

Fall 2009

Clark Memorandum: Fall 2009

J. Reuben Clark Law Society

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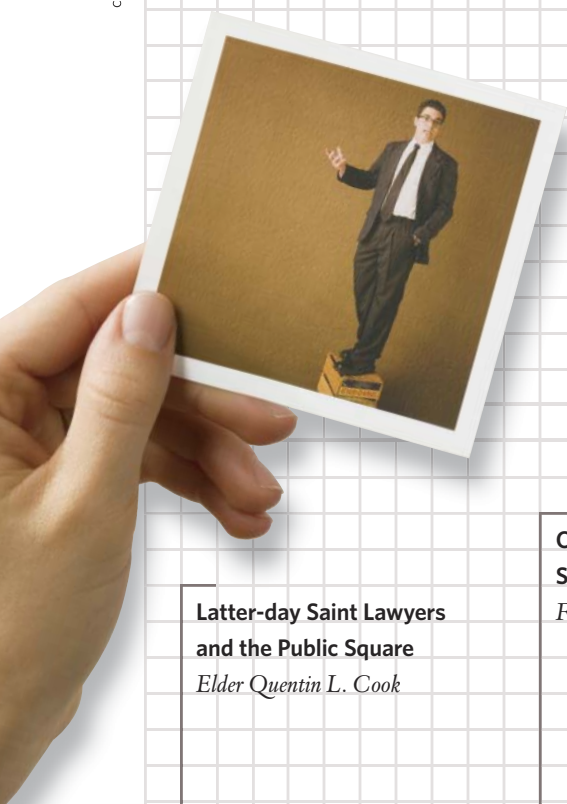
DEAN JAMES R. RASBAND

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CLARK MEMORANDUM

J. Reuben Clark
Law School
Brigham Young
University
Fall » 2009

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The J. Reuben Clark Law Society
draws on the philosophy and
personal example of the Law
School's namesake, J. Reuben
Clark Jr., in fulfilling the following
mission: We affirm the strength
brought to the law by a lawyer's
personal religious conviction.
We strive through public service
and professional excellence to
promote fairness and virtue
founded upon the rule of law.



L A T T E R - D A Y S A I N T
L A W Y E R S A N D T H E

P U B L I C
S Q U A R E

BY ELDER QUENTIN L. COOK OF THE QUORUM OF THE TWELVE

I am grateful to be with you this evening. I have always enjoyed being with lawyers. ♦ Let me take this opportunity to express my heartfelt gratitude to our Church general counsel: Elder Lance B. Wickman,

*This talk was presented at a
J. Reuben Clark Law Society fireside at
the Church Conference Center in
Salt Lake City, Utah, on March 13, 2009.*

PHOTOGRAPHY BY BRADLEY SLADE



William Atkin, and Boyd Black. They render magnificent service to the Church overseeing the General Counsel's Office.

I am sure each of us here has a reason we decided to attend law school. The genesis of my own decision to become a lawyer came from two sources. The first was my father. His uncle, David S. Cook, had been a successful attorney and had created in my father a favorable disposition toward the law. (Incidentally, this uncle had roomed with Albert E. Bowen at the University of Chicago Law School. Elder Bowen, of course, was later an apostle.) In addition to his uncle, my father had utilized lawyers in his various businesses, and as he used to say, in a tone that made it clear he wasn't serious and with a big smile, "Lawyers have a license to steal." To be completely fair, he used the same language to describe doctors. I suppose that, viewed from the competitive business world in which he was involved, the law seemed like a pretty safe haven. My guess would be that most of us here would not concur with my dad's assessment, particularly with the difficult economic times many lawyers are experiencing today.

The other person who influenced my decision to become a lawyer was my second mission president, Elder Marion D. Hanks, who is also a lawyer. In a serious conversation I had with him near the end of my mission, I told him the educational options I was considering. He told me that he thought I should pursue a legal education. From that very moment my decision was made. It wasn't just because he said it, but because I knew he was right.

While I thoroughly enjoyed the practice of law, I did not feel inclined to influence our children toward any particular occupation. Nevertheless, two of the three did become lawyers and are both here this evening: my daughter, Kathryn, who after a 14-year hiatus raising four wonderful children has returned to part-time legal practice; and my son, Larry, who practiced for a time on Wall Street for Sullivan and Cromwell and is now a partner in a private equity firm.

I should also mention that I have two cousins who are distinguished lawyers, and they are both here. One is Judge Dale Kimball, who is a federal district judge here in Salt Lake; and the other is Kimball Johnson, who is in the Utah Attorney General's Office.

Kimball's son is attending the University of Utah Law School and is here tonight with some of his classmates.

As I began preparing for this talk and paying more attention to what is being said today about lawyers and the law, I was interested in an article in the January 12, 2009, issue of *Forbes* magazine and in a subsequent account in the *New York Times* by Evan R. Chesler. Mr. Chesler is the presiding partner at Cravath, Swain & Moore, and the *Forbes* article was entitled "Kill the Billable Hour," with a subheading of "Lawyers Should Bill the Way Joe the Contractor Does."¹ I have to admit that there were three aspects to my interest in his statements. First, I have always had a soft spot in my heart for the Cravath firm. In 1966 when I graduated from law school as a new lawyer, Cravath increased the "going rate" by a few hundred dollars to a magnificent sum exceeding \$8,000 per year for beginning lawyers. My new firm decided to match that rate, and I was the grateful beneficiary of what at that time seemed like a significant increase. Lest you think we were starving to death, very adequate homes could be purchased for \$20,000–\$30,000 in those days. Second, Mr. Chesler described himself as the presiding partner of his firm. That is new terminology to me. When I was practicing, the term was managing partner. But even then it seemed like an oxymoron. Managing lawyers, an almost impossible task, has always resembled the oft-quoted comparison to herding cats. Third, and most important, anything that would take away the burden of billable hours would constitute an improvement to the legal profession.

When I was a second-year law student at Stanford University, a visiting professor arrived to teach first-year constitutional law. His name was Arvo Van Alstyne, and he was then a law professor at UCLA. He had also been president of the Los Angeles California Stake. He was teaching constitutional law to half of the first-year class. The constitutional law teacher for the other half was Gerald Gunther, who had clerked for both Judge Learned Hand and Chief Justice Earl Warren. He had been my teacher the previous year.

In the first few days of class, Professor Van Alstyne informed his students that he was a committed member of the LDS Church. He explained to them that as part of his faith he believed that the United States Constitution

was divinely inspired. He said he wanted them to know about his personal beliefs and predilections. He recognized that the students would need to reach their own conclusions.

This announcement made quite a stir at the law school and engendered both discussion and humor. The students would inquire of each other, "Do you attend the inspired constitutional law class or the uninspired constitutional law class?"

My intent here this evening is *not* to deliver a scholarly discourse on the U.S. Constitution. However, before I speak to the two concepts I do want to cover, a historical overview of how some have viewed the inspired aspects of the U.S. Constitution might be interesting. Both President J. Reuben Clark and Elder Dallin H. Oaks, two apostles who had previously been eminent lawyers, share a common view of our understanding that the Constitution is divinely inspired. Neither of them has seen every word of the Constitution as being inspired. Elder Oaks has said, "[Our] reverence for the United States Constitution is so great that sometimes individuals speak as if its every word and phrase had the same standing as scripture." He continues, "I have never considered it necessary to defend [that possibility]."² President J. Reuben Clark enunciated a similar view in an address given in 1939.³ I concur with their assessment.

President Clark saw three elements of the Constitution as being particularly inspired. First is the separation of powers into three independent branches of government. Second is the guarantee of freedom of speech, press, and religion in the Bill of Rights. And the third is the equality of all men before the law.

Elder Oaks, while concurring with President Clark on these three elements, also includes the federal system with the division of powers between the nation as a whole and the various states and the principle of popular sovereignty. The people are the source of government.

I think most of us would agree with President Clark and Elder Oaks that these incredibly significant fundamental principles elegantly combined in the constitutional documents are indeed inspired and coincide with doctrinal principles in our scriptures. It does not require detailed analysis of the Constitution to see that these five basic fundamentals have been a great blessing to the United States

and were necessary as a precursor to the Restoration of the gospel of Jesus Christ.

I understand that some who are listening by satellite are in foreign countries. Many of the above principles had their antecedents in legal doctrines and philosophies established in Europe and particularly in Great Britain.

My purpose this evening is to let the founding U.S. documents—the Declaration of Independence, the Constitution, and the Bill of Rights—frame just two concepts that I will discuss in broad, practical terms. I believe the concepts are as applicable internationally as they are in the United States.

PURSUIT OF HAPPINESS

The first is the concept of happiness. Much has been written about the meaning of the words “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”⁴ The British political philosopher John Locke is credited with those enduring concepts. George Mason, Thomas Jefferson, and other Founding Fathers weighed into the writing of this language. With respect to the word *happiness*, there was at least some element of protecting possessions and property. For others, the concept of safety was also important. But it is clear that for the authors of the Declaration, happiness was something more than material well-being and the possession of property. One writer described it this way:

*Happiness has to do with a life well lived, or a good human life as a whole; it involves the achievement and practice by a person of such virtues as courage, decency, and charity, virtues that are entirely within a person's own power to attain.*⁵

I have been amazed by the number of articles in the last two or three years that have focused on happiness. It is clear, for instance, that nations rich economically aren't necessarily happier than poor ones. Also, people at all income levels say they would be happy if only they made more money. The message of many magazines today is we're never quite happy enough.

Elder Oaks and I were in Beijing, China, a little over a year ago. An editorial in the *China Daily* was titled “Finding the Right

Path to Happiness for All.” The editorial indicated that despite significant increases in material wealth, people don't feel any happier. A few paragraphs from this Chinese newspaper editorial might be interesting to you.

Growing stress from work and study is making many people blue, as high pressure and long hours offset the happiness brought by economic well-being.

This is also true for school children. Often spoiled, these little emperors and empresses don't smile as much as they should, weighed down by excessive homework and endless tests. They also play less and are physically less fit compared with their parents' generation.

While the divorce rate soars . . . the outcome is often damaging—especially for young children.

Deteriorating morality and manners are also getting people down. . . . Loneliness is also playing a role, as interpersonal relationships become more complicated and people living in urban concrete jungles lose their sense of community. . . .

*Focusing on [gross domestic product growth] is not the right path to happiness.*⁶

This debate about prosperity and happiness has been going on for a long time. The great Anglican theologian Frederic W. Farrar, in *The Life and Work of St. Paul*, wrote of the grandeur of ancient Greece, particularly of Athens. He asserted that those who believe government, culture, philosophy, business, science, or other worthy pursuits can bring permanent happiness are mistaken. He stated:

*Had permanent happiness . . . been among the rewards of culture; had it been granted to man's unaided power to win salvation by the gifts and qualities of his own nature, and to make for himself a new Paradise . . . then such ends would have been achieved at Athens in the day of her glory.*⁷

He concluded that they definitely were not achieved.

The relationship between happiness and religion that was acknowledged by Farrar has been evident to almost all who have studied it. John Tierney, writing in the *New York Times*, December 30, 2008, stated: “Researchers around the world have repeatedly found that devoutly religious people tend to do better in school, live longer, have more satisfying marriages, and be generally happier.”

The Church's doctrine leads to true happiness, and I will discuss that later. But there

are issues relating to happiness with which many people struggle.

DON'T UNDERESTIMATE YOUR ACCOMPLISHMENTS AND CAPABILITIES

Almost all studies of happiness indicate that the relationship between how we think we are doing compared to others is more important than our actual circumstances. Arthur C. Brooks, who has written extensively on this subject, says it this way:

*Imagine two people who are the same in income, education, age, sex, race, religion, politics and family status. One feels very successful; the other does not. The former is about twice as likely to be very happy about his or her life than the latter. And if they are the same in perceived success but one earns more than the other, there will be no happiness difference at all between the two.*⁸

Many years ago a very wise consultant helped me understand this in a way that was meaningful to me. I was running a health care system and had just been called as an Area Authority. I had just returned from a stake conference in San Diego and was feeling that the talks I had given were less meaningful than I would have liked them to be. There were some merger issues in the business that the consultant was helping us resolve.

He took me to a whiteboard and went through the following analysis. He asked, “What are some of the skills that are inherent in what you are trying to do?” We then listed those skills on the whiteboard. I don't remember them exactly, but some of them were giving talks, providing inspired leadership, working with others, delegating, and other similar skills. He then asked me to list the individuals I had met in my lifetime who were the very best in each of the designated areas. I was surprised that in many of the skill areas, I knew immediately who I thought was the best. For instance, I knew that my mission president, Elder Marion D. Hanks, was as good a speaker as I had ever encountered whether it was a prepared talk or one spoken extemporaneously. The quality of content and delivery was exceptional.

With respect to delegation I immediately identified a former stake president, David Barlow. He was the president of the Ortho



Division of Standard Oil, now Chevron, and he was absolutely spectacular with respect to delegation. I can still remember, as a new high councilman assigned to the youth, reporting to him on some challenges that I thought our young people were experiencing. He immediately concurred with my assessment and then asked, "What is the solution?" I had to admit that I had thought deeply about the problem but had no solution as yet to propose. He helped me define what I was looking for and then set a specific time for us to meet to discuss a proposed solution that I was expected to bring to the next meeting. His success in both Church and business was most remarkable, and a significant part of that was his unusual ability to delegate and hold people accountable.

The consultant had me list additional people for each of the other skills or talents. Most of them I was able to identify very quickly. As I recall, there were approximately 10 of these skills. He then listed them across the top of the whiteboard and asked me, using an A, B, C grade formulation, to identify how each of these superstars performed in the other nine areas. To my great amazement, I realized that no one got straight As across the board. Most had significant numbers of Bs, and many had some Cs.

The consultant then pointed out that we often compare ourselves with the A+ performers in each category that we value, and then we feel inadequate and unsuccessful in what we are doing. As the studies I have mentioned indicate, when we feel unsuccessful we feel unhappy.

You might ask why I am sharing this with you. Law and the process of becoming a lawyer are very competitive. The respect for credentials can reach an inappropriate level where they are virtually "idols." In addition, client expectations, regardless of the legal specialty, often exceed any realistic outcome. This can be exaggerated by the crushing impact of losing cases, sometimes in a public setting. In the hothouse environment of the law, there are many people who are very skilled, and there is always somebody who seems to be better in all the ingredients that make up the qualifications to be a lawyer. Notwithstanding these issues, I would ask, "Do we have to be an A in everything to be happy? Do we have to be so hard on ourselves?" The scriptures do, of course, address happiness, but not in terms of material or academic success or skill or professional achievements.

Our doctrine is set forth succinctly in Mosiah 2:41. King Benjamin taught:

I would desire that ye should consider on the blessed and happy state of those that keep the commandments of God. For behold, they are blessed in all things, both temporal and spiritual; and if they hold out faithful to the end they are received into heaven, that thereby they may dwell with God in a state of never-ending happiness. O remember, remember that these things are true; for the Lord God hath spoken it.

I was impressed a while back by an editorial page article in the *Wall Street Journal* written by Steve Salerno. The title was “The Happiness Myth.” He remembered asking his dad when he was 13, “Are you happy?” His father answered, “Son, a man doesn’t have time to think about that. A man just does what a man needs doing.” He then recited a second encounter with his father. He said his dad told him, “Life isn’t built around fun. It’s built around peace of mind.”⁹

That resonated with me as I read it, because one of my favorite scriptures is Doctrine and Covenants 59:23: “But learn that he who doeth the works of righteousness shall receive his reward, even peace in this world, and eternal life in the world to come.”

I would suggest a better list to put on the whiteboard would have been the attributes and teachings of the Savior. That is the list

that, without comparing ourselves to others, we should be striving to achieve and would allow us to have the peace I have just described.

When the Missionary Department was working on the new missionary guide, *Preach My Gospel*, we knew that to be successful, missionaries needed to emulate the Savior. We also felt that if missionaries seriously worked on Christlike attributes, it could become a lifelong quest that would supersede the kind of comparisons I have described. I respectfully submit that members of the legal profession would be blessed if they did not underestimate their accomplishments and capabilities.

