in the heart.

For Chieko and me, these Relief Society calls came on a Friday afternoon. We were in General Conference Saturday and Sunday listening and seeking. When those meetings ended, President Jack asked us if we could meet at 8 a.m. the next morning with just-released Barbara Winder and her counselors, Joy Evans and JoAnn Doxey. Sister Winder had been called with her husband to the Czechoslovakian mission and her time with us was limited to the next morning. Thus it was that in this matter, as in so many others, the time to get life's tasks in order and to get ready was past. A transition occurred and an

intense new focus crowded out matters that a week before had seemed compelling.

For me the great blessing was our charge to seek God's will for the women of the Church. Surely, through Relief Society, women could accomplish together, in the spirit of charity, much more than any of us could ever accomplish alone. I felt a new assurance in the strength of our sisterhood as daughters of God. I knew again that righteous efforts of each one are essential to building Zion. I thought again of how many daughters there are and have been who were meant to be enveloped in God's love. I considered again the unique qualities of each of his children and the unifying gift he had prepared for us as he offered the gift of his Spirit.

President Jack suggested in our first week together a time of seclusion where we could come to better know one another. We spent a day studying scriptures to gain the clarity we needed to articulate the purposes and goals of Relief Society in the new decade before us. President Jack began the readings that day by opening the Book of Mormon. In Jacob 4:3 she read:

For the Spirit speaketh the truth and lieth not. Wherefore, it speaketh of things as they really are, and of things as they really will be; wherefore, these things are manifested unto us plainly, for the salvation of our souls.

As she finished reading, I looked over at Chieko and saw tears in her eyes. There were some in mine too. All three of us had chosen that scripture among the ones we had planned to share. That convergence helped us resolve to understand present realities in gospel light, to use that understanding as we taught hope for the future and faith in Christ. We asked, What are the circumstances surrounding our sisters' lives? How can Relief Society include and bless each one amidst their widely varying conditions of life and status? That direction from Jacob 4 became our hallmark as we began to serve our sisters in the Lord's organization for women.

Since those days in 1990, we've heard from women all over the Church that what they want most from their Relief

Society organization is spiritual strength. Such expressed desires have motivated our quest to understand what they mean. What is spiritual experience? What may stanch it and what gives it nurture?

We've all had communal experience that touched us spiritually at hearing a sincere prayer or responding to hymns and other beautiful music. I've seen a Thai young woman accompany her sacrament meeting congregation on a portable keyboard as they struggled with the western tones and words of "O Little Town of Bethlehem" with electric spiritual effect. In Recife, Brazil, a chorus of Relief Society sisters who sang "Where Can I Turn For Peace?" had memorized the words in English. Their efforts brought the most wonderful relief from my days' long angst at not understanding Portuguese, and their countenances glowed with charity.

But even when we feel we have shared spiritual experience, individual responses are uniquely our own.

And it came to pass when they heard this voice, and beheld that it was not a voice of thunder, neither was it a voice of great tumultuous noise, but behold, it was a still voice of perfect mildness, as if it had been a whisper, and it did pierce even to the very soul— [Helaman 5:30]

Such getting to the soul happens to me unexpectedly at times. But I know because of the scriptures what it means when the Spirit speaks to my soul and pierces in a way I cannot mistake it. It is this voice that brings peace and puts the joy in rejoicing.

Listen to Parley P. Pratt's eloquent description of the gift of the Holy Spirit.

*It inspires, develops, cultivates, and matures all the fine-toned sympathies, joys, tastes, kindred feelings, and affections of our nature. It inspires virtue, kindness, goodness, tenderness, gentleness, and charity. It develops beauty of person, form and features. It tends to health, vigor, animation and social feeling. It . . . invigorates all the faculties of the physical and intellectual [person]. [Parley P. Pratt, *Key to Theology*, 4th ed., 96-97 as quoted in James E. Talmage, *Articles of Faith*, 488]*

My spiritual understandings were greatly influenced by my mother, who joined the

Church as an adult. She was an only and high-achieving daughter of a Presbyterian family. Her acquaintance with the Bible through her early church life was enhanced when she majored in English in college and studied the Bible as literature. She was teaching English and French in a high school when she met my father, who was also on the faculty. His wife had died in the 1918 flu epidemic, and he was left with a baby son.

As their friendship developed, they both were aware that her not being a Mormon was a major matter. Although her parents had lived among Mormons, they had deeply held biases about Mormon theology and about temple marriage and eternal covenants. Mother knew her understanding of the restored gospel came mainly by hearsay, so she decided to “take instruction.”

There were no local missionaries to assist with such a task; member referrals were unknown then in local Utah communities. My father’s father, as a bishop for 25 years, had done such instruction from time to time. But my father hoped for objectivity, so he sought out another bishop who lived some miles away. This bishop handed her the Book of Mormon and said, “Go and read this, and when you have read it come back.”

Mother received the book on a Thursday morning and was back to talk with the bishop by Saturday afternoon. As she went in he said, “Sister, I said that you should read the whole book!” She said, “I have read the whole book!”

Probably because of her background as a reader and with her appreciation of biblical truths, as she read she received a spiritual conviction that couldn’t be denied. She said in those brief days she found many answers about her relationship with God and Jesus Christ. The truths left an indelible impression that she felt came from the Holy Spirit.

Her newly found knowledge directly conflicted with her beloved parents, who at first disowned her at the time of her baptism and subsequent temple marriage. This heart-rending yet elevating time helped her form the methods she used with her children—depending on scripture for life-guiding principles.

My mother read one verse often to me. It helped establish my basic belief in God’s fairness. It contrasts with biased priestcraft practices clearly described in verses preceding it.

We are taught that the Lord has given a commandment that all should have charity. Without charity we have nothing. It is explained to us that the iniquities and evils of this world are murder, lying, stealing, envying, having malice and whoredoms. The list is explicit. Then in 2 Nephi 26:33 we are told:

For none of these iniquities come of the Lord; for he doeth that which is good among the children of men; and he doeth nothing save it be plain unto the children of men; and he inviteth them all to come unto him and partake of his goodness; and he denieth none that come unto him, black and white, bond and free, male and female; and he remembereth the heathen; and all are alike unto God, both Jew and Gentile.

Societies generally have neither understood nor practiced the concepts of that scripture. Two examples demonstrate how women particularly have suffered from this lack:

My South America assignment, which included Arequipa, Peru, coincided with the discovery in the high mountains near there of the frozen remains of what *Time* and *Newsweek* called, “an ice maiden.” She was, it is supposed, an Inca princess about 12 to 14 years old. Because of the way she was frozen, her body fluids, her hair and her skin are all intact and remarkably well preserved. Consequently, scientists came from around the world to study this startling find.

I was struck that there had been a people as sophisticated, disciplined, and diligent as the Incas. Yet, in their search for spiritual strength, they would offer one of their most precious holdings to appease the god of the mountain, whom they feared and worshiped. Without the teachings of Christ, without knowledge of what sacrifice is or is not to be, things can be done that not only are misguided but can be an awful waste.

As I was contemplating the Inca princess, I remembered a story in Judges, chapter 11. It reflects another time in a different culture, and it too suggests waste masquerading as sacrifice.

Jephtha was born in a village to a harlot. In due time his father had other wives and

children and Jephtha was driven out of that village because he lacked status. He became strong physically and must have been remarkable, maybe somewhat like Samson, because he was well known. When war with the Ammonites was imminent, the villagers sent for Jephtha and asked him to lead their armies. Jephtha accepted the challenge. He must have had some teachings about God because as we read in Judges 11:30-31:

And Jephtha vowed a vow unto the Lord, and said, If thou shalt without fail deliver the children of Ammon into my hands,

Then it shall be, that whatsoever cometh forth of the doors of my house to meet me, when I return in peace from the children of Ammon, shall surely be the Lord’s, and I will offer it up for a burnt offering.

Now I don’t know who Jephtha thought might come from his house when he returned in peace from fighting the children of Ammon. I don’t know why he thought that in order for God to support him and to strengthen him and to be with him that he needed to make such a brash vow. But the record says he did.

And Jephtha came to Mizpeh unto his house, and behold, his daughter came out to meet him with timbrels and with dances: and she was his only child; beside her he had neither son nor daughter.

And it came to pass, when he saw her, that he rent his clothes, and said, Alas, my daughter! thou has brought me very low, and thou art one of them that trouble me: for I have opened my mouth unto the Lord, and I cannot go back.

And she said unto him, my father, if thou hast opened thy mouth unto the Lord, do to me according to that which hath proceeded out of thy mouth; forasmuch as the Lord hath taken vengeance for thee of thine enemies, even of the children of Ammon.

And she said unto her father, Let this thing be done for me: let me alone two months that I may go up and down upon the mountains, and bewail my virginity, I and my fellows [sisters].

And he said, Go. And he sent her away for two months: and she went with her companions, and bewailed her virginity upon the mountains.

And it came to pass at the end of two months, that she returned unto her father, who did with her according to his vow which he had

vowed: and she knew no man. And it was a custom in Israel,

That the daughters of Israel went yearly to lament the daughter of Jephtha the Gileadite four days in a year. [Judges 11:34-40]

For me, the story cautions that if we know God, we know what he asks in terms of sacrifice, and we know he would not require us to sacrifice another. I also find in this story an early account of the importance

ordinance coming to us through priesthood power and is also administered to us, men and women, exactly the same way.

As we go forward in our spiritual lives and are able to go to the temple to receive endowments and make eternal covenants, we find that men and women do that in exactly the same way. This equity is evidence of God's love for us regardless of where we are or of our gender, status, stage of education, or nationality. He wants us all

leaders together, inviting them to listen to one another, to understand the resource they can be to each other. In their culture that is difficult. It has not been practiced. They have had other ways of communicating. It is hard for them to change, just as our ways are hard for us to change. It is important for us to comprehend that the culture of Christ is the only culture we aspire to live. In that culture, we love and respect one another; we share perspectives and listen to one another. We

----- Our best season depends on our efforts to build on that foundation. -----

of sisterhood since that's where the daughter turned as she prepared for her ordeal.

In 3 Nephi 9:19-20 we read:

And ye shall offer up unto me no more the shedding of blood; yea, your sacrifices and your burnt offerings shall be done away, for I will accept none of your sacrifices and your burnt offerings.

And ye shall offer for a sacrifice unto me a broken heart and a contrite spirit. And whoso cometh unto me with a broken heart and a contrite spirit, him [or her] will I baptize with fire and with the Holy Ghost.

Though maidens are no longer sacrificed, I think we, too, are sometimes involved in making "sacrifices" that the Lord may not ask for, wasting things that if we really understood the Lord, we would not waste.

Our God invites us to make life-giving alliances with him. Think of the covenants we have made. I believe the first time we had Christ's teachings pierce our souls was in our premortal existence when we understood the options available to us. We understood the plans that had been presented, and we took the initiative to either stand or raise our hand or in some other way say, I will follow Christ. If we had not done that we would not be here. That was the first great commitment and covenant we made with Christ—that we would follow him.

Then we come here and are taught the gospel and have the opportunity for baptism. The saving ordinances of the gospel that lead us to salvation and exaltation come to men and to women, to boys and to girls in exactly the same way. For example, we are baptized the same way. The other covenant that we can make regularly to remember Christ is to partake of the sacrament. That covenant is an

to have those blessings and makes it possible for each of us to have them.

