

LAW SOCIETY MEMBERS
CALLED AS MISSION
PRESIDENTS

This past summer the First Presidency called several new mission presidents who are members of the J. Reuben Clark Law Society. Henry K. Chai II, BYU Law School '79, is serving as president of the Philippines Manila Mission; Sterling D. Colton, Stanford Law School '53 and member of the Mid-Atlantic Chapter of the J. Reuben Clark Law Society, is serving as president of the Canada Vancouver Mission; Michael L. Jensen, BYU Law School '78, is serving as president of the Germany Hamburg Mission; A. Keith Thompson, general counsel, Pacific Area, The Church of Jesus Christ of Latter-day Saints, and chair of the Pacific Rim Chapter of the J. Reuben Clark Law Society, is serving as president of the New Zealand Wellington Mission; and William H. Wingo, BYU Law School '76, is serving as president of the Mexico Monterrey North Mission. In addition, the Law Society welcomes back two members who have recently completed their service as mission presidents: Anthony I. Bentley, Jr., Argentina Buenos Aires North Mission; and Marlin K. Jensen, New York Rochester Mission.

Henry "Keo" Chai and his wife, Judy, met at BYU in 1974 within a year of his return from the Philippines Manila Mission. They are the parents of six children: Nathan, 18; Kristin, 16; Erin, 13; Stephen, 12; Ryan, 6; and Jordan, 3. All of their children have accompanied them to Manila, with the exception of Nathan, who is

serving as a full-time missionary in the Denver South Mission.

Keo worked for the Salt Lake City law firm of Snow Christensen & Martineau from graduation in 1978 until 1992 and then helped organize the firm of Blackburn & Stoll. His practice focused on workers compensation. President Chai's partner, Michael Dyer, reports that after three months in the mission field, Keo is working even harder than he did in the practice of law. Keo feels that his experience in organizing a new law firm prepared him for organizing a mission. He says that his nine years as stake president of the West Jordan Westbrook Stake prepared him for frequent speaking assignments as a

mission president. In addition to his normal workload, President Chai is learning Tagalog so that he can converse more freely with members and investigators.

After 15 years of practice, which include 11 years with the San Diego firm of Luce, Forward, Hamilton & Scripps, Michael Jensen has left labor and employment law and litigation to serve as president of the Germany Frankfurt Mission. This calling is a return to Germany for Michael, who served in the Germany Munich Mission from 1972 to 1974. He and his wife, Jean, are accompanied by their six children: Matthew, 17; Nathan, 15; Jason, 12; Brooke, 11; Justin, 9; and Jacob, 4. The children attend the International School in

Frankfurt. Jean, who taught American literature at Ricks College before their marriage, is looking forward to increasing her family of six sons by approximately 300 elders and sisters over the next three years. Church service is not new to Michael. He served as the bishop of the North Hollywood Third Ward, as stake president of the Penasquitos Stake from 1986–1994, and as regional representative in the San Diego and Blythe Regions for two years.

Six other law graduates are serving or have served as mission presidents: Rulon Munns '76, Mark Zobrist '76, Von Packard '77, James Hamula '85, Steve Snow '77, and Monte Steward '76.

Keo and Judy Chai



A TASTE OF AIR FORCE
LAWYERING

by James Gerard McLaren '89

"You're crazy!" they said in unison. It wasn't quite the reaction I had expected. I had just told my law school friends of my plans to join the Air Force Judge Advocate Corps. Apparently they had little respect for military lawyers. Four years later, having finished my tour, I thought I'd set the record straight.

I first became interested in the Air Force when I was turned down by all the East coast firms with international law offices abroad. I had studied at Glasgow and Edinburgh, and

Michael and Jean Jensen

thought I might get an opportunity to work in England. However, the tone of letters of rejection from firms with names like Goldberg, Finkelstein & Sapperstein left me wondering whether my qualifications weren't up to snuff, whether BYU didn't have a big enough reputation, or whether I didn't have the right last name. I saw an ad in an *ABA Journal* where Imwinkelreid touted the virtues of being a judge advocate (JAG). He writes books, so he should know. I thought this might be a good opportunity to work in England. I applied to the Air Force (they have more slots in England than the Army or Navy do) and went for an interview at Hill Air Force Base.