FREEDOM OF SPEECH AND FREEDOM OF RELIGION

The second concept I want to touch on this evening is the constitutional provision that the United States Congress would “make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹⁰ My emphasis is religious freedom and the practical participation of people of faith in government. In speaking of the U.S. Constitution, John Adams said, “Our Constitution was



made only for a moral and religious people.”¹¹ James Madison, known as the Father of the Constitution, added his view that there had to be a “sufficient virtue among men for self-government.”¹² Thomas Jefferson favored protection of religion and conscience, but he also wanted freedom from religion.¹³

The history of the members of our Church has caused us to be vigilant on free speech and freedom of religion issues. In our early Church history, the vast majority of our members were antislavery.¹⁴ This was prior to the Civil War and was a major element—along with our religious beliefs—in the hostility, the mob violence, and, ultimately, the extermination order issued by Governor Boggs of Missouri.¹⁵ The Prophet Joseph lamented that the U.S. Constitution was not “broad enough to cover the whole ground” and the federal government could not intervene when the state militia expelled the Mormons from Missouri.¹⁶

During the past year and a half, the Church has experienced many issues that have highlighted the significance of freedom of religion. At the direction of the First Presidency, Elder Ballard and I, chairman and vice chairman, respectively, of the Church Public Affairs Committee, have visited with many members of the media as well as leaders of other faiths. Let me review some of these visits. In the latter part of 2007 and the early part of 2008, we visited with the editorial boards of 12 newspapers, magazines, and journals. These included several influential newspapers such as the *Washington Post*, *USA Today*, the *Boston Globe*, the *Wall Street Journal*, and the *Chicago Tribune*.

In addition, we visited the editorial boards of diverse magazines such as *U.S. News & World Report*, the *National Review*, and the *New Republic*. More recently we have met with broadcast media. For instance, in January of this year, we escorted many of the media through the new Draper Utah Temple open house. We were interviewed by Dan Harris of ABC for his *Nightline* program. Other equally significant media entities were visited.

One purpose of the visits was to explain to the media the neutrality the Church maintains in partisan politics. We do not support political parties or political candidates. We explained to them that we do not allow discussions of political parties or candidates to be made from our pulpits. We do not distrib-

ute cards indicating for whom members should vote. We pointed out to them that we have faithful members of the Church in the various political parties and used as examples Senate Majority Leader Harry Reid and senior Republican senator Orrin Hatch.

We told them that we always reserve the right as a Church to take specific positions on moral issues. From time to time the Church has done this. When the Church does take a position, it does so in a public and transparent manner. The Church does not tell legislators how to vote. Legislators and members are always free to vote their conscience.

We then opened the discussions to questions from them. There were two questions that were asked by almost every editorial board. The first was: “Why are you so secretive?” When we probed on this question, we were surprised to find that in virtually every case these highly educated, well-informed people believed that one had to be invited by a member of the Church to attend a Latter-day Saint meeting. Elder Ballard and I were astounded, having both recently been in the Missionary Department, working with the 53,000 missionaries trying to get every investigator to attend Church; we could not believe what we were hearing. It soon became clear that they were all confusing our temples with our meetinghouses. We were able to explain to them that we have approximately 20,000 chapels, where meetings are held every Sunday that anyone can attend without permission. We have 128 operating temples, which were open to the public before their dedication and where tours were given to explain what occurs in the temple. Then they are dedicated to the Lord and are closed, because they are sacred—not because they are secret.

The vast majority of the media were surprised to learn that an unpaid lay leader presided over the ward and branch units. They were also surprised to find that women participate in giving talks and prayers at our most sacred meeting, sacrament meeting.

Turning to the second question that was uniformly asked—and remember, some of this was during the Romney for President Campaign in the U.S.—“Why do some people take the position that you are not Christians?” They had in front of them our cards describing us as apostles of The Church of Jesus Christ of Latter-day Saints. We told

them that we are neither Catholic nor Protestant. We are restored New Testament Christians. We explained to them that if they wanted to know how Latter-day Saints live their lives, they should look at the Savior’s teachings in the New Testament. We attempt to emulate Christlike attributes. We were pleased to report to them our demonstrated efforts to help the poor, the sick, and the needy. Our commitment to fasting and giving offerings to assist those in need is a marvelous Christian effort. Faithful home and visiting teachers bless lives in a most remarkable, Christlike outreach.

We pointed to the concluding chapters of Matthew, Mark, Luke, and John, where the Risen Lord asked His disciples to preach His gospel and feed His sheep. We noted that in this dispensation over a million missionaries have served. We acknowledged that at some times to some people it feels like the missionaries are invading their privacy, but we noted that the Savior’s commandment requires us to preach His gospel.

In most of the meetings there was a discussion of the Nicene Creed to which we do not adhere because of the revelations received by the Prophet Joseph Smith. I would have to say that they seemed far more interested in the fact that we worship the Savior and emulate His teachings than in deep theological differences with other Christians.

Again, I want to note that we were well received and treated with great respect. Of course, there were numerous other questions that I do not have time to review tonight. In many of these meetings, and particularly in follow-up conversations, the issue was raised by some of the media suggesting that the Church and its members be more vigorous with respect to answering legitimate questions people have about our faith and also in dealing with some of the bigotry that occurs.

ACTIVE PARTICIPANT OR SILENT OBSERVER?

My concluding and perhaps most important purpose is to invite you highly educated and talented individuals to do what the media has suggested. Additionally, I would like to challenge you to contemplate how you can improve the society in which you live. Participating in government and asserting righteous principles in the public square

would be a commendable and much needed goal. Many times your particular talents are needed to defend our faith.

What exactly are we asking you to do? First, you will not speak for the Church itself. Only the First Presidency and those authorized from time to time by them will speak for the Church. We are asking you as individuals to respond appropriately and in a Christlike fashion whenever and wherever it is necessary.

Elder Ballard, speaking at BYU–Hawaii and BYU–Idaho, asked our young students to become more involved, particularly with respect to the Internet.¹⁷ The emergence of the Internet has generated countless worldwide conversations on a huge range of subjects, including religion. As we all know, many Internet conversations are about the Church. We see them on blogs, in readers' letters to online publications, in YouTube videos, and in a variety of other formats. These conversations go on whether or not we choose to participate in them.

Most people, even in America, are uncertain what to make of Latter-day Saints. If they know a Latter-day Saint personally, they often have a good impression. But they also hear harsh or mean-spirited criticisms or accusations against the Church. By training, experience, and judgment, you are among the Church's most articulate and thoughtful members. So what is your responsibility during this period of unusual public attention and debate? As Elder Ballard asked a BYU Marriott School of Management Society audience last year in Washington: "Are you going to be an active participant or only a silent observer?"

Elder Ballard went on to say: "Church leaders must not be reluctant to participate in public discussion. Where appropriate, we will engage with the media whether it's the traditional, mainstream media or the new media of the Internet. But Church leaders can't do it all, especially at the grass-roots community level. While we do speak authoritatively for the Church, we look to our responsible and faithful members to engage personally with blogs, to write thoughtful, online letters to news organizations, and to act in other ways to correct the record with their own opinions."¹⁸

Neither is it always about correcting information. Sometimes it's as simple as sharing your personal life experiences to show

how your values and faith intersect, whether it's how you as a parent engage with your teens, or whether it's how you find the time to volunteer in good causes. Countless members of the Church are now doing this. One example I recently became aware of is called *The Daily Scoop*. It is written by a Church sister in Las Vegas. This good woman experienced a tragic loss of a child in her family and began writing her blog to help her get through it. People began to notice, and she developed a following as she wrote about dealing with adversity. Often she doesn't mention the Church at all, but sometimes she does. For instance, she posted comments from a talk given by Elder Joseph B. Wirthlin at the last general conference on meeting adversity. Some of the responses from non-members are impressive as they relate to her circumstances. For some it may have been their first encounter with a Latter-day Saint. She comes across as real, thoughtful, intelligent, and dealing with the same problems that many others face, but in a remarkable way that allows gospel values to shine.

As people sense the common ground they share with you and engage in conversations intelligently, they will relate to your values. I'm well aware that part of the Internet is occupied by people who like to abuse and scream at each other rather than discuss things or, as the *Atlantic Monthly* recently reported, who seem to fit somewhere between bigotry and stupidity.¹⁹ It's not all like that. Those sites attract their own followers, but you can rise above that by reading and commenting on the more thoughtful sites and engaging in more respectful dialogue, sharing your values, and speaking out for the Church when required.

Many of you are not involved in the Internet, but the principles for being engaged in traditional media are similar. As you participate, regardless of the media involved, remember who you are. You are Latter-day Saints. Where possible, be peacemakers. Explain your beliefs in gentle, loving terms. Be wise, thoughtful, considerate, and friendly.

I am grateful that we have reached the point where there are thousands of faithful Latter-day Saint lawyers across the world. The dream of Church leaders when the J. Reuben Clark Law School and this Law Society were established is being fulfilled. I am not sure you can fully comprehend how significant

you are and what you collectively accomplish in blessing mankind and building the kingdom of God here on earth.

You have my appreciation, respect, and best wishes.

NOTES

- 1 Evan R. Chesler, "Kill the Billable Hour," *Forbes* 183, no. 1 (12 January 2009): 26.
- 2 Dallin H. Oaks, "The Divinely Inspired Constitution," *Ensign*, February 1992, 70.
- 3 See J. Reuben Clark Jr., "Constitutional Government: Our Birthright Threatened," *Vital Speeches of the Day* 5, no. 6 (1 January 1939): 177.
- 4 The Declaration of Independence, United States of America.
- 5 Haven B. Gow, "What the Authors of the Declaration of Independence Really Meant," *Liberty: A Magazine of Religious Freedom* 72, no. 2 (March–April 1977): 13.
- 6 Chen Weihua, "Finding the Right Path to Happiness for All," *China Daily*, Beijing, China, 10 November 2007.
- 7 F. W. Farrar, *The Life and Work of St. Paul* (New York: E. P. Dutton, 1902), 522.
- 8 Arthur C. Brooks, "Money-Happiness Link Often Misunderstood," *Deseret News*, 29 June 2008, G3; emphasis added.
- 9 Steve Salerno, "The Happiness Myth," *Wall Street Journal*, 20 December 2007, A17.
- 10 U.S. Constitution. First Amendment.
- 11 In John R. Howe, Jr., *The Changing Political Thought of John Adams* (Princeton, New Jersey: Princeton University Press, 1966), 185; quoted in Ezra Taft Benson, *The Constitution—A Heavenly Banner*, BYU devotional address, 16 September 1986.
- 12 Alexander Hamilton, James Madison, and John Jay, *The Federalist*, no. 55.
- 13 See Gordon Smith, "Protecting the Weak: Religious Liberty in the Twenty-First Century," *Brigham Young University Law Review*, 1999, 479–502.
- 14 See James B. Allen and Glen M. Leonard, *The Story of the Latter-day Saints*, 2nd ed., rev. and enl. (Salt Lake City: Deseret Book, 1992), 81–93, 104–10, 120–30.
- 15 See Leonard J. Arrington and Davis Bitton, *The Mormon Experience: A History of the Latter-day Saints*, 2nd ed. (Urbana, Illinois: University of Illinois Press, 1992), 50–51.
- 16 *History of the Church*, 6:57.
- 17 See M. Russell Ballard, "Using New Media to Support the Work of the Church," BYU–Hawaii commencement, 15 December 2007, and "Making Your Influence Felt," BYU–Idaho commencement, 11 April 2008.
- 18 M. Russell Ballard, address to the BYU Management Society, Washington, D.C., 19 April 2008.
- 19 See James Warren, Dispatch, "When No News Is Bad News," *Atlantic Monthly*, 21 January 2009.

BY FREDERICK MARK GEDICKS

ORIGINALIST ROOTS OF SUBSTANTIVE DUE PROCESS

No person shall be . . .
deprived of life, liberty, or property
without due process of law.
—U.S. Constitution, Amendment V (1791)

ILLUSTRATION BY HOUSTON TRUEBLOOD



THE DOCTRINE OF “SUBSTANTIVE DUE PROCESS” REFERS TO THE SUPREME COURT’S LONG AND CONTROVERSIAL PRACTICE OF USING THE DUE PROCESS CLAUSES OF THE 5TH AND 14TH AMENDMENTS TO CONSTITUTIONALIZE FUNDAMENTAL RIGHTS THAT DO NOT APPEAR ANYWHERE IN THE CONSTITUTION. THE DOCTRINE DEBUTED TO MIXED REVIEWS IN CHIEF JUSTICE TANEY’S INFAMOUS *DRED SCOTT* OPINION,¹ AND CRITICISM OF IT HAS BEEN A FACT OF AMERICAN CONSTITUTIONAL LIFE EVER SINCE.

This criticism has acquired particular resonance as “originalism” has come to dominate debates about constitutional interpretation. The most widely defended version of this interpretive theory, “public-meaning originalism,” holds that the contemporary meaning of a constitutional provision is the meaning that was understood by the people who lived at the time that the provision was proposed by Congress and ratified by the states.

An entrenched conventional wisdom holds that substantive due process is inconsistent with an originalist understanding of the Due Process Clauses of both the 5th and 14th Amendments, since by their terms they appear

to protect only rights to legal process. With respect to the 5th Amendment in particular, an overwhelming scholarly consensus maintains that its Due Process Clause protects only procedural rights. Accordingly, an originalist defense of substantive due process under the 5th Amendment Due Process Clause would be significant. First, it would legitimate fundamental substantive rights that bind the federal government only by application of the doctrine of substantive due process, such as rights to “fundamental fairness” in criminal and civil proceedings,² and to equal protection of the laws.³ Second, because yet more conventional wisdom holds that the original meanings of

the 5th and 14th Amendment Due Process Clauses are identical, a originalist defense of 5th Amendment substantive due process would place the burden on opponents of the doctrine to explain how and why an understanding of the Due Process Clause that encompassed substantive due process in 1791 had vanished by the time the 14th Amendment Due Process Clause was ratified in 1868. And finally, an originalist defense of 5th Amendment substantive due process would demonstrate that originalism is consistent with the common-law judicial protection of unenumerated fundamental rights championed by constitutional liberals since the mid-20th century.

MAGNA CARTA

It is universally agreed that the concept of due process of law is rooted in a provision of Magna Carta, or the “Great Charter”:

No free man shall be taken or imprisoned or disseised or outlawed or exiled, or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers and by the law of the land.

Later English statutes defined the “law of the land” as due process of law, or “procedure by original writ or by an indicting jury,”⁴ an equation that entered into English common law and was eventually absorbed into the English constitution.⁵

In 1628—more than 400 years after Magna Carta—Sir Edward Coke canonized the fundamental-law status of the Great Charter and the law of the land in England with his theory of higher-law constitutionalism. In Coke’s view, the English constitution did not vest sovereignty in the king but rather in the common-law and the courts.⁶ Magna Carta and common-law liberties constituted law that was higher than the actions of royalty, nobility, or Parliament, law that limited what these groups could do even by consensus.⁷ As law possessed of a more fundamental status than ordinary statutes, Magna Carta

Originally written in 1215, Magna Carta bound England’s sovereigns to the rule of law and laid the groundwork for the U.S. Constitution and Bill of Rights.



and the law of the land had a status prior to and more foundational than the actions of the king and even Parliament.⁸ This English “constitutionalization” of Magna Carta and the law of the land is evident in Coke’s confrontation with King James I over the respective jurisdictions of common law and ecclesiastical courts, in judicial opinions authored or reported by Coke—notably *Bonham’s Case* and several antimonopoly cases—and, most clearly, in Coke’s monumental *Institutes of the Law of England* published at the end of his life.⁹

AMERICAN THINKING

The drafting and ratification history of the 5th Amendment Due Process Clause discloses virtually nothing about its original public meaning. However, no legal commentator, not even Blackstone, had more influence on the American revolutionaries than Coke. Consequently, questions about due process of law and its protection of unenumerated rights were at the heart of American constitutional thinking during the Revolution and its aftermath.