One purpose of a recent assignment I had in South America was to assess in a brief time and a large area, "things as they really are" (Jacob 4:13). I faced cities as huge as Santiago, Buenos Aires, Rio de Janeiro, São Paulo, and even Fortaleza and Recife (which though somewhat smaller in Brazil, are large cities to a person who grew up in Springville, Utah). I knew that I could only teach and gain valid perceptions through the Spirit.

On arriving in Santiago, I learned that in Chile, Argentina, and Uruguay there have been 50,000 baptisms in the past year. In Brazil, one country, there were 45,000 baptisms in one calendar year. These people have heard the Spirit. They know what it's like. They have been converted by the Spirit. The spiritual promise is explained in 3 Nephi 9:14:

Yea, verily I say unto you, if ye will come unto me ye shall have eternal life. Behold, mine arm of mercy is extended towards you, and whosoever will come, him [or her] will I receive; and blessed are those who come unto me.

And yet, having come unto Christ and having made the baptismal covenant, members of the Church in South America are struggling, as we struggle, to more fully understand their part in that great commitment. They are learning, as we are, how to serve in Christ's Church, how to combine their abilities to meet the needs they see all around them—in the Church and in their societies. They struggle to learn how to counsel together. My assignment included talking to priesthood and Relief Society

are here to love and serve one another as Christ commanded, not to restrict, disparage, or discount one another.

President Gordon B. Hinckley said during April 1995 Conference: "Your obligation is as serious in your sphere of responsibility as is my obligation in my sphere" (*Ensign*, May 1995, 71). That statement enormously dignifies each of us in our efforts. The members in South America find that almost impossible to believe. They have such a sense of adoration for President Hinckley and all our priesthood leaders. It is difficult for them to believe in the worth of their souls and how necessary they are to building God's kingdom. That concept is difficult for us, too. It is interesting to look at another culture where differences seem apparent. It is easier to interpret them there. It is harder to see them among us. Yet, we too struggle to combine our abilities, to counsel together, to learn how to do things together—which is much better than if we try to act alone.

I saw a wariness in South America. I am sure it exists here—wariness about working together, men and women, whether at home or at Church or in our society generally. We need to recognize that Christ, through his prophets, through his apostles, has given us strong counsel about valuing one another, about recognizing the important part each one can play in building his kingdom.

There are many places in the scriptures we might look, but 1 Corinthians 12 teaches clearly the strength of diversity through unity of the spirit. Applying these truths would eliminate this wariness and bias.

Now there are diversities of gifts, but the same Spirit,

And there are differences of administrations, but the same Lord.

And there are diversities of operations, but it is the same God which worketh all in all.

But the manifestation of the Spirit is given to every man to profit withall. . .

And if the ear shall say, Because I am not the eye, I am not of the body; is it therefore not of the body?

If the whole body were an eye, where were the hearing? If the whole were hearing, where were the smelling? . . .

And the eye cannot say unto the hand, I have no need of thee: nor again the head to the feet, I have no need of you.

Nay, much more those members of the body, which seem to be more feeble, are necessary: . . .

That there should be no schism in the body; but that the members should have the same care one for another.

And whether one member suffer, all the members suffer with it; or one member be honoured, all the members rejoice with it.

Now ye are the body of Christ, and members in particular. [1 Corinthians 12: 4-7; 16-17; 21-22; 25-27]

At a general Relief Society meeting on September 23, 1995 President Hinckley spoke to the women of the Church. I was moved by his breadth of understanding and his expression. It was heartening and reassuring to hear his acute awareness of the challenges women face. He said something to the women that surprised me. I am still searching for the full meaning. He said, “I believe this is the best season for women in all the history of the world. In opportunities for education, for the training of your hands and minds, there has never before been a time when doors were so widely opened to you as they are today” (*Ensign*, Nov. 1995, 99). And he said it with a benediction, with a blessing. It sounded like he gloried in that truth and that he expected us to glory in it. We all need to search for its meaning to us.

I believe the opening of “doors” is best understood as we recognize God’s perfect equity in providing covenants essential to men and women in exactly the same way. The “doors” are opened by the restored gospel of Christ.

Women have had difficulties because of their gender for reasons that most don’t entirely understand. It was late in the 19th century before women even in the United States could fully matriculate at universities. Earlier in that century, it was sometimes possible for women to attend a college or a university, but rarely were women matriculated. Little by little those doors have opened and now many don’t even know there was a time when they were closed. I was born in 1926, and I remember my Mormon grandmother and my Presbyterian grandmother taking me aside on separate occasions and each telling me how fortunate I was to be born in a time when women could vote. Their pronouncement had little affect on me as a child, but it has become more important to me as I measure our progress today.

It seems to me that we should carefully and prayerfully look through the doors the prophet says are opening. We can each decide how those doors can be useful to us and equip us, not so much for the things the world expects, but to make us more constructive with one another. Those opportunities can help us be more able to do the things the Lord would have us do by better qualifying us to receive guidance from the Spirit—to be the disciples of Christ that we deserve to be.

Alma 9:26 is one of the most beautiful verses in scripture. I have many favorites, but I turn to this one often. I find it lifts my soul and particularly helps me sense what coming to Christ is about.

And not many days hence the Son of God shall come in his glory; and his glory shall be the glory of the Only Begotten of the Father, full of grace, equity, and truth, full of patience, mercy, and long-suffering, quick to hear the cries of

his people and to answer their prayers. [Alma 9:26]

It seems to me that of all that comes to us by the Spirit—the most important is to know truth and know how to be equitable and merciful, to accept the blessings of Christ’s grace when we have done all that we can do. Then we, too, could respond as Christ would to bring peace, healing, happiness, and joy into the lives of our brothers and sisters.

And now . . . remember, remember that it is upon the rock of our Redeemer, who is Christ, the Son of God, that ye must build your foundation; that when the devil shall send forth his mighty winds, yea, his shafts in the whirlwind, yea, when all his hail and his mighty storm shall beat upon you, it shall have no power over you to drag you down to the gulf of misery and endless wo, because of the rock upon which ye are built, which is a sure foundation, a foundation whereon if men [and women] build they cannot fall. [Helaman 5:12]

Our best season depends on our efforts to build on that foundation. President Howard W. Hunter advised us to pay ever more attention to the life and teachings of Jesus Christ. Living those teachings by the Spirit is our source of strength.

I am grateful to the Lord for his blessings in my life. It is wonderful to work with President Jack and President Okazaki. I have been blessed with a faithful, strong, supportive husband, three sons, three daughters-in-law, six granddaughters, and five grandsons. That is a joyful balance. I approach the Thanksgiving season with a full heart and the knowledge that he loves us and we are his children. I know that through him we may have eternal life. I pray that we all may have peace in our souls as we carry out our responsibilities and fulfill our intentions. I pray that we will remember that this is a great time in history for women and for men because of the restored gospel. I pray you might have that peace which comes through knowing that voice of perfect mildness. I say this in the name of Jesus Christ. Amen.



T H E

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EDWARD L. KIMBALL
B E H I N D

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T I E



The following are some excerpts from a delightful discussion the *Clark Memorandum* had with Ed Kimball after his recent retirement.

Photography by John Snyder

Others on the faculty have come and gone, but like the poor, I have always been with you. But don't blame me; it is the fault of four deans who have been entirely too polite to tell me to go. Besides, tenure is more powerful than politeness.

The Man Behind the Bow Tie

I am by nature a bit of a stuffed shirt. I always wore a tie to class—in recent years always a bow tie, joining the good company of Gerry Williams and J. Reuben Clark. As a member of the Diversity Committee, I wore a promotional tee-shirt to class, but a bow tie as well. But I am not without humor. I collect stories of criminal stupidity and of chutzpa among litigants, like the prisoner who sued Utah for the insect bites he suffered while hiding out during a brief escape. And I once placed a “For Sale” placard on Bruce Hafen’s car when he was dean.

My thrift came from my mother, though I may have carried the virtue to excess. I once owned two cars, but at least I took pride in the disreputable condition of the second car. More recently I have ridden a decrepit little motor scooter as my “second car.” It does my heart good to fill up the tank with a gallon of gas every once in a while. I have the habit of fishing paper out of my waste basket to jot a note on. And I have a box of big used envelopes that I can draw on in case I should ever need a big used envelope.

My favorite animal is the orangutan. Cows come a close second.

I am a compulsive proofreader. Over the years I have nearly every year sent to the authors of the casebooks I use a list of errata in their books.

Whatever may appear, I am basically a shy person. I find it difficult to meet new people. My idea of hell is an endless cocktail party, standing around with a drink in my hand, making small talk with people I don't know.

Beginnings at the Law School

In September 1971 I was teaching at the University of Wisconsin. I received an invitation to meet in Salt Lake City with a committee laying plans for a new law school at BYU. I was very free with my advice that BYU did not need a law school,

since there were already plenty of universities where Latter-day Saints could obtain a fine legal education. It would be an expensive proposition, with acquisition and upkeep of a building, faculty, and library facilities. Further, I thought it would be difficult to gather the kind of law faculty they would want at a university that took religion seriously.

In the unlikely case they were looking at me as a possible dean, they would have gotten the clear impression that I considered law school administration an assignment about as welcome as a root canal. They thanked me politely for coming but grandly disregarded my advice, going ahead with the creation of a new law school.

If they were determined to have a law school, my candidate for dean was Dallin Oaks of the University of Chicago. But they disregarded my advice on that, too—although they did manage to find another use for his talents. For dean they chose young Rex Lee and assigned him to pull off an organizational miracle.

I got a call from this Rex Lee person, who wanted to meet with me. I discouraged him, saying that I was really not interested in moving from Wisconsin, where I had been happy teaching for 11 years, after five years at Montana. But he was persistent, saying he was going to be traveling to meet other faculty prospects and would like to come get my ideas about what the new school should be like. Who could say, “I won't talk with you,” especially when he showed the good judgment to want my advice?

He proved to be a pleasant enough fellow; we had Arizona ties in common and we even figured out that we were about fourth cousins—and I enjoyed giving free advice. He hoped I would consider teaching at BYU. I had no interest, but wished him well, asking to be kept informed how his difficult assignment was coming along. As I recall, he was on his way to Michigan to talk with Carl Hawkins.

Not one to let go easily, Rex kept in touch and told me who else he was talking

with and his hopes of success. He kept reminding me that the door was open. And meanwhile my wife, Bee, was thinking about the prospect of a move. Our oldest child was about to finish high school, and Bee thought that, although Madison, Wisconsin, was a beautiful place, Utah offered the advantages to our children of church associations and the nearness of family.

As usual, her wishes were crucial to our decision to move. I was caught up in my work and was less concerned with surroundings than she was, particularly as they affected the welfare of the children. In some ways Madison, green and flanked by lakes, was like a garden. The university was a fine one, and I felt valued there. But there were some negative factors, too. The antiwar and racial protests had created tension that was unpleasant. I have sharp memories of the smell of tear gas, the sound of students running to escape it, of being prevented from entering the law school by a cordon of protesters, and of picking up shrapnel from a car bomb that destroyed a university building—and here we were being invited to move to Utahpia.

