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

*Photography by John Snyder*

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

#### The Man Behind the Bow Tie

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

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

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

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

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

#### Beginnings at the Law School

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

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

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

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

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

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

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

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

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

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

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

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



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

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

### The Law School as a Place to Work

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

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

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

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

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

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

### Other Experiences with Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### Parting Advice

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

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

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

### Retirement

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

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