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Clark Memorandum: Spring 2012

J. Reuben Clark Law Society

BYU Law School Alumni Association

J. Reuben Clark Law School

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A full-page oil painting of J. Reuben Clark, an elderly man with white hair, wearing a dark suit and a bow tie. He is seated in a wooden chair with ornate carvings. The background is dark and textured. The painting is signed 'A. FRIBERG 1951' in the lower right corner.

cm

CLARK MEMORANDUM

J. Reuben Clark

Law School

Brigham Young

University

Spring >> 2012

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James R. Rasband



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Elder Steven E. Snow



**Timpanogos
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DEAR ALUMNI AND FRIENDS,

We are honored to publish on the cover of this issue of the *Clark Memorandum* a recently discovered portrait of J. Reuben Clark Jr., painted by Arnold Friberg and generously given to the Law School by Gregory and JaLynn Prince. While preparing his biography of President David O. McKay, Gregory Prince interviewed Friberg about his association with President McKay. During the interview the artist mentioned that he had partially completed portraits of President McKay and his two counselors, Stephen L. Richards and J. Reuben Clark Jr., in his garage. At Dr. Prince's request, Friberg, then in his nineties, finished the portraits, and they are among his last completed works.

The Friberg portrait is a beautiful and significant addition to the Law School, which bears the name of J. Reuben Clark. Former university president Dallin H. Oaks told the students and faculty of the Law School on their very first day of classes that they "must in all respects be worthy of the name [the Law School] bears." The portrait will be hung in the new Law School Conference Center on the fourth floor. We hope that as guests come to the conference center for symposia and other events, and as we ourselves meet in the room, the portrait of President Clark will symbolically center us in our great legacy.

Part of that legacy is President Clark's admonition, delivered in a famous general conference address, to remember those in the last wagon. He recounted the struggles and sacrifices of the common pioneer Saints who, without the resources of the leaders, struggled faithfully across the plains in the last wagon of every wagon train. My hope is that this portrait will remind us of our professional duty to be mindful of those without resources or without our training, who are looking for counsel, comfort, and help to lighten their burdens.

The feature articles in this issue of the *Clark Memorandum* remind us of the professional commitment and values President Clark exhibited: Elder Steven E. Snow's "Musings of a Small Town Lawyer" (page 8) recalls how ennobling it is to be the person to whom others come to solve their most vexing problems. Judge Monroe McKay's "A Handful of Pumpkin Seeds" (page 4) reminds us of the lawyer's role as reconciler and healer. And Professor Lynn Wardle's excerpted law review article, "The Boundaries of Belonging" (page 16), emphasizes the lawyer's role to stand up for causes, even when there is intense opposition.

President Clark's championing of the needs of the less fortunate is underscored by the news story announcing the organization of the Timpanogos Legal Center (page 26). His commitment to religious liberty is reflected in the article chronicling the efforts of the International Center for Law and Religion Studies, the faculty, and the students who worked together to write an amicus brief (page 32) in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*—a case that produced a landmark First Amendment opinion affirming the ministerial exception and the liberty of religious groups to be free of government interference in choosing their own leaders.

I hope you will enjoy this issue of the *Clark Memorandum*.

Warm regards,



JAMES R. RASBAND



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I THANK JIM GORDON for his generous introduction. I want to apologize to him, Cheryl Preston, and Scott Cameron; I have decided not to use their research to talk about the founding of the Law School. Carl Hawkins’s book adequately covers what I might have had to say.

I should know **S** better than to try and speak in a substantive way rather than in pleasing platitudes and clichés at a dinner and reunion affair. I probably should follow my wife, Lucy’s, oft-offered advice that I might as well save my breath to cool my tea. Perhaps I should add a comment by Clarence Darrow. When asked if he ever got in trouble because he was misunderstood, he replied: “Of course—but a lot less than if I had been understood.”

However, my commission was to share my thoughts. They do not run on platitudinal wheels. When speaking of my thoughts, I am reminded of a Tumbuka proverb, which translated says: “Even if you are so poor that you are reduced to eating pumpkin seeds, you should always share some with a neighbor.”

ILLUSTRATIONS BY ANDREW WRIGHT

• • • • • JUDGE MONROE G. MCKAY • • • • •

SENIOR JUDGE, U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT



Of course I do not speak for the court. And this is not about specific case-related items but only about you as lawyers as a leavening lump in the greater society.

My first thought was to talk about selfishness and greed. I planned to start with a story of an encounter I had with my brother, Quinn, on campus. When I asked him what he was doing there, he replied in Diogenes

*The following is the 2011
BYU Law
School
Founders
Day Address,
presented
at the Little
America
Hotel in Salt
Lake City
on August 25.*

fashion: "I'm looking for the Widow's Mite Building." I decided to spare you from that, in part because my point might have been misunderstood as a fund-raising pitch or some political agenda—both of which are off limits for a sitting judge. It is enough to say that getting rich so you can put up seed money in exchange for having a building named after you does not comport with the account of the widow's mite and the account of the rich young man who did not drink tea, coffee, or alcohol and paid his tithe and attended church regularly. I recommend you re-read those two accounts.

Although it is tangentially related to my theme, I decided to spare you from my thoughts about whether anger is an appropriate response in a variety of situations.

What I have settled on is a long-standing concern about our national addiction to a punitive approach to problem solving. I am embarrassed by the fact that we lead the world in per capita prison population—our rate is 745 per 100,000 population. Our nearest competitors are Rwanda and the Russian Federation. Even they are well below us. Other industrialized nations such as Canada, Australia, Greece, France, England, Germany, and Japan have less than one-seventh our per capita prison population; and some of them are pretty nice countries to live in. In our circuit, approximately 55 percent of our cases have to do with the criminal justice system; the other circuits are comparable. You ought to look up the costs.

And yet we seem to be more crime ridden, fearful, and insecure than our competitors in the industrialized world. I cannot help but wonder if our cultural bent for punitive

solutions is not one of the misguided contributors to misbehavior. Perhaps it has caused us to neglect more effective ways of dealing with otherwise disapproved behavior. Sometimes it seems to me that we are more interested in expressing our disapproval than in reducing the problems.

Of course, the courts have nothing to do with setting the policy. We do not initiate prosecutions, and even the trial courts are closely constrained in the decisions about sentencing.

I do not and should not make any specific proposals about what, if anything, we as a country should do about this embarrassment. I only make some suggestions for ways of thinking about problem solving.

I recently read a thought-provoking comment by William Patry, which caught the spirit of my own thoughts. He said:

If we want effective laws, we can't have that if it's based upon an alleged moral case. For politicians or lawmakers to act in an effective way, they have to act like economists. You have to investigate the real world consequences of what you're doing and decide whether those laws, if enacted, do the things you want them to do.

I offer you only two thought pieces about ways of thinking about this matter. One is what I call "before" and one is about "after."

To follow my point you need to know that, in my view, a rule is only a rule if it has a sanction for departure from the standard.

My first anecdotal account is about "before." When I became a Peace Corps director in Malawi, Africa, my predecessor had rules to spare. He reportedly had a staff member assigned to patrol that mud-hut country looking for violators. Morale was low, we were in trouble with the host government, and volunteers were distracted from their charitable missions by constant complaints about trivial matters.

I closed everything down and had everyone gather at an old lakeside hotel, where the volunteers spent the first meeting berating my staff and me for every imaginable default. Some of my staff wanted to retaliate or at least make a defensive show. In the evening I went for a walk along the beach to think through whether or not I should just close down the program and send everyone back to the United States.

As I walked along I saw a group ahead gathered around a small fire. Someone spotted me and said, "Shh, here he comes."

Someone else said: "Oh h---! Let him hear it."

I knelt and listened for a while. When the berating ended and a pause seemed to beckon me to respond, I made a critical, on-the-spot decision. I did not reveal the source of what came to me, because it would have discredited my message in their eyes. It was, of course, from Joseph Smith, when he said that the way he governed such an admirable community as Nauvoo was to teach the people correct principles and let them govern themselves.

I reminded them of the visionary mission they had signed up for and that many of them had lost their way in chaffing at the rules and enforcement. I said, "From here on out, there are no rules." That is, I would of course talk to them about how they ought to behave themselves, but there would be no sanctions.

Some chorused, "B.S."

I stated that, as a show of good faith, I was restoring to a certain volunteer present the month's pay and his midterm leave I had docked him for taking, without authorization, a Peace Corps vehicle and wrecking it while driving drunk. He had endangered the life of his counterpart, whom he was supposed to be training to be a medical aid. (I wish I had the time to tell you what an outstanding person he has become.)

For a couple of months a few seemed to be trying to test me. But before long we had a total turnaround. Some of my staff called a meeting to say how wonderful it was that of the nearly 200 volunteers, we had only five miscreants. (I can still remember their names.) They wanted me to send them home. It was clear to me they did not understand the essential element that had brought us to that happy point. They did not recognize that no system can produce zero tolerance—the best possible system can only produce optimal results. If we then turned to sanctions for some, the key element of our success would be lost.

This ruleless system succeeded to the point in which Washington told me we were the only program in Africa not in trouble with the host country (probably an exaggeration). They wanted me to expand the program,



which I declined. I did not tell them our success was a product of our Ruleless Regime.

That same approach has been followed in my judicial chambers for 33 years. We get our work done in a timely manner and done well (if I do say so myself). We run a ruleless shop—that is, one without sanctions. We do not work for the clock.

My second anecdotal point is about “after.” The setting is South Africa.

After all the depredations toward the black citizens—many of which attacks could properly be described as crimes against humanity—and under the leadership of Nelson Mandela, who had suffered imprisonment for 27 years, the country decided to forgo the retributive and punitive models. They instead established a truth and reconciliation commission. The basic format was that offenders who came before the commission and candidly admitted their part in the persecution and asked for forgiveness would be granted amnesty.

While Lucy and I were serving our mission to South Africa in the 1990s, one man confessed to and demonstrated the torture he had committed. One of his victims was a member of the commission. The vote to grant him amnesty was joined by his former victim.

Compared to other formerly minority-ruled countries in Africa (and with a much more complicated problem of integration and reconciliation than the others), South

Africa—so far as I can tell—is doing the best job of any of them and has the best prospect of succeeding.

My great disappointment when I have given this account has been how frequently many friends and colleagues have responded with something other than admiration. A typical response has been “How can they let them get away with that?”

As an aside, I tell you of a brief experience that may not prove to be too much, but it is a success story in the setting of the LDS Church.

Jim Parkinson, a member of the charter class, and I were traveling in South Africa with a group of African-Americans from Mississippi. We were in Cape Town on a Sunday and decided to go to church. The leader of the group and one other asked to join us. Given our history, I concede I was a little nervous. I saw a number of old friends and visited happily with them. After the meeting, as we stood in the parking lot, Jim asked our leader what he thought. He said he was astonished. He said he had attended church with many mixed-race congregations but that this was the first that did not re-segregate when they sat down. He added that he thought we should do something about our music and our preachers. He used to sing in a black choir. I do not know that it is a cause-and-effect result of the national policy of truth and reconciliation, but I like to think that that policy contributed.

Now don’t leave here and tell people I proposed eliminating prisons or even that punishment is never appropriate. Of course there are some people we need to isolate from the rest of society. I have only suggested some ways of thinking about rules and punishment that might improve our outcomes—particularly about prison as a general deterrent as opposed to a specific deterrent. I have long been persuaded that any plan with an objective of zero tolerance will automatically be less effective (and probably more expensive) than one whose objective is *optimal*.

I do not pretend those two examples are some panacea for our overpopulating our prisons or that they are appropriate in every situation. At most, they are examples of successful thinking against the grain. It would be my hope that you who are among the privileged, you who have influence among the most influential, you who have access to power, will do the creative thinking and courageous acting that will begin to ameliorate this national tragedy.

Finally, I leave you with this—I often use it: When I became chief of the circuit I promoted an investiture program. Judge Ed Dumbauld, an exceptional scholar and federal district judge from Uniontown, Pennsylvania, attended. We had become friends, and he sometimes shared with me poems from the revival of Dutch letters in the late 1800s. He had a degree from Amsterdam University, and I spoke a little Afrikaans, which is derived from Dutch.