By spring 1972, I was thinking seriously about coming to BYU, but was wary of signing on as a crew member for a ship that might sink—right off the launching skids. I kept asking, “Who else is committed to coming?” The answer, typical Lee, was always something like, “If you come that'll make two of us.” “What about Carl?” Rex was hopeful but had no commitment. Carl was clearly the most important single person on his list, but there had to be others in the cast. Rex knew he could staff the law school with practitioners, if need be, but he considered it essential to the initial credibility of the school that there be at least a core of teachers whose credentials in law teaching were already established. And there were, at best, few of us.

At length, with some hesitancy, I took the step and said, “We'll come.” I was the first to make that commitment. Carl agreed soon afterward and, with that much secure, Rex said he breathed a great sigh of relief. Now when he was asked, “Who else is coming,” he had a real answer.

Rex assembled his new faculty from all across the country in the fall, about nine



months before the doors would open, to decide such basic things as curriculum, schedule, and grading system. Rex also had to worry about recruiting students and David Lloyd assembled a library.

A new building was coming, but for the first two years we held forth in what had been the St. Francis of Assisi School. We called it St. Reuben's. Faculty offices were the cubicles earlier occupied by the nuns who taught there. Classrooms and part of the gymnasium provided library space, while the rest of the gym was the one large classroom.

The Law School as a Place to Work

Before deciding to come to BYU, I asked a friend about the atmosphere here and received assurance that things were not as bad as often painted. Pressures to conform were there, but the restrictions involved were pretty much the same as I would impose on myself if I were elsewhere. One does not feel particularly oppressed if what he has to do is what he wants to do anyway. At Wisconsin, I was used to an environment where there were fewer explicit rules, but I was aware that the conduct of faculty members there had consequences, too—either for the individual, the law school, or the whole university, dependent as it is on the good will of the legislature.

The BYU Law School is a fine place to teach. Physical facilities and support systems have been excellent. The students are capable; in every class there are some who challenge my views and make me consider questions I've never thought of before. My faculty colleagues have been genuinely friendly.

If I have a complaint, it is about the difficulty of maintaining faculty interaction. People seem so busy. In the early years we sought to create community by holding weekly brown-bag lunches at which one of the faculty would make a presentation. Though we tried repeatedly, a series never managed to survive long. The consequence is that there is less professional sharing than I would have hoped for. It is not lack of friendliness, but lack of friendship. Some faculty have played basketball or run together, and others undoubtedly had social contact away from school, but I have

always been somewhat isolated, in the midst of people I like very much.

Overall, I consider the Law School a success in providing students a high-quality education in a constructive setting. There are some problems, however. Over the years there has been occasional expression by male students that women ought to not study law, particularly not here, where they would occupy seats that might better go to men, who hold the responsibility of being breadwinners in a family. With the increased numbers of women in the school, one hears less of that, though there may well be men who feel that way.

It would be nice to have a law school community where competition was less and where we could see joint learning as the enterprise we share. But we still have felt we needed to use the spur of grades to motivate diligent study. Grades help some of our students gain employment by showing that they are superior academically to others of our students, but ranking injects a sometimes unhealthy rivalry into the atmosphere. The petty hiding of books that has occurred is a sad symptom. In spite of this, I have not joined those who urge pass-fail grading. Competition works. In an ideal world we would not need structure, rewards, or fears to get us to do what we ought. But I know myself well enough to know that those very factors are significant in determining what I will do.

Other Experiences with Law

In Wisconsin I did some prosecution and defense work and spent three years on a special parole board for sex offenders. When I came to BYU, because of my continuing interest in criminal law and procedure, I served on the Utah Board of Pardons from 1979–83, when it was a five-person citizen board. At the time my term ended, board membership became full-time employment for first three and then five members, with an additional three pro tem members available to fill in as needed. I served pro tem for the past seven years (1988–95). The board's work has been interesting, connected with my teaching, and a public service. The pay has improved, too, from \$25 a day when I began.

The board has the unusual character of being functionally a sentencing agency. In

Utah the judge has three choices: probation without incarceration, commitment for the statutory term for the crime of which he was convicted (1–5 years, 1–15 years, or 5 years to life), or commitment for felony one grade less. Within those broad time spans, the board has power to set the actual terms of release time, to parole, and to revoke parole for cause. It is, therefore, a powerful agency.

Some have thought that responsibility for making decisions about years of someone's life would weigh heavily on me, but it never has. I simply use my best judgment, make a decision (or recommendation) and am done with the case. I know I have made mistakes, both in being too lenient or too tough in individual cases, but I do not feel guilt or anxiety about the decisions; I have done the best I can.

The most curious case I participated in was the petition for the posthumous pardon for Joe Hill, the Wobblie organizer who was executed for a robbery-murder way back in 1915.

The most difficult was a petition for commutation of the death sentence of William Andrews in the Hi-Fi murders case. Pierre Selby, in the robbery of a stereo equipment store raped one victim, kicked a ball point pen into the brain of another through his ear, forced some to drink Drano in expectation it would kill, and shot them all, though two survived head wounds. Andrews was sentenced to death along with Selby, though he did not personally kill anyone. He was present, helped with the Drano, and gave his gun to Selby to do the killing, but he did not pull the trigger. The outcry was that Andrews had not killed anyone and was to be executed in large part because he was black and had not had a fair trial (although the Supreme Court had upheld the conviction).

I was brought in pro tem to sit with Pete Hahn and Vicky Palacios because Paul Boyden was related to a lawyer who had assisted in the prosecution. The hearing was highly publicized, with cameras in the hearing room. We opted to simply give each side four hours to present its case. The case drew international notice and we received stacks of letters and faxes, nearly all generated by Amnesty International. AI is, of course, opposed to any capital punishment,

but reacted with vigor where the condemned man had not killed. AI had not, however, explained to its members how directly Andrews was involved, so the letters were based on incomplete information.

It was a stressful time. Ultimately we rendered a decision denying commutation. I wrote the opinion. Pete Hahn and I signed it. Vicky Palacios dissented, not disputing guilt or fairness of the death sentence in the abstract, but expressing enough concern

what I said is incomplete, is accompanied by a little lie to give the truth a “spin,” or is put in a context where it will be misunderstood. The honest witness or historian is not one who merely presents facts. Even when “facts” can be ascertained with assurance, it is the selection and ordering of them that will communicate a point of view. The best a person can do is to disclose, as far as he is able, his conscious and unconscious prejudices and assumptions.

yet now they get average or below-average grades. I suggest the analogy of the Olympics. At that level of competition even the person who comes in last is a world-class athlete. One has to remember how selective the setting is. I have never been a popular teacher and am probably about average. I console myself with exactly that same analogy.

I urge students to realize that as lawyers they can with surprising ease have an influence on the law. For example, they can

It would be nice to have a law school community where competition was less and where we could see joint learning as the enterprise we share.

that racial bias might have had an effect in the verdict to warrant commutation. The execution did not take place right then, however, because the u.s. Court of Appeals issued a stayed and reviewed the case again.

About two years later a new execution date had been set and Andrews asked for still another commutation hearing. I was asked to participate again, but I declined. Commutation was again denied, this time without dissent (Vicky Palacios having gone to teach law in Oklahoma), and William Andrews was executed.

The case continues to be cited by the Utah NAACP as an example of racial bias. I have been unwilling to accept that characterization, however, since I believe there would have been no hesitation in this state about imposing the death penalty on a Caucasian who had done the same thing. I did not see my responsibility as deciding whether Andrews should be put to death, but only whether he put forth any reason why the legally imposed sentence should not be carried out. And I could find none.

Law Students and Professional Responsibility
I came to teaching ethics late in my career, but I enjoyed it very much. I sharpened my understanding that honesty doesn't mean just not lying. I once thought the oath committing a witness to tell “the truth, the whole truth, and nothing but the truth” was redundant, but I no longer do. I am sure I am not alone in sometimes telling what may be true but still misleading because

However, the lawyer is expected to be honest only with respect to things he knows to be facts. Beyond that, in interpreting evidence of possible facts and everything built thereon, his assigned role is to give a biased view. The only limitation on this sort of distortion is the practical one that he must seem reasonable or lose credibility. Candor about the weaknesses in one's case may lend an air of credibility, but it can be justified only on that ground.

This role assignment is almost incomprehensible to laymen and gives many lawyers trouble. They cannot comfortably see themselves as role players, much as actors in a play who may express views quite at odds with their personal values. The decision is made at the outset—whether to be an actor at all or whether to accept a particular part. The actor cannot rightly decide in mid-play that he will not speak the lines. That would destroy the integrity of the enterprise.

Lawyers do sometimes fudge, refusing to follow the rules when they believe the rules would work serious injustice in a particular case. I would do that, too, in an extreme enough case. But I think it poses a dilemma for one to espouse a profession yet reject those parts of its structure one finds uncomfortable.

Parting Advice

Students often express their dismay at having done less well in law school than they had expected. They are used to excelling,

often become members of influential bar committees, or perhaps Supreme Court advisory committees, simply by letting their interest be known. Volunteers are always in short supply.

Once appointed they should attend regularly, since that gives an important psychological advantage over those who do not. Within the committee, if they volunteer to prepare a draft of a new rule or of a supporting memorandum, they are likely to be given the task. That gives the chance to formulate the issues and the policy alternatives and even the choice of language. The first well-framed proposal has an enormous advantage over other alternatives.

Retirement

I retired at 65 after mulling the idea over a lot. After all, how can the school get along without me?

I want, while I am still healthy, to complete some projects I have neglected. I plan to continue my interest in evidence, perhaps teaching occasionally. A book of Utah evidence law with Ron Boyce of the University of Utah is ready for publication and will need to be kept current. I have several articles on LDS Church history in process. And I am writing an account of Spencer Kimball's 12 years as president of the Church. When I finish that, I mean to write the biography of my grandfather Andrew Kimball. After that it may be time to prepare a trial brief for my defense in the Day of Judgment.



So let it be written

In the last eight years the Chicago-Kent Law Review conducted three faculty productivity surveys to quantitatively and qualitatively identify the 50 most productive law school faculties in the nation. In the study published this year, *BYU* rose out of obscurity to nab slot number 25.¹ Reasons for the rapid rise on this scale are various. “In the early years, the first order of business for faculty was to master courses taught and get the law school organized and running,” explains Associate Dean Clifton Fleming. “These issues haven’t gone away but are no longer emergency matters. Now faculty can turn to other important things, like publishing.”

by Louisa Lyman

ILLUSTRATION BY ROBERT NEUBECKER

Further he says, “The law school as an institution has given enormous encouragement to publishing. Hiring decisions consider potential or proven productivity and this is an issue in promotion and tenure issues as well.”

“The biggest single factor,” offers Kevin Worthen, “is Jim Gordon.” Gordon, now associate academic vice president of the university, publishes frequently in the twenty top journals considered in the survey. He, however, is quick to credit others as well—among them Worthen. “We published in seven of the top 10 journals,” he observes modestly. “A nice recognition.”