NATURAL RIGHTS

The colonists could not rely directly on Coke’s higher-law constitutionalism because revolt necessarily entailed withdrawal from the English constitutional system that higher-law constitutionalism sustained. Thus, the Declaration of Independence opened with a declaration of natural rights rather than fundamental customary rights of English common law. But in short order it moved to a long list of common law grievances, including indefinite dissolution of colonial legislatures, veto of an independent colonial judiciary, maintenance of standing armies in the colonies, quartering of troops in the colonists’ homes, embargoing colonial trade, imposing of taxes without colonial representation in Parliament, and depriving colonists of trial by jury. The Declaration even accused the king of combining with Parliament to subject the colonies “to a jurisdiction foreign to *our constitution* and unacknowledged by *our laws*,” thereby implying the existence of an unwritten colonial constitution analogous to the unwritten English one, and echoing higher-law constitutional arguments about natural and customary rights that were then widespread among the colonists.¹⁰

In short, the Declaration’s basic argument—that Britain’s violation of natural and customary rights justified revolution—fit neatly with Coke’s 17th-century notion that the law of the land and due process of law limited the actions of both king and Parliament.

HIGHER-LAW CONSTITUTIONALISM

That revolutionary Americans carried higher-law constitutionalism into independence is reflected in post-independence state constitutions and judicial decisions. Because natural and customary rights were believed to exist independent of any writing, it was not necessary to enumerate them in a constitutional text or otherwise to enact them into positive law in order for them to limit the actions of the newly framed state governments.¹¹ This distinction is evident in the language used in the written constitutions enacted by about half of the states following independence, which “created” the frames of state government but merely “declared” or “guaranteed” natural and customary rights. Maryland, Massachusetts, North Carolina, Pennsylvania, Vermont, and Virginia maintained this distinction from the start, while Delaware, New Hampshire, and Kentucky (upon its admission) followed suit within a generation.

Some judicial decisions and arguments of counsel following the Revolution also drew upon higher-law constitutionalism,¹² although others relied solely on constitutional texts enumerating fundamental rights.¹³ A much-contested speech by Alexander Hamilton in the late 1780s also supports the view that higher-law constitutionalism was influential in the states following independence.¹⁴

The strongest judicial statement of higher-law constitutionalism prior to 1791 is *Ham v. McLaws*.¹⁵ There, a South Carolina court considered the state’s imposition of a fine and forfeiture for illegal importation of slaves against a family that had been in transit on the high seas when the importation ban was enacted. Conceding that defendants fell within the strict letter of the statute, the court nevertheless declared that “statutes passed against the plain and obvious principles of common right, and common reason, are absolutely null and void, as far as they are calculated to operate against those principles,” and held that the statute not did not



Roger B. Taney, chief justice of the U.S. Supreme Court and staunch supporter of slavery, used the Fifth Amendment’s Due Process Clause in writing the majority opinion in the infamous *Dred Scott v. Stanford* case.

apply to the defendants, reasoning that this was “consistent with justice, and the dictates of natural reason, though contrary to the strict letter of the law.”¹⁶

POWER OF THE FEDERAL JUDICIARY

The 1787 Constitution enumerated very few individual rights and liberties, and even the few it did were criticized by delegates to the Philadelphia Convention as “irrelevant and useless.”¹⁷ Even so, Antifederalists immediately made the Constitution’s lack of a national bill of rights a ratification issue. The Federalists maintained that an enumeration of natural and customary fundamental rights and liberties was unnecessary because the Constitution did not delegate to the national government any power to infringe upon such rights,¹⁸ and was dangerous because it would be impossible to enumerate all of the rights and liberties individuals held.¹⁹ Both arguments rested on two assumptions

explicitly voiced by Federalists in the ratification debates: that natural and customary rights existed independent of the federal Constitution and any other text, and that the federal judiciary would be empowered to invalidate acts of Congress or the state legislatures intruding upon such rights.²⁰ Indeed, Hamilton’s discussion of judicial power in *The Federalist* essay is permeated by the expectation that the federal courts would defend unenumerated natural and customary rights against federal encroachment.²¹



In sum, when Madison set out to draft the 5th Amendment Due Process Clause and the rest of the Bill of Rights in 1790, the higher-law constitutionalism of Coke and the English 17th century had been adopted, adapted, and embedded in American constitutional thinking. In particular, the notion of due process of law associated with the law of the land guarantee of Magna Carta was

widely understood to include a residual guarantee of substantive liberty against arbitrary actions of government, including (especially) the state legislatures.

DEFINITION OF “LAW”

Defenses of substantive due process often founder on the text: How does one get *substantive* rights from a text that seems so tightly focused on *procedure*? This very question reflects the projection by contemporary interpreters of a positivist meaning onto the term “law” in the crucial phrase “due process of law” that the framers did not share. In this positivist understanding, a law is any legislative or other governmental act that has satisfied the formal requirements for making a law. Under this reading, Congress complies with the Due Process Clause—that is, it satisfies due process of law when it deprives a person of life, liberty, or property—so long as it accomplishes the deprivation by means of a congressional act passed in accordance with the lawmaking provisions set forth in Article I of the Constitution.

By contrast, in the 1790s, classical natural law theory had long assigned normative as well as positivist content to the definition of law. To fall within the meaning of law in the classical view, a legislative or other governmental act required more than mere positivist compliance with a rule of recognition; it also needed to be just.²² Cicero, for example, maintained that an unjust statute is not a law, even though clearly adopted and accepted by the nation it governs.²³ Augustine likewise suggested that “a law that is not just is not a law.”²⁴ Aquinas formalized this view into an argument, concluding that, since law derived its essential character from its conformity to “right reason,” whose “first rule is the law of nature,” a law that violates the natural law “is no longer a law but a corruption of law.”²⁵

The classical natural law tradition was still vibrant in late-18th-century America, when the 5th Amendment was drafted and ratified, and the term “law” had not yet acquired the almost entirely positivist connotation that it carries today. To call a legislative act a law during that era did not mean that the act merely satisfied constitutional requirements for lawmaking, but rather it signified that it conformed to substantive limitations on legislative power represented by natural and customary rights. Legislative acts that

William Blackstone argued in his *Commentaries on the Laws of England* that positive law that was not in accord with natural law was no law at all.



violated these limitations would not have been considered laws, even when they satisfied the constitutional requirements for lawmaking. Such acts might have given due process, in other words, but the process owed and given would not have been a process *of law*.²⁶ Under this reading, the Due Process Clause required that a congressional deprivation of life, liberty, or property be accomplished by a law, and to be a law, a congressional act must not have exceeded the limits of legislative power marked by natural and customary rights.

There is substantial evidence that late-18th-century American lawyers read the Due Process Clause in this manner. Legal dictionaries from the late-18th century repeat Aquinas' argument nearly *verbatim*.²⁷ Echoing Aquinas, and notwithstanding his ideas about parliamentary supremacy, Blackstone similarly concluded that there is no obligation to obey human laws that violate the natural law, since such laws have no validity or force.²⁸ And even in England, members of the parliamentary Whig opposition argued that the more extreme acts passed by Parliament to punish colonial intransigence were not law even though properly enacted.²⁹

The classical understanding of law is implicit in the ubiquitous language of nullity and voidness that runs throughout late-18th-century judicial decisions and arguments of counsel involving legislative acts held to have violated natural or customary rights.³⁰ Then, as now, a void law had no existence; it made sense to think of it as never having been a law at all. This understanding was sometimes even made explicit.

For example, the classical theory's normative definition of "law" is expressly invoked in *Van Horn's Lessee v. Dorrance*, a case involving a boundary dispute between Pennsylvania and Connecticut that the states settled by legislatively vesting title to disputed property in certain claimants at the expense of others. Justice Paterson charged the jury that the legislature's act of "divesting one citizen of his freehold, and vesting it in another, without a just compensation" was "void" because it violated natural and customary rights. This meant, he explained, that the settlement act "never had constitutional existence; it is a dead letter, and of no more virtue or avail, than if it never had been made."³¹

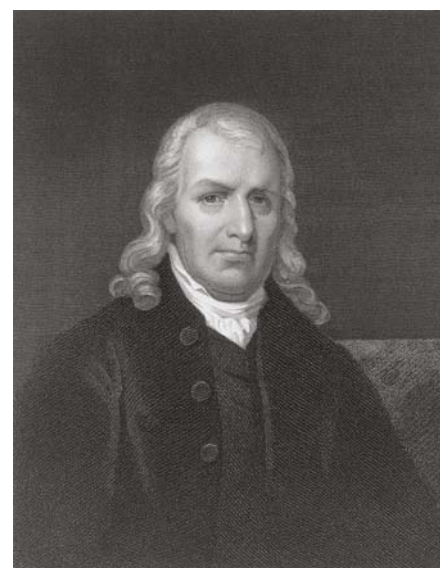
The classical view is also explicit in *Marbury v. Madison*, in which Chief Justice

Marshall famously held that "an act of the legislature, repugnant to the constitution, is void." In considering whether courts are bound to enforce an unconstitutional law, Marshall expressly assumes that a legislative act found to be void because of its inconsistency with the constitution, is not really a law: "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, *though it be not law*, does it constitute a rule as operative *as if it was a law*?"³²

Finally, the classical understanding of law is clearly evident in state judicial condemnations of the positivist construction of law in late-18th-century decisions construing the meaning of the law of the land. These decisions are illustrative of the original meaning of the Due Process Clause, because late-18th-century Americans understood the meanings of due process of law and the law of the land to be virtually identical.³³ Two judges in *Zylstra v. Corporation of Charleston* emphatically held that a city charter that permitted the levying of fines without trial by jury could not be considered part of the law of the land even if authorized by the legislature:

*How then can a law be valid, which constrains a citizen to submit his person and his property, to a tribunal that proceeds to give judgment on both, without the intervention of a jury? Does [sic] these words of the constitution "or by the law of the land," authorize it? Do they mean any law which may be passed, directing a different mode of trial? Such a construction would be incompatible with the declaration of this privilege; it would be taking away all the security which that intended to give it; it would do more, it would be making the constitution itself authorize the means of destroying a right which it afterwards declares shall be inviolably preserved. For if a law may abridge the trial by jury, it may also abolish it; and this great privilege would be held only at the will of the legislature.*³⁴

The author of this opinion cited its reasoning in *Lindsay v. Commissioners* to invalidate a municipal taking, arguing that if "the *lex terrae* meant any law which the legislature might pass, then the legislature would be authorized by the constitution, to destroy that right, which the constitution had expressly declared, should be inviolably preserved," and dismissing this reading as "too absurd a con-



Justice Samuel Chase opined that the protection of natural and customary rights was the very purpose of state constitutions.

struction to be a true one."³⁵ *Trustees of the University of North Carolina v. Foy* similarly rejected the positivist construction when it invalidated a state legislature's unilateral revocation of title to property that the legislature had previously conveyed, reasoning that if the legislature was empowered to alter the law of the land at will, the protections of law of the land clauses were nonexistent.³⁶

Perhaps the clearest statement of the classical understanding of law is the oft-quoted dictum of Justice Chase in *Calder v. Bull*, a United States Supreme Court decision handed down in 1798, only seven years after ratification of the 5th Amendment.³⁷ The Court unanimously held in *Calder* that a special state statute ordering a new trial of a disputed will after the running of the statute of limitations for appeal was not *ex post facto* legislation prohibited by the Constitution. Justice Chase additionally opined that the protection of natural and customary rights was the very purpose of state constitutions, which would be subverted if state legislative power was not subject to natural and customary law limits, regardless of whether such

limits were written into the positive law of the state constitutions:

I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State. . . .

*There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established.*³⁸

As examples of acts beyond proper legislative authority, Chase suggested a law that “punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A and gives it to B.”³⁹

Chase then directly invokes the classical view, arguing that because such actions violate natural and customary rights, they are not truly law, even when enacted pursuant to the constitutionally prescribed procedures for law-making: “An Act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.”⁴⁰

Justice Chase’s famous invocation of the classical understanding was directly challenged by the equally famous dictum of Justice Iredell in the same case. Citing Blackstone, Iredell argued that the only judicially enforceable limits on legislative power were those positively enacted into a constitutional text.⁴¹

The historical context of the 1790s when Justice Iredell wrote this dictum suggests that Chase’s position was the more conventional. Blackstone’s doctrine reflected the constitutionalism of parliamentary supremacy against which higher-law constitutionalism was deployed by the American revolutionaries. Post-independence state constitutions, arguments of counsel, and judicial decisions make clear that higher-law constitutionalism remained the conceptual foundation of American constitutional thinking through the

founding era. Indeed, it was precisely the anarchic consequences stemming from absolutist state legislatures that led to the Philadelphia convention.⁴² The supremacy and sovereignty of Parliament, therefore, is an unlikely constitutional authority to raise less than a generation after the Revolution was fought to vindicate its constitutional opposite.⁴³

Iredell’s position, moreover, was almost uniformly rejected by state constitutional decisions of the period, which, as we have seen, generally held that the law of the land signified natural and customary rights that constrained legislative action and could not be altered by the ordinary exercise of legislative power. In addition to its inclusion in legal dictionaries published during the late-18th century, the classical understanding of law was reflected in frequent references to voidness in constitutional decisions of that era, and was expressly invoked in the majority opinions of one state and two federal courts, including the U.S. Supreme Court. Finally, two state court *seriatim* opinions had used the classical understanding as a premise in rejecting the positivist argument that state legislatures had unrestricted power to alter the law of the land by ordinary enactment. By contrast, the only judicial authority clearly adopting the positivist construction of law argued by Justice Iredell in *Calder* is an opinion reluctantly announced in *State v. _____*,⁴⁴ which was overruled by *Foy* barely a decade later. On balance, then, the late-18th-century legal authorities strongly support the position that the conventional understanding of law in the 1790s was that of classical natural law theory.

Against the backdrop of colonial adoption and adaptation of Coke’s higher-law constitutionalism in the pre-Revolutionary era, the drafting and ratification of the 1787 Constitution and the 1791 Due Process Clause of the 5th Amendment, together with decisions reported during the period immediately before and after ratification, provide strong evidence that due process of law was originally understood to include judicial enforcement of unenumerated natural and customary rights as limitations on congressional power, and was not limited to a mere guarantee judicial process. Whatever other criticisms might be made of substantive due process, its inconsistency with the original understanding of the 5th Amendment Due Process Clause is not one of them.

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NOTES

- 1 60 U.S. (19 How.) 393, 450 (1856).
- 2 See, e.g., *Lassiter v. Department Soc. Serv.*, 452 U.S. 18 (1981); *Estes v. State of Texas*, 381 U.S. 532 (1965).
- 3 See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Bolling v. Sharpe*, 347 U.S. 497 (1954).
- 4 J.C. HOLT, *MAGNA CARTA* 10 (2nd ed. 1992); A.E. DICK HOWARD, *MAGNA CARTA* 15 (1998).
- 5 HELEN M. CAM, *MAGNA CARTA—EVENT OR DOCUMENT?* 17, 20 (1965); HOLT, *supra* note 4, at 14; HOWARD, *supra* note 4, at 24; C.H. MCLWAIN, *CONSTITUTIONALISM AND THE CHANGING WORLD* 135, 172, 174 (1939); Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law* (pt.1), 42 HARV. L. REV. 149, 179 (1928); Gerald J. Postema, *Classical Common Law Jurisprudence* (pt.1), 2 OXFORD U. COMMONWEALTH L.J. 155, 155 (2002).
- 6 HOLT, *MAGNA CARTA*, *supra* note 4, at 9; JOHN V. ORTH, *DUE PROCESS OF LAW: A BRIEF HISTORY* 24, 25 (2003); Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law* (pt.2), 42 HARV. L. REV. 365, 367 (1928); Paul Raffield, *Contract, Classicism, and the Common-Weal: Coke’s Reports and the Foundations of the Modern English Constitution*, 17 L. & LIT. 69, 73, 78–79 (2005).
- 7 See FREDERICK GEORGE MARCHAM, *A CONSTITUTIONAL HISTORY OF MODERN ENGLAND, 1486 TO THE PRESENT* 122 (1960); Thomas G. Barnes, *Introduction to Coke’s “Commentary on Littleton”* (1995), in *LAW, LIBERTY AND PARLIAMENT: SELECTED ESSAYS ON THE WRITING OF SIR EDWARD COKE* 1, 21 (Allen D. Boyer ed. 2004).
- 8 See JAMES STONER, JR., *COMMON LAW AND LIBERAL THEORY: COKE, HOBBS, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 27 (1992) [hereinafter STONER, *LIBERAL THEORY*]; Corwin, “Higher Law” Background (pt.2), *supra* note 6, at 367; Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 855, 858 (1978).
- 9 See Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 601–08 (2009).

