

Spring 2014

Clark Memorandum: Spring 2014

J. Reuben Clark Law School

BYU Law School Alumni Association

J. Reuben Clark Law Society

Follow this and additional works at: <https://digitalcommons.law.byu.edu/clarkmemorandum>



Part of the [Legal Biography Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Legal Profession Commons](#), and the [Practical Theology Commons](#)

Recommended Citation

J. Reuben Clark Law School, BYU Law School Alumni Association, and J. Reuben Clark Law Society, "Clark Memorandum: Spring 2014" (2014). *The Clark Memorandum*. 55.
<https://digitalcommons.law.byu.edu/clarkmemorandum/55>

This Book is brought to you for free and open access by the Law School Archives at BYU Law Digital Commons. It has been accepted for inclusion in The Clark Memorandum by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.



cm

CLARK MEMORANDUM

J. Reuben Clark

Law School

Brigham Young

University

Spring » 2014

contents



Dean's Message
James R. Rasband



Revisiting Humility
Brett G. Scharffs

Defending Innocence
Gregory W. Moeller



Martin Luther King
and the Good Samaritan
Goodwin Liu



Oliver Cowdery
Jeffrey N. Walker

Guardians of the Law
Sheila McCleve

2

4

14

22

32

38

46

MEMORANDA
+ HANNAH CLAYSON SMITH

James R. Rasband, PUBLISHER
Jane H. Wise, EDITOR
Lena M. Harper, ASSOCIATE EDITOR
David Eliason, ART DIRECTOR
Bradley Slade, PHOTOGRAPHER

The Clark Memorandum
is published by J. Reuben Clark
Law School, Brigham Young
University, the BYU Law School
Alumni Association, and
J. Reuben Clark Law Society.
© Copyright 2014 by Brigham
Young University. All rights reserved.
Send subscription inquiries to
dbcoord@law.byu.edu.





DEAR ALUMNI AND FRIENDS,



This issue of the *Clark Memorandum*, like so many before it, captures a part of why the project of building a great LDS law school is worth the candle. I am pleased that BYU Law School provides a place for the reconsideration of Oliver Cowdery's role as "the first Mormon lawyer"; for a faculty colleague to reflect on the critical trait of humility in our lawyering endeavors; for an associate justice on the California Supreme Court to speak about Martin Luther King Jr. and the good Samaritan; for an Idaho state court judge to describe the need to pursue justice for the innocent, even in difficult circumstances; for another accomplished judge and BYU Law graduate to consider our obligation to be guardians of the law; and for one of our graduates to describe her work on behalf of religious liberty. I suppose these sorts of subjects could be considered at other law schools and on the pages of other magazines, but I am convinced that the academic freedom we enjoy at BYU is key to facilitating careful thinking and writing about the relationship between religious faith and professional commitment, as well as about the intersection between law and faith more generally.

The pages of the *Clark Memorandum* of course reflect only a small part of the dialogue that happens each year at BYU Law School and at Law Society chapter events throughout the United States and the world. Last year at BYU Law School

- » more than 300 judges, academics, alumni, and distinguished practitioners visited.
- » federal judges came for our jurist-in-residence program.
- » Nell Newton, dean at the University of Notre Dame Law School, presented our annual Bruce C. Hafen Distinguished Lecture.
- » a variety of immigration law scholars presented papers at our annual Law Review Symposium.
- » more than 20 young legal academics from law schools throughout the West presented papers at the Rocky Mountain Junior Scholars Forum, which we originated a few years ago and now cohost with the University of Utah's S.J. Quinney College of Law.
- » more academics participated with our students and faculty in colloquia in which students critiqued the papers of visiting scholars in addition to preparing their own papers.
- » other scholars came to present their scholarly works-in-progress to our faculty.
- » the International Center for Law and Religion Studies hosted dozens of academics, government officials, and religious leaders from all over the world.

I'll forego a longer list—and please appreciate my sacrifice. I'm all about *BIRGing*—the term social psychologists use to describe the practice of **B**asking **I**n the **R**eflected **G**lory of others' accomplishments until those accomplishments are perceived as one's own. I am proud of the energy of students and colleagues to make BYU Law School a place alive with ideas.

As you would expect, most of these visitors did not specifically engage in the intersection of law, faith, and professional ideals that is common to the pages of the *Clark Memorandum*. But the language of intersection does not circumscribe the pursuit of truth, which includes consideration of important questions of law and policy and so much more. And there is real value in recognizing that rigorous inquiry can reside alongside abiding faith. Whether the connection to faith is more or less foregrounded, my sense is that for students, faculty, and visitors alike, the very mission of BYU Law School to consider the laws of men in the light of the laws of God prompts and enables the sort of inquiry that seeks truth and produces the work found on the pages that follow.

I hope you enjoy this issue and that our paths cross soon, either here in Provo or elsewhere around the world, when I have the chance to visit with alumni and members of the Law Society.

Warm regards,

JAMES R. RASBAND

GUARDIANS OF THE LAW

S
H
E
I
L
A

M
C
C
L
E
V
E

I
am grateful
to Dean Scott
Cameron for
a humbling
introduction by
a very humble,
decent person
and a wonder-
ful friend. It's
really quite
intimidating to
be before this
august group.
I have always
wanted to say
that—*august*—
especially since
we do this in
August.

P
H
O
T
O
G
R
A
P
H
Y

B
Y

B
R
A
D
L
E
Y

S
L
A
D
E



The Statue of Liberty

1886

Gift from France

As part of the 100th anniversary of the Statue of Liberty, the National Park Service has created a special exhibit to celebrate the statue's centennial. The exhibit features a variety of artifacts, including the original torch, the original tablet, and the original crown. The exhibit is located in the Statue of Liberty Museum, which is situated at the base of the statue.

*This
address was
given at
the J. Reuben
Clark Law
School
Founders
Day
commem-
oration
in Salt
Lake City
on August
29, 2013.*

President Samuelson, Dean Rasband, distinguished guests, faculty, staff, students, and friends, this is an undeserved honor for me. I have thought about this since the time that Dean Rasband asked me to speak, and I truly hope that there will be something for you that will be useful in your lives and helpful in your practices as I discuss the things that I have learned in preparing to talk to you.

A WOMAN IN THE LAW

It was suggested that I talk about being a woman in the law since half of us here are women. So, I'm a woman. Because people weren't used to women in the practice of law 40 years ago, I had great opportunities and experiences as a "first woman" in various situations. Many of those were to my benefit. Some were surprising.