It’s not an easy bunch to break into. With few exceptions, the list is limited to general interest law journals edited by students and published by U.S. law schools. Included are names like *Harvard Law Review*, *Yale Law Journal*, *Michigan Law Review*, and *Stanford Law Review*.²

“It’s appropriate to direct output to the scholarly academic audience,” Fleming concedes, “but also appropriate to direct output to the judiciary, practicing bar, and law students.” Publications for these constituencies cover a wide range of materials, including casebooks, published symposia, encyclopedias, anthologies, in-house teaching materials, law reviews—consisting of hundreds published by universities and private organizations—and practitioner-oriented loose-leafs, not to mention the myriad publications in other areas of faculty interest. “The survey,” admits Gordon, “shows only one part of the picture, but in that part our faculty performed very well.”

Getting Started

In fact the BYU law faculty has performed well in all areas of professional writing. How they actually hit on a particular writing topic varies. “It’s different with every

topic. You discuss the topic with colleagues, try it out on students, cultivate it, think about it. “Sometimes the process is quick; sometimes you have to nurture the idea for a long time.” If a topic is truly intriguing to the writer, it will survive over time and generate enough energy “to carry it through the tedium of the midproductivity doldrums when writing becomes long and boring and you’d rather quit,” as Richard Wilkins puts it. Fred Gedicks adds: “Writing is hard enough that you’ve got to do what you’re interested in.”

The freedom to “write on what interests you rather than on what clients are interested in,” according to Wilkins, is “one principal reason to take an academic position.” Worthen agrees, and confides that when he’s writing an article, “I pinch myself and say, ‘Hey, I get paid to do this stuff!’” Practitioners aren’t paid to find out why things are the way they are, asserts

“Religion is a plus. There aren’t many LDS legal scholars and our religion gives us a unique perspective.”

Though the current survey, unlike those in the past, considered faculty-edited, specialty, and interdisciplinary journals, very few of these figure in the final list. Still excluded are the many privately published law journals rife in the country. “Some law reviews aimed at the practicing bar have much larger circulations than the top 20,” asserts Fleming.

Fleming’s criticism—that the survey is limited to such a small list of journals—was one of those leveled at the study when it was first published. Another was that it didn’t allow for the many other types of faculty publishing. Fleming concurs on this last point as well. “The survey is a very narrow measure of productivity and not a particularly appropriate measure for a professional school. Law reviews are heavily skewed to an audience of law professors and their theoretical concerns, and law school constituencies, such as lawyers and judges, are underserved.” The Chicago-Kent response in both cases was that expanding the list to include more journals or to other types of publishing “would [fall] by its weight.”³

project,” purports David Thomas. “Some things I’ve done because I see a need. Others I’ve been assigned by a publisher. For a long time I’d been preoccupied with treatise writing, updating, and new chapters for books. So last summer I got two journal articles out just to see if I could still do it.”

Many publications for Thomas and other faculty members are a side product of their involvement in professional organizations. Dale Whitman currently serves as co-reporter for *Restatement of Mortgage Law*, now in its fifth tentative draft. His last two journal articles grew out of his work on the restatement.

Perhaps the most satisfying reason to write is that a subject “catches your fancy,” as Gordon puts it, and you feel you have something to say. These intriguing topics may relate to his teaching, supreme court cases, discussions with students and faculty, or articles and books he reads. Once he’s interested, Gordon dis-

Jean Burns: “Clients want to get from A to B. In a law review article, you don’t have to get to B. Instead you are free to explore where the law should go—should it go to B or C or D?”

Naturally, writing topics are often closely related to teaching assignments, though, unlike the situation at some universities, that is not a prerequisite. Writing in the areas one teaches has the advantage of improving teaching and assisting the author to become a recognized authority on the subject, however. “It’s easier to get ideas when you know an area well,” observes Gedicks. “Then when you think a new thought, you know it’s new.” Mature scholars, in his view, write the article first and then do research. As a beginning scholar, the opposite is true.

Dale Whitman writes almost exclusively in the areas he teaches. “I’m in a rut,” he confesses. “I’ve been writing on property and real estate for so long it would be an act of temerity to write anything else.”

The imposing bank of filing cabinets in his office is organized by section numbers for the five books he authors and updates for West Publishing. Though this organization facilitates updating his work, he laments, "It is an albatross around my neck." He consults the same files when he prepares an article. Generally 80 percent to 90 percent of the material he needs is in his files, and he has only to decide what position to take before he begins to write.

The supply of topics, says Fleming, is "inexhaustible." His "concern is not what to write about, but how to find time to write on topics out there in abundance." Topics for writing, laments Worthen, are "a two-edged sword. At first you wonder what you'll write about, but the more you write, the more you find to write about. Right now I have 15 ideas. The biggest challenge is to focus." Cheryl Preston, looking at the boxes ranged around her office, agrees. "Papers are just bursting to get out of every one of these. My brother once said he had a paper itching to get out of his head, and I could

incomprehensible titles. These include abortion, same-sex marriage, and feminist issues over more prosaic subjects such as banking, property, and antitrust. Says Burns, "It's easier to get an article on law and religion published now days than one on the ucc." Even if an article deals with a topic commonly treated in a journal, the author must consider that certain points of view are not tolerated. "The most popular journals have a political correctness attitude that makes it hard to get a conservative article on an issue of social morality published," Lynn Wardle believes.

As to why some topics are popular and others not, Burns recalls: "Michael Goldsmith once told me that the student editors favor articles on first-year class subjects, especially constitutional and criminal law. Current hot topics in constitutional law are law and religion and freedom of speech. In criminal law, it's the death penalty."

Though Burns does not advocate picking topics by what is currently popular, authors can't afford to discount the importance of student preference. "Though some articles

interest and pays close attention to the articles similar to those she is working on as well as their footnotes. Footnotes give her names of other journals to consider.

If a faculty member's areas of teaching or writing do not fall precisely into subjects favored by the major journals, writers do better to send their work to special interest journals or link their area of interest to a constitutional or rights issue. "I write Indians and ____ (fill in the blank) articles," Worthen quips. Because Indian law, his main interest, is not at the top of most people's lists, he gives the Indian law a "spin" to more popular areas of law—the federal court jurisdiction in an Indian law context for example, as well as state and local government, international law, equal protection, and same-sex education—meaning all-boy or all-girl schools. "I ask myself, 'How does Indian law inform this issue?'"

Jurisprudential or esoteric topics don't turn Gedicks away from the top journals. With an undergraduate degree in economics and lots of philosophy and literary criticism to his credit, he's armed to take on deconstruction, hermeneutics, postmodernism and a lot of other -tions, -isms and

We shouldn't be embarrassed to talk about it."

—Frederick Mark Gedicks

visualize Athena bursting full-grown from Zeus's brow. The metaphor is different for me. I feel like I'm pregnant, and I won't be comfortable until the baby has arrived."

Getting Published in the Top 20

Naturally, potential publishers influence the choice of topic. Nowhere is this more evident than in the journals considered in the Chicago-Kent survey. The top journals are heavily "oriented to questions of individual rights and not necessarily to getting the work of the world done," criticizes Fleming. "Though their theoretical materials are important, they are not on issues most lawyers deal with." Burns, who Worthen credits with an uncanny ability to psyche out potential law review markets, agrees: "The major journals often concentrate on what I term jurisprudence." Roughly, jurisprudential topics are those related to high profile constitutional issues—many written under the guise of

may be referred to faculty members if the editors have questions," cautions Burns, "students usually have both the first and the last word about what is published."

Gordon concedes that "the students who select the articles for publication in the law reviews tend to be influenced by current fashion, but fashion is only one factor in the process." Other major considerations are well-reasoned development, impressive research, and writing style.

No matter how well an article is written, however, it makes sense to submit it to journals known to publish similar pieces. Says Burns, "You watch which journals are publishing which things. If you run into entire issues or symposia about things you don't understand and you need Fred Gedicks to explain it to you, then you know the journal's not for you." Burns regularly reads the top journals and those in her particular areas of

-ics with aplomb. "I've learned to trust my instincts," he explains. If he has a particular reaction, he knows he should develop it into an article. "Religion is a plus. There aren't many LDS legal scholars and our religion gives us a unique perspective. We shouldn't be embarrassed to talk about it." He doesn't apologize for quoting LDS scripture to make his point, nor for references to LDS history and has placed articles with a Mormon slant in prestigious law reviews. One of his books, *Rhetoric of Church and State*, was published by Duke University.

Like Gedicks, Jack Welch frequently writes on law and religion because he feels that what he says hasn't been said before. For him writing ideas concisely and analytically is an exercise. "I like to try to organize vast amounts of information into coherent patterns or categories. I never feel I've understood a subject until I've written

about it.” And like Worthen, he often links major interests to law—Book of Mormon and law and Biblical law, for example.

Wilkins, Wardle, and Preston all write on constitutional issues that are often in the news. Though Preston’s first published piece after coming to BYU was on a banking issue, feminist issues now vie with her banking interest and place her squarely in the top journals. As she says, “I explore the way gender-specific experiences affect the way we make legal decisions.”

Likewise Wardle’s current writing coincides with the interests of the major journals. He just finished an article on same-sex marriage and has published several pieces on abortion. He feels compelled to write on such subjects, not because they are popular issues and not because he feels his contributions have changed the law, but because the literature is one-sided and he wants to make the community aware of the issues, laws, and contradictions, particularly of the abortion doctrine. Wardle hopes that “someday that doctrine will change. Maybe our students will be instrumental in getting the law corrected.”

Wilkins also addresses the abortion issue, though he is not as optimistic that the law will change. Because of his teaching focus on constitutional law, civil rights, and

simultaneous submissions are being made, and this puts pressure on the staffs to respond quickly if they want a particular piece. “If the article isn’t accepted, by the first 20, I try the next 20 journals on my list,” explains Burns. Whitman prefers to “save the trees” by not sending out an article until he has some assurance that it will be considered. “I call a colleague on the faculty and tell him or her what I have. Usually she or he will offer to hand carry it down to the law review.”

Whichever method is used to get an article into the hands of the law review staffs and accepted for publication, nearly every article produced by the BYU law faculty is eventually accepted and published somewhere, many in the top markets. The difficulties entailed in placing articles in high-profile journals may not seem worth the bother, but Preston feels they are counterbalanced by the sense of community engendered: “I find it much easier to stay involved in research if it relates to broad life experience. You get the sense that you are in a conversation with people.” When she first came to BYU, someone advised her to find a little niche where no one else was writing and fill the need. She has rejected that idea. “It’s much more interesting to work where everyone is building on everyone else.”

addressing client problems, they are serving both the practicing bar and their clients,” says Fleming.

Though Thomas and James Backman have both been published in law reviews, they are currently deeply involved in loose-leaf publishing of particular value to attorneys. “Some years ago, a colleague approached me after a professional meeting to ask if I knew anyone who would update a chapter in a highly regarded property service,” recounts Thomas. “I gave her some names but soon saw that what she wanted was for me to volunteer.” That began a long-term commitment for Thomas and for Backman, who agreed to join him in the effort. What started as one chapter expanded to several over time as well as to other loose-leaves for the same publisher. The key to continued relationships with publishers, observes Backman, “begins with getting a chance” then being “loyal, consistent, and diligent in meeting deadlines.” Most recently Thomas revised an entire property set for a different publisher, with an extremely positive response. Both men comment on the value of collaborating. “It’s nice to work with Dave,” comments Backman. “We encourage each other, share experiences, and often use each other on our projects.”