At a dinner after the program (probably because he thought I either was or might become a little full of myself), he recited in English this Dutch poem with which I leave you:

*What have you preserved from your frenzy?
A lamp that flickers; an eye that weeps.*

*What is there from the storm, that you withstood?
A mournful leaf, that has not yet found rest.*

*What has love done in your heart?
It has made me understand the pain of the lonely.*

*What remains of all the glory that surrounded you?
Nothing but a singing memory.*
[H. W. J. M. Keuls]



MAYNARD DIXON
FARMER NOV 1935



BY ELDER STEVEN E. SNOW

OF THE PRESIDENCY OF THE SEVENTY

*This speech was the Honored
Alumni Lecture, given at J. Reuben Clark
Law School on October 8, 2011.*



HANK YOU, DEAN RASBAND, FOR YOUR KIND WORDS. IT IS A PRIVILEGE TO BE BACK AT J. REUBEN CLARK LAW SCHOOL. IT'S ALWAYS NICE TO MEET WITH STUDENTS, AND I WISH YOU ALL THE BEST AS YOU NAVIGATE YOUR WAY THROUGH THE INTERESTING, OFTEN DIFFICULT, AND EVEN SURPRISING STUDY OF THE LAW.

To the faculty and administrators present, thank you for all you do to further higher education, particularly the study of the law. I hope you appreciate what an impact you have in the lives of others. My theory is that time passes much slower when we are younger and that at this age the experiences imprinted on the minds and psyches of our young people seem much more meaningful than later learning experiences. You have the opportunity to create these learning experiences. My thanks to you who continue to shape the minds and hearts of those students who will soon be the lawyers of tomorrow.

My own career is evidence of this. Shortly out of law school I became a deputy county prosecutor in Southern Utah. The words of criminal law professor Woody Deem and evidence professor Ed Kimball often rang in my mind as I prosecuted accused criminals in district court. Later, the things I learned in Professor Dale Whitman's real property class, Professor Carl Hawkins's tort class, and Professor Dale Kimball's natural resources class (to name just a few) served me well in private practice. This early introduction to the law from dedicated professors laid the foundation for my own law practice. To them and to you who still carry the torch, I owe a debt of gratitude.

I have chosen to speak this morning about the practice of law in a small town. For reasons I will elaborate later, I chose this path, and I have been grateful I did. Don't misunderstand. I have been in law offices and conference rooms in high-rise office buildings in New York; I've had the privilege of being present in congressional offices and hearing rooms in Washington, D.C.; and I've dealt with law firms in Los Angeles that have more attorneys than the entire Utah Bar south of Provo. I know about the opportunities to travel, to earn large sums of money, to represent large multinational companies, and, well, to just go after the brass ring. I understand the lure. I have even stood on the streets of Manhattan and thought, "What if . . . ?" It is exciting, and if that is your goal and your desire, I say go for it!

But before you jump, let me take a few minutes to share with you some experiences about what it is like to practice in a small town.

In 1964, I was 14 years old. One day I came across an advertisement in one of the magazines to which my parents subscribed. The advertisement was from Columbia House Records, and it promised ten, 33 rpm record albums for a penny if you joined their record club. Such an offer I could not resist, so I clipped and filled out the ad, enclosed a copper penny, and sent it off. I was thrilled (and my mother was surprised) when two weeks later a package arrived containing 10 record albums. I explained to mother what I had done, reassured her, and settled back to listen to Gene Pitney, Neil Sedaka, Leslie Gore, and others.

Things went along quite well until a few weeks later when I returned home from school to face my angry mother, who displayed to me a bill from Columbia House Records for \$84. You have to understand that in those days \$84 would buy several weeks of groceries for our entire family. To this day I don't recall exactly what went wrong with my new record club arrangement. In hindsight I probably missed the mailing from Columbia House Records to



buy the current month's record, or perhaps I simply missed the fine print in the ad. But upon seeing my mother's distress, I did something I had never done before or, for that matter, had ever seen my parents do before—I called a lawyer.

F. Clayton Nelson was a chain-smoking attorney who had his small law office on Tabernacle Street between the post office and Mathis Market. At that time the town of St. George, Utah, had a population of 5,000. The entire population of Washington County, in which St. George is located, was just over 10,000. Attorney Nelson was one of a half dozen lawyers who served that corner of Utah.

I arrived at his office at the appointed time, and he invited me in. He greeted me, asked me about the eighth grade, and then began to examine my paperwork (what little of it there was!). After a couple of draws on his cigarette, he looked up and began to speak. He told me to bundle up my 10 new

record albums and return them to Columbia House Records. He further instructed me to write the company a letter in my own handwriting informing them that I was 14 years of age and that I was withdrawing from their record club. As he walked me to the door, I asked him how much I owed him. He told me I owed him nothing but to feel free to call if I ever needed him again. I did as he instructed, and that was the last I ever heard from Columbia House Records.

F. Clayton Nelson died in 1986, and he is buried in the St. George Cemetery. I would guess he did not long remember that encounter with a 14-year-old boy. I don't remember our family ever needing an attorney during the remaining 22 years of his life, but I do know that from that day forward he was "our family lawyer."

That brief encounter instilled in me a deep and abiding appreciation for lawyers. In just a few minutes he had lifted a burden from my shoulders that had seemed very difficult to bear. I wanted to be like F. Clayton Nelson. I wanted to be able to help others, to solve problems, and to bring resolution and peace to difficult situations. It was on that day as a 14-year-old that I decided I wanted to be an attorney.

Fast forward 12 years. It is now 1976, and I am sitting in this same room in this same building in a similar gathering listening to a small-town practitioner from Richfield, Utah, named Ken Chamberlain. Ken had a law partner named Tex. By now I am in my second year of law school, and we are about to conclude our first full year in the new Law School building.

Mr. Chamberlain had been asked to talk to the law students about small-town legal practice. A veteran of World War II, Chamberlain received his law degree in 1950 from the University of Utah. In 1955 he and his family settled in Richfield, Utah, where he practiced law right up to the day of his passing in March 2003.



For about an hour he extolled the benefits of small-town practice and concluded by answering questions from the students. His practice was diverse and interesting. He had carved out a niche as a bond attorney, which was unusual for a small practitioner in rural Utah. During the time for questions and answers, one of my bolder classmates asked about the money. "What can a law school graduate expect to earn in rural Utah?" Ken informed us that if we worked hard, we could expect to earn up to \$25,000 a year after gaining a few years' experience.

Now bear in mind that this was 1976 and I had turned down an offer of \$10,000 a year as an accounting graduate a couple of years earlier. I was actually encouraged that maybe it was possible for me to practice law in a smaller community similar to where I had grown up.

That is the way things turned out. The following year I accepted a position with a small firm in St. George, Utah, and headed south to become the tenth attorney in Washington County. My starting salary was \$800 a month, but I received a generous raise of \$110 when word was received that I had passed the Utah Bar Exam. By then St. George had grown to nearly 10,000 residents, and the county population was over 20,000. The future seemed bright.

**WE BORROWED \$12,000, BOUGHT SOME OFFICE
FURNITURE AND AN IBM SELECTRIC II TYPEWRITER,
RENTED AN OLD HOUSE, AND WENT TO WORK.**

By a stroke of luck I soon had the opportunity to gain a good deal of experience in the courtroom. One of the senior partners, Ronald W. Thompson, was the sitting county attorney, and an opening became available for a part-time prosecutor. I applied, and the county commission approved the appointment. My time was then divided between private practice and the prosecution of misdemeanors and juvenile offenders. Later I moved up to felony prosecutions.

I found the courtroom to be an exciting arena. I know there are continued debates between solicitors and barristers regarding the value of solving legal matters with litigation. But in a rural law practice, most clients do not have the means to survive protracted litigation; it is an inefficient and expensive way to solve disputes. In criminal matters litigation is important to test our judicial processes and provide checks and balances against government abuse. Unfortunately, in some civil matters it is the only path available to bring finality to a dispute.

But if you are blessed with a competitive spirit—if in prior years you roamed the soccer field or the gridiron, you competed in musical or dance competitions, or you dribbled or spiked the ball on a hardwood court—you will love the courtroom. When the judge turns to the foreman of the jury and asks, “Ladies

and gentlemen of the jury, have you reached a verdict?” it is fourth down and goal with three seconds remaining on the clock; it is a 30-foot jumper at the buzzer. There is really nothing quite like it. If you become a litigator you will have frayed nerves, an upset digestive system, and an occasional rush of adrenaline that will make it all worth it.

After a time, another associate in the firm and I decided to start our own law firm. It was January 1979. David Nuffer had been out of BYU Law School for eight months, and I had graduated a year earlier. Dave shaved his beard, and he and I decided we would start wearing ties to the office to make up for our obvious youth and inexperience.

We borrowed \$12,000, bought some office furniture and an IBM Selectric II typewriter, rented an old house, and went to work. At first most of our work involved painting and wallpapering the old adobe home we were renting. I stayed on at the county attorney’s office for one more year working evenings at the private office. Dave put in 15-hour days to make it all work.

Let me just say here that most of you will at one time or another make a choice regarding your professional associates. While these professional relationships do not rise to the level of a marriage, they do come close. If you don’t count sleeping, during my two decades of practice I clearly spent more time

in the company of my law partners than I did in the company of my wife, Phyllis. Keep that in mind as you make decisions in the future regarding folks who will become an important part of your professional life. Let me say that we were richly blessed. David Nuffer and I were partners for 22 years, and during that time I never remember an argument or serious disagreement. Never did either of us raise our voices at one another in anger.

When we began, we sat in our office waiting for the phone to ring. There was little in the way of business and fees. When I left for full-time Church service in 2001, there were 25 attorneys between our offices in St. George, Salt Lake City, and Mesquite, Nevada. David left a year later in 2002 when he was appointed as a full-time federal magistrate in Salt Lake City. Earlier this year he was nominated by President Obama to fill an opening for a federal district judge here in Utah. Last week he was approved by the Senate Judiciary Committee and is one vote away from confirmation. I am grateful I had the privilege to be partners with David Nuffer for more than two decades. They were very good years, and I am grateful for his friendship.

Dave and I had the good fortune to partner and associate with a number of wonderful attorneys through the years. Coincidentally, most of them were J. Reuben Clark Law School graduates. Most of them continue in their legal careers in Southern Utah and Salt Lake City. I am grateful to have worked with Chris Engstrom, Lyle Drake, Terry Wade, Randy Smart, Jeff Starkey, Mike Day, and many others. Choose your professional associates well, and your professional life will be much more enjoyable.

As our practice grew, so did the opportunities. We learned early that if you do good work and charge a reasonable fee, you will stay busy. Having grown up in St. George, I had an initial advantage in attracting clients. One disadvantage, however, was that many of those new clients were relatives. The family discount soon became a bit of a joke around the office.

There is a saying that in a small-town practice, one-half of the town loves you and the other half hates you, that is, until you sue the other half and then they all hate you. I was related to half the town, so that did cause some confusion in our conflict checks through the years.

My sense is that Dave and I would have been content with a very small law practice, but it turned out a bit differently for us. At the time we started our firm, St. George and Southern Utah was on the cusp of three decades of unprecedented growth. Our opportunities and challenges grew with our community. To complete the work that was coming through the doors, we chose to grow rather than to turn work away and lose potential clients. However, others in our community chose to keep their practices small, and they likewise did well in the expanding local economy.

Gradually our attorneys chose their own areas of specialization. Of all my partners I remained the generalist. I enjoyed the variety of issues and problems and particularly the interaction with clients. In a rural practice you usually juggle a large number of clients with small matters rather than concentrate on large blocks of litigation or transactional work. My practice included municipal clients, real estate, business, environmental law, family law, and an occasional criminal defense matter.

I loved the practice of law. I enjoyed going to work every morning. I liked the people with whom I worked in the office, and yes, I even liked most of my clients. I felt it was a privilege to help people solve problems, settle disputes, and move on with their lives. Occasionally I was able to right a wrong, change a law, or litigate a significant matter, but most of the time I gave counsel, negotiated settlements, prepared documents, or finalized an adoption. I represented different generations of the same clients and was occasionally introduced as “our family lawyer.” When that happened I would smile to myself and think back to F. Clayton Nelson.

Now, small-town practice may not be for everyone. It is my counsel, however, that you at least consider all your options before you set in motion a career that will likely last 35 to 40 years. In these difficult economic times, smaller firms, or even solo practice, may provide benefits that you may not have considered. Let me suggest two.

The first benefit is your family. One reason you decided to go to law school was to have some control over your destiny. A law degree can provide that opportunity. There are many different paths you can take with your degree. Some of you will be in the public sector, but most of you will earn your living in private practice. Right now, if you are like most law students, you are probably more concerned with getting a job, getting out of debt, and having sufficient income to never eat macaroni and cheese or tuna fish sandwiches ever again. But you will eventually reach a point in your life when time will mean more to you than money. Some of you, to your detriment, will learn this too late. Children grow up very quickly, and it really isn't your money they want—it's your time. If you ignore your family to further your legal career, you will pay a dear price. We were taught early in our law school education that “the law is a jealous mistress.” While this may not sound politically correct in today's world, the principle is true. You who enter the profession of law will find this to be a continual challenge. There is never enough time. No case or document is perfect. The practice of law can be messy.