At the interview the colonel in charge of lawyers at the base liked me. A top-third finish in law school and moot court/law review are expected. There are about 160 applicants for every 20 slots. I was asked if I liked courtroom work. Apparently most recruits are attracted by the thought of litigating their own cases instead of letting the senior partners get the glory. I wasn't at all interested in the courtroom. "Too bad," he said, "that's where you'll be spending a lot of your time."

The Air Force tried to convince me that England was out of the question for a first assignment, but a little persistence paid off. I was selected and offered a choice of England, Germany, or

North Dakota. I ended up at a base near Cambridge, a mile from Prime Minister John Major's private residence. I rented a home for my wife and three children in a quaint village called Hemmingford Abbots. It had the atmosphere of an Agatha Christie novel about murder at the Rectory. Most of the homes were thatched, most of the residents tweedy. Our neighbors were delightfully friendly, except when someone attending bishopric meeting at our house would park on the verge of their huge, manicured lawns.

The colonel had been right. Much as I hated it, I was thrust into the courtroom trying criminal cases. However, after half a dozen or so courts-martial, I found myself relishing the challenge. I found I had a knack for closing arguments and rebuttal, though my cross-examination was never as exciting as Perry Mason's. At least I've learned never to ask that "one question too many," or to ask the defendant in open court to try on the gloves found at the crime scene, or, as happened to me once, to try to lay a foundation with the wrong witness.

The military judges were very sympathetic toward fledgling litigators. I learned most when Judge McShane was on the bench. With every objection he would expect you to quote the federal rule of evidence number and be specific in the language of the rule. When defense stated objections, he would expect a prosecution rebuttal. Sometimes defense would come up with an unexpected objection. If you didn't have a clue, you at



PHOTO COURTESY OF JAMES GERARD MCLAREN



least scored points by standing up and saying "Frivolous!" in an airy manner. The judge would not press the matter farther, knowing that you were clueless. I tried about 16 courts in all and could have done 50 if I'd wanted to. I'm glad now the Air Force made me do it. Every time I jump to my feet and state an objection, I think of Professor Kimball's classes. Maybe he'd give me a better grade if he could see me now.

I had a unique experience when I was sent to Holland as an investigating officer (I.O.) in a fraud case. I.O.'s perform the same function as the grand jury. Kevin Cutler, an LDS JAG, was prosecuting. Mark Strickland, also an LDS JAG, was defending. The three of us were in a courtroom in the middle of Holland serving three different functions. I resisted the desire to ask the accused if he was LDS too. I quickly got business out of the way, took some leave, and settled down to touring Holland and Germany with my wife, Kathleen. The Air Force

partially paid for the car ferry, and our military gas coupons enabled us to fill up anywhere at one fourth of the local cost. Now that's living!

We frequently visited my family who still live in Glasgow. We visited antique markets, Elizabethan homes, and medieval castles. We ate in pubs, and Kathleen even went to tea at Lord and Lady Hemmingford's residence, called, you may have guessed, "The Old Rectory." I went to local courts and to the appeals court in London to view cases. I even pursued an advanced law degree at Leicester University.

Entry-level judge advocates are usually called on to work in one of three subject areas: justice, civil law, or claims. These rotate roughly each year. By the end of three years you may know quite a bit of criminal law, have written 100 opinions on contracts, environmental, and labor law, and have negotiated 50 tort claims. One of my most memorable days at work was investigating a claim made by some-

one who asserted that he had a government listening device implanted during a hemorrhoidectomy. I'm sure all Orwell devotees will sleep sounder knowing that I got to the bottom of the case, and the claim was without foundation. JAGs also do "legal assistance." During my busiest year, I had 947 legal consultations on *inter alia*, taxes, divorce, wills and estates, consumer law, real estate, landlord/tenant, and immigration. At times it felt like "M.A.S.H.," doing meatball law and seeing six divorce clients in just under three hours. However, if you want to get your feet wet, this is this place.

