

Keeper

Elder F. Burton Howard

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San Diego
Chapter of the
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the

Flame

I acknowledge the gracious invitation to speak to this distinguished group and recognize that it has come primarily because of the fact that I was a lawyer before I became a General Authority. I thank you for honoring my office and take some comfort from the words of J. Reuben Clark, that "if I did not hold the office I hold, I would amount to little in the eyes of the people."

• It was suggested that I address the question of the right of privacy vs. the right to know. That is a wonderful subject about which I know very little. I am aware that in 1883, one year after he had been appointed to the Supreme Judicial Court of Massachusetts, Oliver Wendell Holmes gave what he

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called "An After-Breakfast Talk." Present were civic leaders and members of the bar. There, lamenting the lack of privacy in his high office and the constant intrusions of the press, he said:

The interviewer is the product of over-civilization, who does for the living what the undertaker does for the dead, taking such liberties as he chooses with the subject of his mental and conversational manipulations, whom he is to arrange for public inspection. The interview system has its legitimate use—is often a convenience to politicians, and may even gratify the vanity and serve the interests of an author. In its abuse it is an infringement of the liberty of the private citizen, to be ranked with the edicts of the Star Chamber and the visits of the Inquisition. The interviewer, if excluded, becomes an enemy, and has the columns of a newspaper at his service, in which to avenge himself. If admitted, the interviewee is at the mercy of the interviewer's memory, if he is the best meaning of men; of his inaccuracy, if he is careless; of his malevolence if he is ill disposed; of his prejudices, if he has any; and of his sense of propriety, at any rate.

I have not done enough research to know who was present at that breakfast. I suspect that two fearsomely bright young Boston lawyers, Samuel Warren and Louis D. Brandeis may have been there. If not, they undoubtedly were influenced by the talk. In 1890, writing in the newly founded *Harvard Law Review*, they addressed the right of privacy versus the tactics of prying photographers and newspaper columnists and concluded with these words: "The question of whether our law will recognize and protect the right to privacy must soon come before the courts." Samuel Warren & Louis D. Brandeis, "The Right of Privacy," 4 *Harv. L. Rev.* 193 (1890).

That prophecy signaled an entirely new field of jurisprudence. Brandeis frequently lectured about freedom of the press and attracted a national audience. For example, writing in *Collier's Weekly*, in 1912, he said: "The function of the press is very high. It is almost holy. It ought to serve as a forum for the people, through which the people may know freely what is going on." But, he warned, "To misstate or suppress the news is a breach of trust."

Holmes was appointed to the U.S. Supreme Court in 1902. Brandeis followed his mentor there in 1916. His interest in the subject continued unabated. In a dissenting opinion in *Olmstead vs. U.S.* 227 U.S. 438 (1928), he gave eloquent expression to the right of privacy:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Let me cite two or three other voices from among the thousands who have written or spoken about this controversy:

Daniel Defoe, in "An Essay on the Regulation of the Press," London, January 7, 1704, wrote: "All Men pretend the Licentiousness of the Press to be a publick Grievance, but it is much easier to say it is so, than to prove it, or prescribe a proper Remedy; nor is it the easiest Grievance to Cure."

Two hundred years later, Clarence Darrow reputedly said: "Our independent American press, with its untrammelled freedom to twist and misrepresent the news, is one of the barriers in the way of the American people achieving their freedom."

Last week, the lead editorial in the *Wilson Quarterly*, Autumn, 1993, pp. 5–7 read: "We seem determined that the whole nation should have the privacy of a military barracks. Supreme Court decisions turn precariously on invocation of a constitutional right to privacy, and we want that right fiercely guarded. Yet we often behave in daily life as if nothing should be kept private anymore, and no one spared."

If I were required to adjudicate between these basic rights, I would construe the issue narrowly and prayerfully. However, if freedom is to be meaningful then it seems to me that the right to know must often give way to the right not to tell where individuals alone are involved.

But I did not accept the invitation to speak to you tonight to talk about the law. There are many more qualified than I who can do that. I really came because I am a keeper of the flame. I knew J. Reuben Clark. I knew Marion G. Romney. I knew those who founded the J. Reuben Clark Law School under the auspices of which we have met tonight. I know something of the expectations they had for you, and I know something of the perils of practicing law. Let me begin at the beginning.