I was in my third year of law school when one of my fellow classmates came up to me and said, "You shouldn't be here. You're taking the place of a man who needs to support his family." His view was not a view peculiar to BYU at the time.

My boss in Salt Lake City hired me as a young prosecutor, wondering whether a woman prosecutor would work out. In my office I hung my diplomas, my bar admission, and other lawyer emblems on the wall behind my desk. Still people would see the display and say, "You must be the secretary. You're the secretary, aren't you?" Of course I would explain that really I was the lawyer.

Then when I became a judge, a defendant came in front of me on the bench, stood five feet from me, looked up, and said, "Are you a real judge?" To which I replied, "Yes, and I'm sending you to a real jail."

I mention these things not only to describe how it used to be but also because I believe that each of us endures similar experiences in life. I think we all also make sense of life by putting people and things into categories or classifications. Whether based upon race, religion, economic status, education, appearance, gender, or whatever the classification is, categorizing is a tool we use to be able to manage the world. It brings a certain order to things. The problem is that sometimes it results in mistreatment, exclusion, or worse.

I had the great blessing of having wonderful parents, particularly a father who was wise. In elementary school I read about Florence Nightingale and Madame Curie, and I liked them both. In eighth grade I liked medicine. I thought I might be a nurse, because at that time girls were nurses and boys were doctors. But my father said, "You know, you might think about being a doctor if you like. You're smart enough to do that." What a great dad! He wanted me to be everything I could potentially be. As a result, I never really thought in terms of limitations; I always thought in terms of possibilities.

While things happen to each of us as a result of categorization from time to time, I believe that it is a lot easier to recognize the injustice that we get than it is to recognize the injustice that we give. And we all get, and we all give. I hope that perhaps the things I have mentioned will be helpful to you as you proceed in your careers and as you proceed in your lives and that we can be thoughtful about how we treat one another.

Really, I was not at all interested in going to law school. I thought lawyers were technicians, and I wasn't too excited about the law. My heart and my mind changed when I heard Tom Reed from Duke University talk about *Brown v. Board of Education*¹ and the line of cases that followed. Then, of course, I talked to Bruce Hafen and Dean Rex Lee, who portrayed what a great adventure the Law School was going to be. I came. And it was a great adventure—not one that I expected at all. Honestly, I didn't like it much. In fact, I used to say I really hated law school. But I am so grateful for the career and the life that it gave me. There is no question that God's hand was in that decision and in my life, and I really need to acknowledge that.

I will say that on the bench there were times when I saw the inhumanity, the dishonesty, the depravity, and the violence that we commit upon each other, and I thought, "If there were a God in heaven and a Savior of the earth, why would They bother? Really, why would They bother?" Fortunately, I live in a little haven of a ward, and seeing those people who are trying to live the gospel, who are faithful and good, always uplifts me and reminds me of the truth.

ESTABLISHING BYU LAW SCHOOL

Over the years I have attended and listened to a few of the talks at these dinners, and I recently reread some of them. What stood out to me about them is what some of the founders said about the Law School. The five I mention all believed that the Law School was, well, a bad idea.

Last year Elder Dallin H. Oaks talked about having the temerity—when he was asked what he thought about creating a law school at BYU—to tell President Harold B. Lee that it was a bad idea.² Dean Rex Lee also talked about how he thought that establishing a law school was a bad idea. He was worried that the school would be associated with a particular political view that would be limiting. In fact, when the board of trustees asked him about selecting a dean, he advised them to get someone who was an academic rather than a practitioner. He famously said, “They took me instead of my advice.”³

Bruce Hafen had always wanted to teach at BYU Law School, but he never thought there would be a BYU Law School—and he certainly didn’t want to do anything in administration. As it turned out, he did both. He left his law practice to help establish the Law School. When he was interviewed by President Marion G. Romney for a faculty position, he voiced his own apprehension about the question of politics. President Romney simply asked him, “Are you either a Socialist or a John Bircher?” He replied that he was neither, and that was all President Romney asked about that.⁴

Dale Kimball, who also was worried about political extremism and how it might hurt the Church and the school, “did not feel good about” establishing a law school either.⁵ And of course, the story about Carl Hawkins is that President Oaks asked Professor Hawkins, who was renowned in the academic world and a stake president back in Michigan, to join the faculty. The Law School needed a top-notch academic anchor. Carl Hawkins repeatedly refused and then finally said yes. That’s when President Oaks said, “[T]he Lord must really want this law school. . . . Carl is coming.”⁶

The founders of the Law School weren’t like the Founding Fathers of this country. They didn’t risk their lives as the Founders of the country did. But the Law School founders sacrificed their jobs, risked their reputations, and uprooted their families in order to establish the Law School. There must have been no small amount of stress on them to create a law school that would meet with the board of trustees’ expectations. The board wanted a law school that would be well regarded and would produce competent lawyers who would be good people.

Elder Oaks told us last year that founding the Law School 40 years ago was perfect timing.⁷ Despite the fact that most of the people who were asked to found it, create it, and participate in it were apprehensive about it, the founders sustained the board of trustees as prophets, seers, and revelators, and so they established the Law School.

Here are some results of what they did (comparing nearly 200 law schools):

U.S. NEWS AND WORLD REPORT'S BEST GRAD SCHOOLS

- 5th** for law degrees with most financial value at graduation
- 7th** in federal judicial clerkship placement
- 10th** for graduates with least debt
- 39th** in country overall

PRINCETON REVIEW'S "BEST LAW SCHOOL"

- 8th** in country overall
- 10th** for best academic experiences
- 16th** for best teaching faculty
- 21st** for most selective admissions

THE NEW YORKER

Malcom Gladwell listed BYU Law School as **no. 2** in the United States in 2011.⁸

NATIONAL JURIST

2nd in the 2010 Best Value Law Schools ranking (weighs school’s bar pass rate, nine-month employment rate, average income versus cost of attendance, and average indebtedness after graduation)
20th overall in 2013 national rankings (based on postgraduate success, quality of teaching, and cost efficiency)

That’s pretty good in terms of meeting expectations for the Law School.

THE EXPECTATIONS THAT WERE SET

In terms of meeting expectations for competent lawyers who are good people, there are over 5,000 graduates of the Law School who would qualify, but I chose five from my class as examples.