Some matters drag on for months or years. If you like to lead a neat, tidy life in which chores are completed every day, I recommend being a mail carrier for the U.S. Postal Service. Not letting the practice of law consume you will be a challenge you will need to face throughout your career. That is difficult enough. But if you add to that burden the expectation that many large firms have for their associates to bill 200 or more hours a month, something is going to give. Sadly, all too often it is the family. Balance your priorities as you consider your future. Usually, though not always, you will find more time for family in smaller firms in which billing expectations are more modest and small-town family life is more appreciated.

The second benefit is community service. My grandfather was mayor of St. George during World War II; he served on community boards throughout his life; and he was dedicated in his church service. There are some

things he taught me about service. He often quoted, “The public service we render is the rent we pay for our place on earth.” All of us have a responsibility to make our communities a better place. Lawyers are particularly prepared to step forward and make a contribution. Our training helps us to analyze complex issues and identify a way forward. This ability is needed in public service.

Another thing my grandfather often told me was, “I would rather be a big fish in a small pond than a small fish in a big pond.” Meaning, of course, there are more opportunities to make contributions in a small town than there might exist in a large city.

In my personal life I have found this to be true. As I became more established in the practice of law, opportunities came to provide public service. In my case, I gravitated toward education, running for election to the local school board and serving on the statewide governing board over higher education. I also have a passion for the environment and eventually was invited to serve on the board of a regional environmental organization. These opportunities enriched my life, and I hope I've made some small difference in the community and state I so dearly love.

Such opportunities will come your way in your career. On the one hand you will be the butt of countless lawyer jokes that your friends and acquaintances will be eager to share. But I assure you, lawyers command respect. You will be an important part of the community, and those same friends and acquaintances will seek you out to serve in various capacities in the community. That doesn't mean they will always understand you, but they will respect you.

Let me illustrate this with an experience I had shortly after I was called to serve as bishop years ago. In our ward there was a rough fellow who made his living as an excavation contractor. He approached me one Sunday before sacrament meeting, stuck out his hand, and looked me straight in the eye. “I don't know, Bishop,” he said. “My testimony has been severely

tested. Not only is my new bishop a lawyer, he's a Democrat as well!" (I didn't bother to ask which offended him the most.)

Take the opportunities to serve. It is my belief that such opportunities will abound if you choose to practice in a small town.

It is a privilege to be a lawyer. It is a noble responsibility to be an advocate, a counselor, and a peacemaker. While I am willing to accept that there is some satisfaction in representing the corporate behemoths of the world, I do know for certain that there is great satisfaction in representing friends, neighbors, and associates in your community. Attending a small-town city council meeting, sitting with local farmers in their irrigation company board meeting, visiting the home of an older couple to counsel them through a simple estate plan, resolving a difficult real estate boundary dispute—these are just a small sample of the kinds of experiences you will enjoy in small-town practice. I am reasonably certain those fellow members of the bar perched on the 52nd floor of a Manhattan high-rise will not have such experiences. As you consider the future, I hope you will consider the benefits of a small town, with the added benefit of going home for lunch every day if you desire.

Let me conclude with three pieces of advice shared by a friend:

First, always go for the big engine.

Second, the early bird may get the worm, but the second mouse gets the cheese.

Third, don't underestimate the power of stupid people in large groups.

Let me explain. "Always go for the big engine"—in other words, aim high. Set lofty goals. As Emily Dickinson wrote, "Live a big life!"

As to the second mouse and the cheese, in all your planning, plan to be surprised. Life has some great adventures for you, so take advantage of the opportunities that will come. Don't be so busy focusing on your plan or doing your chores that you miss the surprises and opportunities that lie ahead.

Finally, in your professional and personal life it is sometimes necessary to take positions that may not seem popular or accepted. You will represent clients who may be guilty, unpopular, or polarized by society. Given your personal beliefs, there will undoubtedly be times in which your standards and decisions will be questioned or even ridiculed. Do not let the unruly crowd define you personally or professionally. Stand up for what's right, and stand up for those you represent.

Thank you again for this opportunity to be with you this morning. I wish you all the very best as you move forward in your own legal careers. It is my hope that you, too, will enjoy the practice of law. It is also my hope that a few of you will provide legal representation to those fine citizens who reside in the small towns scattered across our great land. And for those who do, I hope that on occasion you, too, will be introduced as "our family lawyer."



ART CREDITS

PAGE 8: Maynard Dixon (1875–1946), *Empty House*, 1935, oil on canvas, 30 x 25 inches. Brigham Young University Museum of Art, gift of Herald R. Clark, 1937.

PAGE 11: Maynard Dixon (1875–1946), *Old Homesite*, 1937, oil on canvas, 36 x 40 3/16 inches. Brigham Young University Museum of Art, gift of B. Darrel and R. Reed Call, 1977.

PAGE 12: Maynard Dixon (1875–1946), *Mormon Home*, 1940, oil on canvas, 25 1/4 x 30 1/4 inches. Brigham Young University Museum of Art, 1971.

PAGE 15: Maynard Dixon (1875–1946), *The Plains*, 1931, oil on canvas, 26 x 30 inches. Brigham Young University Museum of Art, gift of Herald R. Clark, 1937.





*If everyone
is family,
then no one
is family.*

BARACK
OBAMA.²

..... LYNN D. WARDLE¹

T H E B O U N D A R I E S O F B E L O N G I N G

P H O T O G R A P H Y B Y B R A D L E Y S L A D E

I. Introduction: Belonging

"No man is an island." —JOHN DONNE³

The yearning to belong is said to be inherent in human nature.⁴ As Bruce C. Hafen put it, "People simply feel a desire to be connected with others, especially in close relationships. They are feeling the longing to belong."⁵ Humans are communal and seek (and flourish in) social associations, beginning with the family. From ancient times⁶ to modern,⁷ the social nature of human beings has been noted, protected, and regulated.

One of the paradoxes of belonging is that the need to belong also creates a need to exclude; in order for belonging to occur, there must be boundaries: standards defining the relationship and criteria that separate members of the group from nonmembers. All communities have membership requirements that define their boundaries. A variety of disciplines and theories of belonging—community, identity, inclusion, and allegiance—help us understand how to draw such boundaries. A key element in all of these bodies of knowledge about belonging is the need to reflect, protect, and promote the purpose of the community in drawing boundaries of belonging.

Marriage is a particularly important kind of community. Marriage is the primary expression of and preferred locus for the most meaningful and socially beneficial forms of intimate belonging. Though many other personally meaningful and fulfilling relationships exist,

harmed some families and generated confusion in family law and in social expectations concerning marriage.⁹ When inclusion undermines the purposes, meaning, and functions of a core social institution, long-term negative family social consequences outweigh short-term benefits for the additional members.

The boundaries of marriage must reflect the key purposes of that public community. Gender integration—uniting a man and woman in a gender-complementary union—is an essential, and perhaps the most indispensable, purpose of marriage. Allowing same-sex couples to marry seriously undermines the basic legal and social institution of marriage.

II. Boundaries and Exclusion Are Necessary for Community

"Good fences make good neighbors."

—ROBERT FROST¹⁰

A "community" is "a group of people distinguished by *shared circumstances* of nationality, race, religion, sexuality, etc.,"¹¹ "a group of people who *share the same interests, pursuits, or occupation*,"¹² and a group of people who exist because of "[t]he fact of *having a quality or qualities in common; shared characteristics, similarity; identity; unity*."¹³ Thus, the very concept and meaning of community creates the need to define boundaries, establish standards for membership, and identify the common qualities that are criteria for belonging to a community.

Identity and group theorists remind us that boundaries are needed to define, understand, and protect our institutions as well as to live in peace with others who are not members of the community. Boundaries protect the community, its identity, its independence, and the relations community members have with those outside the community. Boundaries also protect our neighbors and our relationships with them.¹⁵

Clear boundaries—bright lines—enable responsible individuals to make and implement plans on their own, knowing that they can rely upon clear boundaries.

*To secure loyalty, groups must not only satisfy members' needs for affiliation and belonging within the group, they must also maintain clear boundaries that differentiate them from other groups. In other words, groups must maintain distinctiveness in order to survive—effective groups cannot be too large or too heterogeneous. Groups that become overly inclusive or ill-defined lose the loyalty of their membership or break up into factions or splinter groups.*¹⁶

The doctrine of allegiance provides an especially relevant example of and basis for understanding the importance of boundaries that define membership in a group. "By the traditional English doctrine of allegiance, every loyal subject was entitled to the protection of the king. . . . However, allegiance was conditional upon the provision of that protection."¹⁷ In other words, duties and benefits were linked. As Coke explained in *Calvin's Case*, "Ligeance is the mutual

AS WITH OTHER COMMUNITIES, MEMBERSHIP IN THE COMMUNITY OF MARRIAGE REQUIRES AN UNDERSTANDING OF THE BOUNDARIES

the benefits of marriage to society and to family members are unique.⁸ As with other communities, membership in the community of marriage requires an understanding of the boundaries of that relationship and some necessary exclusions to preserve the core community purposes of the institution. Some kinds of belonging are inconsistent with and contrary to the core purposes of the community. Some well-intentioned attempts to expand inclusiveness in laws governing family relations have

Numerous intellectual disciplines and traditions as well as significant legal doctrines underscore the importance of boundaries to protect communities and to give meaning to belonging. These include group and identity theory, communitarian theory, and allegiance theory. Scholars of many perspectives and disciplines have noted that "groups come into being in order to provide members with a collective good, and that these collective goods will often be public goods."¹⁴

bond and obligation between the King and his subjects, whereby subjects are called liege subjects, because they are bound to obey and serve him; and he is called their liege lord, because he should maintain and defend them."¹⁸ Membership in a community carries with it significant duties, including allegiance to the purposes for which the community was formed.

The doctrine of allegiance came to America with the English colonists. For

example, both the Mayflower Compact¹⁹ and the so-called “Arabella Covenant,” in Jonathan Winthrop’s sermon “A Model of Christian Charity,”²⁰ emphasize the reciprocal rights-duties relationship between rulers and the governed as the basis for the duty of allegiance. The landmark 1776 Virginia Declaration of Rights linked allegiance to the right of suffrage in the political community.²¹ Allegiance theory assumes the connection between allegiance to the purposes of the community and membership in it. Allegiance to boundaries strengthens relationships.

III. Boundaries Must Support the Core Purposes of the Community

The doctrine of allegiance also emphasizes that boundaries must reflect the core reasons and functions of the community. Not accepting the duty of allegiance to the core purposes of the community disqualifies one from membership in the community.

Anthropologist Claude Levi-Strauss observed that, historically, the core and essential purpose of marriage was to create alliances and form intergroup allegiances with other kinship groups.²² Additionally, social compact theory and republican government theories historically linked membership in the community with allegiance to the purposes of the community.²³ Blackstone identified the reciprocal duties of membership and allegiance as the “original contract of society . . . [that] in nature and reason must always be understood and implied in the very act of associating

Marriage is a public community status and a public institution that serves both dual purposes, public and private, as Dean Roscoe Pound long ago noted.²⁶ While individual marriage couplings will certainly reflect the private purposes of the parties, such unions also must conform to and reflect allegiance to the public trust—and to the core public purposes of marriage.

Boundaries preserve and protect the community of marriage for the sake of individuals, families, and society. Marriage is a core social institution protected by law; marriage laws communicate our shared understandings and clarify our expectations of persons in the communities and relationships that are prescribed by law.²⁷ Belonging loses meaning if those boundaries are expanded beyond the core purposes of family relationships. One may seek to preserve the label of “family” or “marriage,” but through overinclusive redefinition of the boundaries of family relationships, it will be drained of meaning and significance for both society and for the individuals in those relationships, as noted below.