One April evening, before the organization of the Law School, Marion G. Romney, Howard W. Hunter, and Ernest Wilkinson invited 80 University of Utah students to dinner at the Lion House in Salt Lake City. These students, all graduates of BYU, were enrolled in the University of Utah College of Law. The brethren asked a question. Three selected class spokesmen responded. The question was phrased like this: "How has your training at BYU contributed to your success or failure in law school?" We might paraphrase the question; how has your being a member of the Church contributed to your success or failure in law school? Marion Romney later commented:

To my surprise and disappointment, two of the three were notably critical of their training at BYU. They had not been, so they said, conditioned to think and find the answers for themselves; they complained that they had been taught as if they were children and the teachers already had all the answers. They felt that they had been restricted in self-expression. The so-called protective atmosphere at BYU had, so I understood them to feel, put them at a disadvantage at law school. Not one referred to the distinctive training BYU is maintained to give.

From no one of them did I obtain the slightest indication that they had left BYU morally fortified to deal with the toils of the law.

This dinner, and the responses of those students, led to a significant series of events. In June 1970, in a meeting with

Harold B. Lee and N Eldon Tanner, Brother Romney's counsel about the organization of the Church Educational System was requested. He recommended Neal Maxwell for commissioner of education and for the first time talked with the First Presidency about a BYU law school in honor of President Clark. Marion reported, "they seemed favorable; at least they did not say no."

The following day he had a discussion with President Ernest Wilkinson of the university. He told him that he intended to substitute a motion that the law school be established at BYU in honor of President Clark instead of an Institute on Human Dignity that had been proposed previously.

On December 1, 1970, Marion met with Neal A. Maxwell and Ernest L. Wilkinson about a proposal for a law school at BYU. Later in the day he met with the executive committee of the BYU Board of Trustees when a recommendation was passed to be presented to the board the following day recommending the establishment of a law school. After the meeting, Elder Romney called Brother Maxwell, who was by then commissioner of education, aside and told him, "I want to build a law school at BYU in honor of J. Reuben Clark, and I want you to help me."

President Romney's journal, a month later, records the following: "In the meeting of the Board of Education, Board of Trustees—the most interesting decision made was the decision to go forward with the establishment of the J. Reuben Clark Law School at Brigham Young University."

Later in that year, he was assigned to be chairman of a search committee to recommend administrators for employment in the Church Education System. Speaking of this assignment, he once said:

I want to testify to you that in the Search Committee, which has nominated five school administrators, all of whom have been appointed, the Lord has been with us. We have sought them out through faith and study. If you could see the stack of materials we have gone through you would know that we worked hard. When we began our deliberations, we were miles apart. We didn't use that word "liberal," but we had on the committee the two ends of the spectrum. As we sat around the desk in my office, we were at times as far apart as we could get. Sometimes I wondered how we would ever get together. But when we had finished and had taken test ballots, we got down on our knees and asked the Lord to help us find the man. We found those men just like you find stake presidents: Neal Maxwell for commissioner of education, Dallin Oaks for president of BYU, Henry B. Eyring at Ricks; Steven Brower out in Hawaii; and Rex Lee for dean of the J. Reuben Clark Law School. These men were chosen by inspiration just as our stake presidents. I know the power of the Spirit is with us in our work.

Four and one-half years later at the dedication of the J. Reuben Clark Law School building on September 15, 1975, President Romney, then himself a member of the First Presidency, stated:

It has been suggested that I might comment on the reasons for the establishment of the J. Reuben Clark Law School. I cannot say with certainty what was in the minds of those who made the final decision to establish the school. I can, however, tell you why I used such influence as I had to get it established. To begin with, I have long felt and now feel that no branch of learning is of more importance to an individual or to society than the subject of law. I likewise felt that the atmosphere of honor, integrity, patriotism, and benevolence prevailing in Brigham Young University would be a good influence upon a law school and the members of its student body.

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keeper of the flame.**

I knew J. Reuben Clark.

I knew Marion G. Romney.

In the privacy of his journal, Marion added another thought:

Law students must be taught and inspired to obtain for themselves a motivating conviction that the revelations do, in fact, prescribe a solution to the problems of our day. A mere mental concept is not enough. Students must be so familiar with the scriptures themselves that they not only recognize in them the solutions but also understand them and apply them to current questions and problems.

Well, so much for the hopes and expectations of the founding brethren. For better or for worse, you are the result. By virtue of your training and education, whether obtained from BYU or not makes no difference, you will be thrust into leadership positions in the Church and into decision-making roles across the length and breadth of this land. Your careers will epitomize the teaching of Alma, who when counseling those who wanted to accept the covenant of baptism, reminded them that they had agreed to "bear one another's burdens, that they may be light." This is the principal business of a lawyer, to bear the burdens of another.