“I like to try to organize vast amounts of information into coherent

federal courts, his writing usually addresses social issues that find their way into the courts. His controversial topics include voting records and the ideological leanings of justices, the role of advocates in courts of appeal, and American law in international relations. Interestingly enough, one of his latest articles deals with Charles Dickens and modern notions of community and responsibility. Of his writing he asserts, “I don’t write to clarify an arcane little area of interest to academics. I’m more interested in debating broad social issues relevant to society.”

Once an article is completed, the submission process begins. Burns and others send their pieces out in waves to 20 or 25 journals at once, opting for the most prestigious first. Most law reviews expect that

Getting Published Elsewhere

Certainly, the Chicago-Kent rating is valuable to the Law School. “It shows that we have a faculty measured by several important constituencies of law schools and judged to be excellent,” sums up Fleming. “It will catch the attention of students and new faculty we want to recruit and should also benefit our fund-raising efforts.” But its value should not be overestimated to the exclusion of other valuable writing, all of which is of service to the Law School’s constituencies and is rewarding in its own way.

Serving the Bar. One constituency is the practicing bar. “People will often decide how they feel about the legal system based upon personal experiences. When faculty members produce materials to help thoughtful lawyers be more effective in

Whitman also updates titles of particular interest to the bar. His approach is methodical and ongoing. “I get the releases for all of the reporters. With student help I go through each one, eventually snipping all those cases that impact on the subjects of my publications and file them under section and paragraph.” Anything not in his files, he can usually get from WESTLAW.

Fleming’s publications also benefit the bar. Though distanced from the ivory tower, “good lawyers are looking for creative solutions and need good analysis and theory,” he says.

Serving Students. Besides the kinds of materials the BYU law faculty publish in journals, treatises, and loose-leaf services, several also author textbooks and other student-oriented materials. Whitman

authors and updates two case books, two hornbooks, and a black-letter law for West Publishing. Fleming recently published a new text for basic income-tax courses. Wardle is preparing a conflict-of-laws casebook. Even if they don't publish their materials, most faculty members prepare extensive class packets and supplements. These may be collections of rulings and readings, as those Welch does. He prefers to custom make his own materials rather than use others'.

Serving the Judiciary. Judges are another of the law school's constituencies. The assumption is often that judges go to the law reviews or privately published treatises for guidance in making difficult decisions. Wilkins insists this is seldom the case: "Academics write to each other, and judges ignore it. When asked if he consulted prestigious law reviews when he reviewed a case, Justice Scalia greeted the suggestion with a loud guffaw." Wilkins recalls sending a particularly well-reasoned article to a Supreme Court justice who was then dealing with that very issue. He received a gracious thank-you letter in return, but the letter was dated so soon after he had mailed his article that he knew the judge couldn't have read it. Wilkins admits his perspective is nontraditional, but rather

jects, may have more impact in the long run."

Likewise, the research and writing to prepare testimony for the United States House and Senate or for teaching constitutional adjudication to state and federal judges in Utah requires large expenditures of time. "Not measured on a scale of productivity, these efforts may do more to promote ordered and reasoned development of law than any single article," Wilkins said.

Serving the Larger Community. Naturally all the scholarly writing undertaken by law professors at BYU is not law related. Welch has written on such diverse subjects as scriptural poetry and prominent LDS scholars. "I've always loved to write," he confesses. "I published my first article on chiasmus in the *Book of Mormon* when I was a junior at BYU. Since then there has only been one year, my first year at Duke Law School, when I haven't had something published." His writing takes him into "many different worlds," and he "can't imagine doing without any of these dimensions. They all have a way of complementing each other and compelling me to communicate clearly. Really good writing in one area enhances your ability to write well in another," he said. Editor as well as author, his name figures on many

others it is, as Backman says, "a juggling act." "It helps to make commitments so when they approach, they turn into emergencies," Fleming observes. Welch tries to write daily. He carries a laptop, he dictates, he has a home computer and two offices on campus. "I can write wherever there's a phone's not ringing," Burns has staked out a retreat at the University of Utah medical school library near her husband's office. "It's quiet and air-conditioned; I don't know anyone, and I'm not tempted to read the books." Somewhat computer phobic, she writes her first draft longhand and often calls on the "excellent law school secretaries" in preparing the final drafts.

Usually, scholarly writing requires uninterrupted blocks of time, a rare commodity during the school year. "Books, the computer, things on the desk yell out at me," says Backman. He addresses the problem when classes are in session by having an office in the Lee Library and by retreating, when possible, to his cabin. Most prefer to do their intensive writing during the summer. Not only are generous research grants available to support such writing, but computer systems and librarians are less in demand and more available to the faculty. Whitman, who does summer bar-preparation courses around the country, carries his

patterns or categories. I never feel I've understood a subject

than hope his articles reach the judges and have an influence on them, he prefers to be actively involved in the system. He freely admits that "one of the biggest enemies to academic productivity is getting involved in real-life litigation." Nevertheless he will continue to contribute pro bono time to such causes as prolife, profamily, and prochildren movements because that service has, in his view, "a more significant contribution to make than law review articles." A substantial amount of writing goes into defending such causes, though none if it figures in the publishing indexes. Over the past few years he has written briefs or amicus briefs on issues like school prayer, racial discrimination, voting rights, and abortion. "I believe that work, fully as difficult as writing articles on the same sub-

until I've written about it." —*John W. Welch*

FARMS (Foundation for Ancient Research and Mormon Studies) publications, almost all of which he has had a hand in editing. Currently he edits *BYU Studies*.

Beyond the contributions made by the teaching faculty, the law library faculty publishes widely in law librarianship, librarianship generally, and in nonlibrary publications.

Getting the Time

The time required to produce the materials sent out by the Law School is prodigious, but the faculty accept it as their due rather than an annoyance. For some, like Thomas, output is steady throughout the year. For

laptop with him and hooks into WESTLAW in his hotel room or spends his days writing at a local library. Naturally all writing does not occur during the summer, but as Backman explains, "editing, updating, and reading proofs is something that doesn't require the same level of concentration as the initial research and writing. It can be done when school is in session, in the evenings, or on weekends."

Getting Support

Time to write in the summer is generously supported by the Law School through funds it has raised. "Grants are available to almost everyone who submits a proposal,

explains Worthen, currently on the Faculty Research Committee. "At the end of the summer, faculty report on their progress and submit any new publications to the committee."

Grants received elsewhere are also encouraged by the university. Wardle, for example, received a grant from the National Endowment for the Humanities that allowed him to study outside sources. A Fulbright Grant recently allowed Worthen to live, teach, and research Indian issues in Chile.

All faculty are allowed funds for research assistants. Much of what student assistants do is akin to clerking duties at a firm. They find cases, locate laws and regulations, and do research. Generally they do

not do any of the writing for the final products, but their contribution is immeasurable. Some students make such a contribution that their names figure in the final publications. The annual survey of Supreme Court opinions that Wilkins compiles, most recently published by *Hastings Constitutional Law Quarterly*, bears the names of his student aids as well. Similarly several of Welch's law review articles are coauthored by student research assistants and even classes. "I like collaborating with students and colleagues. Each brings different perspectives to the project." He also appreciates the opportunity this gives to critique each other's work.

tronic capabilities, available to every faculty office, which allow access to on-line and CD-ROM databases.

The level of university support, in time, money, human and computer assistance, makes writing at BYU less arduous and more rewarding than at many other schools. "We are liberated in this environment," says Wardle. "There's not a negative competitiveness—'If she gets ahead, I look bad.' Rather it's 'If she gets ahead, we all look better.' There's less turf protection and narrow-minded parochialism here." Preston appreciates this as well. "Just the fact that they let me do this stuff," she says, referring to her current research interests, "is a great show of support. But colleagues also edit for me, allow me to

ered that doing scholarship itself is exciting and enjoyable. It sharpens your thinking, helps you learn, and involves you in a larger dialogue about law."

NOTES

1. The 1989 survey covered the years from 1982 to 1987 (The Executive Board of the *Chicago-Kent Law Review*, *Chicago-Kent Law Review Faculty Scholarship Survey*, 65 CHI.-KENT L. REV. 195 [1989]), and the 1990 study covered 1983–1988 (Janet M. Gumm, *Chicago-Kent Law Review Faculty Scholarship Survey*, 66 CHI.-KENT L. REV. 509 [1990]). BYU did not place in the top fifty in either one. In the recently published survey (Colleen M. Cullen & S. Randall Kalberg, *Chicago-Kent Law Review Faculty Scholarship Survey*, 70 CHI.-KENT L. REV. 1445

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Besides student assistants, faculty may occasionally have reduced teaching loads during the school year to allow more writing time.

Finally, professional research librarians and the extensive library collection make an important contribution. Unlike law schools where faculty researchers are expected to purchase their own sources, a significant portion of the Howard W. Hunter Library collection supports faculty writing. Library reference faculty devote untold hours to aiding faculty by accessing the collection and locating obscure sources. "I joke with Gary Hill," says Worthen, "that I'm going to give him a source he can't find—but so far I haven't succeeded." Fleming also emphasizes the advanced elec-

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Despite the high levels of support, Fleming feels more can still be done to foster a writing faculty. Sabbatical leaves, currently not funded, "would help faculty to approach a bigger project presently beyond our capabilities." Likewise an enlarged travel budget, which is currently "somewhat constrained—particularly concerning international travel—would send more faculty out to cross-fertilize by presenting papers at conferences." Additional faculty slots, "particularly in international areas, would broaden subjects in which faculty do research," says Fleming. Additional funding for administrators to assume some nonscholarly chores now done by faculty and additional funds for librarians and secretarial help would all contribute to productivity.

Getting Paid

The BYU Law School profits from the increasing output of its faculty, but most faculty agree that, ultimately, writing is its own reward.

"When I first went into teaching," confesses master teacher Gordon, "I thought doing scholarship was the price one had to pay to be able to teach. But then I discov-

[1995]), covering the period from 1988 to 1992, however, BYU rated 30TH for number of articles and pages per faculty member in the ten leading law reviews, 21ST in articles and pages per faculty member in the 20 top journals (excluding in-house articles), and 24 in articles and pages in the top 20 journals (including in-house articles). They rated 25TH overall.

2. The survey rates faculty publishing in the top 10 and the top 20 journals. The criteria for the top journals have changed in each survey. In the most recent, the list was determined by counting citations to law reviews in *Shepard's Law Review Citations* and the *Social Sciences Citation Index*. The top twenty, as determined by this method, were *Harvard Law Review*, *Yale Law Journal*, *Michigan Law Review*, *Stanford Law Review*, *Columbia Law Review*, *University of Pennsylvania Law Review*, *University of Chicago Law Review*, *California Law Review*, *Texas Law Review*, *Duke Law Journal*, *Southern California Law Review*, *Cornell Law Review*, *Georgetown Law Journal*, *UCLA Law Review*, *Journal of Legal Studies*, *New York University Law Review*, *Harvard Civil Rights-Civil Liberties Law Review*, *Vanderbilt Law Review*, and *Northwestern University Law Review*. For more detail on the selection of these titles, see Cullen & Kalberg, *supra* note 1.