IV. Gender Integration Is a Foundational Purpose of Marriage

One of the core purposes of marriage is to unite and integrate men and women in long-term, consensual unions. Gender integration is shorthand for a number of specific essential qualities, characteristics, and critical purposes of marriage. Among these

contexts—relationships in which there is minimal risk of violence (for young persons and women especially)²⁹ and also little risk to public health (from sexually transmitted diseases, dangerously premature childbearing, etc.).³⁰ Husbands and wives, not insignificantly, are said to enjoy the most healthy, most satisfying, and most socially beneficial sexual relations.³¹ Likewise, there continue to be enormous social interests in responsible procreation. These include providing the optimal situation for pregnancy and childbirth (including emotional commitment to and financial support of the pregnant woman and the child she is carrying). This also includes providing the most positive environment that offers the best prospects for the most beneficial child rearing (dual-gender child rearing provides the greatest protection for healthy development with the least fears and incompetencies).³²

Gender-integrating marriage links and mutually reinforces all three of these social interests. The social interest in healthy human relationship development is reflected in the terrible financial and social costs (from crime to loss of productivity to physical and emotional health problems and to detrimental impacts upon children) that result when significant intimate relationships break up.³³ Gender-integrated relationships are also the strongest types of relationships and are least susceptible to instability and to related and consequential insecurities.³⁴

The core purposes of marriage are built around human recognition across time and cultures that men and women are different in ways that are complementary. The integra-

OF THAT RELATIONSHIP AND SOME NECESSARY EXCLUSIONS TO PRESERVE THE CORE COMMUNITY PURPOSES OF THE INSTITUTION.

together”; and it was that “the whole should protect all its parts, and that every part should pay obedience to the will of the whole.”²⁴

It is the commonality that defines the community. “[D]istinctiveness per se is an extremely important characteristic of groups.”²⁵ Change the common characteristics, the boundaries for belonging to a community, and you change the community itself. Thus, the boundaries of community must protect the core purposes of the community.

are “(1) safe sexual relations, (2) responsible procreation, (3) optimal child-rearing, (4) healthy human relationship development, [and] (5) protecting those who undertake the most vulnerable family roles for the benefit of society, especially wives and mothers.”²⁸ All of these purposes require or assume gender-integrating unions between a male and a female.

Society has a great interest in channeling sexual relations into safe, socially beneficial

tion of mutually matching, harmonious, and corresponding gender differences is an indispensable purpose of the institution of marriage. “The classic purpose and function of marriage is to integrate biology, social conventions, law, etc., into one package, which is the intact married family.”³⁵ The uniting of genders has been a consistent core conception of marriage since the Enlightenment, found across a wide variety of philosophical and jurisprudential schools and traditions.³⁶



Likewise, the integration of a male and a female has been identified in the philosophies of Western civilization for thousands of years as a core constitutive purpose of marriage.³⁷

One contemporary intellectual school that provides compelling and eloquent justifications for gender integration as the core purpose of marriage is relational feminism, including, especially, French feminists, African feminists, and religious feminists. All of these groups appreciate the duality of humanity; celebrate the unique and irreplaceable contributions of women to our social institutions, including marriage; and insist upon their need to be equally included and valued as women in all of the basic institutions of society.³⁸

From a feminist perspective, gender-integrating marriage is important because it acknowledges the duality of humanity and prohibits exclusion of one gender from the public definition and constitution of a basic legal institution. Additionally, male-female marriages are different from same-sex unions because they manifest and implement the important value of, inclusion of, and respect for the different contributions of both men and women. Finally, from a utilitarian perspective, same-sex marriage is ill advised because marriage has been customized over millennia for gender-integrating male-female unions; and same-sex unions have different characteristics and expectations.³⁹

For example, French feminist Sylviane Agacinski argues for what she calls *mixité* (which she translates as “mixture” in English, meaning “to maintain the specificity of the term in its implication of the bringing together of two *different* elements”).⁴⁰ Her core claims are that “the duality of the sexes—whether viewed as a universal existential condition or as a social differentiation[—] . . . will not allow itself to be reduced or passed over”⁴¹ and that one “cannot separate the meaning and value of sexual difference from the question of generation.”⁴²

Similarly, many African feminists have advocated legal recognition of gender differences and representation of both genders in public institutions. “[T]he slowly emerging African feminism is distinctly heterosexual, pro-natal, and concerned with many ‘bread, butter, culture and power’ issues.”⁴³

Feminists writing from many religious traditions also have explained the importance of recognizing valid gender differences in the law and have celebrated gender-integrating marriage. A large and growing body of literature by some remarkable Catholic feminists, including Professor Elizabeth Schiltz, seeks to connect contemporary feminist concerns with historical Catholic theological roots.⁴⁴ Helen M. Alvare describes marriage as “the crucial social institution harmonizing men’s, women’s, children’s, and society’s

needs and goals.”⁴⁵ Notre Dame Law School professor Margaret Brinig has also written about the covenant tradition and covenant religious dimensions of marriage.⁴⁶ She and her family law casebook coauthor warn: “Opening marriage to homosexual as well as heterosexual might be the most dramatic change in the institution in American history.”⁴⁷ Likewise, some Evangelical feminists also have articulated justification for appropriate recognition of gender differences in the law generally and in marriage particularly.⁴⁸

Some Mormon feminists have written about the importance of male-female marriage, reflecting the influence of their faith’s unique religious doctrine that marriage is a God-ordained, dual-gender institution.⁴⁹ For example, Camille S. Williams writes that “the norm of heterosexual marriage is a necessary—albeit not sufficient—condition for social equality for women.”⁵⁰ She asserts that “[m]arriage and the marital family are arguably the only important social institutions in which women have always been necessary participants.”⁵¹ She argues that if women are not indispensable in the core public institution of marriage (if two men can make a marriage without a woman), women’s presence and voice may not be indispensable in other public institutions either.⁵²

Thus, the integration of a male and a female has been long and widely identified as one of the core purposes of marriage. Gender integration is not a useless vestigial remnant of ancient primitivism but is consistent with and reflective of fundamental human nature throughout history, endorsed by thoughtful scholars and commentators today and recognized as serving essential social functions that contribute to the stability of marriage and to social capital in society.⁵³

The Supreme Court of the United States has repeatedly emphasized the fundamental importance of marriage in our society as well as in our constitutional system of laws.⁵⁴ Those decisions consistently assume, clearly imply, and directly reinforce the dual-gender, male-female, gender-complementary nature of marriage:

*[N]o legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.*⁵⁵

Gender integration remains a core and essential purpose of marriage.

V. Same-Sex Marriage Undermines the Core Gender-Integrative Purposes of Marriage

Same-sex unions are inconsistent with and fail to meet and manifest allegiance to several of the core gender-integrating social purposes of marriage. They are by definition a rejection of the core, dual-gender composition and integrating purposes of marriage.

Some advocates of same-sex marriage note that no state requires a test for fertility before giving couples marriage licenses and that many couples who marry are infertile. They argue that the inability to procreate is not ground to deny same-sex couples the right to marry.⁵⁶

This argument for same-sex marriage is reductionist and overly simplistic. Married couples age together, passing through many biological and developmental stages—including stages in which, due to the normal course of life, they will not be able to procreate, perhaps will not be able to have sexual communion, and, in end-of-life conditions, may not be able to interact with each other at all, though they remain loyal to and supportive of those institutional purposes.

Allegiance theory bridges the gap between ability to procreate and marriage for infertile male-female couples. By analogy, citizenship does not oblige all citizens, including infants, adolescents, the infirm, and the elderly, to take up arms in defense of their nation on the front lines of its military wars; yet citizenship imposes the expectation of loyalty and allegiance and a willingness to show allegiance to and to do what one can in defense of the nation in times of armed conflict. Likewise, the infirm and aged and infertile may not be able to fulfill personally the procreative purposes of marriage, yet the nature of their gender-integrating

union expresses their ongoing allegiance to that social purpose and to the institution so conceived. That lack of allegiance to a core purpose of marriage is one of several factors that distinguish infertile heterosexual couples from same-sex couples.

Another source of concern about the inability to bear allegiance to and fulfill a core purpose of marriage comes from data about the high rate of sexual fluidity and instability—infidelity—in same-sex unions. Fidelity goes to the essence of allegiance in the marital bond. Sexual fidelity is especially critical to the safe and responsible socialization and rearing of children and to the optimization of children's chances and prospects for creating successful marriages of their own.⁵⁷

VI. Permanence and Process: "And This, Too, Shall Pass Away"⁵⁸

The history of marriage and marriage law includes the story of many popular fads that seemed to signify revolutionary changes in the nature and structure of the institution of marriage. Eventually each faded and passed into oblivion, leaving only a few broken human relationships in their wake. For example, some still living may remember the "free love" movement of the 1960s and the communes of the hippie days of the 1960s and 1970s.

The history of changes in marriage and family law have left significant, widespread damage to society—not just to a few individuals or couples or families, but to entire generations. For example, antimiscegenation laws forbidding interracial marriage and the unilateral no-fault divorce fad have done great harm and left permanent scars. Those social movements "captured marriage" and redefined marriage by changing marriage

laws in ways that endorsed harmful ideologies imbedded within them. Our long and tragic national experience with antimiscegenation laws, which took a full century—and a major Supreme Court decision—to correct, is evidence of the scope of the problem of marriage laws that codify misguided social ideologies which crystallize into law-distorted perceptions of marriage.⁵⁹

Legal processes and structural balances provide important buffers against damaging fads and temporary fashions that sweep through societies and become embedded in the laws. One of the most ironic consequences of the battle over same-sex marriage in California, Iowa, and Massachusetts has been the judicial disenfranchisement of the citizens in those states who opposed the redefinition of marriage to include same-sex couples.⁶⁰ Similarly, the unilateral decision of President Obama's Justice Department to refuse to defend the federal Defense of Marriage Act (DOMA),⁶¹ after DOMA had been successfully defended and upheld in multiple cases before his administration,⁶² undermines the democratic processes and demeans, marginalizes, and disenfranchises the people and institutions that enacted DOMA. It also has boundary-shifting effects to redefine the institution of marriage—and does so by executive fiat.

VII. Conclusion: Belonging

All communities, including the community of marriage, have boundaries that define membership in that community and which must reflect and protect the essential purposes of the community. The definition of marriage is the defining issue of our generation. How it is decided will have life-changing, world-changing consequences.

TO SOCIETY—NOT JUST TO A FEW INDIVIDUALS OR COUPLES OR FAMILIES, BUT TO ENTIRE GENERATIONS.



- 1 Lynn D. Wardle is the Bruce C. Hafen Professor of Law at J. Reuben Clark Law School, Brigham Young University. The full version of this article can be found in 25 B.Y.U. J. Pub. L. 287 (2011). An earlier draft of this article was presented at the Symposium on Belonging, Families and Family Law on January 28, 2011, at Brigham Young University Law School, where a dozen scholars addressed themes prominent in the legal scholarship of former dean Bruce C. Hafen. The valuable research assistance of Curtis Thomas, Robert Selfaion, and Alyssa Munguia is gratefully acknowledged.
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- 4 Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 Psychol. Bull. 497, 499 (1995).
- 5 Hafen, BELONGING, *supra* note 4, at 6. As Hafen notes, some psychologists identify this need to belong as the most powerful and important of all basic human psychological needs. *Id.* at 10. Yet Hafen says, “Ours is the age of the waning of belonging.” *Id.* at 43.
- 6 Genesis 2:18 (King James) (“It is not good that . . . man should be alone.”); Aristotle, THE POLITICS 3 (Stephen Everson ed., Benjamin Jowett trans., Cambridge Univ. Press 1988) (“Now, that man is more of a political animal than . . . any other gregarious animals is evident. . . . [I]t is a characteristic of man that he alone has any sense of good and evil, of just and unjust, and the like, and the association of living beings who have this sense makes a family and a state.”).
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foundational social unit underlies the state marriage amendments that have already been adopted in thirty states and over thirty-five nations. See William C. Duncan, *Thirty (30) State Marriage Amendments & Maine Question 1: Language, Votes and Origins* reprinted in Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution*, 58 Drake L. Rev. 951, App. 1, at 993 (2010); Lynn D. Wardle, *Who Decides? The Federal Architecture of DOMA and Comparative Marriage Recognition*, 41 Cal. W. L. Rev. 143 (2010).

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- 15 Boundaries protect those outside the group from intrusion, such as persons who do not wish to conform to the expectations of marriage by having marital obligations imposed upon them.
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- 19 *Mayflower Compact*, THE AVALON PROJECT (1620) http://avalon.law.yale.edu/17th_century/mayflower.asp. (“We whose names are underwritten . . . covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation,

and Furtherance of the Ends aforesaid . . . do enact, constitute, and frame, such just and equal laws . . . for the general Good . . . [and] we promise all due Submission and Obedience.”)