But we must not forget that the covenant further requires those desirous of coming into the Church "to stand as witnesses of God at all times and in all things and in all places, even until death" (Mosiah 18:8–9). I have always liked the statement by Whittaker Chambers, who after having his testimony in the Alger Hiss case questioned by lawyers and politicians throughout the country, wrote in his autobiography:

A man is not primarily a witness against something. That is only incidental to the fact that he is a witness for something. A witness in the sense that I am using the word, is a man whose life and faith are so completely one that when the challenge comes to step out and testify for his faith, he does so, disregarding all risks, accepting all consequences.

And so with you, whether you know it or not, or whether you intend to honor the covenant or not, each of you has covenanted to stand as witnesses for God, not only in fast and testimony meeting, but in cloakrooms and courthouses, in halls of power and law offices, with clients and judges, and with wives and families. More than most men and women, you will have the opportunity to stand as witnesses of God at all times and in all things and in all places. Your lives and your faith must become one so that when the challenge comes, as it most certainly will, you can step out and be witnesses for your faith as well.

At the funeral of former Dean and Judge Samuel R. Thurman on July 17, 1941, Marion Romney was a pallbearer. J. Reuben Clark was asked to speak. To the surprise of all present, he did not speak about the law. Marion Romney noted: "He gave a ringing testimony on the necessity of a knowledge of God and faith in the atonement. It was thrilling, even more so in view of the audience of hardened lawyers."

Several years ago I visited the Utah Supreme Court. I had clerked there after leaving law school. I had made friends with the personnel and the justices. In particular, I admired and respected Judge J. Allan Crockett. He had been extremely helpful to me when establishing my first law office. I went to see him on a sleepy summer afternoon. We began to reminisce. He told me he was thinking about retiring from the court and asked me what I thought about that. I couldn't imagine the Supreme Court without him, and I blurted out the first inane thought that came to mind, "Oh, don't do that, judge." I said, "It's comforting to know that there is someone on this bench who always tries to do what's right."

I spoke out of frustration and a practitioner's feeling that not everyone on the bench shared that policy. I assumed he would understand what I meant. His indignation, however, surprised me. He thundered a response that perhaps only a lawyer can understand, and only a lawyer who is a member of the Church can fully appreciate:

"Do what's right," he snorted. "Heavens, Burt, any fool can do what's right. It's knowing what's right that's hard."

Now, by electing to go into the law, you have assumed the burden of counseling clients, advising governments, and making decisions regarding what the law is and what is right. The formulation of this counsel is without any doubt the most critical and creative event in the life of any lawyer. And while most lawyers are taught not to concern themselves with the rightness or wrongness of a client's cause, the LDS lawyer cannot wholly avoid concerning himself with what is right.

It is said that when Samuel Johnson entered into the study of the law in 1765, he formulated this prayer:

Almighty God, the Giver of wisdom, without whose help resolutions are vain, without whose blessings study is ineffectual, enable me, if it be Thy will, to attain such knowledge as may qualify me to direct the doubtful and instruct the ignorant: to prevent wrong and terminate contentions; and grant that I may use that knowledge which I shall attain to Thy glory and my own salvation; for Jesus Christ's sake. Amen

Such a pronouncement would not be made anywhere in the United States of America today by a lawyer unless it were made by one such as you.

Bless me to use the knowledge I gain "to prevent wrong and [to] terminate contentions to Thy glory and my own salvation." I commend these concepts to you. May you use the knowledge you attain here to the glory of God and to your own salvation. I should note that it will be a constant challenge.

Several years ago I read this little poem in the American Bar Journal. I have taken a liberty or two with it, but you will be interested just the same.

A lawyer at the pearly gate
Protested, "Make the record straight, St. Peter
I'm too young to die."
The old Saint raised a kindly eye
And sighed and put his [Postum] down.
Reviewed his books with puzzled frown,
Then smiled: "There's no mistake," said he
"My ledger shows you're eighty-three."
"How can that be?" in outraged tone,
The lawyer cried "I'm fifty-one."
The good Saint shrugged and sipped his cup,
"We added all your time sheets up."
[Allan J. Parker, "Time in Eternity"]

This is perhaps what President Kimball had in mind when at the dedication of the J. Reuben Clark Law School he said: "Here at this college of law we hope to develop an institution where those who attend will become superior in the legal aspects for which they come, and also in the ethical part which is so greatly needed in our land."

The founders of the BYU Law School were examples of ethical excellence. Even in the privacy of his heart, Marion G. Romney lived this principle.

Again, returning to his journal to an entry dated July 10, 1941, he wrote: "During the evening I was at a meeting at President Clark's where he talked to Harold B. Lee and me for about three hours. I greatly appreciated his confidence and shall respect it by not writing down here what was said."