- 10 *E.g.*, *Robin v. Hardaway*, 1 Va. (Jeff.) 109 (Va. Gen'l Ct. 1772) (case report by Thomas Jefferson summarizing George Mason's argument that "all acts of legislature apparently contrary to natural right and justice are, in our laws, and must be in the nature of things, considered as void"); *Paxton's Case* (Mass. Bay Super. Prov. Ct. 1761), reported in 1 JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BETWEEN 1761 AND 1772, at 51–57 & app. I-A at 395–405 (1865) (case report by John Adams summarizing John Otis' argument from *Bombam's Case* that "an Act against the Constitution is void; an Act against natural Equity is void; and if an Act of Parliament should be made, in the very Words of this Petition, it would be void"); see, e.g., Gedicks, *supra* note 9, at 617–18 & n. 172 (summarizing higher-law constitutional arguments by John Adams, Samuel Adams, Samuel Cook, Daniel Dulany, Benjamin Franklin, and the Massachusetts Circular Letter based on Otis's argument in *Paxton's Case*).
- 11 See Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1146 (1987); e.g., BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 188 (Leonard Levy, et. al. enlarged ed. 1992) ("Legal rights are 'those rights which we are entitled to by the eternal laws of right reason'; they exist independent of positive law, and stand as the measure of its legitimacy.") (quoting Philip Livingston).
- 12 See, e.g., *Ham v. McClaws*, 1 S.C.L. (1 Bay.) 91 (S.C. Ct. Comm. Pl. 1789); *Butler v. Craig*, 2 H. & McH. 214 (Md. Gen'l Ct. 1787); *Trevett v. Weeden* (R.I. 1786), private report reprinted in 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 417, 420–21, 423 (1971); *Rutgers v. Waddington* (N.Y. City Mayor's Ct. Aug. 17, 1784) (per Duane, Mayor & C.J.), private report reprinted in 1 LAW PRACTICE OF ALEXANDER HAMILTON 392 (Julius Goebel, Jr., ed. 1964).
- 13 *Bayard v. Singleton*, 1 N.C. (Mart.) 42, 45 (N.C. Sup. Ct. L. & Eq. 1787); *Holmes v. Walton* (N.J. 1780), reported by Austin Scott, *Holmes v. Walton: The New Jersey Precedent*, 4 AM. HIST. REV. 456, 456–59 (1899), cited and described in *State v. Parkhurst*, 9 N.J.L. (4 Halst.) 427 app. (1802).
- 14 Alexander Hamilton, *Remarks on an Act for Regulating Elections*, New York Assembly (Feb. 6, 1787) (relying on Magna Carta and Coke to argue that a bill proposing to deprive British loyalists of their rights to vote and to run for office would violate due process of law guaranteed by New York's statutory bill of rights), in 4 PAPERS OF ALEXANDER HAMILTON 35 (Harold C. Syrett ed. 1962), reprinted in 5 THE FOUNDERS' CONSTITUTION 313 (Phillip B. Kurland & Ralph Lerner ed. 1987).
- I demonstrate in the longer article that opponents of substantive due process mistake this speech as support for their position, when it actually supports substantive due process. See Gedicks, *supra* note 9, at 630–33.
- 15 1 S.C.L. (1 Bay.) 91 (S.C. Ct. Comm. Pl. 1789).
- 16 1 S.C.L. (1 Bay.) at 91–96.
- 17 GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 536 (2nd ed. 1998).
- 18 *E.g.*, THE FEDERALIST No. 84, at 578–79 (Alexander Hamilton) (Jacob E. Cooke ed. 1961); THE COMPLETE BILL OF RIGHTS, 742, 746 (Neil H. Cogan ed. 1997); IV DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 166–67 (Jonathan Elliot 2nd ed. 1836); see, e.g., JACK RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IN THE MAKING OF THE CONSTITUTION* 144 (1996).
- 19 *E.g.*, James Wilson and John Smilie Debate the Need for a Bill of Rights, Pennsylvania Ratifying Convention (Nov. 28, 1787), in 1 THE DEBATE ON THE CONSTITUTION 807–08 (Bernard Bailyn ed. 1993); Remarks of James Iredell at North Carolina Convention Debates (July 29, 1788), in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 945, 949–51 (Bernard Schwartz ed. 1971); see Sherry, *supra* note 11, at 1162.
- 20 STONER, *supra* note 8, at 199, 208; Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006); e.g., Edmund Randolph, Suggestions for the Conciliation of the Small States ¶5 (July 10, 1787), reprinted in 4 FOUNDERS' CONSTITUTION, *supra* note 14, at 597; II ELLIOT, DEBATES, *supra* note 18, at 161–62 (remarks of Theophilus Parsons).
- 21 See, e.g., SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS* 112, 113 (1995); STONER, *LIBERAL THEORY*, *supra* note 8, at 204.
- 22 *E.g.*, CICERO, *DE RE PUBLIC & DE LEGIBUS* 317–19, 385 (Clinton Walker Keyes trans., 1928) (51 BCE); see SOPHIE VAN BIJSTERVELD, *THE EMPTY THRONE* 15–16, 239 (2002); Philip Soper, *In Defense of Classical Natural Law in Legal Theory: Why Unjust Law Is No Law at All*, 20 CAN. J.L. JURIS. 201, 205 (2007).
- 23 CICERO, *supra* note 22, at 385–87.
- 24 ST. AUGUSTINE, *ON FREE CHOICE OF THE WILL*, bk. i, ques. V, at 11 (Anna S. Benjamin & L.H. Hackstaff trans. 1964) (ca. 395).
- 25 2 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* ques. 95, art. 2, at 227–28, ques. 96, art. 4, at 122 (Fr. Laurence Shapcote trans., Daniel J. Sullivan rev. 2nd ed., 1990) (1265–74) (quoting AUGUSTINE, *supra* note 24, bk. i, ques. V, at 11); accord CICERO, *supra* note 22, at 317–19.
- 26 See, e.g., II(2) WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1151 (1978) (1953) (describing but rejecting this reading); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 525–28 (1997) (same); Christopher Wolfe, *The Original Meaning of the Due Process Clause*, in THE BILL OF RIGHTS 213, 224 (Eugene W. Hickock, Jr. ed., 1991) (describing this as a plausible, but not the most plausible, reading).
- 27 *E.g.*, "Law," in A NEW LAW DICTIONARY 405 (Giles Jacob 8th ed. 1762). The identical definition also appeared in the "corrected and greatly enlarged" American edition of Jacob's dictionary published in 1811. See 4 "Law," in THE LAW-DICTIONARY 89 (T.E. Tomlins ed., P. Byrni 1st Am. ed. 1811).
- 28 1 WILLIAM BLACKSTONE COMMENTARIES *70.
- 29 See 4 JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* 29–33 (1987).
- 30 For judicial opinions, see *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 18–20 (1800); *Bowman v. Middleton*, 1 S.C. (1 Bay) 252, 254 (S.C. Comm. Pl. 1792); *Ham v. McLaws*, 1 S.C. (1 Bay) 93, 98 (S.C. Comm. Pl. 1789).
- For arguments of counsel, see *Cooper*, 4 U.S. (4 Dall.) at 16; *Trs. of the Univ. v. Foy*, 3 N.C. (2 Hayw.) 310, 325 (1804); *Robin v. Hardaway*, 1 Va. (Jeff.) 109, 114 (Va. Gen'l Ct. 1772); *Paxton's Case*, *supra* note 10, App. I-D, at 474.
- 31 *Van Horne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 204, 28 F. Cas. 1012, 1015, 1018 (C.C.D. Pa. 1795).
- 32 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).
- Later in *Marbury*, however, Marshall uses the term "law" more loosely, as if it included unconstitutional as well as constitutional legislative acts. See *Id.* at 178.
- 33 *E.g.*, *Butler v. Craig*, 2 H. & McH. 214, 1787 WL 95, at *12 (Md. Gen'l 1787); see, e.g., ORTH, *supra* note 6, at 31, 100; Thomas Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211, 218 (1988); Wolfe, *supra* note #, at 221.
- 34 1 S.C. (1 Bay) 382, 390–91 (S.C. Ct. Comm. Pl. 1794) (per Waites, J., joined by Bay, J.).
- 35 2 S.C. (2 Bay) 38, 59 (S.C. Const. Ct. App. 1796).
- 36 5 N.C. (1 Mur.) 58, 62 (1805).
- 37 3 U.S. (3 Dall.) 386 (1798).
- 38 3 U.S. (3 Dall.) at 388.
- 39 3 U.S. (3 Dall.) at 388.
- 40 3 U.S. (3 Dall.) at 388 (emphasis added).
- 41 3 U.S. (3 Dall.) at 398–99.
- 42 See WOOD, *supra* note 17, at 319.
- 43 See Barnette, *supra* note 20, at 30 n.122.
- 44 2 N.C. 28, 29, 1 Hayw. 38, 39 (1794).

ART CREDITS

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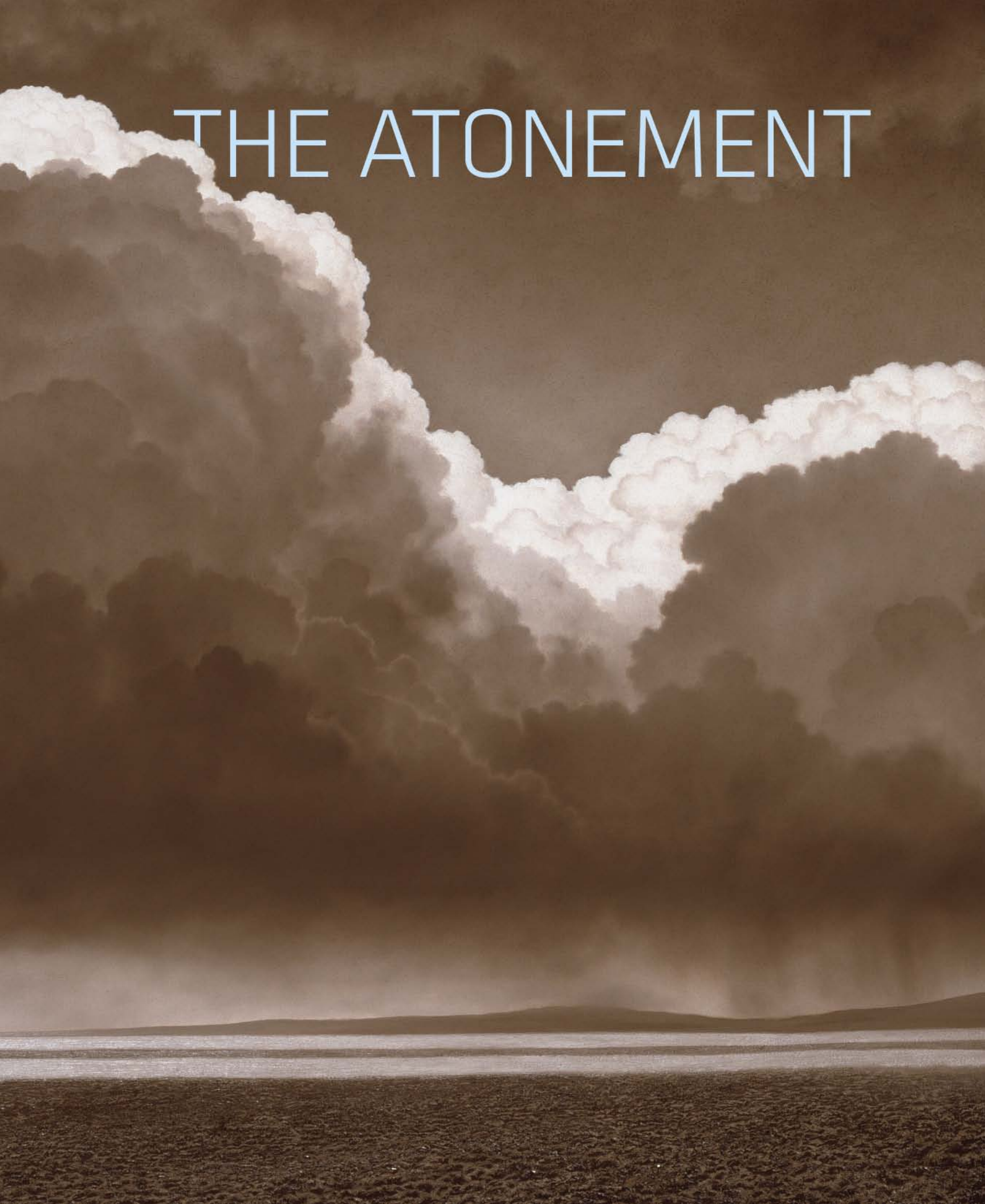
THE TRIUMPH OF



BY ELDER EARL C. TINGEY

THIS SPEECH WAS PRESENTED AT AN
EASTER FIRESIDE FOR STUDENTS
AT THE J. REUBEN CLARK LAW SCHOOL
ON MARCH 23, 2008.

THE ATONEMENT



The Easter season to me is a wonderful season. I would like to share with you some of the events that occurred during the life of Christ during the last week of His life. There will not be time to read extensively from the scriptures. If you had perhaps an entire year, you could probably study this topic in great detail.

Each July when we have a little break as General Authorities, we are encouraged to be at home, to be with family. Each of us tries to use that time for preparation for the next year. Several years ago I took the opportunity in the month of July to study these events. I did it in this manner: I had on one part of my table the four Gospels: Matthew, Mark, Luke, and John. I had *Jesus the Christ* by James E. Talmage. Then I had a third book called *The Life of Christ* by Frederic Farrar. Frederic Farrar was a German born in 1831, a year after the Church was organized. He was not a member of the Church. But in 1879 he wrote this marvelous book. It is quite a well-versed doctrinal history of the life of Christ and compares very similarly with what we read in our Church literature, particularly in *Jesus the Christ*.

I took time to review each of the Gospels because they vary. The synoptic Gospels vary a little bit, as you would expect, as they are written by different authors. Matthew was written to convince the Jews that Jesus is the Christ. Mark was written more for the common people. Luke was a very literary writing that appealed more to the Greeks. And John in his writing focused on the more spiritual manifestations of the life of the Savior. Each of them is different; some include events that others do not. But as a group, as a synopsis, they tell this marvelous story. As law students, I am sure you like to do research: reading and studying notes that go with the text, and precedents and court cases. Study this subject using the four Gospels, the other books that I have referenced, and the footnotes that appear at the end of each chapter of *Jesus the Christ*. It is a great opportunity to see the similarities and the differences.

I would like to start with the beginning of the week preceding the Crucifixion and the Resurrection. Sometime about the first of the week, the Savior made His triumphal entry into Jerusalem. The Christian world celebrates that date as Palm Sunday. You'll find in the scriptures the references of how He came into Jerusalem, how they laid palms

in front of Him. I also would like to share with you some of the messianic prophecies that foretell of events that are referenced in the New Testament.

Fortunately, the Book of Mormon is many times more elaborate in its messianic prophecies of the Savior, but I am going to focus on some of the Old Testament messianic prophecies. For example, referring to His triumphal entry into Jerusalem, we read the following in Zechariah 9:9:

Rejoice greatly, O daughter of Zion; shout, O daughter of Jerusalem: behold, thy King cometh unto thee: he is just, and having salvation; lowly, and riding upon an ass, and upon a colt the foal of an ass.

That is quite descriptive of the triumphal entry of the Savior into Jerusalem. Now, Jesus was one to honor the local customs, and, of course, this was the week of the Passover. He came to celebrate the Passover, the feast of the unleavened bread. In His time they would put the blood of the lamb on the altar. He honored the local customs and all that went with them.

But as He proceeded into Jerusalem, He instructed His disciples to go out into the street, where they would find a man who would invite them to use his home for the special meeting Christ had planned for the disciples. Of course this referenced the upper room. This man recognized the apostles, and that gave them access to this upper room.