My job gave me the opportunity to travel in Europe and to be close to my family in Scotland. The academic credentials of many of the JAGs with whom I worked were impressive. Most of the JAGs were great people to work with and to work for. There was always good camaraderie and excellent work ethic. The hours were reasonable with only occasional call-outs at midnight

or 5 a.m. By day I might be dining with British solicitors, by evening donning full chemical warfare equipment and sheltering under a desk during an exercise. My four years met all my expectations and made me a much more competent lawyer. Air Force lawyering may not have the respect it merits. Many JAGs stay on because jobs after the military are scarce. One thing's for sure though, I wasn't crazy.

James Gerard McLaren '89 now works at Hill Harrison Johnson & Smutz, PC, in Provo.

MAKING SENSE

Gary C. Bryner '94

A Review of Frederick Mark Gedicks' The Rhetoric of Church and State: A Critical Analysis of Religion Clause Jurisprudence. Duke University Press, 1995.

The Supreme Court's rulings on religious freedom and establishment of religion are among the most unpopular of the Court's decisions and are more widely criticized, challenged, and ignored than perhaps any other constitutional law area. Scholars and practitioners have struggled to make sense of these decisions and to deduce from them a coherent theory of religious freedom. Dissatisfaction with the Court's religion clause decisions has produced a proposed Religious Equality Amendment to the U.S. Constitution and other constitutional amendments aimed at reversing the Court's decisions. The Court's inability to provide

a coherent constitutional framework for these issues is part of a much broader ferment over religion's role in American politics and society.

In *The Rhetoric of Church and State*, Professor Frederick Mark Gedicks of BYU's J. Reuben Clark Law School argues that the Supreme Court has greatly contributed to the controversy over the place of religion in American life. In the Court's establishment clause cases, it generally requires governments to have secular purposes before interacting with religion, but its holdings are inconsistent. Even more troubling are the Court's decisions under the free exercise clause. In the past, the Court contended that religious freedom was to be viewed as are other "fundamental" rights: governments could not infringe on such rights unless there was a compelling interest and the means selected was the least burdensome possible. While this test appeared to provide protection for religious liberty in theory, in practice, most plaintiffs and nearly all non-Christians lost challenges to government actions infringing on their exercise of religious belief. In its widely criticized 1990 decision, *Employment Division v. Smith* (494 U.S. 872), the Supreme Court announced a less stringent test for governments to meet in actions that limit religious exercise, making the theory of religious freedom correspond more nearly with the Court's practice—and posing a serious threat to that freedom.

The Rhetoric of Church and State is a thoughtful,

creative, and effectively developed endeavor to deduce a theory that accounts for what appears to lack any principle or coherence. Professor Gedicks provides a framework that can be used to make sense of what has in the past largely escaped explanation. His theory is not predictive in the sense that it can be used to predict how the Court will rule in its next religious establishment or freedom case. Still, it provides a helpful framework for understanding what the Court has done and why it has fallen so short dealing with these difficult issues. Readers will learn much from this thoughtful and elegantly argued book.

Professor Gedicks finds the root of the Court's confusion over church and state in its reliance on two competing paradigms or discourses concerning church and state.

The first discourse, religious communitarianism, holds that religious and political institutions are physically separated but have the same goals; separate institutions share political, cultural, and social power. Religion assumes a fundamental role in fostering the values and practices that are essential for civilized society. Faith, tradition, and authority are sources of these values. Government is not neutral, but plays an active role in culture by promoting religious traditions and practices that reinforce these core values. Community is paramount.