3. Janet M. Gumm, *Chicago-Kent Law Review Faculty Scholarship Survey*, 66 CHI.-KENT L. REV. 514.



—Lynn Wardle



Jean Burns glances past a miniature winged gargoyle crouched atop her computer and out a long narrow window at the falling flakes. They're not thick yet, but a storm is on the way. She is driving herself today—contrary to an old student rumor

thing. First she graduated magna cum laude and Phi Beta Kappa from Vanderbilt University with a major in philosophy. (“When people ask me, ‘Why philosophy?’ I always answer, ‘For the money.’”) From Vanderbilt she went to the University of Chicago Law School, where she graduated cum laude and Order of the Coif while being on the law review. Next she clerked for Judge Wilbur F. Pell Jr. at the United States Court of Appeals, Seventh Circuit. Finally, before coming to BYU, she became a partner in a prestigious Philadelphia firm. People should be afraid of her! In fact, former student and car-pool driver Kim Littlefield freely admits, “She can scare the holy heck out of you in class.”

When asked about her 10 years at BYU, Jean responds that one of the unexpected pleasures of the job has been carpooling. “I thought the commute between Salt

Driving Mrs. Burns

by Lovisa Lyman

that she can't drive—and she doesn't relish tackling the snow: “I read somewhere that 90 percent of drivers believe they are above average. I freely admit to being in the remaining 10 percent,” she quips. The gargoyle on the computer monitor, one of many in her office, is not just a decoration: “Computers, like dogs, can sense fear,” she explains. “My gargoyles protect me from the evils of the world.” Today, she says, she needs a gargoyle in her car.

It's amazing that Jean Burns would need protection from any-

Lake City and Provo would be the worst part of teaching at BYU. Instead, carpooling with students (a system begun by



Jean's colleague, Michael Goldsmith) has turned the commute into a fun and broadening experience." Jean furnishes the car and the gas, and a student, who also lives in Salt Lake, does the driving. Sometimes it's been just her and the student; other times Michael Goldsmith has commuted with them; and then there has been the steady flow of car-pool "guests."

Jean uses the hour on the way down to prepare for class and the hour on the way home to chat with her student driver about everything and anything. Jean explains that "it's been a wonderful way for me to get to know a few students really well—and also to find out what's really going on at BYU."



The student drivers have varied widely over the years. The first was Solomon, a BYU engineering student and a Shiite Moslem, who had just emigrated from Lebanon and only learned to drive after arriving in the U.S. Solomon was "our most exciting" driver, Jean says. She explains that Michael Goldsmith taught Solomon the right-turn-on-red rule. The problem was that either Michael did not teach or Solomon did not learn the stop-before-you-turn part of the rule. "We'd just go whizzing around corners, barely missing pedestrians a few times. Occasionally

Michael or I would let out a scream. With a Middle Eastern stoicism, Solomon would just say, 'We don't need them' and keep going."

Thereafter Jean stuck with BYU law students for her drivers. Over the years she's carpooled with Matt Lalli (now practicing in California), Robert Booker (now practicing in Salt Lake), and Kim Littlefield (also working in Salt Lake). During the last two years she has carpooled with Marnie Jorgensen, currently a third-year student, and Diana Grant, a second-year student. In fact, as Jean and some of her former carpoolers tell it, the car-pool experience provides valuable lessons in law and life.

Tools of the Trade: The Burnsmobile

The first car used by the car pool was Jean's four-wheel drive Toyota Tercel wagon, better known as the Burnsmobile. Of the car, Matt Lalli says: "[It] made every philosophical statement I ever wanted in an automobile. It was Thoreauvian in its simplicity, had the strength and ambition of Napoleon, and was even more pure than a BYU coed. It was, literally, the golden mean of transportation."

When it came time to buy a new car, Jean disposed of her beloved Tercel in the

only appropriate way: she donated it to the BYU Law School to be auctioned off, with the proceeds going to the library fund.

Evidence: The Car-Pool Privilege

When the car pool began, Jean and Michael created a new evidentiary privilege: the car-pool privilege. This rule, Jean explains, is more sacred than the attorney-client or doctor-patient privilege. It means that anything said in a car pool is confidential and can't leave the car pool. Jean says, "This way we're all free to rant and rave about anything at all. I think we all say things in the car pool that we'd never tell a spouse." Which brings up the next insight.

Negotiations

"Gerry Williams should assign carpooling as part of his negotiations class," Jean chuckles. "My car pool has outlasted some of the riders' marriages and relationships with 'significant others.'" Jean's convinced that the reason is twofold. First, "there's more honesty in the car pool than in most marriages." For instance, if a carpooler doesn't like the music being played or even a fellow rider's cologne, he or she never suffers in silence. Second, Jean laughingly says, "Car pools are probably harder to get and keep than spouses, so people are more willing to negotiate." Over time, rules evolve, like, "Whoever's driving gets to pick the route." Time to leave Salt Lake is roughly determined by when carpoolers' classes begin. Departure time is completely negotiable, depending on the needs of the car-pool members.

In fact, car-pool departure is a great way of escaping a late afternoon meeting. The words "My car pool is leaving," are wonderful, says Jean. "People respect it; it's like, 'My mother is dying.'" She adds, "Of course I never mention that it's my car."

One thing is not negotiable in Jean's car: the music is only 1960s and 70s Motown. Jean admits, "I'm a sucker for the Four Tops, the Supremes and the Temptations." Says Kim Littlefield, "Every once in a while I would get into the car and see a big grin on Jean's face, and she

would announce, ‘I just made a new tape for the car.’” It was a different tune on those days when the car pool used Michael’s car. Kim explains, “We listened to the light jazz stuff he likes.” Michael counters, “It’s amazing that the car pool survived Jean’s taste in music.”

One car-pool guest, Paul Werner, was the source of another car-pool rule. Paul (now practicing in Salt Lake) always brought treats—cookies, cake, pie—when he hitched a ride in the Burns car pool. Soon the rule was established: Guests *must* bring treats (or suffer harassment the whole way to Salt Lake).

Family Law

“Lots of car-pool conversation revolves around spouses,” reports Michael. Jean and her husband, Jim, have been married more than 25 years. They met when both were undergraduates at Vanderbilt and married after graduating. Jean went to the University of Chicago Law School while Jim attended Northwestern Medical School. “It’s great being in school together. No one feels guilty about studying on Friday night. Besides,” Jean adds, “it’s so cold in Chicago that there’s nothing to do but stay inside and study.”

After graduation, both found jobs in Philadelphia. Ten years later, Jim, a neurologist who does medical research, got an inquiry from the University of Utah Hospital. He visited the department and liked it. Jean had been considering teaching and interviewed at BYU. Since Jean and Jim took most of their vacations hiking in

the West, it was a perfect solution for them. Jean says that her carpoolers know all about Jim. “The problem is that my carpoolers almost always decided that he’s too good for me.” Kim Littlefield, who worked for Jim as a research assistant before coming to law school, agrees. “Jim is the nicest man on earth; the best boss I ever had.” Jean laughingly counters that

Jean thought Marnie had encountered the strangest penal regulation when she reported being ticketed by a BYU cop for “unauthorized use of a washing machine.” (Marnie is quick to add that she “beat the rap” in court.) But then Diana confessed to being nabbed for after-hours visits to a city wall. It seems that recently one night Diana and some friends were enjoying the view of the



Jim is the lucky one. By going into medical research, with its dependence on grant funding, “he’s managed to find the only area of medicine that combines low pay and no job security. And then he works like crazy to keep this job. Go figure.”

Criminal Law

Jean reports that her two most recent drivers, Marnie Jorgensen and Diana Grant, have added criminal-law experiences to the car-pool dialogue. “I keep getting mixed up with these law breakers,” Jean jokes.

Salt Lake City lights from a wall overlooking Memorial Grove Park (less than a block from Diana’s home). A policeman stopped and told them to move on, because “the wall closes at 10 p.m.” Diana’s confession led to numerous car-pool discussions concerning such matters as: How do you close a wall? Is the sidewalk also closed? The street? The sidewalk on the other side of the street? What about sitting in a car in the street next to the wall?

Civil Trial Practice

Jean knows firsthand what it is to be a tough woman in a man’s world. What she didn’t know before, she learned during 11 years as a litigator in Philadelphia. To students in the car pool, she freely imports words of wisdom about their future practice of law.

Robert Booker credits his successful Salt Lake practice, in part, to advice she gave

I can’t remember a thing Jean Burns taught me about the Uniform Commercial Code, but I’ll take to my grave these valuable lessons I picked up as we slid white-knuckled through the snow at the point of the mountain. —MATT LALLI

him: “To be a successful lawyer, you need to explain things as though a juror were in the sixth grade.” Robert has found this to be true: “Lawyers tend to talk about big concepts in big words. What they really need to do is break it down and dose it out in bite-sized pieces.”

Matt Lalli claims, “I can’t remember a thing Jean Burns taught me about the Uniform Commercial Code, but I’ll take to my grave these valuable lessons I picked up as we slid white-knuckled through the snow at the point of the mountain: Never make important decisions on Monday morning (and if possible avoid making any decision on Monday); recognize when you don’t have any power and keep your mouth shut; organize important papers on your desk under one rock and unimportant papers under a different rock; and, most important, when you are in a strange land where people do funny things, keep a sense of humor.”

Jean believes her background in litigation helped her make a smooth transition into law teaching. “I structure my class exactly like I would a direct examination. I try to find a logical, step-by-step progression through the material.”

BYU students are obviously glad she’s here. For five of the 10 years she has taught at BYU, she had been awarded excellence in teaching awards. Michael Goldsmith teases, “I tell her she consistently wins the Teacher of the Year Award, but she’ll never win Miss Congeniality. She’s a cross between Magnum Force and Murphy Brown—but possibly lacking some of Murphy Brown’s restraint.” He adds more seriously, “She comes across as tough and demanding and despite that wins student praise. I give her credit for that.”

Now that he’s a lawyer and interacts with other lawyers, Robert Booker meets few who study and have such a passion for their field of expertise as does Jean. “She loves what she’s doing, takes it very seriously, and enjoys teaching law.” “Jean is incredibly bright, and so funny,” adds Kim Littlefield.

Leisure Activities: Life Outside the Car Pool

Jean also takes her leisure activities seriously. A self-described “weekend warrior,” she enjoys running and hiking. Recently Kim Littlefield got her interested in weight lifting a couple of times a week. “Kim explained how muscle tissue burned more calories even when a person’s just sitting. I figured you couldn’t beat that,” Jean says.

Another diversion is Jean’s extracurricular reading. Though her office shelves are devoted to her legal collection—and an occasional gargoyle—her home library is filled with literary classics. Her love of literature was a determining factor in choosing the University of Chicago. Saul Bellow was teaching there. “But I never saw him once in three years,” she laments. She claims her reading is an attempt to complete her high school reading list. But no college prep regimen compares with the



one she established for herself. “Life is short,” she explains. “I generally don’t read writers until they win the Nobel Prize.” All of the critically acclaimed works of Austin, Balzac, Bellow, the Brontes, Butler, Caldwell, Camus, Cervantes, Chekhov, Conrad—just to name A through C—are on her list. She keeps a tally on her computer so she won’t buy the same book twice and marks the individual titles off as she reads them. She read all of Dickens, Austin, and the Brontes when her husband was doing his internship and residency. Of all the authors on her list, she has a special fond-

ness for Balzac. “In American and British literature, good guys always win. With Balzac, usually the biggest villain comes out on top.”