It is important to note the way the Jewish people numbered the hours in their days. A day would begin at what we consider 6:00 p.m. For example, it is now 7:40 p.m. on Sunday evening, but under the Jewish calendar, this would be the beginning of Monday. So on Thursday evening before 6:00 p.m., it would be Thursday, and after 6:00 p.m. it would be the beginning of Friday. Probably around sundown, Jesus and the disciples went into this upper room. One of the first events that occurred was the disclosing of who would betray the Savior. Judas had already determined with the elders that he would betray the Savior. As they sat down in this upper room, the Savior announced, "Verily, verily, I say unto you, that one of you shall betray me" (John 13:21). Of course they looked at one another, and some said, "Is it I? Is it I?" And then:

Jesus answered, He it is, to whom I shall give a sop, when I have dipped it. And when he had dipped the sop, he gave it to Judas Iscariot, the son of Simon.

And after the sop Satan entered into him. Then said Jesus unto him, That thou doest, do quickly. . . .

He then having received the sop went immediately out: and it was night. [John 13:26-27, 30]

I thought it was most interesting that after Judas left, there was some very vital instruction that probably could not have been given if he had been present in the room. As Judas left, the Savior began to teach. One of the first things He did was teach about service, and He did this by washing the disciples' feet. Remember that Peter did not want the Savior to wash his feet, and the Savior said, "If I wash thee not, thou hast no part with me" (John 13:8). Then Peter said, "Not my feet only, but also my hands and my head" (v. 9).

Then Jesus taught them about the Lord's Supper (this is when the sacrament was introduced, the breaking of the bread and the wine). He taught them new commandments that they love one another as He loved them. Then He prepared them for their future and some of the challenges they would have. Peter, of course, stepped forward and offered to lay down his life in exchange for the Savior not having to suffer some of these things. That is when the Savior turned to Peter and told him that before the cock crowed, Peter would deny Him three times.

After He taught them, He left the upper room and went to the Mount of Olives. For those who have been to Jerusalem, you know that the city is separated from the Mount of Olives and the Garden of Gethsemane by the Kidron Valley, which is quite a steep ravine. But, nevertheless, sometime later in the evening they departed. The rest of His instructions occurred as they were walking or arriving at the Mount of Olives.

This was the beginning of the test period that came to the disciples. Of course Judas had already failed; he was no longer with them. But this is when Jesus taught that in His Father's house were many mansions. "If ye love me, keep my commandments. And I will pray the Father, and he shall give you another Comforter," which is the Holy Ghost (John 14:15-16). He taught the principle that the Holy Ghost is the third member of the

Godhead and then the wonderful allegory of the 15th chapter of John regarding the true vine and its branches.

Then He gave what is referred to as the great Intercessory Prayer, or the Lord's high priestly prayer. For all of you, especially you returned missionaries, of course, this is chapter 17 of John. Let me read these several verses as an instruction of almost this entire chapter:

And this is life eternal, that they might know thee the only true God, and Jesus Christ, whom thou hast sent.

I have glorified thee on the earth: I have finished the work which thou gavest me to do. [John 17:3-4]

The Savior then speaks of unity—a wonderful prayer for the unity of the people and a prayer for the unity of His Twelve:

Neither pray I for these alone, but for them also which shall believe on me through their word;

That they all may be one; as thou, Father, art in me, and I in thee, that they also may be one in us: that the world may believe that thou hast sent me. [John 17:20-21]

The entire 17th chapter of John is one of the most beautiful prayers in all of scripture. All these things were said at the Mount of Olives. Then they sang a hymn and departed for the Garden of Gethsemane (which, as I remember, is down the hill a bit from the Mount of Olives). When they went into the entrance of the Garden of Gethsemane, the Savior instructed the eight disciples to remain there and to pray and to watch over Him. He took Peter, James, and John and went into the center of the Garden of Gethsemane, and He told them to pray and to be on guard. Alone, He went into the garden and prayed. There is not much we know about this prayer. In fact, Elder McConkie, speaking of the prayer in the Garden of Gethsemane, indicated that we have but a sliver of a great tree as to what Jesus said. The most quoted portion of that prayer is this statement: "O my Father, if it be possible, let this cup pass from me: nevertheless not as I will, but as thou wilt" (Matthew 26:39).

I have always enjoyed this paragraph from Farrar's *The Life of Christ*; listen to the beauty in which he described this event in Gethsemane:

As he went into Gethsemane, it was with a total awareness of what lay ahead. "Jesus knew that the awful hour of His deepest humiliation had arrived—that from this moment till the utterance of that great cry with which He expired, nothing remained for Him on earth but the torture of physical pain and the poignancy of mental anguish. All that the human frame can tolerate of suffering was to be heaped upon His shrinking body; every misery that cruel and crushing insult can inflict was to weigh heavy on His soul; and in this torment of body and agony of soul even the high and radiant serenity of His divine spirit was to suffer a short but terrible eclipse. Pain in its acutest sting, shame in its most overwhelming brutality, all the burden of the sin and mystery of man's existence in its apostasy and fall—this was what He must now face in all its most inexplicable accumulation."

[Bruce R. McConkie, *The Mortal Messiah*, 4 vols. (Salt Lake City: Deseret Book, 1979-1981), 4:126; quoting from chapter 57 of Frederic W. Farrar, *The Life of Christ* (1874)]

There is no language known to mortals that can tell what agony and suffering was His while in the Garden of Gethsemane: blood ran from the pores of His body.

As He was going through this experience, He got up three times, and each time He found that the apostles were asleep. I wonder how He must have felt that even His trusted three and His trusted eight were not able to remain on guard as He had instructed them. So great was His pain that we're told that a heavenly messenger appeared to Him to strengthen Him while He was suffering this lonely vigil and individual struggle.

About this time, as He concluded this experience in the garden, the soldiers came accompanied by Judas, and we read how Judas betrayed Jesus. He made a pact with the guards that the individual he would kiss was the one they should arrest. That's exactly what Judas did. He kissed the Savior and then quickly left, and the Savior was taken.

Now, going back to Judas, let me share with you two messianic prophecies that tell of this event. In Psalm 41:9 we read: "Yea, mine own familiar friend, in whom I trusted, which did eat of my bread, hath lifted up his heel against me." And in Zechariah 11:12-13, it tells what happened next in the life of Judas:

And I said unto them, If ye think good, give me my price; and if not, forbear. So they weighed for my price thirty pieces of silver.

And the Lord said unto me, Cast it unto the potter: a goodly price that I was prised at of them. And I took the thirty pieces of silver, and cast them to the potter in the house of the Lord.

Judas, when he left the Garden of Gethsemane with the 30 pieces of silver, came to himself as he came into the temple where the priests and the elders were gathered, and he realized what he'd done. He took the 30 pieces of silver and cast them down on the floor of the temple and ran out and hanged himself. The priests picked up these 30 pieces of silver and with them bought what was referred to as the potter's field, which was to become a burial place for the indigent and strangers.

At this time all of the apostles, except Peter and possibly John, disappeared. The Savior had instructed them that they should leave. But Peter lingered and followed, and it's quite possible that John did also. This would have been sometime in the middle of the night, possibly after midnight, which would be Friday according to our time. The soldiers took the Savior first to the house of Annas, the father-in-law of Caiaphas, the high priest. All of this took place probably between midnight and sunrise on Friday morning. If you look at a map of where the Garden of Gethsemane is and where you would have to pass through the Kidron Valley up the other side to go into the city of Jerusalem, you'll see that these locations are quite some distance and that it's not an easy walk.

When they got to the house of Caiaphas, all of the high priests and the elders were waiting for Christ to come; they knew that He had been captured, that Judas had betrayed Him, and that now He was to come in and they were going to find some charge that would bring about His death. And so they conducted what is referred to as a trial. Now, as you know, the Jews did not have the liberty of inflicting death on a person, and so they had to focus on finding Christ guilty of something. So they began to question Him, and they began to bring in witnesses who could testify against Him—the scriptures refer to them as false witnesses. Two witnesses testified of something the Savior had said earlier. In Matthew, one person said, "This fellow said, I am able to destroy the temple of God, and to build it in three days" (Matthew 26:61). In Mark 14:56-58 we read:

For many bare false witness against him, but their witness agreed not together.

And there arose certain, and bare false witness against him, saying,

We heard him say, I will destroy this temple that is made with bands, and within three days I will build another made without bands.

Now, you can go to John 2:19 to read what He actually said as recorded at the wedding in Cana several years earlier in His ministry. Speaking to the Jews who asked for a sign, “Jesus answered and said unto them, Destroy this temple, and in three days I will raise it up.”

He did not say “I will destroy.” He simply said, “Destroy this temple, and in three days I will raise it up.” We know why each of the false witnesses were false; they made reference that He said “I will destroy” and “I will raise it up.” His accusers took these two witnesses and this testimony as evidence that He was guilty of sedition, or that He was a disturber of the peace. But they needed more, so they began to ask Him who He was. And finally they asked Him if He was the Christ, the Son of God, and Jesus said, “Thou hast said” (Matthew 26:64). His reply was evidence of blasphemy, because now He was saying that He was Jesus the Christ or the Savior whom they expected to come. So they had these two charges: blasphemy, which is the most serious charge under Jewish law, and high treason, or sedition, which is the most serious charge under Roman law.

On the basis of that, they felt they had the means now to go to the Roman governor and to seek a penalty. When all of this was taking place in the house of Caiaphas, Peter was somewhere close by. A woman turned to Peter and said, “Art not thou also one of [them]?” and Peter said, “I am not” (John 18:17; see also v. 25, 27). This occurred three times. As the cock crowed, Peter suddenly remembered the statement that the Savior had said. Now, let me read Luke 22:60–62, which I think is probably the best account of godly sorrow.

And immediately, while he yet spake, the cock crew.

And the Lord turned, and looked upon Peter. And Peter remembered the word of the Lord, how he had said unto him, Before the cock crow, thou shalt deny me thrice.

And Peter went out, and wept bitterly.

Imagine how Peter must have felt to know that the Lord knew that he had denied Him three times. His later life would testify that he went out in true godly sorrow and true repentance because he later became the president of the Church. That was a very defining moment in the life of Peter to have this occurrence.

From there they went to Pontius Pilate, the Roman governor over all of Judea, and they encouraged him to seek some sort of death penalty for the Savior. But Pilate simply said, “I find no fault in him” (John 19:4; see also Luke 23:4 and John 18:38). In great frustration they left Pilate and went to the home of Herod Antipus, the tetrarch over Galilee. Now this was the man who had beheaded John the Baptist, and it was his father, Herod the Great, who ordered the slaying of all the babies a couple years after Christ was born. So you get some idea of this family—the father slaying all of the children at the birth of the Savior and Herod Antipus killing John the Baptist, beheading him.

Herod began to question Christ, and the scriptures record that to all of the questioning by Herod, the Savior said nothing—He did not utter one word. Talmage said that Herod is likely the only person who questioned the Savior but never heard His voice. I think the Savior did not dignify that individual by even speaking to him. In fact, Herod was the only person known about whom Christ made a contemptuous reference, when on one occasion He told the apostles, “Go ye, and tell that fox” (Luke 13:32). Well, they left Herod and went back to Pilate, in great frustration because Herod would not impose a penalty. Now, under their law during the season of the Passover, it was permissible to release a prisoner, and so Pilate offered to release a prisoner. Of course the priests did not want that, and that’s where you have the story of Barabbas, a murderer, being released. Once again Pilate found no fault in Christ and even washed his hands in evidence that he found no fault, no blasphemy or sedition.

But because the people were becoming so pleading and so boisterous—and, we don’t know, maybe out of fear—Pilate finally succumbed, and he agreed that he would inflict the Roman sentence of death by crucifixion because that is what they wanted.

Now, sometime when you have an opportunity, read the 34th chapter of *Jesus the Christ*. In the footnote there are 12 points of the illegality of the trial by night, and, as lawyers, future lawyers, and law students, you should find it most interesting to read those three pages, as each aspect of that trial that took place that evening under Jewish law was illegal. But nevertheless it occurred, and they were able to extract a penalty from Pilate.

We are told that at that point they scourged Him, probably stripping the clothing from the upper part of His body, which they lashed with a leather whip embedded with tiny pieces of bone that would be sharp like a razor. As He was whipped, the pieces of bone would be embedded in and cut His flesh.

They spit in His face. They put a blindfold on Him, and different people would strike Him on the face and say, “Prophecy, who is it that smote thee?” (Luke 22:64). And, of course, the Savior said nothing and endured it. They put a crown of thorns on His head.

They put a reed representing a royal scepter in His right hand to signify that He was a king. They saluted Him as king of the Jews, and, of course, as they went to Golgotha, He was required to carry His own cross, which He did for a while—but due to exhaustion, another individual assisted Him. Finally, He was crucified between two criminals. You know the manner of crucifixion: one’s arms would be outstretched and large nails would be driven through the palms and the wrists of the hands and through the ankles to hold the body to the cross, and then the cross would be put into a hole, where it would remain upright. A sign was put on the cross: “The King of the Jews.” And then He was mocked: “If thou be the king of the Jews, save thyself” (Luke 23:37). They kept saying, “If thou be Christ, save thyself” (v. 39). Of course this “if” was a reference to His 40 days of fasting when He was tempted by Satan (see Matthew 4:6–10). Then finally the Savior asked for water; He said, “I thirst” (John 19:28). But He was given vinegar instead of water.

Let me read to you several of the messianic prophecies that foretold of the events that occurred on the cross. In the book of Psalms we read, “For dogs have compassed me: the assembly of the wicked have inclosed me: they pierced my hands and my feet”



(Psalm 22:16). In Isaiah 22:23 we read, “And I will fasten him as a nail in a sure place; and he shall be for a glorious throne to his father’s house.” Again, in Psalm 22:18: “They part my garments among them, and cast lots upon my vesture.” You remember that the soldiers cast lots for the clothing that they had taken from His body. In Psalm 69:20: “Reproach hath broken my heart; and I am full of heaviness: and I looked for some to take pity, but there was none; and for comforters, but I found none.” In the book of Psalms He then said what we know as His final statement.

Before I read that, let me read one other verse from Psalm 69:21: “They gave me also gall for my meat; and in my thirst they gave me vinegar to drink.”

Let me just point out the chronology of this: According to scriptural references, we believe that the Savior was nailed to the cross sometime in what was referred to as the “third hour.” They would number their hours starting with 6 a.m. being the first hour, 7 a.m. the second, 8 a.m. the third, and so forth. He was put on the cross sometime in the third hour. Sometime in the sixth hour,

being about noontime, darkness came across the land and lasted for three hours. We believe He expired sometime around the ninth hour, or around 3:00 p.m.

Just before He expired He turned to His apostle John and gave him charge to take care of His mother, Mary. We are told He then uttered these words: “My God, my God, why hast thou forsaken me?” (Matthew 27:46; Mark 15:34). In that bitterest hour of His suffering, Christ was truly alone. He then said, “It is finished” (John 19:30) and “Father, into thy hands I commend my spirit” (Luke 23:46).

I HAVE GLORIFIED THEE ON THE
EARTH: I HAVE FINISHED THE WORK
WHICH THOU GAVEST ME TO DO.

JOHN 17:4



He lowered His head and voluntarily gave up His life. That is where this messianic prophecy that I read from the book of Psalms comes in: "Into thine hand I commit my spirit: thou hast redeemed me, O Lord God of truth" (Psalm 31:5). Then, again, in Psalm 22:1 (a psalm of David): "My God, my God, why hast thou forsaken me? why art thou so far from helping me, and from the words of my roaring?"

And so, as we read, the Savior voluntarily gave up His life and died. You have read the accounts, not only in Talmage's *Jesus the Christ* but also in many other books, that relate the cause of His death as likely being a ruptured heart. The sword being thrust into His side and the combination of blood and water coming forth is a good description of how that would be medical evidence of a ruptured heart. That is why I like the reference in Psalm 69:20: "Reproach hath broken my heart; and I am full of heaviness." It was truly of a broken heart that He died.