- 20 Jonathan Winthrop, *A Model of Christian Charity*, THE RELIGIOUS FREEDOM PAGE (1630) <http://religious-freedom.lib.virginia.edu/sacred/charity.html> (“[W]e are a company professing ourselves fellow members of Christ; . . . the care of the public must oversway all private respects . . . we are entered into covenant with Him [God] for this work . . . the Lord hath given us leave to draw our own articles . . . if we shall neglect the observation of these articles . . . the Lord will surely break out in wrath against us.”) (In this case, God is the ruler and the people are the governed.)
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- 24 Blackstone, *supra* note 11, at *35; see also *id.* at *233.
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- 30 See Wardle, *supra* note 15, at 1022–25.
- 31 See Linda J. Waite & Maggie Gallagher, THE CASE FOR MARRIAGE 47–52, 75–89, 152–58, 162–68 (2000).
- 32 See Lynn D. Wardle, *Multiply and Replenish: Considering Same-Sex Marriage in Light of State*

- Interests in Marital Procreation*, 24 Harv. J.L. & Pub. Pol'y 771, 784-96 (2001).
- 33 See Waite & Gallagher, *supra* note 70, at 47-64, 101, 143-149, 152.
- 34 See Lynn D. Wardle, *The Morality of Marriage and the Transformative Power of Inclusion*, in What's the Harm? Does legalizing same-sex marriage really harm individuals, families or society? 207, 219-225 (Lynn D. Wardle, ed. 2008) (reviewing literature on infidelity and instability of same-sex unions); see also Bradford Wilcox, *Honoring Thy Fathers*, Catholic Education.org, June 13, 2008) available at <http://www.freerepublic.com/focus/f-religion/2031631/posts> (last visited March 23, 2011) (children are less insecure when raised with a father in the home).
- 35 Bradford Wilcox, *Why Marriage Matters: A Natural Law Perspective on Marriage and Family Life*, Address at the Wheatley Institution Conference on Defense of the Family: Natural Law Perspectives, Brigham Young University, 27 Jan. 2011; see generally Sara Israelsen-Hartley, *Traditional Marriage Has Impact Beyond Faith, Scholar Says*, DESERET NEWS, Jan. 27, 2011, at A1, 13.
- 36 Scott Yenof, FAMILY POLITICS, THE IDEA OF MARRIAGE IN MODERN POLITICAL THOUGHT (2010).
- 37 See Sherif Girgis, Robert George & Ryan T. Anderson, *What is Marriage?*, 34 Harv. J.L. & Pub. Pol'y 245 (2010).
- 38 Lynn D. Wardle, *Gender Neutrality and the Jurisprudence of Marriage*, in THE JURISPRUDENCE OF MARRIAGE AND OTHER INTIMATE RELATIONSHIPS 37, 37-65 (Scott FitzGibbon, Lynn D. Wardle & A. Scott Loveless, eds., 2010) [hereinafter "Wardle, Gender"].
- 39 *Id.* at 44-45.
- 40 Sylviane Agacinski, PARITY OF THE SEXES viii (Lisa Walsh trans., Columbia Univ. Press 2001) (1998).
- 41 *Id.* at xxviii.
- 42 *Id.* at 22.
- 43 Gwendolyn Mikell, *Introduction to AFRICAN FEMINISM: THE POLITICS OF SURVIVAL IN SUB-SAHARAN AFRICA* 1, 4 (Gwendolyn Mikell ed., 1997); see also Wardle, *Gender*, *supra* note 79, at 48.
- 44 See generally Elizabeth Schiltz, *Does Sarah + John = 3? The History and Future of Complementarity in Catholic Feminism*, Keynote Address presented at The Family: Searching for the Fairest Love, Notre Dame Center for Ethics and Culture, Ninth Annual Fall Conference (Nov. 7, 2008), available (in video) at <https://sites.google.com/a/nd.edu/the-notre-dame-center-for-ethics-and-culture/video/fall-conference-videos/the-family-searching-for-fairest-love-videos> (last visited March 24, 2011); Sr. Prudence Allen, *Analogy, Law and the Workplace: Complementarity, Conscience and the Common Good*, 4 U. St. Thomas L.J. 350, 356 (2007).
- 45 Helen M. Alvaré, *Communion or Suspicion: Which Way for Woman and Man?*, 8 Ave Maria L. Rev. 167, 167, 195 (2009); see also Helen M. Alvaré, *The Turn Toward the Self in the Law of Marriage & Family: Same-Sex Marriage and its Predecessors*, 16 Stan. L. & Pol'y Rev. 135, 163 (2005).
- 46 Margaret Brinig, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY (2000). See also Margaret F. Brinig & Steven L. Nock, *What Does Covenant Mean for Relationships?*, 18 Notre Dame J.L. Ethics & Pub. Pol'y 137 (2004).
- 47 Carl E. Schneider & Margaret F. Brinig, AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS AND PERSPECTIVES 57 (2d ed. 2001).
- 48 See Sally K. Gallagher, *The Marginalization of Evangelical Feminism*, 65 Soc. Relig. 215, 227-28 (2004); see generally Wardle, *Gender*, *supra* note 79, at 53-54.
- 49 See Alan J. Hawkins et al., *Equal Partnership and Sacred Responsibilities of Mothers and Fathers*, in STRENGTHENING OUR FAMILIES: AN IN-DEPTH LOOK AT THE PROCLAMATION ON THE FAMILY 63 (David C. Dollahite ed., 2000) (reviewing scriptural basis for Mormon belief in the dual-gender, gender-equal, gender-interdependent marriage in the Book of Mormon, Doctrine and Covenants, and Pearl of Great Price, as well as the Bible).
- 50 Camille S. Williams, *Women, Equality and the Federal Marriage Amendment*, 20 BYU J. Pub. L. 487, 489 (2006).
- 51 *Id.* at 487.
- 52 *Id.* at 494-99 (arguing that dual-gender marriage promotes the social and economic equality of women).
- 53 *Id.* See also Maria Sophia Aguire, *Marriage and the Family in Economic Theory and Policy*, 4 Ave Maria L. Rev. 435, 436 (2006) ("From an economic policy point of view, both marriage and the family are important. Healthy families are essential because they directly impact human, moral, and social capital. . ."); Maria Sophia Aguire *The Feminine Vocation and the Economy*, 8 Ave Maria L. Rev. 49, 52-54 (2009) (nonmonetary contribution of women in the family is crucial to family development, and such contributions contribute greatly to overall social capital); see further Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. Democracy 65, 74 (1995).
- 54 See *supra* note 20.
- 55 *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (emphasis added).
- 56 See *Morrison v. Sadler*, 821 N.E.2d 15, 36-37 (Ind. Ct. App. 2005) (Friedlander, J., concurring) (many infertile non-same-sex couples can marry); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (procreative interests of the state are not rational justifications for limiting marriage to male-female couples because fertility and procreation are not prerequisites for obtaining a marriage license); Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 Yale J.L. & Human. 1, 20, 32 (2009); Catherine E. Smith, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion—Legitimacy, Dual-Gender Parenting, and Biology*, 28 L.& IneQual. 307, 315 (2010); Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. Davis L. Rev. 305 (2006).
- 57 Lynn D. Wardle, *Parental Infidelity and the "No-Harm" Rule in Custody Litigation*, 52 Cath. U. L. Rev. 81, 110-127 (2002).
- 58 Abraham Lincoln, *Agriculture: Annual Address Before the Wisconsin State Agricultural Society, at Milwaukee, Wisconsin, Sept. 30, 1859*, in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 493, 504 (Roy P. Basler ed., unabridged paperback ed. 2001), available at <http://showcase.netins.net/web/creative/lincoln/speeches/fair.htm> (last visited Jan. 17, 2011).
- 59 *Loving v. Virginia*, 388 U.S. 1 (1967). While some individual states prohibited interracial marriage before the Civil War, see Walter Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 Va. L. Rev. 1189 (1966), the nationalization of antimiscegenation laws occurred after the Civil War and lasted until the Supreme Court ruled in 1967 in *Loving* that such laws were unconstitutional. Lynn D. Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the "Loving Analogy" for Same-Sex Marriage*, 51 How. L.J. 117 (2007).
- 60 *Varnem v. Brien*, 763 N.W.2d 862 (Iowa 2009); *In re COORDINATION PROCEEDING, SPECIAL TITLE* [Rule 1550(c)] Marriage Cases, No. 4365, 2005 WL 583129 (Cal. Super. Ct. S. F. County, Mar. 14, 2005), *aff'd* *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded* by Cal. Proposition 8, Nov. 4, 2008, *as recognized in Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 943, 959 (Mass. 2003); *In re Opinion of the Justices to the Senate*, 802 N.E.2d 565, 569-71 (Mass. 2004).
- 61 Statement of the Attorney General on Litigation Involving the Defense of Marriage Act, Feb. 23, 2011, available at <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html> (last visited Feb. 23, 2011).
- 62 *Smelt v. County of Orange*, 447 F.3d 673, 686 (9th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303-09 (M.D. Fla. 2005); *In re Kandui*, 315 B.R. 123, 131-48 (Bankr. W.D. Wash. 2004). Compare *Commonwealth v. Dep't. Health & Human Servs.*, 698 F.Supp. 2d 234 (D. Mass. 2010); *Gill v. Office of Personnel Management*, 699 F.Supp. 2d 374 (D. Mass. 2010) (cases in which the administration failed to competently defend DOMA).

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TIMPANOGOS



LEGAL

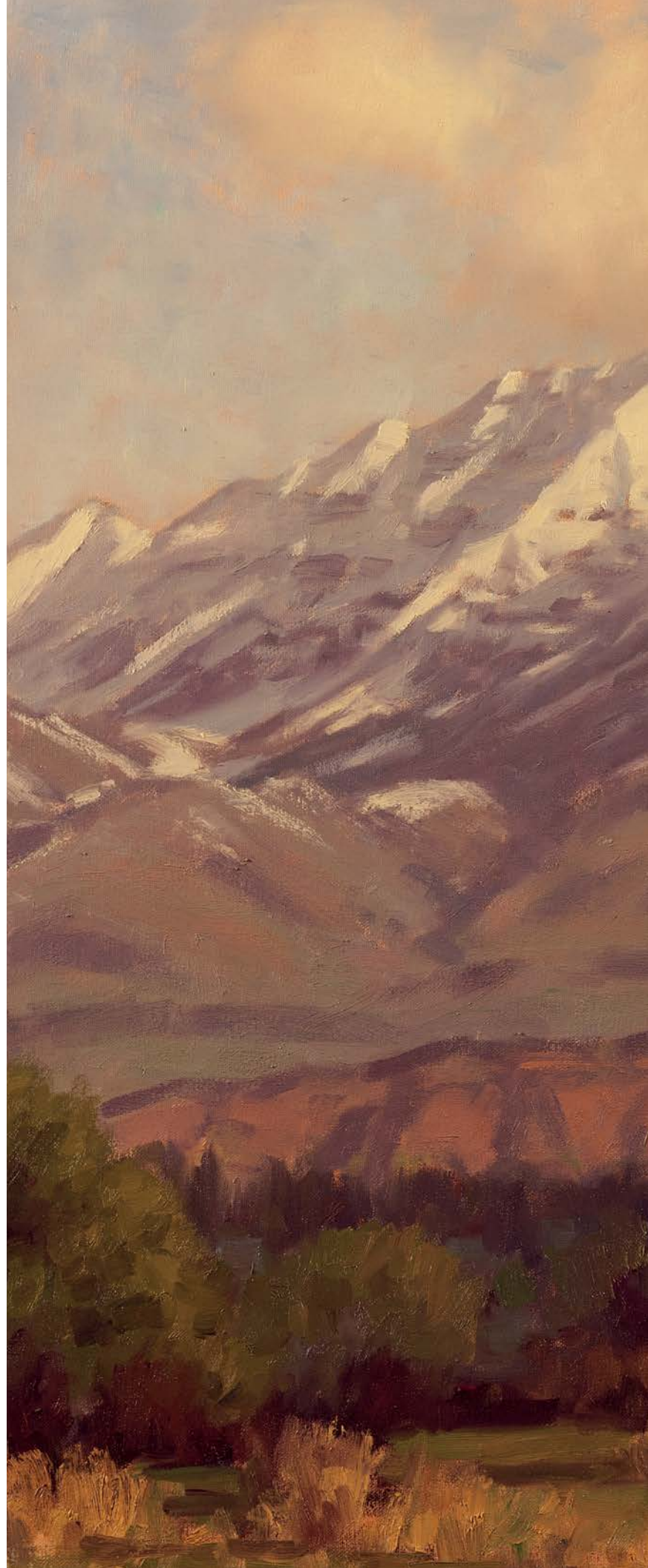


CENTER

A POWERFUL
CONFLUENCE FOR GOOD

by Jane H. Wise

PAINTING OF MOUNT TIMPANOGOS
BY KARL THOMAS





“PRO BONO SERVICE
IS A BLESSING NOT ONLY TO
THE PEOPLE WHO
RECEIVE THE SERVICE BUT
ALSO TO THOSE WHO
GIVE. THERE IS AN UPLIFTING
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LEGAL PRACTICE.”