Monte Stewart was a federal law clerk for Clifford Wallace and for Chief Justice Warren Burger, an associate with a large Nevada firm, and the U.S. attorney for Nevada. He founded the Marriage and Law Foundation for Traditional Marriage Values and is now in an Idaho firm.

Larry Corbridge was a partner in his own firm. He was a bishop, high councilor, stake president, and president of the Chile Santiago North Mission, and he is now in the First Quorum of the Seventy.

Lew Cramer practiced law in Los Angeles and San Francisco, taught at USC and Georgetown, and was a White House Fellow. He represented U.S. West in Washington, DC, was the founding president and CEO of World Trade Center Utah, and is now a stake president.

Margaret Nelson, who passed away in September 1992, had a private practice, was a deputy county attorney, and was an assistant U.S. attorney for the District of Utah. She was on the Utah State Board of Education for two terms, was active in stake and ward callings, and was a Daughter of Utah Pioneers.

Jim Parkinson, a personal injury lawyer in national high profile cases, reached the Tobacco Masters Settlement Agreement, which was worth over \$200 billion. He has represented the Bataan Death March survivors, who were slave laborers in World War II; he wrote a book and created a DVD; and he is a speaker who educates students around the country about World War II heroes.

Expectations met. But where does that leave us?

I think creating a law school was not about an increase in tithing or about graduates' careers or about the places the graduates would go or see—or even about the high regard that the Law School would enjoy. I think it was about more than that.

When Dean Rasband asked me to consider the memories that I have of the Law School, I thought of the founding-day meeting in the de Jong Concert Hall at the Harris Fine Arts Center. I sat in the audience along with nine other women among 157 men of the first class. The dignitaries—then President Oaks, Dean Lee, Neal A. Maxwell, who was then commissioner of Church education, Elder Marion D. Hanks, and others—were on the stage. I remember feeling like I was starting first grade. On my first day of elementary school, some boys in the second grade, who said they were sixth-graders, told some stories that were overwhelming to me as a little first grader. Similarly, in that meeting on the first day of law school I overheard a student talking to the people around him about how he came from a family of lawyers, so he knew all the ropes of law school. I thought, “What am I doing here?” I remember that feeling, and, frankly, I don't remember what was said by anybody on that founding day.

What I do remember is seeing President Marion G. Romney, who was a counselor in the First Presidency and a driving force in the creation of the Law School. I remember how I felt when I saw him. I remember how good he was and how touched I was by him. In preparing to speak tonight, I looked up what he said on that founding day and also what he said two years later when the law school building was dedicated.

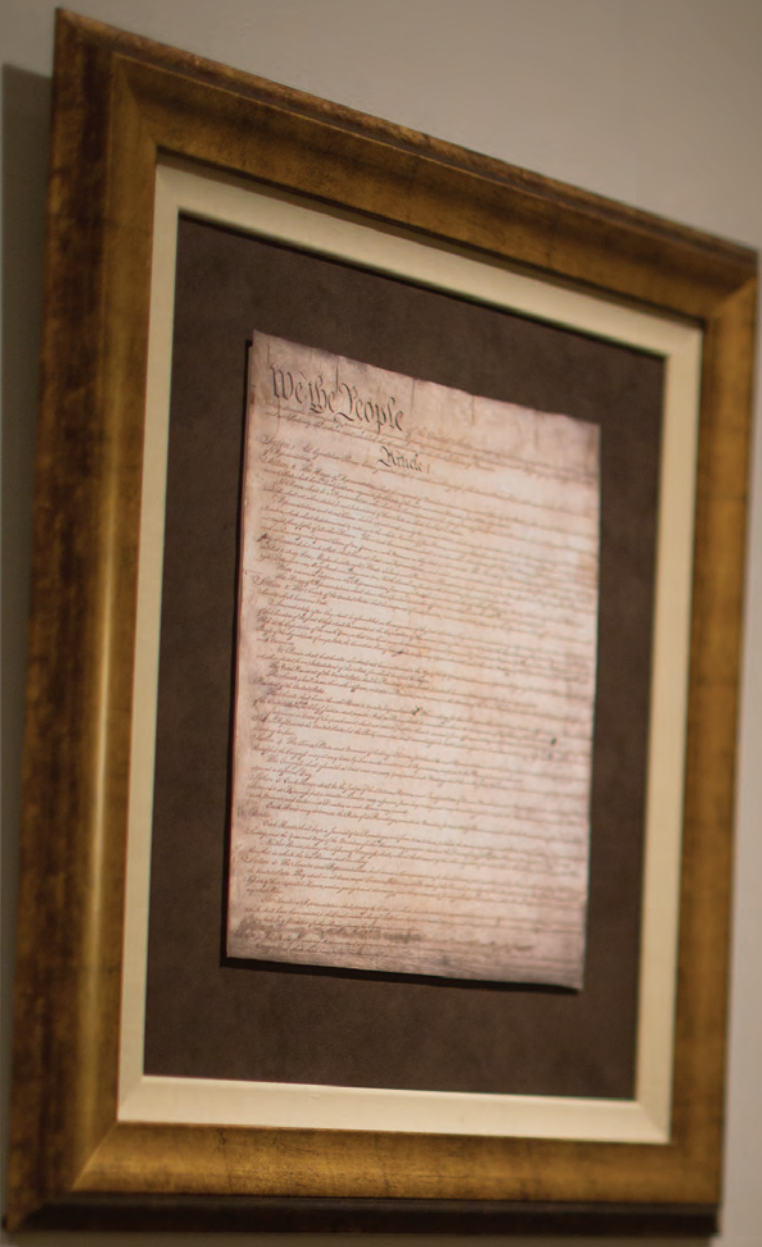
On that founding day President Romney addressed the question of the reason for the Law School. He didn't explicitly say the reason for the Law School. Instead, he talked about a few things that would prepare us to understand the reason. First, and I think most important, he began to outline gospel “verities,” as he termed them. One, we are children of God. Two, this life is about more than mortality. Mortality is an indispensable phase, but it isn't the only phase of life. Three, God's purposes for this life are our immortality and eternal life. Our Father in Heaven gives us the opportunity to choose to be with Him and helps us get there. Four, the only way back to our Father is through the gospel of Jesus Christ. Five, the Church is here to teach and administer to all the world—to *all the world*. Finally, six, we have been given the ability to choose our own destiny.⁹

President Marion G. Romney . . . wanted the Law School to . . . emulate President Clark's characteristics: faith, virtue, integrity, industry, scholarship, and patriotism.