Well, now it's about sundown on Friday, and of course to the Jews this would be a horrible desecration of the Sabbath to have these bodies on the cross at the beginning of their Sabbath. By custom they would immediately cause death by breaking the bones of the feet and legs, and when that occurred, the body would slump down in death. When they came to the Savior, He had already died, so His legs were not broken. We read again in Psalm 34:20: "He keepeth all his bones: not one of them is broken." So, very quickly, as it became sundown they took Christ down from the cross, and Joseph of Arimathea, a righteous, wealthy man, made available his tomb where His body could be laid. We are told that Nicodemus—a great friend of the Savior who came to Him early in His ministry and enquired about his mission—brought myrrh and aloes, and primarily the women took the body and wrapped it in clean linen with spices and brought it in haste and laid it in the sepulchre. Pilate had instructed his soldiers that they were to guard the tomb in case Christ's worshippers came to steal the body, as was rumored. They rolled a large stone across the opening, and the soldiers were placed there to guard the entrance.

The body lay in the tomb that Friday evening, which was now the beginning of the Saturday in the Jewish calendar, and was there all day Saturday. When you visit Jerusalem,

the guides show you a location where they claim the sepulchre was located. We believe it was at the Garden Tomb. Several of our prophets (including President Harold B. Lee, Spencer W. Kimball, Howard W. Hunter, and Gordon B. Hinckley) have borne witness that the Garden Tomb is the correct location.

Now, moving to early Sunday morning, Mary Magdalene and the other women knew and recognized that they simply had not had time to properly prepare the body for burial. When the women arrived there, the stone had been rolled back, and the tomb was empty. The women were told by an angel that He had risen and that they were to go tell the apostles. So the women went and found the apostles and told them. Peter and some of the disciples quickly ran to the tomb, and when they arrived there they went in and also found the tomb empty and the linen that had covered His body neatly folded. They did not understand, so they left. Then Mary came back alone, and she saw two personages who were angels, and she asked if they knew where His body was. Mary went outside the tomb and saw a man whom she thought was the caretaker of the garden, and He said to her, "Woman, why weepest thou? whom seekest thou?" (John 20:15). She replied, thinking that someone had taken the body of Jesus, and then this man simply said to her: "Mary" (v. 16). She recognized the voice and manner in which He said, "Mary." Of course she was speaking to the resurrected Christ.

All of the writings are a witness to the fact that the first person to see the resurrected Savior was a woman, Mary Magdalene. She quickly went and informed the apostles of what she had seen. Of course the Savior went to the 10 disciples—Thomas not being with them at this time—and showed them His hands and His feet and His body and broke bread with them and ate. Thomas, really not believing this, said that unless he could thrust his hand into His side and touch the nail prints, he simply would not believe. That's where we get the term "Doubting Thomas." The Savior appeared to Thomas individually and gave him that witness, and Thomas then became a believer of the Resurrection. The Savior appeared to several people on the road to Emmaus.

The Savior also appeared to over 500 as recorded by Paul. Of course He visited the Nephites, and then as He ascended into

heaven, He appeared to the disciples. As you read this account, you can only believe that the Resurrection was literal—the flesh-and-bone body came back and joined with Him. He ate, He consumed food, and they touched Him and felt a human being.

Now these events, my brothers and sisters, usher in a whole topic of the Resurrection and the Atonement. The greatest event that I can think of that has occurred in our world is the Resurrection of Jesus Christ and His putting in place the Atonement and providing the opportunity for us to return to Him. His disciples became His witnesses, and that is what they did for the balance of their lives—they bore witness of what they had seen. Most of them lost their lives through persecution, with many of them dying in exactly the same way the Savior died.

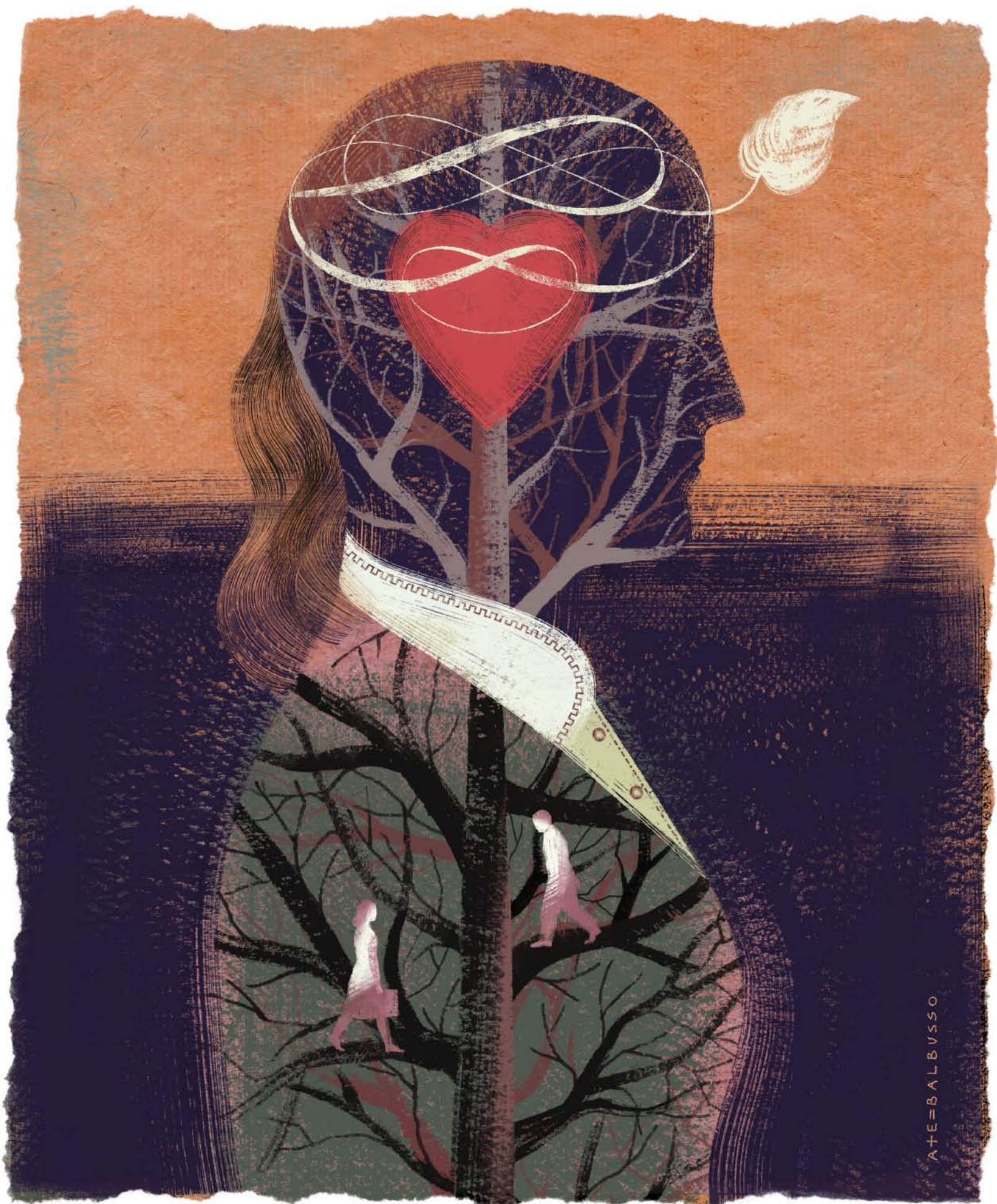
Then we have the long period of apostasy and the ushering in of this dispensation through the Prophet Joseph Smith, and fortunately today we have not only these witnesses of the Bible but also the witnesses of the Book of Mormon, and we have the living witnesses of the apostles and prophets who live and walk the earth today.

I bear this witness of these men who are true witnesses; they are charged to bear witness of Jesus Christ of their own knowledge, not on any other person's knowledge but to acquire their own knowledge that Jesus is the Christ—that He lived, He died, He was resurrected, and He lives again today. I have that witness. That is one of the charges that the Seventy receive; we are charged to be special witnesses of Jesus Christ.

I bear that witness to you that He indeed does live, that He was resurrected, that He is our Savior, and that He has wrought the wonderful Atonement that will provide us with the opportunity to return to our Father and His Son, Jesus Christ, if we keep the covenants and the commandments that have been given to us by our prophets. I leave this testimony and witness with you and wish you all joy and happiness during this wonderful Easter season. This is my humble prayer in the name of Jesus Christ, amen.

ART CREDITS

Page 1: *Illuminated Section*, 1999. Page 20–21: *You Will Find It*, 2005. Page 25: *Presence*, 2005. Page 26: *Remember This Day*, 2005. David Linn, private collection.



ATE=BALBUSSO

The Heart of Lawyering

«« CLIENTS, EMPATHY, AND COMPASSION »»

by Kristin B. Gerdy

IN SEPTEMBER 2006, KAREN J. MATHIS, PRESIDENT
OF THE AMERICAN BAR ASSOCIATION, COMMENTED:

Ultimately, lawyering is a delicate balancing between a constantly evolving world and the fundamental principles that define our legal system. It calls upon your compassion as well as your intellect, your heart as well as your head. . . . [C]aring is as much a part of the legal profession as intelligence. . . . [I]t is every lawyer's responsibility in every setting to serve others.²

ILLUSTRATIONS BY ANNA AND ELENA BALBUSSO

Understanding clients and exercising empathy and compassion comprise the heart of lawyering. The *Oxford English Dictionary* defines empathy as “the power of projecting one’s personality into (and so fully comprehending) the object of contemplation.”³ The English word *empathy* comes from the German word *Einfihlung*, which literally translated means “feeling into.”⁴ According to Carl Rogers, the founder of the client-centered therapy movement, to demonstrate true empathy is “to sense the Client’s private world as if it were your own, but without ever losing the ‘as if’ quality,”⁵ whereas compassion, which is often mistakenly seen as synonymous with empathy, is “the feeling or emotion when a person is moved by the suffering or distress of another and by the desire to relieve it; pity that inclines one to spare or to succour.”⁶ This definition refers to the compassion given “towards a person in distress by one who is free from it, who is, in this respect, his superior.”⁷

Empathy and compassion must go hand in hand with “thinking like a lawyer,” and in fact, caring actually makes analysis stronger. If we accept the premise that understanding clients and demonstrating empathy and compassion are essential to the successful practice of law, then it becomes important to understand how they function in practice.

Laura Biering and Debby Stone, professional coaches and consultants who specialize in working with lawyers, describe a hypothetical lawyer whom they call Catherine. Catherine is the typical law professor’s “dream graduate”: top of her class, Order of the Coif, highly recruited out of law school, and ultimately settling on a prestigious law firm.⁸ Members of the firm are impressed by the work she does and by her intellect and work ethic, and the overwhelming opinion is that she is on a fast track to the top: certainly partner, if not ultimately running the firm. The only problem is that as she begins working closely with clients, the firm finds that while she is certainly intelligent and competent, clients feel she doesn’t care about them:

*They felt she didn’t hear them. There was no connection. It was as though she knew what they would say before they even met. She would ask elaborate questions, leading the clients to the answers she presupposed. And when the clients offered new information that didn’t fit with her agenda, she glossed right over it.*⁹

While Catherine may possess a great level of legal knowledge, she lacks the greater intelligence necessary to see the value in what her client is saying, the value in really listening. What she wrongly assumes is that her great “intelligence” leads her to the arrogant and ignorant position of believing that she knows the answers before all of the information is on the table.

The hypothetical story of Catherine underscores the truth that “success in law (as in other fields) correlates significantly more with relationship skills than it does with intelligence, writing ability, or any other known factor.”¹⁰ Professor Joshua Rosenberg rightly explains the interplay between the heart and the head:

*Basically, most lawyers and academics vastly overestimate the importance of reason and logic. We tend to view them as both the primary motivator of our behavior and the primary tool to change the thinking and behavior of others. Although they are important, they are only one part of the puzzle. There are important differences between the kind of dispassionate reasoning and analysis in which lawyers and law students engage while sitting at desks at home, in the office, or in the library, and the kind of activities in which we engage when we are dealing in real time with real people. Real-time, real-life interactions implicate emotions, learned patterns of behavior, habituated perspectives and frames of reference, and other human, but not reasoned, responses.*¹¹

In other words, while analyzing the law and using one’s intellectual skills is the key to preparation, to learning the law, to conducting legal research, and to analyzing problems, once the lawyer steps into the room with the client, her understanding, empathy, and compassion (which are often expressly manifest in her ability to actually listen to the client) become equally important. As other scholars have noted,

Many lawyers believe that the practice of law demands concentration of the facts of a case and leaves no room for concern about the emotional state of a client. These lawyers seem to approach each case simply as a factual matter, giving at most minimal, and more frequently no attention to the emotions of their client. Most lawyers view the practice of law as a set of legal problems that must be solved like a puzzle, rather than as a vocation which assists people who have problems involving both factual and emo-

*tional dimensions. Their primary orientation is the problem; the person seems incidental.*¹²

Not only does the involvement of empathy and compassion in practice make clients happier, it also makes lawyers happier. According to Professor Rosenberg:

*When asked what they like best about their work, lawyers who like their work typically respond with statements about relationships: “I like to help people”; or “Last week, a client told me that what I did for her made a big difference in her life”; or “I like being part of a team.” Like other humans, lawyers get satisfaction from helping others and from good relationships. . . . Not only do relationship skills allow one to enjoy her success, but, perhaps more importantly, they are essential tools to achieve that success.*¹³

Empathy, or “the power of projecting one’s personality into (and so fully comprehending) the object of contemplation,”¹⁴ is a vital lawyering skill.¹⁵ Professor Carrie Menkel-Meadow describes empathy as “learning how to ‘feel with’ others,” and she asserts that empathy “is an essential part of the client-lawyer relationship.”¹⁶ Empathy is central to human relations and has been referred to as “the cornerstone of not only professional interpersonal relations, but also any meaningful human relationship.”¹⁷ Leading legal counseling scholars have said that empathy “is the real mortar of an attorney-client (indeed any) relationship.”¹⁸

To “understand, from a human point of view, what the other wants to happen in the world” requires the lawyer to think, feel, and understand what that person would think, feel, and understand, to be what Professor Martha Nussbaum terms “an intelligent reader of that person’s story.”¹⁹ Simply put, when a person experiences empathy, she is able to “stand in the shoes” of the other person. As Atticus Finch explained so clearly to his daughter, Scout, in Harper Lee’s classic novel *To Kill a Mockingbird*, “You never really understand a person until you consider things from his point of view . . . until you climb into his skin and walk around in it.”²⁰ Young Scout finally understood her father’s lesson much later after Boo Radley, the object of earlier mocking, saved her life and that of her brother. After walking Mr. Radley home, Scout reflects, “Atticus was right. One time he said you never really know a man until you stand in his shoes and

walk around in them. Just standing on the Radley porch was enough.”²¹

To experience empathy means to share or at least understand a client’s feelings, to imagine and thereby nonjudgmentally understand what it would be like to be in the client’s position.²² Once the lawyer has developed empathy for the client, she can more effectively exercise her other skills on the client’s behalf.²³

To be truly effective in the use of empathy, the “intelligent reader” of the other’s story must become the “accurate translator” of that story to others. A lawyer fundamentally is a translator.²⁴ As such, she needs to be able to empathize with the other side in order to translate that point of view for her client during settlement negotiations. She also needs to empathize with what opposing counsel is experiencing in order to relate effectively with her. She needs to empathize with the judge or the jury in order to know their concerns and address them as she conveys information to her client and as she makes her own strategic judgments. In other words, empathy is fundamental to the hard-core lawyering skills that affect results.

Despite some lawyers’ contentions that developing empathy for the client is at best uncomfortable and inefficient and at worst inappropriate and manipulative, empathy does play an important role in law practice.²⁵ Every interaction a lawyer has with a client involves an emotional component, and facilitating the client’s discussion of her emotions through expressions of empathy is not only appropriate but also beneficial to the lawyer-client relationship and ultimately to the legal case itself.²⁶

Developing empathy is key to all types of law practice—it isn’t just a trait for the litigator:

*[T]he imagination of human distress, fear, anger, and overwhelming grief is an important attribute in the law. Lawyers need it to understand and depict effectively the plight of their clients. Judges need it to sort out the claims in the cases before them. Lawyers advising corporations need it in order to develop a complete picture of the likely consequences of various policy choices for the lives of consumers, workers, and the public at large, including the public in distant countries where corporations do business. Factual knowledge is crucial, and in its absence the imagination can often steer us wrong. But knowledge is inert without the ability to make situations real inside oneself, to understand their human meaning.*²⁷

Thus, every lawyer must develop the capacity to empathize with others and in so doing will increase her effectiveness. Specifically, empathy can aid the lawyer in building rapport with her client, thus fostering a more beneficial relationship; foster open and complete communication; lead to more thorough legal analysis; improve the image of the legal profession; and satisfy client expectations.