Ethics, as you know, is the study and philosophy of human conduct with emphasis on determining right and wrong. Most modern thought blurs or eliminates this distinction. You, however, have been instructed sufficiently that you know good from evil (see 2 Nephi 2:5). That instruction must be added to all the rest. As you reason, make fine distinctions and find exceptions to rules.

Conventional wisdom teaches that there is no rightness or wrongness to your client's cause as long as intellectual tools are sharp and our presentation professional. There is an alarming tendency to judge the morality of any issue by the legality of that issue. You, of all people, must determine these issues by God's standard as well as man's.

A few years ago, Harold Williams, a former chair of the Securities and Exchange Commission, gave a speech to the American Bar Association. He said,

Increasingly we as a society, look to the law to define right and wrong, moral and immoral: the notion that the law sets the floor rather than the ceiling receives little currency. By the same token, the tendency to focus on the law leads to a withering of interest and concern for the ethical. The implicit assumption increasingly becomes that if [the Law] has not forbidden it, it must be [morally] acceptable. This results in increased dependence on legal process to define the limits, and the game becomes one, as it has in tax law—of avoidance and loophole closing. The result is a fundamental change in the mores of the society.

As Latter-day Saints we must, it seems to me, be concerned with the morality of what we do. We cannot afford to confine our gospel observance to the meeting house and practice law according to the manner of the world. This perhaps is our greatest challenge and our most significant opportunity.

And to those who say to you that you should not concern yourselves with the rightness or wrongness of a client's cause, I say nonsense. Only a prostitute does not concern himself with the morality of his actions. Only a mercenary sells his services to a cause without concern for the consequences. You must become involved in these issues or risk your salvation.

Here arises the great ethical dilemma that all of us must face. Which is the greatest commandment—my client's wishes or my own integrity? Do I serve the end or do I serve the means? Unfortunately, a lawyer must confront this question more than once and the battle is never ending. As comfort and assistance in the struggle, I offer the words of the psalmist, who summing up his own life to the great Judge of all said:

Judge me, O Lord; for I have walked in mine integrity: I have trusted also in the Lord: therefore I shall not slide

Examine me, O Lord, and prove me; try my reins and my heart.

For thy loving kindness is before mine eyes: and I have walked in thy truth

I have not sat with vain persons, either will I go in with dissemblers.

I have hated the congregation of evil doers; and will not sit with the wicked.

I will wash mine hands in innocency; so will I compass thine altar, O Lord:

That I may publish with the voice of thanksgiving, and tell of all thy wondrous works.

Lord, I have loved the habitation of thy house, and the place where thine honour dwelleth. [Psalms 26:1–8]

You will recall that shortly before the Israelites entered the promised land, Moses counseled his people. He knew them and knew that he had not been permitted to go with them. He feared for their spiritual survival under a lesser law. Allow me to repeat his words.

Behold, I have taught you statutes and judgments, even as the Lord my God commanded me, that ye should do so in the land whither ye go to possess it.

Keep therefore and do them; for this is your wisdom and your understanding in the sight of the nations, which shall hear all these statutes, and say, Surely this great nation is a wise and understanding people

Only take heed to thyself, and keep thy soul diligently, lest thou forget the things which thine eyes have seen, and lest they depart from thy heart all the days of thy life: but teach them thy sons, and thy sons' sons. [Deuteronomy 4:5–6, 9]



For all of us it seems that there is danger that "what our eyes have seen" will depart from our hearts. Moses knew that constant contact with a lesser law can make us forget spiritual principles we once knew. Parenthetically, I would add that the controversy and contention and the competitive will to win, so associated with our profession, are inimical to celestial law. And the corrupting influences that sometimes accompany the practice of criminal law—or the burning ambition and exalted ego that often follows us into the political arena—none of this can be

considered a higher law. These things will not argue well for us when we meet the Holy One of Israel.

My son, Michael, graduated from BYU in August. Many years ago after a hectic day that same son met me at the door with news that his first grade class had voted to have fathers' day at school. Several students had volunteered to have their fathers come and explain to the class exactly what it was they did for a living. My son told me that none of the other kids had a lawyer for a father. He had assured his teacher that I would not mind coming.

While accepting his invitation, I grumbled a little, "Son, it's kind of hard to explain to first graders exactly what a lawyer does. I don't think that even you know, do you?"

He assured me that he did. To test him I said, "All right, tell me what does a lawyer do?"

He looked me in the eye and said, just like he had known it all the time, "A lawyer is a man who makes things better."

May this be your lot, I pray in the name of Jesus Christ, amen.

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