These are largely conservative cultural values—support for the nuclear family, public acknowledgment of

God, and opposition to abortion, feminism, gay rights, and sex education in schools. While government cannot coerce belief and must protect basic rights of religious dissenters, it can and must encourage citizens to embrace the moral principles reflected in conservative religion. Tolerance but not neutrality is the standard: "when widespread commitment to certain values is essential to the preservation of the good society, government can hardly be indifferent to the task of encouraging those fundamental values and discouraging or prohibiting other values that threaten the foundational ones" (p. 13).

In contrast, secular individualism strictly confines religion to the private sphere. Government is neutral between the demands of competing religious groups and between religious and nonreligious interests. Government can only act if it has a secular purpose. Government actions or law must rest on a foundation of reason; knowledge is discovered by reason and cannot be established through an appeal to religious authority or tradition; and religion is an irrational and regressive force in society that must be strictly confined to the private sphere.

In this secular individualism, religious belief is a private matter free from government interference, and insulation of public life from religion is essential to ensure individual freedom and political balance. The individual is paramount: "The emphasis is on preservation of individual choice through value-neutral procedures, so that individuals remain free

to act upon the truths they discover in the exercise of their own reason. Secular individualism permits religion to influence government and public life, but only indirectly, as the effect of private choice rather than as the result of direct government encouragement or assistance" (p. 13).

The culmination of a continuous process of secularization and privatization of American life, secular individualism has replaced religious communitarianism as our public, constitutional discourse. While a religious communitarian approach occasionally surfaces, the secularist discourse dominates. In every area of religious clause jurisprudence, the Court has replaced the discourse of religious communitarianism with secular individualism.

As Professor Gedicks argues, the two discourses somewhat parallel a debate among legal scholars, political scientists, sociologists, and others about the American Founding and its understanding of individual rights. The republican tradition assumes "an objective conception of the public interest and a state that could legitimately promote virtue"; in contrast, liberalism assumes "individual self-interest as the only legitimate animating force in society" and denies "any conception of an autonomous public interest independent of the sum of individual interests" (p. 21). Republicanism permits government to promote virtue, while liberalism requires government neutrality concerning religion in public life. However, theories of republicanism do not agree

on the role of religion in such a society or the source of truth. Liberals disagree over whether religious practices could be exempt from otherwise neutral laws.

Professor Gedicks believes three problems result from the Supreme Court's inability

The second shortcoming is that even as the Court has shifted ideologically to the right, it has still relied on a secular individualism to view government involvement in or support of religious activities. The reasoning that rejects inter-

able only if they can be secularized. So, the Court denies the religious nature of activities it seeks to protect and weakens public commitment to religion.

The third problem is the result of the Court's jumbled jurisprudence. The Court has failed to provide clear and dependable guidelines for determining what is required to ensure governmental neutrality about religion, secular purposes underlying government actions, and the protection of religious freedom. This failure has spawned tension. Overwhelming public support is for the religious communitarian view, and there is corresponding little support for secular individualism.

The justices have failed to recognize the subjectivity of the discourse they embrace. The Court gives preference to secular, objective knowledge over that which is subjective or based in religion. As a result, religious freedom has not been secured. The Court has failed to provide exemptions for religious practices such as an Orthodox Jew wearing a yarmulke in the military or the government halting a highway construction project because it prevented a Native American tribe from worshipping.