KNOWLEDGE
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First, instilling empathy in the relationship can improve rapport between lawyer and client and thereby improve the relationship. While there is a lively scholarly debate about the ideal relationship between lawyers and their clients and the roles that each should play to maximize success,²⁸ the unfortunate reality is that too many lawyers treat their clients like they are children who must be supervised, watched over, and occasionally even disciplined. These lawyers believe that they “know what is right” for the client and are willing to impose their views even when the client objects.²⁹

Relationships with clients are central, even critical, to the “helping professions,” which include counseling, teaching, social work, ministry, and law.³⁰ Positive relationships between the professional and the client are conditioned upon “empathy, respect, and genuineness,” which is primarily in the control of the professional rather than the client. Additionally, “[r]apport, or mutual trust, is . . . central to a good client-professional relationship.”³¹ The most important ingredient in establishing rapport is empathy. In therapeutic contexts research shows that a therapist’s empathy is the “key behavioural element in professional-patient interactions which builds the therapeutic alliance, increases patient motivation to participate actively in treatment and is a predictor of successful outcomes.”³² The same is true with the attorney-client relationship. When clients feel understood and believe that the lawyer is truly

interested in a successful solution to their problems and concerns, the client becomes less anxious and more at ease. And when a lawyer truly empathizes with what a client is feeling and experiencing, “decisions might be made differently and the process of arriving at decisions might be made with more consideration for the client’s actual needs.”³³

Second, instilling empathy can improve communication between lawyer and client. Clients who feel that their lawyer understands them are more willing to provide information,³⁴ including information that might be potentially embarrassing yet important to their case. “Active listening,” which is a technique used to demonstrate empathy, has long been heralded as the key to effective legal interviewing and counseling. Through active listening, empathic lawyers can bolster their clients’ trust and more effectively open lines of communication. Expressions of empathy can also reduce client anxiety, which can lead to increased accuracy and relevancy in what the client tells the lawyer, and can prevent, or at least diminish, hostility toward the lawyer.

Third, instilling empathy can enhance a lawyer’s legal analysis. According to Professor Lynne Henderson, empathy plays a role not only in the lawyer’s analysis but also in the decisions that are ultimately made by judges and others. Empathy “aids both . . . the procedure by which a judge . . . reaches a conclusion . . . [and the] justification for] the conclusion . . . in a way that disembodied reason simply cannot.”³⁵

Fourth, instilling empathy in individual lawyer’s client interaction may ultimately

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improve the public's perception of lawyers and the legal profession. If, as described above, many Americans feel that lawyers are uncaring and even manipulative, an increase of empathy among individual lawyers may benefit the overall image of the profession.³⁶

Finally, instilling empathy satisfies client expectations. Clients expect at least some degree of empathy from their lawyers. In fact, empathy is specifically mentioned by *Consumer Reports* editors in their article advising people about what to do when they need a lawyer:

Communication with your attorney is crucial. Before you hire anyone, make sure you'll feel comfortable speaking honestly and opening with him or her. Take note, too, of whether the lawyer can explain things clearly. Make it known that you want to be kept informed of what happens in the case, and agree on some ground rules—perhaps that you'll be sent copies of documents or given periodic reports over the phone. That doesn't mean that your lawyer has to be your best friend. But you might expect him or her to be empathetic and supportive if you're going through a crisis.³⁷

While empathy is certainly beneficial to the lawyer's practice and her relationship with clients, lawyers should be cautioned that too much empathy—in other words, “too complete identification with the client”—may be harmful. Effective lawyers must be able to “step back from the client's situation, in ways that the client often cannot, in order to provide the critical eye and assessments that are part of [the lawyer's] obligation to him.”³⁸ Although too much empathy may cause problems, lack of empathy certainly will. Lawyers have to be objective, but not robotic. They must hone their empathic skills, and that takes training and practice.

Unlike learning how to analyze a case or write a persuasive argument, learning to empathize requires the lawyer to engage her ability to empathize with and care for her client in addition to her ability to analyze, strategize, and advocate. Developing empathy requires the lawyer to set aside her analytical tendencies and simply learn to feel. Professor Joshua Rosenberg explains that “[e]mpathy is not entirely, or even primarily, a cognitive experience. Indeed, it involves the momentary suspension of most of the key cognitive functions.”³⁹ Such intellectual functions as judgment, evaluation, analysis, and problem solving must be set aside to allow the person to empathize with another. Doing this requires the person to do more than read or think; it requires her to actually place herself in positions to experience what the other person is feeling.

To fully empathize with a client, a lawyer must actually experience the legal world from the client's point of view; the lawyer must try to figuratively “walk in the skin” of her client. Occasionally lawyers have the opportunity (if they can call it that) to actually be a client—to be involved as a party to a lawsuit. That experience can be a tremendous opportunity to learn empathy. Gail Leverett Parenti, former president of the Florida Defense Lawyers Association, tells of her experience as a defendant in numerous cases including a malpractice action that lasted 15 years and how these experiences taught her things and gave her “insights [she] couldn't



have learned in any other way” about what it means to be a client.⁴⁰ For example, she relates that lawyers “can’t have a true appreciation of the anguish, the sleepless nights, the self-doubt, the depression, the impotent rage, the frustration with the legal system, the delays and the endless nonsense that a litigant experiences until [they] have experienced it first-hand.”⁴¹

But lawyers need not actually be involved as clients in litigation to have at least limited personal experience with what their clients are feeling. Lawyers can gain a level of understanding and empathy by meeting their clients in “their environment” rather than in the sterile law office. Being in the client's environment helps the lawyer see firsthand what the client experiences. For example, a domestic relations lawyer could interview her



clients in a shelter for battered women—or at the very least she could spend a few hours volunteering there to better understand and appreciate the plight of the women who come there for solace.

Lawyers can also develop their empathic skills by participating in role-playing and other simulation scenarios with their colleagues. Such hands-on, participative experience is essential to gaining true empathy because “studies indicate that learning to care must be situated in concrete learning rather than in general, abstracted learning.”⁴² Such experiential learning must be repeated throughout a lawyer’s career, because empathy or “the imagination of human predicaments is like a muscle: it atrophies unless it is continually used.”⁴³

In addition to being aware that they need to find concrete experiences in which to come in contact with the feelings and experiences of their clients, lawyers wishing to develop greater empathy must be aware of behaviors and character traits that detract from empathy. Smith and Nester summarized empathy-detracting behaviors including:

Saying nothing, failing to accurately respond to the client, using clichés, distorting what the client says, ignoring his feelings, putting the client’s problem in a bigger picture too soon, ignoring client clues about the inaccuracy of the lawyer’s responses to him, feigning understanding, parroting the client’s words back to him, allowing the client to ramble too much, doing nothing else but communicating empathy, seeming

*overeager, using inappropriate language, using legal jargon or stilted phrases, being longwinded, making wrong choices about whether to respond to the client’s feelings or the content of his speech, responding to the feelings of the client too quickly, responding defensively or negatively to client questions, asking too many questions, asking only leading questions, and asking questions whose answers do not help the lawyer in counseling the client.*⁴⁴

Thus, developing and exercising empathy is key to successful lawyering.

In addition to showing empathy—feeling with the client—a successful, effective lawyer also shows compassion and feels “for” her client—she feels that desire to relieve her client’s distress and provide aid and succour. Dean Kevin J Worthen acknowledged this reality to a group of law students on their first day of law school:

*Because of the ubiquity and complex nature of law in our society, people are required to trust lawyers with their hopes, their dreams, their fortunes, their rights, and sometimes even their lives. How lawyers deal with those precious commodities is of extreme importance to those people. . . . [H]ow important it is that [lawyers] learn to really care enough about the human condition that they will refine and use those skills to improve others’ lives.*⁴⁵

The lawyer’s ability to care for others has been lauded by multiple leaders in the legal community. For example, Paul L. Stevens, then president of the Pennsylvania Bar Association, wrote that lawyers “need to become more compassionate about [their] clients. [Lawyers] need to show [their clients that they] care for them, and [lawyers] need to communicate with [their clients] as people,

not treat them as just another case. We need to let them feel they are helping ‘run the store.’”⁴⁶ Similarly, Maryland Lieutenant Governor Michael Steele, speaking at the Catholic University Law School, exhorted students: “Be a lawyer, yes, be a good lawyer, absolutely, but be a man or woman . . . whose words and deeds are touched by . . . compassion and abundant love.”⁴⁷

Compassion deeply engrained in a lawyer can provide the reason and the motivation for the hard work, long hours, and personal dedication necessary to succeed in law practice. As Sharon Salzberg stated:

*Compassion is not at all weak. It is the strength that arises out of seeing the true nature of suffering in the world. Compassion allows us to bear witness to that suffering, whether it is in ourselves or others, without fear; it allows us to name injustice without hesitation, and to act strongly, with all the skill at our disposal.*⁴⁸

Some lawyers may mistakenly believe that compassion detracts from their ability to practice law or even makes it impossible for them to do some of the things that lawyers frequently find that they must do in practice. For example, some lawyers may believe that if they develop compassion in their practice they might have difficulty impeaching a hostile witness at trial, painting the facts in the light most advantageous for their client, or in other ways zealously advocating for their clients. While this may be true to a small extent for some lawyers, it is a small price to pay for the other benefits of compassion.

In her piece about enlightened advocacy and a more humanistic and holistic approach to lawyering, Ingrid Tollefson made the following key observation:

*The lawyer as nurturer implies a focus on the client’s needs encompassing humanistic, analytical, and technical approaches to conflict resolution. The metaphor, however, does not imply a “new-age,” “feel-good,” “touchy-feely,” or “warm-fuzzy” approach to lawyering. Proficiency in the intellectual and technical rigors of legal analysis, or “thinking like a lawyer” is fundamental to capable and accomplished lawyering. However, compassion is equally pragmatic. It functions as an essential and practical component of the nurturing practice. Thus, for the nurturing lawyer, ambition to master critical reading, writing, argument, and reasoning skills met with the ambition to cultivate compassion creates the ideal for what it means to be “successful” in the art of legal advocacy and counseling.*⁴⁹

Despite its possible misuse, compassion plays an important role in the effective practice of law. In fact, lawyers need to develop and express compassion to best serve their clients because “the quality that elevates us from being a great lawyer and moves us into the next level is simply caring.”⁵⁰

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Compassion plays a role in nearly all interactions with clients, but it is essential in those where emotions are strong and pain very real. Philip Weinstein, of the Rhode Island Bar Association, reminds lawyers that family law is ripe with the need for compassion: "It behooves us to work to better understand and appreciate the pain and grief that people go through with a failed marriage, the pain their children endure, and the anger that people feel in a divorce."⁵¹ But compassion and care is not limited to the personal emotions of family law, it is key in other litigation contexts as well. For example, lawyers can show compassion for plaintiffs injured because of another's negligence or for a patient whose life is forever changed because of medical malpractice.⁵²

Truly compassionate lawyers also find opportunities to extend care to those accused of negligent behavior or even "for a physician who is being sued for producing an injury despite his Hippocratic Oath to do no harm."⁵³ Compassion even comes into play in purely transactional practice as lawyers extend care to aging parents who seek to create an estate plan to best protect their children or structure business arrangements between partners who ultimately may have differences that lead to the dissolution of the partnership.

Finally, lawyers should develop compassion because their clients often value it. When a client feels that a lawyer truly cares about her and is compassionate, she feels that the lawyer is loyal to her cause and "can be a source of emotional sustenance, particularly for those clients whose legal problems are as painful as they are complex."⁵⁴ With the emotional support of a compassionate lawyer, the client may be better equipped to face a long, difficult legal battle. A client who feels compassion from her lawyer "may be more responsive to the lawyer's advice, and while this possibility opens the door to manipulation, it also offers the hope that good advice, which would have been discounted by a more reserved client, will now be taken seriously."

Compassionate lawyers bear the burdens of others, namely, their clients. Lawyer F. Burton Howard once said that it "is the principal business of a lawyer to bear the burdens of another."⁵⁵ Speaking to a group of alumni from the BYU Law School, James E. Faust,⁵⁶ a former attorney, encouraged them to "[l]ook

upon [their] learning and license to practice law as a way to do great things for little people and little things for everyone."⁵⁷ The ways that lawyers can serve others differ from the more tangible services provided by those in other professions like engineering or medicine, but, as John W. Davis once remarked, that service is equally valued and necessary. He said,

*True, we build no bridges. We raise no towers. We construct no engines. We paint no pictures—unless as amateurs for our own amusement. There is little of all that we do which the eye of man can see. But we smooth out difficulties; we relieve stress; we correct mistakes; we take up other men's burdens and by our efforts we make possible the peaceful life of men in a peaceful state.*⁵⁸

Compassionate lawyers can hardly be restrained from trying to render assistance and to bring healing when they witness suffering, pain, and other injustice. A moving example of the desire to bear another's burden is found in the following story, shared by an extraordinary lawyer:

*[A] few weeks ago, I went to see one of the children who is a named plaintiff in a mental health class action I am litigating in Massachusetts. He lives with his grandmother in a tiny, one-bedroom apartment also shared by his aunt, her husband, and their two infant children. He has profound behavioral and language challenges, strikes out frequently and hugs, a bit roughly, almost as frequently. He has much to say but can barely speak. He loves to play but has no one to play with. He is loved by his grandmother but almost no one else. As a result of his behavioral challenges, complex needs, and poverty, he is isolated, segregated, and abandoned by most educational and mental health providers. I had been spending long hours on this complex case on behalf of the class of children and had little time left over for individual advocacy. But when I left his tiny apartment, got in my car and closed my eyes, I made a decision that I would do everything in my power to alter this desperate situation. I vowed to represent him in whatever forums, for however long, in whatever ways necessary to remedy this neglect.*⁵⁹

Truly this lawyer has developed compassion, and all lawyers can help to bear the burdens of others as they focus on the people they serve and seek solutions for the problems they face.

Further, compassionate lawyers comfort those who stand in need of comfort. Often this comfort is given by small acts of compassion that may or may not be directly related to the legal proceedings in which the lawyer is involved. Sometimes this compassion is shown simply by the way the lawyer interacts with the client and in the relationship that develops between the two. The lawyer who could not be restrained from aiding the struggling boy in Massachusetts shared this example of compassionate comforting:

*Laurie was a client of mine at the Northampton State Hospital. She was a twenty-five year old woman who had been institutionalized for eight years. She was afraid to talk to anyone. I spent almost a year, visiting with her at least once a week. For months we only sat quietly together. After a while we held hands, and gradually she began to respond to my questions, albeit with only a nod of her head. Eventually we started having conversations. A year later she initiated these conversations, eagerly and with a smile on her face. She told me of her abuse, and witnessing the abuse of her siblings. Eventually, as her confidant and dedicated advocate, I helped her leave the hospital and move to a community home. When she died a few years later . . . I cried because I had lost a dear friend. But her presence and friendship was an enormous teaching in patience and compassion.*⁶⁰

While this lawyer did offer traditional legal services to Laurie, perhaps the most important service he rendered was by being a comforter and a friend. Lawyers can employ that same compassion in their interactions with opposing counsel and others by seeking to transcend the adversarial nature of the proceedings. The following story about an otherwise typical lawyer illustrates such integration:

*Litigation is often contentious; sometimes overly so. On one occasion, this lawyer found himself in a deposition involving several attorneys, one of whom repeatedly verbally abused one of the other lawyers, engaging in personal attacks and tirades. [The lawyer], somewhat stunned, did little to intervene on behalf of the victim, in part because the issues which sparked the outbursts had nothing to do with his client. That evening, however, he felt horrible. He resolved that he would never again allow that to happen to another attorney or witness when he was present . . . He has kept that resolve to this day.*⁶¹

By bearing burdens, giving comfort, and showing care in their interactions with others, lawyers can demonstrate compassion in their professional practice.