Jean’s carpoolers portray her as tough, generous, funny, incorrigible, and incredibly bright. Undoubtedly, there is much more that is of a confidential nature that they refuse to reveal. Robert Booker sums it up with an analogy: “If someone says, ‘What do you think of Mount Timpanogos?’ how can you answer? It’s too big. You don’t know where to start to tell what you think. That’s the way it is with Jean. I cannot begin to express the ‘like’ I have for her.”

Snow is coming down faster now, and Jean wants to be on her way. Just then there’s a knock at the door and a student sticks her head in. “I can do it!” she announces. Jean is obviously pleased and relieved. “Wednesday then. I’ll pick you up. You drive.”

I tell her she consistently wins the Teacher of the Year Award, but she’ll never win Miss Congeniality. She’s a cross between Magnum Force and Murphy Brown. —MICHAEL GOLDSMITH

If It Is Broken, Fix It

by Kevin J. Worthen, Professor of Law

A REVIEW OF JUDGE MALCOLM R. WILKEY'S *Is It Time for a Second Constitutional Convention?* THE NATIONAL CENTER FOR THE PUBLIC INTEREST, 1995 ■



The American system of government is broken. At least it is if you believe many thoughtful persons involved with the system, such as Bill Bradley and Warren Rudman. Other, less-experienced people are arriving at that same conclusion as they see repeated government shut-downs due to congressional and presidential squabbling over continuing budget resolutions and airplane seat assignments, and popular, well-qualified candidates refusing to seek high office. With the publication of *Is It Time for A Second Constitutional Convention?* we can now add Judge Malcolm R. Wilkey to the list of those whose governmental experience and seasoned observations lead them to believe that serious change is in order.

The BYU Law School played an important role in the coming forth of this intriguing book. In November 1993, Judge Wilkey visited the school as a scholar in residence. During that time, he gave a series of lectures about constitutional reform, the last of which summarized “Why the Founding Fathers Would Call Another Constitutional Convention Now.” This concluding lecture was published in *Clark Memorandum* in 1994. The entire series of lectures, expanded and reorganized, are in this book, which should be of great interest to anyone interested in the current state

and future course of government in America—an audience one hopes is quite large.

The main message of the book is that our duty as heirs of the Framers of the Constitution is to assume the same responsibilities that they did: to address our current political and social problems with imagination and courage. This course requires that we discover, discuss, and seriously consider the nature of the fundamental problems with our current system and all potential solutions that might address those problems. The book provides an excellent starting point for that important process.

The book is divided into two parts. The first contains the expanded text of the “Wilkey lectures.” The second consists of commentary by what one author calls “a variety of conservatives . . . a pair of think-tank denizens [Walter Berns of the American Enterprise Institute and Terry Eastland of the Ethics and Public Policy Center], . . . a pair of conservative activists [former U.S. Attorney General Edwin Meese, a Fellow at the Heritage Foundation, and Phyllis Schlafly of the Eagle Forum], and finally three academics [Michael DeBow of the Cumberland School of Law at Samford University, Dwight Lee from the University of Georgia Economics Department, and Michael Stokes Paulson of the University of Minnesota Law School].” The diverse nature of the responses from this somewhat politically homogeneous group testifies to the provocative nature of the ideas Wilkey sets forth. Wilkey has clearly touched on subjects about which people feel strongly, and the ideas he addresses are wide-

ranging enough to draw praise and criticism from almost every direction.

Wilkey begins the book by briefly outlining fundamental premises held by the Framers of the Constitution (about the need for the executive to resist legislative encroachments on his power, the sorts of persons who would serve in the presidency and Congress, and the limited role of the federal government), changes that have occurred since that document was drafted in 1787 (the enormous infrastructure and technological changes), and what has not changed (the fundamental structure of the government). It is this last factor, the limited number of structural changes to the federal government despite changes in the shared premises and other transformations in American and global society over the past 200 years, that Wilkey finds most surprising and most telling. That Americans have not more frequently availed themselves of the amendment process to make necessary structural adjustments is evidence to Wilkey that something is amiss. That something, he postulates, is that “the people who would be most affected by changes, who would have their powers altered, are precisely those who can most easily originate constitutional amendments, namely, members of Congress” (p. 17). Thus, the book’s recurring theme is introduced: It is time for the American people to circumvent Congress, as Article V permits them to do, and make the necessary structural changes themselves.

Some may be tempted to dismiss the book as another right-wing tract advocating the return of the Constitution to

its original pristine form from whence it has been wrested by evil conspirators. However, Wilkey's argument is much different and more complex than that. He advocates not that we readopt the specific constitutional remedies the Framers found applicable to their 18th-century problems, but that we consider ways to adapt the Constitution, as its Framers intended it to be, to the new challenges. If any part of the Constitution has been wrongly ignored, Wilkey seems to contend, it is Article V, whose provisions outline two separate ways in which the document can be amended—evidence that the Framers themselves foresaw the need for updating and adapting the document. In our zest to attribute near perfection to the Framers, we may be missing their main message to us and frustrating their efforts. “We will fritter away, or have destroyed overnight, what the Framers gave us,” Wilkey asserts, “unless we confront our current problems with the same imagination, practicality, courage, and selflessness they displayed in 1787. And that requires us to acknowledge that our world is dramatically different from theirs” (p. 15).

Having sounded the basic theme, Wilkey then describes three manifestations of the cur-

rent woeful state of national politics: legislative “gridlock” (the inability to enact constructive legislation that a vast majority support), “perpetual incumbency” (even during the “Republican Revolution” of 1994, 90 percent of the members of Congress who sought reelection were successful), and

“total unaccountability” (evidenced by the budget crisis in which Congress blames the president and vice versa) (pp. 19–37). Following a short chapter contending that judicial activism (another “example of systemic failure under the Constitution”) is itself attributable, at least in part, to the three legislative failures noted above (pp. 39–46), Wilkey then turns to a lengthy chapter discussing “Needed Reforms” (pp. 47–110).

This chapter is the heart and most interesting feature of the Wilkey lectures. The possible reforms discussed are wide-ranging, extending from such well-known suggestions as term limits for Congress, line-item veto power for the president, and a balanced-budget amendment to changes familiar more to students of political

science than the general public: longer terms for the president and members of the House and changes even more novel, such as having the president elected first and then Congress elected a few weeks later.

Two novel specific proposals seem particularly timely in light of recent events and pro-

Wilkey's major proposals, one wonders how the current Republican presidential primaries would have been different, or how the upcoming presidential election would vary, if such a system were in place.

Similarly, with the recent spate of Washington budget,

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Wilkey seems to contend, it is Article V.**

vide examples of the kind of analysis Wilkey provides for each possible reform. First, Wilkey suggests that

on every ballot for federal office there be a line and an opportunity to vote for “None of the above.”

... If “None of the above” received a plurality for the office, there would be another election in thirty to sixty days. The salutary effects would be obvious. If “None of the above” won, which would be rare, it would be clear that the major parties nominated obviously unacceptable candidates. The citizens would deserve better, and “None of the above” would force the parties—or the independents—to come up with better. ... Even if “None of the above” never won, it would have an important salutary effect under many circumstances. For example, if a candidate for Congress won 40% of the vote, “none of the above” received 35%, and the second major party 25%, then the 40% winner has a warning.

... A “None of the above” choice would give an officially recorded protest vote, much more authentic than polling. It might even increase voter turnout. The discontented voter would have something better to do than stay home. [pp. 108–109]

Although this is not one of

with federal workers being furloughed while Congress and the president battle over the details of the budget, one of Wilkey's other minor, yet novel, proposals becomes particularly intriguing. Responding to the charge that a balanced-budget amendment could never be effectively enforced, Wilkey advises:

Simply provide that, unless a balanced budget is submitted by Congress to the President and approved by him x months after Congress convenes, then all Members' and staff salaries are suspended (the proviso requiring presidential approval is to prevent Congress from submitting an outlandish budget, getting a veto, then taking its time revising). This type of amendment would produce purposeful action. [p. 77]

If nothing else, the sight of members of Congress losing their paychecks because of budget gridlock would be more appealing to most than would the current system under which congressmen are the only ones who get paid while the squabble continues.

Wilkey does not advocate that all these changes be made. He even acknowledges that some contradict others. He does make clear, however, that

LAW SCHOOL RANKS HIGH

The J. Reuben Clark Law School fared well in two recent national rankings. The U.S. News & World Report in the “1996 America's Best Graduate Schools” guide ranked the BYU Law School 32 of the 178 law schools accredited by the American Bar Association. Judging student satisfaction, The National Jurist, April/May 1996, published by the Princeton Review ranked the Law School 11th of 170.

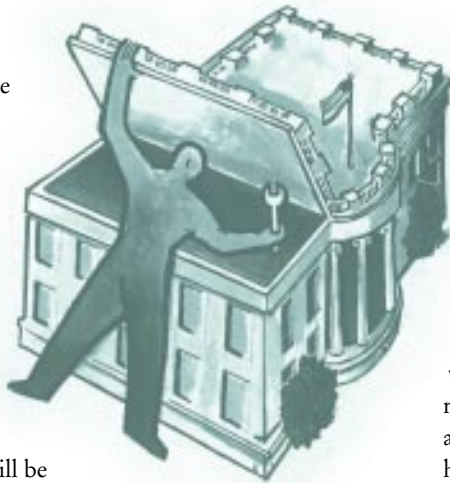
we need to consider all options, and he provides a comprehensible and succinct analysis of the pros and cons of each proposal and the potential impact.

Ultimately, Wilkey asserts, any meaningful set of reforms must address the fundamental structural problem, a problem created by failure of the constitutional structure to keep up with changes in our society: “What we are now living in, and trying to make work, is a system designed for talented and capable part-time amateurs but filled with perpetual professional politicians—and without the responsibility provided by a parliamentary system which automatically generates a visible accountable majority” (pp. 13–14). Because he views this problem as the root of the current constitutional crises, Wilkey maintains that whatever specific reforms we adopt, we must first choose between two alternatives. Once the course is chosen, then it will be more clear which particular set of reforms will best advance us along the chosen path.

The first [course] is to accept the desirability—if not inevitability—of a professional political class with consecutive terms in office (that is, career politicians), and move to make that political class more accountable to, more responsive to, and more representative of the people. The second is to recognize that career politicians and the political party system as currently constituted have failed the American people and move toward a government more like that which the Framers contemplated, namely a government filled by persons of demonstrated

talent drawn from different walks of life, for specific terms, who will return relatively quickly to private life. [p. 49]

Wilkey calls the first approach the “professional political class” model (which looks to the British parliamentary system for experience). He refers to the second as the “Cincinnatus” model—named after the “Society of Cincinnati, instituted by the officers of the Continental Army in 1783, [in] memory of Lucius Quinctius Cincinnatus, who left his



plough to save the republic, and then returned to his humble fields” (p. 1 n. 2).