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For years the Utah County legal community has seen the need for delivering pro bono legal services to low-income clients who weren't being helped by other organizations. The dream was to have skilled legal volunteers help at a pro bono center sustained through the legal community's donations of time and money and not founded on any one person's charisma or agenda. This was to be a community effort. There were stops and starts, but nothing sustainable was attained until the Timpanogos Legal Center (TLC) was formed in the fall of 2010. This dream became a reality because of the legal community's vision and commitment to make it succeed.

Named for the mountain that stands sentinel over Utah County, the acronym for the Timpanogos Legal Center—TLC—was chosen for the care the Center was prepared to give to its clients. TLC's mission statement is “Lifting Lives Through the Law.” The Center is open every Tuesday evening at the

RICHARD SHEFFIELD

COFOUNDER AND
PRESIDENT OF TLC

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PHOTOGRAPHY
BY BRADLEY SLADE



Health and Justice Building in downtown Provo, and a special document clinic is held once a month. “We wanted to convey an image of lifting your eyes up to Timpanogos,” said Richard Sheffield, cofounder and president of TLC. “Pro bono service is a blessing not only to the people who receive the service but also to those who give. There is an uplifting feeling experienced by those who give the service that is real, that makes you enjoy the legal practice more, and that helps you be even more effective in legal practice.”

The confluence of people involved with the law along with community legal organizations made TLC happen. The list is impressive.

PARTNERS

Central Utah Chapter of J. Reuben Clark Law Society. Richard Sheffield was chair of the Central Utah Chapter of J. Reuben Clark Law Society in 2010 when he looked to the Southern Utah Community Legal Center in St. George as a model for establishing volunteer legal services for Utah County. He was inspired by the scripture that was the theme for the then upcoming Law Society conference: “Put your trust in that Spirit which leadeth to do good—yea, to do justly, to walk humbly, to judge righteously; and this is my Spirit . . . , which shall enlighten

your mind, which shall fill your soul with joy” (D&C 11:12–13).

To found the Center, Sheffield drew together the entities he foresaw would become the best partners in coming up with a plan like the Southern Utah model. Some changes were made to fit the plan to what was unique in Utah County. “I’m doing this because I care about reaching out to the neediest in my community,” Sheffield said. “Looking for an opportunity to do good has made me find more fulfillment in my own legal practice.”

BYU Law School. BYU law professor James Backman has been involved in exploring means for providing pro bono services through students and volunteer attorneys since the early 1990s. He has been a champion for the Center from the beginning. As a cofounder, he says, “Every attorney is responsible to assist both pro bono clients and those organizations serving persons of limited means. This reaches to those preparing for practice, too. Law schools must provide substantial pro bono activities for their students under law school accreditation rules.”

Susan Griffith—a part-time professor at BYU Law School, a Utah Legal Services attorney, and the executive director of TLC—serves as one of the licensed attorneys at the Center. She graduated from the Law School in 1987, served an externship at Utah Legal Services while a student, and went to work there after graduation. She knows intimately the legal problems facing the poor and specializes in family law having the tools to aid



Richard Sheffield and Craig Carlile (*opposite*), Professor James Backman, cofounder (*above*), and Marilee Allred and Susan Griffith, executive director (*left*), at a Timpanogos Legal Center Board meeting.

victims of domestic violence and child abuse. She has taught courses at the Law School in elder law, domestic law intervention, street law, and lawyers as leaders in the community. Currently more than 100 BYU law students assist approximately 70 attorneys at TLC with initial client interviews, in drafting documents, and in preparing for hearings and trials. Third-year law students can help argue in court under the Utah third-year practice rule. “Law students fit well in the program as volunteers,” Griffith said. “At the document clinic they bring their computers and pair up with the attorney volunteers. Students do the typing and the legwork for the attorneys, and TLC provides the document templates.”

BYU law students have found that working side by side with practicing attorneys not only provides great work experience but also brings personal fulfillment. Camille Borg, current president of the Law School’s Public Interest Law Foundation, has served with TLC from the first. “Students should get involved because it is the right thing to do,” Borg said. “Lawyers have a responsibility to help lift lives through the law.”

Central Utah Bar Association. Liisa Hancock, Central Utah Bar Association (CUBA) president, is a member of the TLC Board and CUBA’s representative to the Center. Having attorneys volunteer from CUBA is essential to TLC’s staying power, with even inactive attorneys able to participate. Like students who look forward to working side by side with practitioners, attorneys enjoy working with students and mentoring them.

Utah has a rule that allows attorneys on inactive status to still do pro bono work so long as they are under the direction of a licensed attorney. “The TLC has identified and invited participation of unique groups of inactive status attorneys,” Professor Jim Backman said. “We call this group our ‘TLC team of attorneys,’ and we have had more than 40 step forward to be involved in ways permitted by newly established bar association rules for inactive attorneys to assist on pro bono matters.”

Not all inactive attorneys are those who have practiced for years and then retired. Griffith reports on a subset of this group: “I love that we can give our stay-at-home mothers a chance to do important community service work. This program gives these really



Volunteers at a TLC document clinic.

talented women the opportunity to primarily work at home. At the same time it provides an outlet for them to use their professionally trained skills.” TLC also draws volunteers from recent graduates who aren’t fully employed and want to be engaged, using their law skills to prepare documents and interview clients. Although unpaid for their services, these new attorneys are building résumés.

Utah County attorneys, whether on active or inactive status, and Utah County law firms are committed to TLC. Their donations of time and money keep TLC busy serving the low-income clients.

Utah Valley University Paralegal Department. Jill Jasperson of the Utah Valley University (UVU) Legal Studies Program is a member of the TLC Board. UVU paralegal students volunteer on Tuesday nights at the Center and at the document-writing clinic, using their creativity and practical skills to serve clients. They are an important part of the student volunteers at the Center.

OTHER TLC CONNECTIONS

Not only does TLC have partners in Utah County, it is connected with the larger state legal community.

Utah Legal Services. Utah Legal Services has always had walk-in clinics for low-income

clients, but it simply hasn’t been able to provide ongoing representation for most clients because of a lack of funds. There has always been a need for volunteer attorneys to fill that gap. TLC is helping to provide those services in Utah County.

Utah Legal Services provides client screening for TLC, and attorneys Sue Crismon and Susan Griffith coordinate the volunteers and supervise the inactive volunteers during clinic hours. Volunteers are given access to cases, forms, and sample pleadings provided by Utah Legal Services. Staff attorneys answer volunteer’s questions, and Utah Legal Services provides staff for continuing legal education seminars on family law issues—those most often encountered by TLC volunteers.

“And Justice for All,” Utah Bar Foundation, United Way. Located in Salt Lake City, “And Justice for All” helps with fund-raising efforts for its groups: Legal Aid Society, Utah Legal Services, Disability Law Center, Utah State Bar, and the Minority Bar. It has adopted TLC as a subagency so that TLC donations flow through directly for TLC along with the other donations for its other entities. The organization “And Justice for All” provides an advisory role for TLC. The Utah Bar Foundation, an arm of the Utah State Bar, provides annual grant money from the Bar to Utah Legal Services. The United Way has provided



Tamara Fackrell of the Law School trains attorneys in mediation at the Food and Care Coalition.



funding for a TLC coordinator, Debbie Myers, who helps with the case screening.

THE PLAN FOR VOLUNTEERS

TLC can call on a broad range of volunteers because of two Utah practice rules. With the “limited scope” practice rule in Utah, it is now possible to represent clients for only part of their case. TLC helps clients generate documents for temporary orders and other limited representation in cases, providing what is most immediate for the client. The Utah Courts website doesn’t provide online documents for temporary living arrangements. This is an example of how volunteer attorneys can help represent clients within the

“limited scope” rule. They prepare the papers for temporary order hearings and prepare the clients to appear in those hearings with documents that are understandable and clear to both the client and the court.

The second practice rule opens up practice opportunities for attorneys who are inactive to volunteer with TLC. So long as the inactive attorneys are supervised by a licensed attorney, they can work in the Center’s clinic and document center. Free continuing legal education seminars for Utah State Bar accreditation provide the training for these attorney volunteers.

For more information on how you can help the Timpanogos Legal Center or attend a free CLE, contact:

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THE AMIGO BRIEF

AT WORK ON AN EXCEPTIONAL CASE:

HOSANNA-TABOR EVANGELICAL LUTHERAN

CHURCH AND SCHOOL V. EQUAL

EMPLOYMENT OPPORTUNITY COMMISSION

by Donlu Thayer¹



BRADLEY SLADE

THE CASE

In March 28, 2011, the U.S. Supreme Court agreed to hear a case immediately hailed as the most important religious freedom case in decades. At stake in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* was the “ministerial exception,” a First Amendment doctrine never before explicitly recognized by the Court, though it had been used by all U.S. Circuit Courts of Appeal to exempt churches from discrimination claims brought by their leaders and teachers.

The case began when Cheryl Perich, a teacher at a Lutheran elementary school, decided to return early from disability leave. She first showed up in the classroom in which her temporary replacement was teaching, and then, when the church did not meet her demands, she threatened to sue, citing violation of the Americans with Disabilities Act (ADA). From the point of view of the church, however, Perich was not a lay employee protected by the ADA; rather she was a person called of God and commissioned by the congregation to be “the Church’s *primary* means of teaching the faith to

her students.”² She was, in short, a minister. Since her threat to sue violated church teachings that such disputes should be resolved outside of litigation, Perich was asked to resign voluntarily. She refused. Her commission was rescinded by the congregation, and she was dismissed.

Perich then filed a complaint with the Equal Employment Opportunity Commission (EEOC), which became party to the suit. The district court ruled that the firing was subject to the ministerial exception and thus not within the purview of the court. On appeal Perich countered that religious matters occupied only a small portion of an otherwise secular teaching day, and she therefore should not be considered a minister. When the Sixth Circuit ruled in Perich’s favor, the church appealed to the Supreme Court, asserting its constitutional right to select its own religious leaders and teachers. In response, the government took the surprising position that the circuit courts all had erred in finding constitutional support for the ministerial exception.

Before the Court heard oral arguments in *Hosanna-Tabor* on October 5, 2011, it had seen

10 briefs in support of the government’s position, including one representing more than 60 professors of law and religion. It had also received 20 briefs in favor of the Petitioner, including one from the International Center for Law and Religion Studies (ICLRS) at BYU.³

The decision, announced on January 11, 2012, was stunning: “We agree that there is . . . a ministerial exception,” wrote Chief Justice Roberts for the entire Court, the unanimous opinion overturning the Sixth Circuit and repudiating the “untenable” arguments of the U.S. government. The Constitution provides “special solicitude to the rights of religious organizations” and bars “the government from interfering with the decision of a religious group to fire one of its ministers.” The protection extends not just to pastors, priests, bishops, or rabbis but to any leader or teacher who personifies the beliefs of the religious community. “By imposing an unwanted minister,” wrote the Chief Justice, “the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments.”

THE ICLRS’S INVOLVEMENT

Days after the announcement that *Hosanna-Tabor* would be heard, Center personnel were discussing the case at the International Society meeting on BYU campus with BYU law alum Hannah Smith, now senior counsel at the Becket Fund for Religious Liberty, co-counsel for the Petitioner. A week later a request came from lead counsel Douglas Laycock for a “comparative law brief”—something the Center, with its ability to mobilize an international network of foreign experts, is uniquely qualified to undertake. A few Supreme Court justices are known to appreciate the persuasive value of international precedent, and it was thought that a comparative law brief might be important in tipping the balance in favor of the Petitioner.

The filing deadline was only six weeks away though—hardly enough time to survey the world and write a complex brief, especially when Center director Cole Durham would be participating in conferences in half a dozen countries during that time, and other Center personnel faced heavy travel, teaching, and publication schedules.

Fortunately, the Center is part of a law school.

As work on the brief began, most of the Center's 2011 BYU law student fellows were leaving for their summer assignments abroad. Brandon Bastian, however, was assigned to Salt Lake City and was able to coordinate the student team throughout. Other student fellows who contributed in the beginning or returned in time to help in the flurry at the end included Joseph Stewart, Cynthia Hale, Szonja Ludvig, Rachel Snow, Katelyn Trottier, and Crystal Wong. The bulk of the student work fell

Students from six law schools worked together to assist staff at the International Center for Law and Religion Studies in preparing an amicus brief in the Hosanna-Tabor case decided by the U. S. Supreme Court in January 2012.

Universität, who came with his law-student wife, Cynthia, from Frankfurt, Germany.