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NOTES

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- 2 Karen J. Mathis, keynote address at the Drexel University College of Law Inaugural Celebratory Dinner (September 27, 2006), http://www.abanet.org/op/mathis/speeches/drexel_univ_dinner_speech_0906.pdf (accessed January 4, 2007) (emphasis in original).
- 3 OXFORD ENGLISH DICTIONARY (2d Ed. 1989), available at <http://dictionary.oed.com>.
- 4 Carrie Menkel-Meadow, *Is Altruism Possible in Lawyering?* 8 GA. ST. U. L. REV. 385, 389 (1992).
- 5 John L. Barkai and Virginia O. Fine, *Empathy Training for Lawyers and Law Students*, 13 SW. U. L. REV. 505, 507 (1982) (quoting CARL ROGERS, *ON BECOMING A PERSON* 284 [1961]).
- 6 OXFORD ENGLISH DICTIONARY (2d Ed. 1989), available at <http://dictionary.oed.com>. The Oxford English Dictionary gives two definitions for *compassion*. The first is very similar to the definition of *empathy*; under this definition, compassion is "suffering together with another, participation in suffering; fellow-feeling, sympathy." However, this first definition is to be used "between equals or fellow-sufferers." It is this second definition of compassion, the desire to relieve distress or succor another that is most applicable to lawyers.
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- 8 Laura Biering and Debby Stone, *Coaching Tools for Better Client Communication*, 2 Complete Lawyer no. 2 <http://www.thecompletelawyer.com/volume2/issue2/article.php?ppaid=61> (2006).
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- 13 Rosenberg, *supra* note 10, at 1228.
- 14 OXFORD ENGLISH DICTIONARY (2d Ed. 1989), available at <http://dictionary.oed.com>.
- 15 For a general discussion of empathy for lawyers, see David A. Binder et al., *Lawyers as Counselors: A Client-Centered Approach* (West 2001).

- 16 Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 620 (1994).
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- 21 *Id.* at 282.
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- 27 Nussbaum, *supra* note 19, at 277-78.
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- 29 See Menkel-Meadow, *supra* note 4, at 389.
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- 36 See Barkai, *supra* note 5, at 512-13.
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- 40 Gail Leverett Parenti, *Things I Learned from Being a Defendant*, 25 TRIAL ADVOC. Q. 2 (Summer 2006).
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- 42 Menkel-Meadow, *supra* note 4, at 416.
- 43 Nussbaum, *supra* note 19, at 277-78.

- 44 Allen E. Smith and Patrick Nester, *Lawyers, Clients, and Communication Skill*, 1977 BYU L. REV. 275, 281-82.
- 45 Kevin J Worthen, "The Essence of Lawyering in an Atmosphere of Faith," CLARK MEMORANDUM, fall 2004, 36.
- 46 Paul L. Stevens, *Good Client Relations Are Essential to Restoring Public Confidence in Lawyers*, 16 PA. LAW. 4 (July 1994).
- 47 Michael S. Steele, Pope John XXIII Lecture, CUA Columbus School of Law, August 29, 2005, <http://publicaffairs.cua.edu/speeches/06SteeleLecture.htm> (accessed January 4, 2007).
- 48 Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and their Clients*, 7 HARV. NEGOT. L. REV. 1, 64-65 (2002) (quoting SHARON SALZBERG, *LOVING-KINDNESS: THE REVOLUTION ART OF HAPPINESS* 103 [1997]).
- 49 Ingrid N. Tollefson, comment, *Enlightened Advocacy: A Philosophical Shift with a Public Policy Impact*, 25 HAMLINE J. PUB. L. & POLICY 481, 501 (2003-04).
- 50 Robert F. Blomquist, *Ten Vital Virtues for American Public Lawyers*, 39 IND. L. REV. 493, 508 (2006) (quoting Michael N. Dolich, *Finding Joy in the Practice of Law*, PA. LAW. 34, 38 [Feb. 25, 2003]).
- 51 Philip M. Weinstein, *Legal Representation: A Place for Compassion*, 54 R.I. B. J. 3 (Feb. 2006).
- 52 *Id.*
- 53 *Id.*
- 54 Stephen Ellmann, *Empathy and Approval*, 43 HASTINGS L. J. 991, 1000 (1992).
- 55 F. Burton Howard, "Keepers of the Flame," CLARK MEMORANDUM, Fall 1994, 25.
- 56 While I was finishing this article, President James E. Faust, who served as the Second Counselor in the First Presidency of The Church of Jesus Christ of Latter-day Saints, passed away on August 10, 2007. I would be remiss if I failed to publicly acknowledge his example of compassion and empathy both as a lawyer and as a Church leader. His example is one that attorneys of all faiths would be wise to emulate. He will be missed.
- 57 James E. Faust, "Become Deliverers," CLARK MEMORANDUM, fall 2002, 29.
- 58 James E. Faust, "Be Healers," CLARK MEMORANDUM, spring 2003, 7 (quoting John W. Davis, address at 75th Anniversary Proceedings of the Association of the Bar of the City of New York [March 16, 1946]).
- 59 Steven J. Schwartz, "Maintaining Integrity and Cultivating Compassion," speech at the NARPA Annual Conference 2003, available at <http://napra.org/integrity.htm>, p. 3-4 (accessed January 4, 2007).
- 60 *Id.* at 6.
- 61 Kevin J Worthen, "Religiously Affiliated Law Schools," CLARK MEMORANDUM, fall 2007, p. 15.



James R. Rasband Named New J. Reuben Clark Law School Dean

James R. Rasband's appointment as dean of the J. Reuben Clark Law School was announced by Academic Vice President John S. Tanner on April 17, 2009, and became effective June 15, 2009. Dean Rasband replaces Interim Dean James D. Gordon III, who served during the 2008-2009 school year, following the appointment of former Law School dean Kevin J. Worthen as advancement vice president at Brigham Young University.

"Jim Rasband will be a superb dean," said Tanner. "I have worked closely with Jim for two years. He has tremendous gifts of mind and heart along with high standards, people skills, administrative experience, and a love for the Law School. I expect the Law School to flourish under his leadership."

A BYU alumnus, Rasband received his juris doctorate from Harvard Law School in 1989. He was a law clerk for Judge J. Clifford Wallace on the U.S. Court of Appeals for the Ninth Circuit. He practiced law at Perkins Coie in Seattle, and in 1995 he joined the faculty at the Law School, where he is Hugh W. Colton Professor of Law. He served as associate dean for research and academic affairs at

the Law School from 2004 to 2008. Since 2008 he has served as associate academic vice president for faculty at Brigham Young University.

"I am thrilled to return from university administration to the Law School," says Dean Rasband. "It is a remarkable place with a legacy of outstanding students as well as committed faculty, administration, and staff. I am convinced that, as our faculty continue to strive collectively and individually to have an enduring influence in the lives of the students and in the development of law, policy, and theory in their particular legal fields, our students will, in turn, build upon their predecessors' legacy and be an increasing influence for good in the nation, in their communities, in the Church, and in their homes."

Dean Rasband's primary areas of expertise are public lands (including public lands legal history), water law, wilderness and grazing law, regulations covering the national parks and national monuments, and international environmental law. He is a co-author, along with James Salzman at Duke University and Mark Squillace at the University of Colorado, of *Natural Resources Law and Policy*, a casebook used in law schools around the country.

BYU Law Professor Heads U.S. Bureau of Indian Affairs

On June 26, 2009, Brigham Young University law professor Larry EchoHawk was sworn in to head the U.S. Bureau of Indian Affairs. EchoHawk vowed to do all in his power to combat the poverty, poor schools, and crime that are too common in Indian country. "It's the opportunity to affect the lives of nearly 2 million American Indians and Alaska Natives. Many of these people live in poverty. There are communities of American Indians that have nearly 80 percent unemployment. I'm going to do whatever I can to improve their quality of life."

Interior Secretary Ken Salazar extolled EchoHawk: "He is a dedicated public servant with excellent leadership abilities, legal expertise, and legislative experience to help us carry out President Obama's commitment to build strong Indian economies and safer Indian communities. Together we will work cooperatively with the federally recognized tribes to empower



American Indian and Alaska Native people, restore the integrity of the government-to-government relationship, and fulfill the United States' trust responsibilities."

A member of the Pawnee Nation of Oklahoma, EchoHawk made history when he was elected attorney general of Idaho in 1990. He was the first American Indian in U.S. history elected to a statewide office. He had served as the Bannock County prosecuting attorney since 1986. Before that, EchoHawk served two consecutive terms in the Idaho House of Representatives, from 1982 to 1986.

Curt Conklin Receives National Law Librarian Award

On July 26, 2009, Curt E. Conklin, associate director for technical services at BYU Howard W. Hunter Law Library, received the Renee D. Chapman Memorial Award for Outstanding Contributions in Technical Services Law Librarianship in Washington, D.C. This award is presented each year to an individual or group in recognition of extended service to technical services law librarianship and to the American Association of Law Libraries (AALL).

"This award is the highest honor a law cataloger can receive in this country and it is the equivalent of a lifetime achievement award in technical services law librarianship," said Kory Staheli, director of

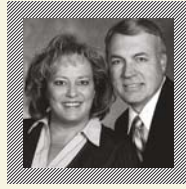


the Howard W. Hunter Law Library. "Curt is well deserving of such an honor and I am very pleased that the American Association of Law Libraries has chosen to recognize his many contributions to the field of law librarianship with this very prestigious award."

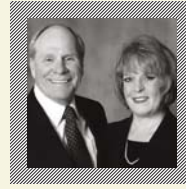
Curt has worked with the BYU Howard W. Hunter Law Library for 37 years in a variety of positions, all within technical services, retiring from the library in May 2009. He has also been a member of AALL for 35 years.

Six New Mission Presidents

The following J. Reuben Clark Law School alumni and JRC Law Society members have been called to preside over missions: G. Mark Albright, '81, with his wife, Karyn Jean Wasden, to the Washington D.C. South Mission; Armand D. Johansen, '78, with his wife, Juliet Warner, to the Norway Oslo Mission; Larry R. Laycock, '86, and his wife, Lisa Dawn Gleave, to the Chile Santiago East Mission; Jay D. Pimentel, '79, and his wife, Colleen Reed, to the Germany Berlin Mission; Vladimir A. Nechiporov and his wife, Elena E. Nechiporova, to the Russia Rostov Mission; and Gregory Mark Saylin and his wife, Jennifer Ashleigh, to the Texas Houston South Mission.



PRESIDENT AND SISTER
G. MARK ALBRIGHT



PRESIDENT AND SISTER
ARMAND D. JOHANSEN



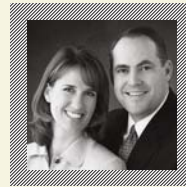
PRESIDENT AND SISTER
LARRY R. LAYCOCK



PRESIDENT AND SISTER
JAY D. PIMENTEL



PRESIDENT AND SISTER
VLADIMIR A. NECHIPOROV



PRESIDENT AND SISTER
GREGORY MARK SAYLIN

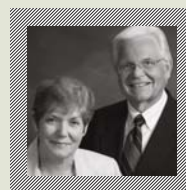
Called to Preside

J. Reuben Clark Law Society member Ruth Lybbert, partner at the Salt Lake City law firm of Dewsup King & Olsen, along with her husband, Dale G. Renlund, cardiologist, will respectively wrap up their two successful careers before moving to Johannesburg, South Africa, in July 2009. Called to the First Quorum of Seventy, Elder Renlund will serve as the second counselor in the Africa Southeast Area Presidency.

Ruth Lybbert graduated from the University of Maryland Law School. She is a past president of the Utah Association for Justice (UAJ), a professional organization dedicated to holding wrongdoers accountable for their actions and to preserving



PRESIDENT AND SISTER
DALE G. RENLUND



PRESIDENT AND SISTER
STANLEY D. NEELEMAN

trial by jury. She chairs the Judicial Conduct Commission, the body charged with investigating complaints against Utah judges. She formerly served on the Utah Supreme Court Advisory Committee for Professionalism and is a director of the Deseret News Publishing Company and of the Workers Compensation Fund of Utah.

New Temple President

BYU law professor Stanley D. Neeleman and his wife, Sheryl Hunt, have been called to serve as the Sao Paul Brazil Temple president and matron. Previously, he served as the president of the Brazil Sao Paulo South Mission.



BRENT H. NIELSON

Two Called to Quorums of Seventy

Brent H. Nielson, J. Reuben Clark Law Society member, has been called to the First Quorum of the Seventy. He had been serving as a member of the Fifth Quorum of the Seventy in the Idaho Area when called. Elder Nielson received a bachelor of arts degree in English from Brigham Young University and a law degree from the University of Utah and has been an attorney/partner at a law firm since 1985. He is married to Marcia Ann Bradford.

Wilford W. Andersen, '76, has been called to the Second Quorum of the Seventy. Elder Andersen was serving as a member of the Sixth Quorum of the Seventy in the North America Southwest Area when he was called. He received both a bachelor's degree in business management and a juris doctor degree from Brigham Young University. He has been a managing partner of an investment firm since 1969 in Mesa, Arizona. Elder Andersen is married to Kathleen Bennion.



WILFORD W. ANDERSEN

Reaching Full Harmony: Hearing Women in the Law

by Wendy Archibald

I AWOKE WITH A START WHEN MY ALARM WENT OFF AT 5 A.M. THE MORNING OF THE HIKE to Stewart Falls in Provo Canyon. We gathered in the predawn darkness, and I hiked alone, listening to the bits and pieces of conversation going on all around me. We arrived at the falls greeted by the first morning light. By then I could see the faces of my fellow hikers. I noted, as I often do, the ratio of men to women was about 3:1.

We sang the traditional hymns sung at Stewart Falls. There was a particularly moving moment when the sun broke brilliantly through the gathering storm clouds just as we started to sing “The Day Dawn Is Breaking.” I was especially pleased to have a baritone singing just behind me. I hardly heard my own singing as I listened to his deep, rich, resonate voice. Standing there at the falls singing hymns with all those men flooded me with warm memories of singing as one of a few sister missionaries in much larger groups of elders. There is something unparalleled in the power and tone of men’s singing groups. To be sure, there were women in both groups, but our voices were swallowed up in the sheer numbers of men singing in full voice.

I mused on both experiences as I hiked back to the conference, and a small ray of sunshine broke through the clouds of my thoughts. The music sung by men alone is inspiring; however, most great composers write music for the breadth of human voices: bass, tenor, alto, and soprano. In Spain, at Stewart Falls, and all too often in the legal profession, I see the faces of women but often find it difficult to hear their voices despite understanding that all four principle parts create a far more compelling chorus.

I have witnessed the positive differences an alto or soprano can make in a chorus otherwise dominated by basses and tenors. The recommendation of a sister missionary regarding the training of new missionaries and their senior companions resulted in a markedly more effective method for both. In my work as a guardian ad litem, I saw better outcomes for my clients with the perspective given from a four-part chorus. For example, a 17-year-old suffered years of abuse at the hands of her father. With very little evidence to mitigate the father’s behavior, all were prepared for the maximum sentence. However, the young victim had a very different point of view. She wanted her father to get much needed help but did not want him summarily removed from her life. The prosecutor set aside her own ambition and honored the wishes of the victim, explaining that the victim deserved to be heard after so many years of silence. The judge grudgingly issued a sentence near the minimum mandatory.

In music and in the practice of law, we are all diminished if one or more choral sections is muted. There are experiences inherent in the lives of women in the law that regularly inform different perspectives. There are occasions when notes are left out of a chord or a voice is left out of a legal proceeding. At first, it can be hardly noticeable, but over time the chord and ultimately legal decisions will sound hollow because neither resonates properly. In joining together, the varied strengths of each choral voice are magnified and weaknesses minimized. I’m sure we can’t imagine the music we can make by engaging a full range of voices in our legal associations.

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

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J. Reuben Clark Law Society

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Brigham Young University