These six things in actuality explain the plan of salvation. We lived before this life, and we had an opportunity to come here because our Father loved us. We were introduced into mortality so that we could have opposition and, through the law, make choices about what we want and who we want to be—whether we want to be like our Father and learn to love others the way we are loved or not. The only way we can do that is by faith in the Savior and in our Father, because we are not capable of that kind of love alone.

So what was President Romney telling us? I believe he focused on gospel verities so that we would too. He also referred to education and law—the Constitution specifically, with scriptural support for it. He said that he wanted the Law School to have an aura of J. Reuben Clark, that we should emulate President Clark’s characteristics: faith, virtue, integrity, industry, scholarship, and patriotism. He concluded on that first day with, “You know why you are here, what your school, the Board of Trustees, your own loved ones, and yes, your Father in Heaven expect of you.”¹⁰



THE CONSTITUTION
OF THE UNITED STATES OF AMERICA
1787



TO BE GUARDIANS OF THE LAW

When he gave the dedicatory address and prayer two years later at the dedication of the Law School building, President Romney further explained what Father in Heaven expects of us. He said, “And Father, help the lawyers trained in this law school to remember that they are to be the guardians of the law Isaiah spoke of three thousand years ago, when he said, ‘Out of Zion shall go forth the law, and the word of the Lord from Jerusalem.’ (Isaiah 2:3.)”¹¹

What did he say? We are to be the guardians of the law that Isaiah spoke of 3,000 years ago. Do you see the big picture? It’s not just about mortality. It’s always about more than mortality. We are trained in the law to be the guardians of the law.

What was the law that Isaiah spoke of? President Harold B. Lee explained how George Albert Smith defined the law at the dedication of the Idaho Falls Temple:

I have often wondered what that expression meant, that out of Zion shall go forth the law. Years ago I went with the brethren to the Idaho Falls Temple, and I heard in that inspired prayer of the First Presidency a definition of the meaning of that term “out of Zion shall go forth the law.” Note what they said: “We thank thee that thou hast revealed to us that those who gave us our constitutional form of government were men wise in thy sight and that thou didst raise them up for the very purpose of putting forth that sacred document [the Constitution of the United States (see D&C 101:80)]. . . .

“We pray that kings and rulers of the peoples of all nations under heaven may be persuaded of the blessings enjoyed by the people of this land by reason of their freedom under thy guidance and be constrained to adopt similar governmental systems, thus to fulfill the ancient prophecy of Isaiah that ‘. . . out of Zion shall go forth the law and the word of the Lord from Jerusalem.’”¹²

A partial fulfillment of the law going forth was the establishment of our constitutional form of government and its influence throughout the world. In October 2009 Elder Oaks observed:

In 1833, when almost all people in the world were still ruled by kings or tyrants, few could see how the infant United States Constitution could be divinely designed “for the rights and protection of all flesh.” [D&C 101:77.] Today, 176 years [now 180] after that revelation, almost every nation in the world has adopted a written constitution, and the United States Constitution profoundly influenced all of them. Truly, this nation’s most important export is its constitution, whose great principles stand as a model “for the rights and protection of all flesh.”¹³

It is no wonder that J. Reuben Clark proclaimed: “[T]he Constitution of the United States is a great and treasured part of my religion. . . . The overturning, or the material changing, or the distortion of any fundamental principle of our constitutional government would thus do violence to my religion.”¹⁴

Why would he say that? Remember the plan? The plan was that we could come here, have opposition, and be able to make choices. That was the whole point of it: to be able to make choices as to whether we are going to live like our Heavenly Father or not. Of course the Constitution is part of our religion; it is part of the essence of our religion.

The purpose of the Constitution is, through the law, to allow us to choose our own destinies. That is the law that Isaiah spoke of. In other words, it is the law that enables and protects moral agency. In Doctrine and Covenants 101 we read:

That every man may act in doctrine and principle pertaining to futurity, according to the moral agency which I have given unto him, that every man may be accountable for his own sins in the day of judgment. . . .

And for this purpose have I established the Constitution of this land.¹⁵

President Romney prayed that we would remember that we are to be the guardians of the law Isaiah spoke of. We know that law. What is it that we guard?

The purpose of the Constitution is, through the law, to allow us to choose our own destinies. That is the law that Isaiah spoke of.

**Part of the mission
for each of us,
I believe, is to be a
guardian of the
law Isaiah spoke of.**

I've had guardians appear in front of me. Usually they are lawyers. Sometimes they are not, but usually they are lawyers in court. Not only are they advocates in an always adversarial court setting, but they are also protectors. They are protecting someone or something for someone.

As guardians of the law we guard the freedom to choose—not just for people in this country, not just for people whom we love and whom we know, but “for the protection of all flesh”—all of Heavenly Father’s children. We sing it when we sing “America the Beautiful”: “Confirm thy soul in self-control, Thy liberty in law.”¹⁶

Guardians often appear in a courtroom setting. What is the setting of our guardianship? Elder Oaks said:

We are living in the prophesied time “when peace shall be taken from the earth” (D&C 1:35), when “all things shall be in commotion” and “men’s hearts shall fail them” (D&C 88:91). . . .

Evil that used to be localized and covered like a boil is now legalized and paraded like a banner. The most fundamental roots and bulwarks of civilization are questioned or attacked. Nations disavow their religious heritage. Marriage and family responsibilities are discarded as impediments to personal indulgence. . . .

An increasing number of opinion leaders and followers deny the existence of the God of Abraham, Isaac, and Jacob and revere only the gods of secularism. Many in positions of power and influence deny the right and wrong defined by divine decree. Even among those who profess to believe in right and wrong, there are “them that call evil good, and good evil” (Isaiah 5:20; 2 Nephi 15:20). Many also deny individual responsibility and practice dependence on others, seeking, like the foolish virgins, to live on borrowed substance and borrowed light.”¹⁷

In Ephesians we read, “For we wrestle not against flesh and blood, but against principalities, against powers, against the rulers of the darkness of this world, against spiritual wickedness in high places.”¹⁸ This is the adversarial setting we face.

I hope that you will think of ways in which you are guardians of the law. I believe that you have done that, that you are doing that, or that you will do that—all of you. Part of the mission for each of us, I believe, is to be a guardian of the law Isaiah spoke of. I felt that about us in Law School without recognizing it. I still feel that to this day. Over 5,000 graduates may seem like a lot of people to guard the law, but, comparatively in the world, it is only salt for the savor, leaven for the lift.