The actual drafting of the brief called upon the talents and experience of Center associate director Elizabeth Clark. Managing director Robert Smith created assignments for the students and supervised the

project. Administrative assistant Deborah Wright handled scores of communications with international experts. The Center's editor, Donlu Thayer, was the keeper of the draft, incorporating the student research and the contributions of associate directors Brett Scharffs and Gary Doxey and senior fellow David Kirkham, along with comments, requests, and final revisions from Cole Durham.

In early April, somewhere between Warsaw and Rome, Durham approved a letter to be sent to four dozen friends, international experts in church-state relations, and recommended contacting Gerhard Robbers in Germany. Robbers had successfully represented The Church of Jesus Christ of Latter-day Saints in an important employment case before the European Court of Human Rights,⁴ and he was able to quickly obtain German government permission to send a crucial document from the case that summarized the rights of religious organizations to hire and fire employees in many European countries. The document, however, was in German.

Samuel and Cynthia Fröhlich thus were invaluable at the outset of the project. They not only provided insights into European judgments and laws generally, but they translated the Robbers document, which formed the backbone of the research for the brief.

What followed, in the words of Bastian, was a crash course in "the climate of religious freedom in the world," as the team "spent hundreds of hours poring over books, articles, emails, cases, and briefs, referencing forty-some-odd countries. In efforts to state the case as clearly as possible, charts, graphs, briefs, summaries, and quotations were assembled.

The initial, basic research document topped 215 pages, and we scoured all available resources to answer 11 questions about 34 countries—374 answers that we wanted properly cited."

One focus, suggested early on by Scharffs, was the Sixth Circuit's "nutty percentage-of-time" test for determining whether someone qualifies for the ministerial exception. The task of providing support for countering this argument fell to incoming BYU law student Jared Hatch: "I found one French case that somewhat indicated that the amount of time spent engaging in secular activities was a 'consideration' but ultimately was not a determinative factor," he says. "Thus, I was very pleased when I read Justice Roberts's remark: 'The issue before us . . . is not one that can be resolved by a stopwatch.'"

Though from several different schools with "very different personalities," the students nevertheless got along, says Megan Healey Taylor. "Everyone had the skills and work ethic to stick to those long nights and to function as a unit." At some point, says Healey Taylor, a late-night slip of the tongue led the team to start calling the project the "amigo brief," which seemed to capture the process perfectly.

In the end, according to Becket Fund's Eric Rassbach, who coordinated the briefs for the Petitioner, the Center's brief provided crucial resounding international affirmation of the principle underlying the ministerial exception, which became particularly significant when the government chose to contest the constitutional basis of the doctrine.

For the students, Bastian says, "Our eyes have been opened to what it takes to write a brief for the Supreme Court. We have a knowledge of

the state of religious freedom internationally, and we can say that we were part of a unanimous Supreme Court decision, historic in many ways, that cemented in judicial precedent a freedom worth fighting for."

A final footnote to the *Hosanna-Tabor* opinion, one that is "likely to take on added significance as time goes on,"⁵ suggests that lawyers who understand these important issues might find work in coming years. The ministerial exception, wrote Chief Justice Roberts, is not "a jurisdictional bar" to all such lawsuits claiming workplace bias. Rather, it is "a defense on the merits. District courts have power to consider [such] claims in cases of this sort, and to decide whether the claim can proceed or is instead barred by the ministerial exception."⁶

The Amigo Team will be ready.

NOTES

1. Donlu Thayer is managing editor of print and electronic publications for the International Center for Law and Religion Studies at Brigham Young University.
2. *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* slip opinion; <http://www.religlaw.org/document.php?DocumentID=5788>.
3. See <http://www.scotusblog.com/case-files/cases/hosanna-tabor-evangelical-lutheran-church-and-school-v-eeoc/>.
4. *Obst v. Germany*, ECtHR App. No. 425/03, 23 September 2010, available at <http://www.strasbourgconsortium.org/portal.case.php?pageId=10#caseId=4>.
5. Lyle Denniston, "Opinion recap: A solid 'ministerial exception,'" *SCOTUS Blog*, 11 Jan. 2012, 11:33 a.m., <http://www.scotusblog.com/?p=136532>.
6. *Hosanna-Tabor* slip opinion, *supra* n. 2.



BRADLEY SLADE

THE VALUE OF ENDURING FRIENDSHIPS

DEAN JAMES R. RASBAND HAS EMPHASIZED THAT A LAW DEGREE IS “AT ITS CORE A LEADERSHIP DEGREE.” COMMENCING WITH THIS INTERVIEW WITH ROBERT A. JOHNSON, ’76, CEO OF DESERET MUTUAL BENEFIT ADMINISTRATORS (DMBA), CLARK MEMORANDUM WILL EXPLORE WITH GRADUATES THE WAYS IN WHICH THEIR LAW DEGREE HAS PREPARED THEM FOR LEADERSHIP.

Bob, will you describe your educational background, both your undergraduate major and your graduate work, and how you made the decision to attend law school?

I grew up in California and New Jersey. After graduating from high school in New Jersey, I attended Princeton University, located 45 minutes from home. After two years at Princeton, I served a mission for The Church of Jesus Christ of Latter-day Saints. Upon completing my mission, I

realized that the very best thing for me would be to transfer to Brigham Young University.

At BYU I majored in economics, which was the perfect major for me. It had enough quantitative rigor that I didn’t have to compete with very capable English majors but not enough quantitative rigor that I had to worry about math majors. When I completed my undergraduate degree, I taught summer courses in the BYU Economics Department. I was set to attend Harvard Business

School in the fall, but I met Rex Lee that summer, and he persuaded me to embark with him and others on the grand adventure of a new law school at BYU.

Where did you serve your mission?

California. I’d grown up in a less-than-active family. My mission really got the fire of the gospel burning in me.

As you attended and completed law school, what were your expectations?

I found that studying the law was a pleasant task, and thinking like a lawyer came naturally. I graduated from law school determined to try the practice of law. At that point I didn't think I'd become a business executive, even though before law school I was headed in that direction.

With whom did you start your practice?

After serving for a year as a clerk for a federal judge, I began my practice in Washington, D.C., at a law firm by the name of Wilkinson, Cragun & Barker. Wilkinson was Ernest Wilkinson, former president of BYU. Bob Barker was counsel for the Church on several matters. I was intrigued by the prospect of being in such an exciting location and occasionally representing Church interests.

How long were you there?

I was there for two years (1977–79). I left because the firm was in the throes of blowing up. The

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This article is from an interview with Robert A. Johnson, CEO of Deseret Mutual Benefit Administrators, on June 16, 2011.
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atmosphere was toxic, and I thought I would try practicing somewhere else. I had a very good friend, Robert Grow, with whom I went to law school and who was one of my missionary companions. He encouraged me to come to Salt Lake to join a small firm in which he practiced. What a wonderful place to practice. The firm was small at first, so I gained a lot of practice experience quickly, and the

senior partners were very generous towards the associates. The firm (now Parr Gee) grew rapidly, and instead of being at the bottom of the pyramid I was near the top—and that's a better place to be at a law firm. I was at that firm for 10 years.

What did you do next?

As I noted, I was good friends with Robert Grow. He had joined Joe Cannon to start Geneva Steel and left me Geneva as a client. It was a very exciting time to be representing Geneva. The company was just getting started, there were fascinating legal issues, and we were billing Geneva piles of money. Then one day Robert and Joe invited me to come down to Geneva as general counsel, and I did.

How long were you with Geneva?

I was there a little over two years. In 1991 Bruce Reese, another friend and fellow law school classmate, was promoted to executive vice president of Bonneville International Corporation (the Church's broadcast company). With his promotion, he vacated the general counsel chair. So he called me up and said that he would like me to serve as his successor. He introduced me to Rod Brady (Bonneville's president) and President Gordon B. Hinckley (Bonneville's chair). It was easy to accept the invitation from President Hinckley to serve as the general counsel at Bonneville.

In serving as general counsel at Geneva and then at Bonneville, how did the nature of your work change from private practice?

It changed in two ways. First, you own problems as

a corporate officer in a different way that you own problems as an outside counsel. At a law firm your clients' problems are their problems. If they are convicted of crimes, they go to jail—you don't. If you successfully negotiate a contract, they have to abide by its terms. You, on the other hand, take your family to dinner. As general counsel you are much closer to the results of legal representation. Second, you are free from the tyranny of billable hours. You don't have as one of your primary goals getting 2,300 hours billed by the end of the year. Rather, you get determined to solve problems, and I was exhilarated by that.

You went from working for a steel company to working in broadcasting. What were the similarities between those two businesses, and what were the differences?

They are similar in that if you're not careful, both can pollute the air—one by way of very small particles that you breathe in, the other by way of ideas in audio and visual entertainment that taint the human spirit. And they both operate in highly regulated industries. But there are vast differences. Geneva was a start-up business with little financial security. As a public company, Geneva's mission was to produce wealth for its shareholders. By contrast, Bonneville had been around for much longer and had secure financial footing. Bonneville was owned by the Church, which has an important and very non-monetary mission. Thus Bonneville had the ability to think long-term about the future with a range of goals that were quite ennobling.

What were the most important skills you learned in law school that you used in the practice

of law? Is there a different set of skills that you use as a CEO?

Law school, as I remember it, is a very competitive environment. Success in law school can be derived from very solitary commitment, and the law firm environment shares some of that separateness fostered in law school. You succeed in law firms by securing clients, holding them close, and making sure that your cords of attorney-to-clients loyalty are stronger than the bands of death (or at least any attempt by another lawyer to spirit your clients away). You don't get a lot of points being a team player in law school or at law firms. Success in business results from a much more team-oriented effort. In business you throw out ideas and an iterative and collaborative process begins. When an idea is good, the company moves forward and all share in that progress.

You have had the good fortune to work with friends. How did that influence your career as an attorney and your transition into business?

Even before law school I was blessed to be continually connected with two very dear friends, Robert Grow and Bruce Reese. They are both heroes of mine. As lawyers, they were going through the same experiences and adjustments that I was going through. It was easy for me to share my problems with them, and I knew that they would keep confidential what I shared. Their insights were invaluable. Both had a head start on me in the environments we shared—Robert at the law firm and Geneva and Bruce at Bonneville. Both were senior to me, and yet they went out of their ways to see that I was treated generously.

Bruce, in particular, aggressively shared his success with me before Bonneville's owners. It has been an amazing experience to work with, collaborate with, and know these men. I consider myself enormously blessed by their friendship.

Tell me about the transition from Bonneville to the health care industry and DMBA.

When I transitioned from being general counsel at Bonneville to being its chief operating officer (in 1996), I was invited to begin service as a member of the Deseret Mutual board of directors. For 14 years I had the opportunity to serve on the board as an outside director, to serve on key committees of the board, to be vice chairman of the board, and to work closely with Michael Stapley, then CEO of Deseret Mutual. I came to understand somewhat the nature of the place, the types of issues that consumed Michael, and the strengths of the members of the management team. In particular, Michael and I became personal friends. Perhaps in honor of that friendship, when Michael announced that he was going on a mission for the Church he reached out to me and said, "Bob, you'd be the perfect person to replace me."

Well I wasn't quite sure of it. I had become president and chief executive officer of KSL Broadcast Group and was enjoying myself. Further, Michael Stapley was an expert in benefit matters—a giant in the industry—and I knew that I could never duplicate his expertise and stature; the arc of my career wouldn't be long enough to allow me to do so. I politely deflected Michael's interest, and he went to search for other candidates. Each time Michael

would get close to finding his replacement, the marriage didn't work out. And each time he would call me and say, "Bob, it's not working out because you need to leave KSL and come here."

Over a six-month period Michael's calls began to open my mind to the possibility of a career change. I began to ponder the matter and eventually counseled with some people I respect greatly and who had an interest in both organizations. Finally I came to feel that the right place for me was at Deseret Mutual. Now that I am at Deseret Mutual, I can tell you that I feel completely at home. I love this place.

Elder Dallin H. Oaks gave a graduation speech at BYU in which he described some of his "Fathers in the Law"—those who had the greatest impact on his career. Can you describe some individuals who have had an impact on your career?

I have already honored Robert Grow and Bruce Reese. Let me add two others. First, Bob Barker, one of the name partners of Wilkinson, Cragun & Barker. Bob, who is deceased, was a magnificent attorney. He taught me to ask the bigger questions about the problems I was dealing with as a lawyer. He taught me to get context, to understand from the client why I was given the problem, and then to be creative at a high level about the solution. There's such a temptation for young lawyers to jump into the statutes, regulations, and case law to find the nugget that solves the problem. I was taught that our clients are best served by asking broader questions about the matter before we start looking at the law.