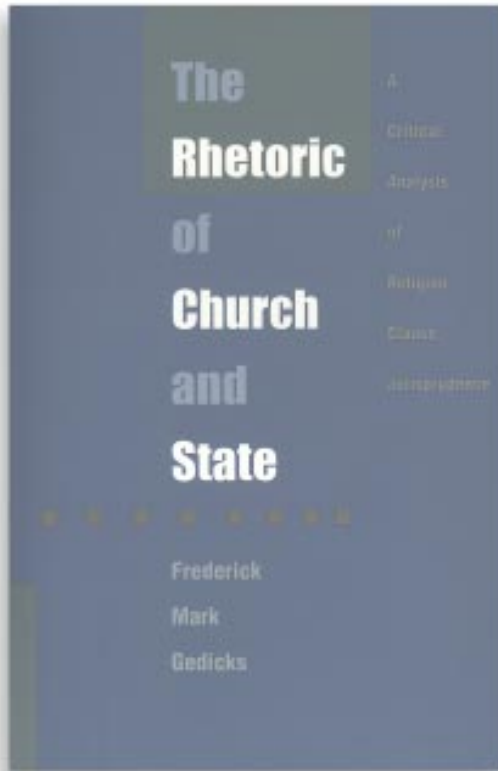
Several chapters of the book show these problems and review in detail the major Supreme Court cases that have arisen under the First Amendment's religion clauses. In chapter three, Professor Gedicks argues that the idea of neutrality is manipulated in deciding cases concerning public aid to parochial schools. The Court relies on a secular

individualist discourse that requires governments to be neutral regarding religion: aid that flows directly to religious schools is unconstitutional, while assistance aimed at individual students is acceptable.

In the equal-access cases, reviewed in chapter four, religious groups can be given access to public facilities if they are simply one of many groups and if assistance to religion is incidental. A neutral position toward religion does not justify denial of financial and other benefits to religious schools; denying government aid to parochial schools can only be viewed as neutral if government educational funding is insignificant—an implausible position given current spending levels.

Chapter five discusses cases where the Court has permitted aid to religiously sponsored colleges and social service agencies and upheld property tax exemptions for churches but failed to acknowledge the value of these organizations as religious bodies.

Chapter six charts the failure of the Court to find ways of accommodating religious practices. Professor Gedicks is particularly critical of the Court's decision in *Employment Division v. Smith*. The Court's decision is consistent with a religious communitarian outcome, but it tries to fashion a rationale through secular individualism. In several cases, the Court has required that government actions that burden religious freedom or religious-based objectors be justified by a compelling interest. In some cases, such as



ty to deal with these competing discourses. Two problems are the shortcomings in the Court's reasoning. First, the Court's decisions appear to be confused and inconsistent because different holdings rely on different theories. Since the theories are contradictory, the decisions seem erratic and unpredictable. Under the Establishment clause, for example, states may provide religious schools with maps and films but not textbooks. They may assist schools with busing students to and from school, but not with field trips.

twining of church and state is now used to defend close ties between the two. For example, in upholding Sunday closing laws, prayers in legislatures, religious displays on public property, and some assistance to religious-based higher education institutions, the Court relies on a secular individualist value of neutrality instead of the religious communitarian view that religion plays an important social role and should be encouraged. Under the Court's view, public religious expressions are accept-

payment of social security taxes, the Court has found such an interest. But it abandoned that standard in *Smith*, “effectively repealing” the free exercise clause (p. 108). Government can now reinforce religious values that contribute to social order while rejecting deviant religious beliefs. The Court “uses a secular individualist analysis to justify what is a religious communitarian result” (p. 116), and ultimately fails to ensure religious liberty.

Professor Gedicks concludes that the secular individualist approach should be rejected because it cannot provide an effective guide for the Court’s religion clause decisions. It is also unable to produce a coherent theory for exemptions to the free-exercise standard that prohibits religious discrimination and ensures real religious liberty. The discourse itself is also highly unpopular. But a religious communitarian discourse is not a viable option, because of the way it operated in the 19th century “to justify legal persecution of religious, racial, and ethnic minorities” and continues to fail to protect “those who find themselves outside the religious mainstream in the locality in which they live” (pp. 122–23). Unfortunately, secular individualism and religious communitarianism are, according to Professor Gedicks, “the only two imaginable alternatives” (p. 125), and a new discourse will only emerge when justices and others become convinced of the failure of secular individualism to provide the basis for church-state relations.