WHAT WE ARE HERE FOR

In the big picture, important jobs and significant achievements are not just for this life—not just so that you can be in a prestigious law firm, wear nice suits or dresses, and dine at places with fine linen. Guardians of the law can move the kingdom forward and do the things that Heavenly Father expects us to do. Elder Oaks told us how:

First, we must speak with love, always showing patience, understanding, and compassion toward our adversaries. We are under command to love our neighbor (Luke 10:27), to forgive all men (Doctrine and Covenants 64:10), to do good to them who spitefully use us (Matthew 5:44), and to conduct our teaching in mildness and meekness (Doctrine and Covenants 38:41).¹⁹

He also said that we should follow Christ’s example in balancing truth and tolerance. We should operate by “kindness in communications but firmness in truth.”²⁰ We need to love the way in which the Savior loves us; we need to learn to love the way in which we are loved. And if we can do that, we can be the kind of guardians that our Heavenly Father expects.

This final quotation pertains to us in the same way that Marion G. Romney’s petition to Heavenly Father in the dedicatory prayer of the Law School pertains to us. President Lorenzo Snow explained:

A man's mind should be single to the glory of God in everything that he starts to accomplish. We should consider that of ourselves we can do nothing. We are the children of God. We are in darkness, [unless] God enlightens our understanding. We are powerless, [unless] God helps us. The work that we have to do here is of that nature that we cannot do it unless we have the assistance of the Almighty. . . . Here is the great trouble with men of the world, and too much so with the Elders of Israel; we forget that we are working for God; we forget that we are here in order to carry out certain purposes that we had promised the Lord that we would carry out. It is a glorious work that we are engaged in. It is the work of the Almighty; and He has selected the men and the women whom He knows from past experience will carry out His purposes.²¹

Just as President Romney asked Heavenly Father to help us remember, so also President Snow reminded us that we forget—we forget what we are here for.

We are here to have faith—the same kind of faith that the founders of the Law School, who all thought it was a bad idea, had in trusting the board of trustees as prophets, seers, and revelators. We are here to learn to treat our enemies with love, to fight the fight with love, to be the guardians of the law with love in the way the Savior loves us and loves everyone. We are here because choice is not a political issue; it is part of our religion, and we need to protect that freedom. Let us not forget. Let us remember who we are and what we came here for. Most important, let us remember that it is always about more than mortality. Always.

In the name of Jesus Christ, amen.

Sheila McCleve is a member of the charter class of BYU Law School and was a judge for Utah's Third District Court. Prior, she was an assistant Salt Lake City prosecutor, a Salt Lake Deputy County attorney, and an administrative law judge for the Utah Public Service Commission. She recently retired after 25 years on the bench and currently teaches as an adjunct faculty member at the Law School.

NOTES

- 1 Brown v. Board of Education, 347 U.S. 483 (1954).
- 2 See Dallin H. Oaks, *Unfolding in Time*, CLARK MEMORANDUM, spring 2013, at 14, 16.
- 3 Rex E. Lee, *Thoughts After Fifteen Years*, CLARK MEMORANDUM, spring 1990, at 12, 14.
- 4 Bruce C. Hafen, *Glimpses of the Law School's Founding*, CLARK MEMORANDUM, spring 2002, at 14, 15–16.
- 5 Dale A. Kimball, *Stories That Defined Our Law School*, CLARK MEMORANDUM, spring 2010, at 10, 12.
- 6 Quoted in Hafen, *supra* note 4, at 16.
- 7 See Oaks, *supra* note 2, at 18.
- 8 According to Gladwell, BYU would be ranked no. 2 if cost of tuition were a larger factor in the national rankings. See Malcolm Gladwell, *The Order of Things: What College Rankings Really Tell Us*, THE NEW YORKER, February 14, 2011, at 5.
- 9 See Marion G. Romney, in ADDRESSES AT THE CEREMONY OPENING THE J. REUBEN CLARK LAW SCHOOL, August 27, 1973, 17.
- 10 *Id.* at 27.
- 11 Marion G. Romney, *Why the J. Reuben Clark Law School? Dedicatory Address and Prayer of the J. Reuben Clark Law Building*, September 5, 1975.

- 12 Harold B. Lee, *The Way to Eternal Life*, ENSIGN, November 1971, at 9, 15; quoting George Albert Smith, *Dedicatory Prayer*, IMPROVEMENT ERA, October 1945, at 562, 564.
- 13 Dallin H. Oaks, *Religious Freedom*, BYU-Idaho devotional address, October 13, 2009.
- 14 J. REUBEN CLARK JR., STAND FAST BY OUR CONSTITUTION 7 (1973); quoted in Romney, *supra* note 9, at 26.
- 15 D&C 101:78, 80.
- 16 Katherine Lee Bates and Samuel A. Ward, *America the Beautiful*, in HYMNS no. 338 (2nd ed. 2002).
- 17 Dallin H. Oaks, *Preparation for the Second Coming*, ENSIGN, April 2004, at 7, 9–10.
- 18 Ephesians 6:12.
- 19 Oaks, *supra* note 14.
- 20 Dallin H. Oaks, *Strengthening the Free Exercise of Religion*, address given at the Becket Fund for Religious Liberty Canterbury Medal Dinner in New York City on May 16, 2013, at 7 or part IV; see also Oaks, *Truth and Tolerance*, CES devotional address, September 11, 2011, printed as *Balancing Truth and Tolerance*, ENSIGN, February 2013, at 24, 28.
- 21 Lorenzo Snow, in DESERET WEEKLY, May 12, 1894, at 638; quoted in TEACHINGS OF PRESIDENTS OF THE CHURCH: LORENZO SNOW 180 (2012).



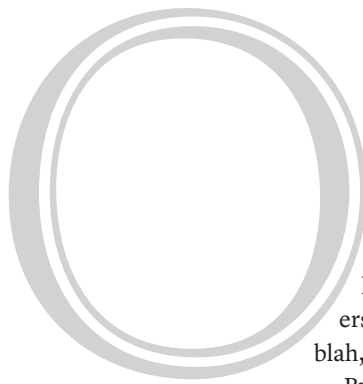
REVISITING

HUMILITY

BRETT G.