Second, Dale Kimball, once a name partner at the Salt Lake law firm in which I practiced. Dale taught me to appreciate the

strong, admirable qualities of my partners. When I would process with Dale about a law firm issue or a lawyer in the firm, Dale would teach me the qualities of my colleagues that could bless my practice. Dale's habit of looking for the strengths and not the flaws in others is a practice that I try to emulate.

What advice would you give to young lawyers as they start their legal practice?

I would encourage them to find places to practice where the very best parts of them—their integrity, their humanity, their curiosity—are reinforced by the people they choose to practice with. They will grow most if they are in a nurturing environment in which those elements are honored.

In an economy in which finding the perfect job is difficult, how can a young lawyer determine whether or not an environment will be one that will nurture and help to develop their capabilities?

I appreciate that right now job choices are limited. You need to feed yourself and your family, so you may not have time and resources sufficient to find the ideal law firm. But you can always reflect on your circumstances and try to be strategic. We have a lot to do with the creation of our own environments, not the person in the next office. You create your environment by choosing whom you reach out to in bar organizations, in alumni organizations, and in your neighborhoods. Those people could eventually have a great deal to do with what you become and where you practice. Have the energy and foresight to nurture those relationships. My career was determined by my friends

and mentors to a vastly greater degree than it was by my class rank or my law review standing.

As a CEO you often hire attorneys or determine whom you would select to be legal counsel for your company. What are the qualities that you look for in an attorney?

I want someone who will take the time to try to understand my vision and senior management's vision for the company. I want someone who buys into that vision and then will guide all of his or her representation by that vision.

How have you maintained balance in life among employment, family, and other commitments?

I'm not sure I've done a great job of maintaining a healthy balance in my life, particularly at certain points in my career. Since this interview will be read by law students, I offer this regret regarding my personal law school experience: in law school I was too interested in academic success and not interested enough in the richness of the study of law for its own sake. I was also too often willing to sacrifice my family's needs for my studies and practice. However, over time, through the process of making mistakes concerning what I was committed to and how much I would give to that commitment, I have learned that my greatest satisfactions are in the personal relationships that I have. As I have matured I have consciously tried to dedicate more of my time—quality time—to the people around me. I'm not a model, but I know that life as a law student, as a young lawyer, as a general counsel, and as an executive will be better and more satisfying if you live a life that has balance.

Arnold Friberg Portrait Unveiled



On Friday, February 10, 2012, an Arnold Friberg portrait of J. Reuben Clark Jr. was unveiled at the Law School by donors Gregory and JaLynn Prince. The portrait will be displayed in the Law School Conference Center on the fourth floor.

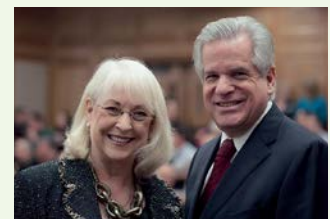
Gregory Prince, Dean James Rasband, and JaLynn Prince



JaLynn Prince



Gregory and JaLynn Prince || Dean James Rasband and Lew Cramer



JaLynn and Gregory Prince

TWO ROMAN BRONZE PLATES ON DISPLAY AT THE LAW LIBRARY

AN INTERVIEW WITH PROFESSOR JOHN W. WELCH

CM: We are fortunate to have in the Law Library a very attractive and interesting exhibit featuring two Roman bronze plates recently gifted to BYU. Why has this display come to the Law School?

JW: There are many reasons. For one thing, these two plates are legal in nature. This rare set of plates documents the grant of citizenship by the Roman emperor Trajan in AD 109 to a retiring soldier, Marcus Herennius Polymita Berens, and his two sons and daughter. In addition, these two plates are put together in a fascinating format. They are doubled, sealed, and witnessed—a legal format that was widely used in formalizing important legal documents in various ancient legal systems for over two millennia.

CM: Where else have these BYU Roman plates been exhibited?

JW: This is the third venue for the exhibit. The first was for a year and a half in the Harold B. Lee Library at BYU, and the second was at the UVU Institute of Religion. It is wonderful to bring it now to my home here in the Law School. I appreciate Kory Staheli and his staff for doing a terrific job of installing these intriguing artifacts and explanations in the Reference Reserve area of the Howard W. Hunter Law Library.

CM: Tell us more about Roman citizenship and plates such as these.

JW: No right was more powerful in the early Roman Empire than citizenship. It gave citizens a number of legal immunities, privileges, and protections, including exemption from tax. The Apostle Paul invoked some of these rights in his trials before Felix and Festus in Caesarea. How Paul proved that he was a Roman citizen is unknown, but we do know that the punishment for falsely claiming to be a Roman citizen was death. Plates like these would have served as important proof of citizenship, especially for one who had just obtained this high status.

CM: Where have plates such as these been found?

JW: Fragments of these so-called military diplomata have been found in all parts of the Roman Empire, but only about a dozen complete pairs have been found. The BYU plates were found in February 1986 in Romania, in an area that was once part of the Roman province of Dacia. A collector in Berlin acquired them, and when he died in 2001, the plates were sold at auction and were then offered for sale by the Royal Athena Gallery in New York, where they were acquired and donated to BYU.

CM: What other museums own such plates?

JW: Not very many. I believe BYU holds the only set of Roman military diplomas in the United States. I have

stumbled onto other sets in the British Museum, the Louvre, the Bibliothèque Nationale in Paris, and the Römisch-Germanisches Zentralmuseum in Mainz. So BYU is in pretty elite company.

CM: What does it mean that these plates were “doubled, sealed, and witnessed”?

JW: These plates have, of course, a total of four sides. When you put the two plates together, it’s like a sandwich with two pieces of bread. On the outside of the top plate is cast the full text of the imperial decree. On the two inside faces is inscribed a second copy (the “double”) of that complete text. On the backside of the bottom plate is cast the names of the seven administrative witnesses along with their official personal seals (hence, this set was “sealed” and “witnessed”). The two plates were held together with two corner rings so that they could be opened like a book. When closed, the two plates were bound together with a wire that ran through two holes in the middles of the plates, and a rectangular case was affixed over the twisted wire to hold the plates snugly together. In the case was a bed of wax into which the seals were impressed. More than sealing something closed, seals in the ancient world were stamps of approval, legitimacy, validity, and warranty.

CM: You mentioned that these plates were witnessed

with seven seals. Does this have anything to do with the Book of Revelation?

JW: I think so. Remember that the Romans were issuing these official documents in profusion in the last part of the first century and the beginning of the second century, around the very time when the Revelation of John was written. Note that John saw in a vision “a book written within and on the backside, sealed with seven seals” (Revelation 5:1). That obscure verse now seems a lot more understandable.

CM: Why would Romans and others go through so much trouble to double and seal these documents?

JW: Actually, this manner of preserving and verifying documents served many legal functions. Lawyers today can learn from the Roman legal and administrative genius. Requiring such a formal written copy fights against sloppiness, forgery, and document falsification. Having a backup copy also mitigates the problems of lost or altered documents. Only a judge had authority to break the seals and open the record. If there were ever a question about the reading of the open portion of the document, a judge could open the seals and find there a duplicate original, and he could then rule with confidence.

CM: How widespread was this legal convention in antiquity?



Important legal documents were preserved on metal plates in many ancient cultures. BYU owns this rare set of doubled, sealed, and witnessed Roman plates (left and center) from AD 109. (Left: front of plate 1; Center: back of plate 2.) The plate from Gubbio, Italy, (right) presents an Iguvine law (ca. 200 BC) in the Umbrian language using an Etruscan script.

JW: Doubled, witnessed, and sealed documents were virtually universal. They are found in many cultures, languages, and media. Archaeologists have found all kinds of documents—deeds, manumissions, bills of divorcement, promissory notes—using Latin, Greek, Hebrew, and Akkadian and written on clay, papyrus, parchment, wood, and metal.

CM: Hebrew? That sounds unusual. How do we know that ancient Israelites used this practice as well?

JW: For one thing, in Jeremiah 32:6–15 we read about the closing of a real estate transaction in which Jeremiah purchases land from his nephew. They prepare a deed with two parts: one that was “sealed according to the law and custom” and another that was “open.” Because of Aramaic deeds from the fifth century BC that were found on the island

of Elephantine in Egypt, we can now see exactly what Jeremiah was talking about. Sealed documents are also mentioned in Isaiah 8:16 and 29:11. In Ezekiel 2:10 the prophet was shown a book that “was written within and without,” presumably referring to this same practice. The lengths to which the ancients went to preserve and authenticate their most important records makes these legal protocols a strong and widely understood literary element that becomes important in interpreting the symbolism of these texts. For example, one of the reasons why an ordinary person cannot read a sealed book is that only a person with proper authority has the right to even open it.

CM: Working with these plates certainly opens up a lot of exciting things to think about. What experiences have you had that have been especially eye-opening?

JW: Teaching my course at the Law School on ancient laws in the Bible and the Book of Mormon made me aware of Jeremiah 32 long ago. But I wanted to learn more about that text and to see if anything like Jeremiah’s deed had ever been found. After all, Jeremiah and Nephi were contemporaries in Jerusalem, and in their own way the plates of Mormon were put together as a sealed record, complete with witnesses, with one part open and the other part sealed. I looked high and low (in the days before the Internet) and finally figured I was just not going to be able to find anything. Then I went to a conference on ancient law held at the Leiden Papyrological Institute in the Netherlands. On the final day of the conference, as I sat in the reading room where we were meeting, I noticed right behind me a shelf of books on *Doppelurkunden* (doubled documents). That

was a gift from heaven and the beginning of many rewarding years of research, discovery, and writing.

CM: Where can a person read more about these plates?

JW: Two full articles about these plates have been published in *BYU Studies*, volume 45, number 2 (2006), which can be easily accessed for free on the *BYU Studies* website (www.byustudies.byu.edu). These articles answer all kinds of questions, such as, How did these plates come to BYU? Are these plates authentic? What do they say? What rights were granted to BYU for these plates? Where are other doubled documents that have been found? and What significance do these plates have for Latter-day Saints? Also, a free brochure summarizing these points is available to all who visit the exhibit in the Howard W. Hunter Law Library.

Coming Events for BYU Law School Alumni and J. Reuben Clark Law Society

MAY 21	Supreme Court Swearing-In Event George Washington Law School and Georgetown Law School Washington, D.C.
MAY 21	Rex E. Lee and Shawn Bentley Awards Luncheon Atrium Ballroom of the Washington Court Hotel Washington, D.C. 12:30 p.m.
JUNE 1-4	Law Society Asia Pacific Conference New Zealand www.jrcls.org
JUNE 13	Religious Freedom Discussion Series with Gary B. Doxey Register at www.iclrs.org
JULY 11	Religious Freedom Discussion Series with Elizabeth A. Clark Register at www.iclrs.org
JULY 18-21	Utah Bar Conference: BYU Law Reception Sun Valley, Idaho 3:00 p.m.
AUGUST 1	Religious Freedom Student Writing Competition Submission Deadline www.jrclsdc.org (Int'l Religious Liberty link)
AUGUST 14-17	Law Society Education Week Lawyer CLE Program BYU ce.byu.edu/ed/edweek
AUGUST 23	Founders Day Dinner Little America Hotel Salt Lake City Elder Dallin H. Oaks
AUGUST 24	BYU Law Alumni Golf Tournament The Links at Sleepy Ridge
SEPTEMBER 5	Religious Freedom Discussion Series with Brett G. Scharffs Register at www.iclrs.org
OCTOBER 4-5	Annual Law Society Leadership Conference Aspen Grove
OCTOBER 6	General Conference Reception Joseph Smith Memorial Building, 10th Floor Salt Lake City Noon
OCTOBER 7-9	19th Annual International Law and Religion Symposium BYU Law School
OCTOBER 11	International Religious Liberty Award Dinner Mayflower Hotel Washington, D.C.
OCTOBER 12	Ethics CLE Symposium BYU Law School lawalumni.byu.edu
OCTOBER 12-13	Alumni Weekend BYU lawalumni.byu.edu Reunion Dinners: '77, '82, '87, '92, '97, '02, '07
DECEMBER 5	Religious Freedom Discussion Series with Robert T. Smith Register at www.iclrs.org

2013

TBA	Law Society Annual Fireside LDS Conference Center Salt Lake City
FEBRUARY 16-18	Law Society Annual Conference and 25th Anniversary Celebration George Washington University Law School and Georgetown Law School Washington, D.C.
APRIL 6	General Conference Reception Joseph Smith Memorial Building, 10th Floor Salt Lake City Noon

The *Clark Memorandum* welcomes the submission of short essays and anecdotes from its readers. Send your short article (750 words or fewer) for "Life in the Law" to wisej@law.byu.edu.

Clark Memorandum

J. Reuben Clark Law School

Brigham Young University