The concluding chapter of the Wilkey lectures discusses the issues that would arise if “the People” followed the judge’s advice and used their Article V power to call for a constitutional convention. Wilkey makes special effort to refute what he calls “the bugaboo of a ‘runaway convention’” (p. 130). He begins by noting that contrary to the suggestion of many, the original Constitutional Convention of 1787 was not itself a runaway convention. Those who con-

tend that the original Framers ignored the instructions given them by Congress to convene for “the sole and express purpose of revising the Articles of Incorporation” overlook the salient fact that this congressional resolution was not the legal document that authorized the convention to convene. Congressional action followed by several months the action of no less than eight state legislatures calling for a convention. “It was in the enabling legislation of the states that the source of the delegates’ authority lay,” Wilkey contends, and these instruments “with a single exception . . . were cast in general terms and did not impart specific instruction” (p. 131, quoting Julius Goebbels, Jr.’s *History of the Supreme Court of the United States, 1:201–202* [1971]). Therefore,

Wilkey asserts, “the Framers had *no binding* instruction on the scope of their action. This need not now be the case were a Constitutional Convention held” (p. 131). States calling for a constitutional convention today could well limit the scope of the convention, Wilkey maintains, although they chose not to in 1787.

Moreover, Wilkey argues, even an unlimited convention is not likely to cause the chaos predicted by some, because “a Constitutional Convention can only ‘propose’ amendments” (p. 131). If the convention were to adopt some outlandish provisions, Wilkey asks, “who would approve?” Unless three-fourths of the states agreed with them (something unlikely if they are truly outlandish), the proposals would remain just that—proposals. Wilkey acknowledges that the secrecy

surrounding the original Constitution (which may have allowed the kinds of discussions and compromises needed to reach the best result), is unlikely today, but even that difficulty does not justify putting off the constitutional convention “any more than [it does] putting off day-by-day legislation just because of the distortions which may appear in the press.”

The responses of the commentators (which range from three to 14 pages in length) each focus on particular reforms or aspects of Wilkey’s arguments, some with disdain, others with praise. Walter Berns criticizes most of Wilkey’s proposed reforms, because they “are designed to empower popular majorities” (p. 141), whereas the original Constitution was designed to guard against misrule by popular majorities (p. 141). Berns also questions whether the “very propitious circumstances” that permitted the original Constitution to achieve such stunning success can ever be recreated in our modern times.

Terry Eastland agrees with Judge Wilkey that we need to relimit the federal government, and that term limitations, balanced budget reform, and a line-item veto would serve to further that end. He also agrees that “Congress now appears unlikely to propose to the states for ratification even one” of these proposals (p. 145). He is willing to wait, however, until the next election to see if the current political process can be used “not simply to stop but even to reverse the trend in our politics” (p. 150).

Phyllis Schlafly is Wilkey’s most pointed critic, charging that Wilkey “just doesn’t like the American form of govern-

ment created by the United States Constitution” (p. 151) and contending that his proposed “structural ‘reforms’ are virtually a carbon copy of those made by the Committee on the Constitutional System,” a “‘power’ group,” of Washington insiders, who want to “change our system of government and move us toward a parliamentary system” (p. 154). She also notes disparagingly that this Wilkey-ccs campaign to “totally restructur[e] our government” has been joined by Utah Governor Mike Leavitt and other advocates of the Conference on the States (pp. 161–162).

Edwin Meese disagrees with Schlafly about the merits of the Conference of the States, calling it “a new development with great promise” (p. 176). However, he does not think the time has yet come to convene another constitutional convention. While agreeing with much of Wilkey’s analysis, Meese concludes that “because of recent events that demonstrate changes taking place within government [among them, the Republican electoral success using the Contract with America], as well as in the approach of the people toward their government, there may be alternative means [such as the Conference of the States] to achieve the same goals that the Judge sets forth, without resorting to the more drastic step of a Constitutional Convention” (p. 169).

Professors DeBow and Lee examine Wilkey’s proposal using the insights of “public-choice” theory (a theory using “economic reasoning to analyze political and governmental processes,” the basic premise of which is “that people in the political process act

primarily to advance their own self-interest, in much the same way as they act in the marketplace” [p. 190 n. 2]). They share Wilkey’s “preference for the Cincinnatus model over the status quo, but . . . do not agree that the professional political class model would be an

improvement” (p. 188). They are also skeptical about the chances that a constitutional convention can fix the problems. Like many public-choice theorists, DeBow and Lee doubt the ability of any political body, including a constitutional convention, to come up with the right answers. (They assert that “[i]n virtually every instance, there is no ‘correct’ answer to a public policy question waiting to be discovered by well-meaning office holders”

[p. 188]). Instead of the great statesmen that Wilkey believes would be attracted to a constitutional convention, DeBow and Lee “expect politicians to turn out in large numbers, with their eyes on, among other things, how the Convention’s deliberations

would affect their own future prospects, as well as the prospects of their political party” (p. 190). Their alternate solution is to revitalize the idea of limited government by requesting that members of Congress take a public pledge “not to vote for any governmental program or activity that cannot be squared with the enumerated powers of Congress set out in Article I, Section 8—*read as of the time of the Founding*” (p. 198). While

the pledge would not be self-enforcing, DeBow and Lee believe that the voters would ultimately hold enough of the members accountable to make it meaningful.

Michael Stokes Paulsen addresses Wilkey’s concluding chapter on the procedural questions arising out of a constitutional convention, and he goes Wilkey one better in two respects. Whereas Wilkey expressed the belief that Congress had limited power to bind the convention delegates, Paulsen concludes that Congress has no power to do so (pp. 203–207). Similarly, while Wilkey urges states to force Congress to convene a convention by calling for a convention under Article V, Paulsen asserts that two-thirds of the states (the constitutionally requisite number) have already done so, noting that 45 states have in place some kind of unrestricted, unrepealed application for a convention (pp. 207–209). For Paulsen, the call has already gone forth.

“What we are now living in, and trying to make work, is a system designed for talented and capable part-time amateurs but filled with perpetual professional politicians.”

BRUCE C. HAFEN CALLED TO FIRST QUORUM OF SEVENTY

Just when the Law School thought that Bruce C. Hafen would be returning, President Hinckley had other plans. On April 6, 1996, Provost Hafen was called to the First Quorum of the Seventy. As third dean of the Law School and law professor for 23 years, it would be ungrateful not to express our feeling of loss; however, knowing of Bruce and Marie Hafen’s talents, it would also be ungrateful not to share them with Latter-day Saints throughout the world.

Service to the LDS Church has been a part of Provost Hafen’s life since his mission to West Germany in 1960. He was in private practice in Salt Lake City for four years after graduating from Law School, but he and Marie have been intimately involved in the Church Education System since 1971 when he became assistant to the president of Brigham Young University. His work in creating the Law School and assembling the initial student body and his years as dean have left a significant mark on the Law School. Through his years of service as president of Ricks College and university provost, the Law School has maintained a place for Bruce. It is always hard to fill the place of an exemplary dean, scholar, and teacher; it is not possible to fill the place of a trusted friend.

Wilkey responds briefly to each commentary (as one might expect, his response to Schlafly is the most extensive), taking the debate even one level deeper.

While most (but not all) of the specific proposals in the book have been expressed in one form or another in other publications, this book collects all these ideas in one place and provides some analysis of each. Moreover, Judge Wilkey's insights concerning the potential cause of our current struggles and the need to decide which basic model Americans want to adopt are valuable contributions to the ongoing discussion. The book thus serves as a valuable primer for understanding the terms of the debate that is beginning to be waged. Ultimately, however, the book is a call to action.

Instead of sneering at Congress or the President, as citizens we ought to be considering reforms to make these elected officials accountable, responsive, and effective. Instead of permitting the Congress and the President to abdicate so much of policy making to the courts, we ought to be devising—or revising—a framework to compel them to perform their constitutional duties.

Article V is the instrument by which the Framers thought their Constitution would be preserved. Article V is as much a product of their genius as are Articles I, II, and III. Yet the timid shrink from utilizing it. If we do not act now, who will? If now is not the time to act, when is?

Those who answer, "No one" and "Never," or who cannot answer who and when, are blatantly reading Article V out of the Constitution. If the intent of the Framers can be thus flagrantly violated, their masterwork will not survive. [p. 137]

These are strong words. At a minimum, they should cause us to reflect seriously and deeply. Wilkey's book clearly succeeds in that respect.

National Chair Honored with Appointment to Arizona Supreme Court

On March 5, 1996, Charles E. "Bud" Jones was appointed by Governor Fife Symington to fill a vacancy on the Arizona Supreme Court. The appointment crowns a distinguished 30-year career in labor and employment law with the Phoenix firm of Jennings, Strouss & Salmon.

Bud completed his undergraduate work at Brigham Young University in 1959 and graduated from the Stanford Law School in 1962. He is currently serving as national chair of the J. Reuben Clark Law Society. During his tenure, the Law Society has added two new chapters and increased its membership by nearly 300 members.

The screening process for nominees to the Arizona Supreme Court is an arduous one. The Commission on Appellate Court Appointments, a diverse citizen group, carefully chooses three candidates for the governor's final consideration.

Bud made his way through the process with aplomb. One group that opposed his appointment questioned the governor on whether Bud met the ten-year residency requirement. They argued that because

of the three years Bud served as president of the France Paris Mission of the Church he did not meet the requirement.

The state Attorney General's Office concluded that he was a bona-fide resident. When asked about the opinion, Chief Justice Stanley Feldman suggested that residence does not always require physical presence. "It was quiet clear from the facts that he [Jones] intended to remain a resident here," Feldman said.

The chief justice also noted that Mr. Jones had even voted by absentee ballot in the elections held while he was mission president. In an article in the *Arizona Republic* the chief justice said that Bud has a "sterling reputation. He's a man of unquestioned integrity, a fine lawyer, active in all sorts of community and public affairs, and one of the most highly respected practitioners in the state."

Letters

Re: *Soldiers of the Spirit* by Elder Lance B. Wickman

Dear Editor:

As a veteran of many "white knuckles" lawsuits, I humbly express concern that *Soldiers of the Spirit* is idealistic. I love its concepts. I would love to always see them reciprocally implemented. However, many of our rising generation of lawyers, in their efforts to implement the lofty principles outlined by Elder Wickman, may be disadvantaged in the real world of legal combat.

If your adversary resorts to tactics which in your honest evaluation are abusive of the legal system, when do you "get

tough"? Consider this: With the original complaint in a personal injury case discovery is filed seeking, inter alia, a copy of the liability insurance carrier's policy. A specific rule of procedure authorizes the discovery of this document. Your opponent objects to its production on the basis that it is "not relevant." An abecedarian knows better. Would you conclude that the objection is asserted to harass, cause unnecessary delay, or needless increase in litigation? (See Rule II, FRCP) I did! I always have! I ever shall! "The decided are always gentle," but sometimes they have to be "as stout as Aunt Nellie's breath!"

Let me be clear. I believe in Christ. I believe that his way of life is the only true way to happiness. I want to discourage litigation. I want to resolve civil conflicts amicably. I embrace the conceptual correctness of Elder Wickman's article, but brace yourselves! Do not waste your time trying to handle cranky opponents with kid gloves. Resort to the compulsion available within the system. I am not offended if you disagree. Do not be offended with my position. May your professional career be void of conflict, contention and all "white knuckles" encounters. But if it is not, *do not think you have failed as a Christian. All (even good Christians) engage unavoidably in such encounters many times in a legal career. Celestial principles can only be implemented in a telestial world if all concerned are willing. The vast majority usually are not so inclined!*

Sincerely,

H. Deloyd Bailey
Provo, Utah