SCHARFFS¹

ILLUSTRATIONS BY RICHARD MIA



f all virtues, none needs a public relations consultant more than humility. The virtue of wimps and doormats, humility is a sop we throw to life's losers: "Blessed are the poor in spirit, blah, blah, blah," declares the conquering horde. But hang on. Being humble is, for Christians, a categorical imperative—but not only for them. Humility is for everyone the key to understanding the human condition.²

Many virtues can stand on their own two feet. As Aristotle, the godfather of virtue ethics, defined them, moral virtues, which he distinguished from intellectual virtues, lie in a mean between extremes of excess and deficiency.³ For example, courage lies in a mean between an excessive state of rashness and a defective state of cowardice or timidity. Much the same can be said of other virtues recognized by Aristotle, including temperance, which lies midway between profligacy and insensibility; generosity, which lies in a mean between prodigality or wastefulness and meanness or stinginess; and magnanimity, which Aristotle describes as "greatness of soul" and which lies in a mean state between excessive vanity and a defect of parsimoniousness or "smallness of soul." With regard to honor and dishonor, Aristotle said, "[T]he mean is proper pride,

the excess is known as a sort of empty vanity, and the deficiency is undue humility."⁴

Thus we see that Aristotle viewed humility as a defective state with respect to the virtue of honor or self-respect. Indeed, he viewed it as a character trait of inferior classes, such as slaves, tradesmen, women, and children.⁵ It is not a virtue of free men. To Aristotle, humility was a mark of inferiority and subservience—the congenital cousin of humiliation.

The closest Aristotle came to appreciating humility is in recognizing the virtue of friendship as lying between two types of excess—obsequiousness on the one hand and flattery on the other—and a defective state of being quarrelsome or surly. On a related note, Aristotle conceptualized truthfulness as a virtue lying between boastfulness or pretense and exaggeration, which we might view as a kind of pride, and a defective state of self-deprecation. Friendship has an element of equality and truthfulness a component of honesty—ideas that are structurally related to humility. But when we think of humility, equality and truth are not the concepts that seem most closely linked, although I will argue that these ideas actually get us closer than we might think to the essence of humility.

But while it is easy to see how other moral virtues lie in a mean between excessive and defective states, it is not so obvious in the case of humility. Perhaps this is why Aristotle, along with the ancient Greeks in general, did not even think of humility as a virtue worthy of a citizen. For Aristotle, humility was a relational concept but not a virtue; rather, it was a sad reality of biological and social inferiority.

While we have every reason to reject Aristotle's biological elitism, his account of moral virtues as lying in a mean between extremes of excess and defect has survived more than two millennia of scrutiny and experience.⁶ Aristotle was also right that humility can only be understood relationally, but he was wrong in discounting it as a virtue worth cultivating.

In my earlier article I argued that, like justice and mercy, humility too should be understood as a virtue susceptible to both

excess and defective states. When humility is underdone, the defective state—pride, arrogance, or vanity—is easy enough to recognize. We are used to thinking of pride as standing in opposition to humility. The excess state, however, is harder to recognize. What might it mean to have too much humility? I suggest that an attitude of inferiority, subservience, and servility is the excess state of humility. When humility is overdone, the result is an attitude of insecurity, worthlessness, or subjugation.

We could easily make the mistake of not realizing that one can have too much as well as too little of the feelings or attitudes underlying humility. While pride (too little humility) is often understood to lie in opposition to humility, it is less common to recognize that feelings of inferiority, worthlessness, subservience, or subordination (too much humility) also lie in opposition to humility.

Indeed, one might even mistakenly think that humility requires one to be accepting of subjugation and subordination. But humility does not demand timidity, self-effacement, passiveness, or quietness, although it does urge circumspection, patience, respectfulness, and considered attention to others. Humility is manifest when we treat other things—and especially other people—as if they really matter. Humility does not imply weakness, although those who are humble will be mindful of the nature and hazards of personal weaknesses.

Humility also denotes an attitude of open-mindedness and curiosity, a willingness to learn, reassess, and change. One who is humble can be persuaded that his conclusions are wrong, that his perspectives are limited and should be broadened, and that his settled opinions merit reconsideration. One who is humble will possess

A DIVINE LAWSUIT

In the first article I wrote as a law school professor, I argued that humility, along with justice and mercy, is the forgotten key to understanding and exercising practical wisdom, which for Aristotle lies atop the pinnacle of practical virtues.¹ A shorter version of that article, "Centering on Humility," appeared in the winter 1998 issue of the *Clark Memorandum*.²

In developing this argument, I took my cue from the Hebrew prophet Micah and his account of a divine lawsuit between God and the children of Israel. After a summons (see Micah 6:1), empaneling the mountains and foundations of the earth as jury (see verse 2), the Lord indicts the children of Israel for forgetting God and their covenants (see verses 3–5). Israel responds with strident self-justification:

Wherewith shall I come before the Lord, and bow myself before the high God? shall I come before him with burnt offerings, with calves of a year old?

Will the Lord be pleased with thousands of rams, or with ten thousands of rivers of oil? shall I give my firstborn for my transgression, the fruit of my body for the sin of my soul? [verses 6–7]

In verse 6 Israel demands to know just what it is that God wants. Does the Lord wish them to bow low before Him? Does He require burnt offerings? In verse 7, one detects a sharper edge of self-justification, even sarcasm, on the part of the defendants. Would the Lord be satisfied with "thousands of rams" or with "ten thousands of rivers of oil?" The defendants' tone of self-justification finally "rises to a hysterical and ghastly crescendo"³ when they demand, "Shall I

give my firstborn for my transgression, the fruit of my body for the sin of my soul?"

Given the defensive and strident tone of the defendants' response, we might expect God to answer with a voice of anger. Instead, through a rhetorical question God issues a beautiful, tender, and poignant injunction. Micah states simply and majestically:

He hath shewed thee, O man, what is good; and what doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God? [verse 8]

What does God require? With elegant clarity, God summons His people to be just, merciful, and humble. More precisely, He employs a series of action verbs, imploring them to *do*, *love*, and *walk* with justice, mercy, and humility. Humility, I argued, is important in helping us mediate the competing claims of justice and mercy.

Fifteen years later, I remain convinced that humility is a virtue that plays an important role in reconciling and harmonizing the competing claims of justice and mercy. But in a deeper sense I have come to believe that I completely overlooked—or perhaps only glanced at in passing—the most important characteristic of humility: its relational character.