A CREATIVE READING
BETWEEN THE LINES OF
HISTORY

Michael Patrick O’Brien*

A Review of Timothy Burton Anderson’s The Reign of the Stavka. Grossmont & Diehl, 1995.

The late 1980s and early 1990s were a momentous, evolutionary, and historical time to be alive. Just think about what happened.

The Berlin Wall fell.

coup and while initiating the one that brought to an end the existence of the Soviet Union as a nation.

Nearly a half century’s worth of maps were redrawn with almost a wink of the eye and the nod of the head. It all seemed to happen so fast, so easily—maybe too fast, too easily?

Such suspicions are at the heart of Timothy Burton Anderson’s first novel, *The Reign of the Stavka*.

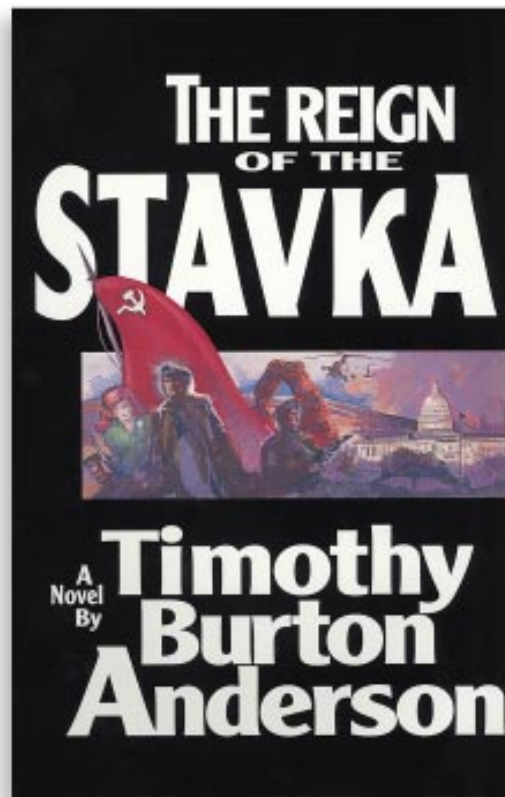
Anderson is a 1978 graduate of the J. Reuben

legal counsel for a corporate subsidiary of the Soviet Ministry of Aviation, leading to regular visits with the KGB and, as you might expect, the FBI, the latter intrigued with the motives of a cadre of Soviet businessmen interested in southern Utah. In his spare time, Anderson now writes novels.

In *The Reign of the Stavka*, Anderson spins an enthralling, Tom-Clancyesque tale linking dead cosmonauts, elite KGB troops, and the polygamists of southern Utah in a dramatic conspiracy played out on the streets of Moscow, in the Caucasus Mountains of former Soviet Republic Georgia, and in the shadows of the red rocks of Utah’s Color Country.

The Reign of the Stavka starts with the suspicion that the fall of the Soviet empire happened too fast and too easily. Anderson provides a fictional explanation of why it happened the way it did. In the world of Anderson’s first novel, democratic Russia may just be the most clever geopolitical strategic gambit since the Trojan Horse.

Whether or not this gambit succeeds rests on the



Czechoslovakia’s dissident playwright became its president. Solidarity came to rule the Poland that had banned it just a few years before. The Baltic Soviet republics again gained independence. A Chinese Statue of Liberty was raised in Tiananmen Square. Boris Yeltsin stood on a tank to thwart one

Clark Law School and a shareholder with the Utah law firm of Jones, Waldo, Holbrook & McDonough. He practices in the fields of litigation and international commercial law and lives with his wife and three children in St. George, Utah. In the early 1990s, Anderson worked as U.S.

*Mr. O’Brien practices law in the Salt Lake office of Jones, Waldo, Holbrook & McDonough. He holds degrees from the University of Utah College of Law and the University of Notre Dame. The substance of this review is in no way based on the gracious Christian charity Tim Anderson bestowed on Mr. O’Brien after last year’s BYU–Notre Dame football game.

wits of the novel's three main characters. The novel takes the reader through seven eventful months in the lives of these main characters. One is a Dutch computer businessman who served an LDS mission in southern Utah and suddenly finds himself returning to his mission field as executive director of The Russia Center, a new cultural facility and historical museum to be built in St. George.