1 Brett G. Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 UC DAVIS L. REV. 127 (1998).

2 Brett G. Scharffs, *Centering on Humility*, CLARK MEMORANDUM 2 (winter 1998).

3 Scharffs, *supra* note 1, at 150, quoting LESLIE C. ALLEN, THE BOOKS OF JOEL, OBADIAH, JONAH AND MICAH 370 (1976).



a quiet confidence that makes him capable of learning and reassessment, because he is not defensive or insecure. What is more, one who is humble will seek the insights and viewpoints of others because he will not have unwarranted confidence in the power of his own intellect or the rightness of his every conclusion. One who is humble will have the capacity to be surprised by an argument or insight that causes him to rethink long-held opinions or favorite theories. Humility does not imply softheadedness or intellectual weakness, although the learned and mentally acute are particularly susceptible to being prideful.

In my earlier article I also argued that justice and mercy, which are recognized as the central virtues related to practical wisdom, often conflict with each other and that humility helps us synthesize or mediate the competing demands of justice and mercy.

WALK HUMBLY WITH THY GOD

In revisiting the Micah story 15 years later, I think I previously passed too quickly by one of the central lessons of the account. The final verse of the divine lawsuit reads: “He hath shewed thee, O man, what is good; and what doth the Lord require of thee, but to do

justly, and to love mercy, and to walk humbly with thy God” (Micah 6:8). God instructs His people not just to walk with humility but to “walk humbly *with thy God*.”

Humility is not an abstract concept. It is found in our walk with God—*walking* invoking the idea of movement forward, *with* implying the idea of being side by side, and *God* being our Maker and Father. Humility is found in our walk with God our Father.

Thus I have come to believe that the key to understanding—and, more important, valuing and cultivating—humility lies in what must be regarded as the central doctrine of Abrahamic religion (Judaism, Christianity, and Islam): the fatherhood of God and the brotherhood of humankind. This idea is to my mind the most powerful and important concept in revealed religion, and it can be found in the first chapter of Genesis.

In the creation story, in Genesis 1:26, God says, “Let us make man in our image, after our likeness.” The following verse says, “So God created man in his *own* image, in the image of God created he him; male and female created he them” (Genesis 1:27; emphasis added).

The concept that human beings are created in the image of God is of course susceptible to many different conceptions. I suggest that the more literally we take the idea of the fatherhood of God and the brotherhood of man, the more likely we are to strike the right chord with respect to humility.

Fathers have a vertical relationship with their children, and even as we grow and progress, in an important sense we never surpass our fathers; we remain in a parent-child relationship in which we owe them certain duties. Nevertheless, there is a deep equality between fathers and children, because children have within them the capacity to grow and develop into the same sort of being as their father. This is not to say that children ever surpass or take the place of their parents. This is all the more so in our relationship with God: to aspire to replace God is blasphemy and dangerous (as Icarus learned), but to aspire to become more like God is the essence of filial piety and is another categorical imperative of Biblical religion.⁷

Brothers are fundamentally equal as well—not in the superficial sense of being identical but in the deep moral sense of moral worth. Thus Dylan Thomas was not making a witty aside but stating a profound truth when he prefaced his collected poems with this observation: “These poems, with all their crudities, doubts and confusions are written for the love of man and in praise of God. And I’d be a damn fool if they weren’t.”⁸ Coming to appreciate the relationship between God and man, and between human beings, transforms the meaning of everything we do, including writing poems—and we’d be damn fools if it didn’t.

THE BROTHERHOOD OF MANKIND: “I LIKE PIGS”

Winston Churchill, bombastic and rude as he was, may have come closer than anyone in identifying the sine qua non of humility with his frequent—and varied—expression of his fondness for pigs. “I like pigs,” Churchill would say. “A cat will think himself your superior and look down upon you. A dog will think himself your inferior and look up at you. But a pig will look you in the eye and treat you as an equal.”⁹ Churchill was so fond of this idea that he often sketched a picture of a pig when signing his name, even in important official correspondence. Churchill may not leap to mind as exhibit A when we think of humility, but he captured its essence with this homely example.

The brotherhood of man is an often-cited and seldom-followed principle. But the very heart of humility lies in viewing the other neither as a superior nor an inferior but as an equal.

Gordon B. Hinckley, 15th president of The Church of Jesus Christ of Latter-day Saints, often recounted a story he heard from a former Israeli prime minister. It is a variation of a story that appears in the Talmud. The prime minister “had seen much of conflict and trouble in his time.”

He told a very interesting story . . . of a Jewish rabbi who was conversing with two of his friends. The rabbi asked one of the men, “How do you know when the night is over and a new day has begun?”

His friend replied, “When you look into the east and can distinguish a sheep from a goat, then you know the night is over and the day has begun.”

The second was asked the same question. He replied, “When you look into the distance and can distinguish an olive tree from a fig tree, then you know morning has come.”

They then asked the rabbi how he could tell when the night is over and the day has begun. He thought for a time and then said, “When you look into the east and see the face of a woman and you can say, ‘She is my sister,’ and when you look into the east and see the face of a man and can say, ‘He is my brother.’ Then you know the light of a new day has come.”

This story, said President Hinckley, “speaks of the true meaning of brotherhood.”¹⁰

The distinctive feature of humility is that it is a relational virtue. Humility can only be experienced in the context of relationships. The essence of humility in human relationships is to understand the irreducible inherent equality of human beings. Knowing that I am no more worthwhile than you and you are no more worthwhile than I is the heart of humility. But this is only half of the equation. The essence of humility in divine relationships is to understand the fatherhood of God and our essence as His children created in His image.

CREATED IN GOD’S IMAGE: THE ISRAELI ENEMY COMBATANT CASE

Consider a case decided by the Israeli Supreme Court in 2005, sitting as the High Court of Justice.¹¹ The case involved the Israeli government’s policy of preventative strikes aimed at killing members of terrorist organizations in the West Bank and the Gaza Strip, even when they were not actively or immediately engaged in terrorist activities. The petitioners argued that this preemptive strike policy against enemy combatants violated international law, Israeli law, and basic principles of morality and human rights. The petitioner argued that the targets of these strikes had to be treated as ordinary criminals and must be dealt with by the ordinary mechanisms of criminal law, including arrest and trial.

President (emeritus) Aharon Barak of the Israeli Supreme Court rejected the absolutism of the petitioner’s claim. In a thoughtful article reflecting upon this case, Oxford philosopher Jeremy Waldron noted that Justice Barak’s opinion contained the following statement:

Needless to say, unlawful combatants are not beyond the law. They are not “outlaws.” God created them as well in his image; their human dignity as well is to be honored; they as well enjoy and are entitled to protection . . . by customary international law.