The second character is a colonel who, having served both the Soviet and now the Russian KGB, finds his own internal struggle symbolic of the intense struggle for the future and the freedom of Russia. Finally, there is the young, untested, diamond-in-the-rough Washington County deputy sheriff who finds his life suddenly and surprisingly intertwined with the other two main characters and with a global struggle he cannot even begin to fully contemplate.

Anderson also has created other minor—but nonetheless fascinating—characters for his book. Watch out especially for the female KGB operative with a chilling ambition and multiple disguises.

Interesting too are the female victims of the excesses of polygamy cults, characters that could be reflections of Anderson's own extensive efforts to help real life victims of the same.

The plot of *The Reign of the Stavka* is a page-turning, thrilling conspiracy that regularly manages to put you back on the edge of your seat just when you're sure you've got it all figured out. The book is slow only during its initial pages when Anderson, like any good

trial lawyer, lays the foundation from which he launches his story.

Anderson's writing, however, is not stereotypical lawyerly. He tells a crisp, uncluttered, and interesting story without once referring to "the party of the first part" or bogging down his text with a "hereto" or "whereas." He also crafts some memorable phrases, for example, describing the often corrupt Russian bureaucracy as the "land of the bribe and the home of the fee."

The Reign of the Stavka is a fine first book by a Utah lawyer/novelist who shows a great deal of potential. By reading between the lines of history and asking questions such as "what if?" or "how about?" as he does in *The Reign of the Stavka*, Anderson has already established a unique personal style that can be applied to many different settings. Based on Anderson's first novel, we can look forward with excitement to where he next sets his creative sights.

WELCOME HOME R & B

While for music aficionados in mainstream America, R&B may stand for "rhythm and blues," at the BYU Law School the initials stand from Rex and Bruce. Their collaboration will be remembered long after contemporary "r&b" tunes have been forgotten. It is a collaboration for the ages. In the history of the J. Reuben Clark Law School and the Brigham Young University, it is virtually impossible to think about one without the other.

Over twenty-three years ago these two young lawyers from Arizona and Utah left

law practice and threw in their lots with a grand adventure: the formation of the J. Reuben Clark Law School at Brigham Young University. They have left their indelible marks on the building: after all, Rex fought for the white cast stone facade over GI pale-yellow brick, and no one will forget that it was Bruce who commissioned the Valoy Eaton paintings of famous courthouses which grace the Law School foyer (not to mention the Hafen autumnal color scheme which has been a part of the Law School since 1975.) More importantly they have left their marks on their students and colleagues over two decades.

Although their lives have taken interesting turns and their careers have been more rich and varied than they would have imagined, the J. Reuben Clark Law School has remained the touchstone. A striking similarity in their careers has been their willingness to put personal desires and personal projects in the background and focus on the duties to which they are assigned.

Rex's life has extended from the university to the Justice Department and the

Office of Solicitor General, and back to the Law School; Bruce's has extended from Ricks College to the dean-ship, the provost's office, and back to the Law School. Each has been given weighty responsibilities on several occasions and each has completed them with honor.

Leadership roles have not kept our quintessential lawyers from their ties with scholarship and the law. Rex, the advocate, has continued and will continue to try cases before the United States Supreme Court; Bruce, the scholar, has continued and will continue to be on the cutting edge of legal scholarship in family law.

The law school is pleased that each will be given a deserved sabbatical before returning, but more pleased that the sabbaticals will be of fairly short duration. During the 1996-97 school year the students, faculty, administration and staff will be waiting with open arms to welcome them home.

Alumni envy the students who will learn about the constitution, about law governing familial relations, and most of all about life—from Rex and Bruce, the law school kings of R&B.