As Waldron noted, the reference to the idea that all men are created in the image of God found in Genesis 1:26–27 is clear enough. The question, urged by Waldron, is, what on earth is this doing in the judicial opinion of a secular court? After all, in a concurring judgment Vice President Eliezer Rivlin made the same point in exclusively secular terms. Said Rivlin:

The duty to honor the lives of innocent civilians is thus the point of departure . . . but it is not the endpoint. It cannot negate the human dignity of the unlawful combatants themselves. . . . Human dignity is a principle which applies to every person, even during combat and conflict.

Why did Justice Barak appeal to the religious idea that all men are created in the image of God when the secular idea of human dignity, invoked by Rivlin, was readily available?

The answer is not immediately apparent. The opinion’s author, Aharon Barak, lost his parents in World War II and came to Israel as a teenager, where he was a brilliant student, a brilliant professor, and eventually a brilliant judge. But he is not himself a believer; he is a Jew but a secular Jew, deeply mistrusted by religious conservatives within his own country. Throughout his career he has been viewed as a liberal who has pushed the envelope in protecting individual and human rights. As a judge he was protected by a bodyguard, not so much due to threats from Palestinians who live in Israel but due to threats from conservative Jews. Yet we have every reason to believe Justice Barak knew exactly what he was doing.

In Professor Waldron's judgment, Justice Barak's reference

is intended to pull us up short. It is intended to remind us that although we are dealing with an outsider and an evil person, an enemy of the state of Israel and the Jewish people, a threat to our lives and those of our loved ones, one who will kill and maim scores of innocent people if he gets the opportunity—although we are talking about someone who may be justly liable through his actions and intentions to deadly force—we are nevertheless not just talking about a wild beast, or an outsider to our species, or something that may be manipulated or battered or exploited as a mere tool for our own purposes (the purpose of saving the lives of members of our community). The unlawful combatant may be a threat and an outsider and an evil and dangerous man, but he is also man-created-in-the-image-of-God and the status associated with that characterization imposes radical limits on what may be done with him and radical constraints on how lightly we may treat the question of what may be done with him.

Judge Clifford Wallace, emeritus chief judge of the Ninth Circuit Court of Appeals, who knows Justice Barak personally, agrees and believes there is something else important going on as well. Although the petitioners in the case lost, Wallace notes that Justice Barak is communicating a powerful message to one of the primary audiences, specifically religious Jews who are deeply conservative. He uses their scripture to reinforce the boundaries that exist in the treatment of enemy combatants, and while he does not grant the petitioners the broad protection they were seeking, he sends a cautionary message to the government and its conservative supporters: we are watching, and we expect you to be faithful to your own professed beliefs. To conservative Jews, Justice Barak says, in effect, I expect you to be mindful of and constrained by your own deepest commitments, including the bedrock belief that all men are created in the image of God.

Waldron speculates, correctly I think, that an American court would not cite scripture the way Justice Barak did in the enemy combatant case, although, as he notes, there was a time in American history when judges



did speak in these terms, “a time when Justice McLean could say (in his dissent) of the petitioner in *Dred Scot v. Sanford* that “[h]e bears the impress of his Maker, . . . and he is destined to an endless existence.”

Waldron observes, “Israeli courts are not afflicted with the Rawlsian doctrines of public reason that our philosophers put about, which are intended to limit the citation of religious considerations in public life, and which indeed take the federal courts as an exemplar of this sort of restraint.”

At various times in American history, the concept enshrined in the preamble of the Declaration of Independence, that all men are endowed by their creator with

certain inalienable rights, has been very influential. According to Oxford historian Richard Carwardine’s masterful biography of Abraham Lincoln, this idea lay at the heart of Abraham Lincoln’s political thinking. According to Carwardine, “The Declaration of Independence, in which he rooted his arguments during the 1850s, was for Lincoln more than a time-bound expression of political grievance. It was a near-sanctified statement of universal principles, and one that squared with essential elements of his personal faith: a belief in a God who had created all men equal and whose relations with humankind were based on the principles of justice.”¹²

A PIG WILL LOOK YOU IN THE EYE AND TREAT YOU AS AN EQUAL

As Lincoln said in a speech in Lewistown, Illinois, on August 17, 1858, the Founding Fathers declared that “nothing stamped with the Divine image and likeness was sent into the world to be trodden on, and degraded, and imbruted by its fellows.”

CONCLUSION

I have to come to believe that the brotherhood of man and the fatherhood of God are the essence of humility—brotherhood understood in its old-fashioned, ungendered incarnation and fatherhood understood as bodily incarnate, in the person of our Father in Heaven, the Perfect Man. Humility is cultivated in our peaceable walk with God as we strive for justice and seek to become merciful. It is found in understanding that all are children of God, created in His image, each of equal and eternal moral worth. For His part, the God who invites humility is not a distant, unapproachable, and unknowable abstract entity but a father, the person we are designed to grow and become like unto—not to become equal to or to replace but to become His heirs, joint-heirs with Christ.¹³

NOTES

1 Francis R. Kirkham Professor of Law and associate director of the International Center for Law and Religion Studies, J. Reuben Clark Law School, Brigham Young University. BS, BA, MA, Georgetown University; BPhil, Oxford University; JD, Yale Law School. This article is an adaptation of *Relational Humility*, 30.1 INTERDISCIPLINARY HUMANITIES 30–41 (spring 2013). Thanks to Shawn Tucker, professor at Elon University, for his invitation to contribute to a special edition on pride and humility. Thanks also to my research assistant Blake Richards for his help with footnotes and editing and to Scott Cameron and Jane Wise of the *Clark Memorandum* for the editorial deftness.

2 The first half of this claim is scriptural, the second half the gravamen of this article. For example, Matthew 18:4 reads, “Whosoever therefore shall humble himself as this little child, the same is greatest in the kingdom of heaven.” All biblical quotations are from the King James Version, which I use here for its historical significance and magnificence of language. In a similar vein, Matthew 23:12 says, “And whosoever shall exalt himself shall be abased; and he that shall humble himself shall be exalted” (see also Luke 14:11; 18:14).

3 Quotations from Aristotle are from A NEW ARISTOTLE READER (J. L. Ackrill ed., Oxford 1987). For example, in book II, chapter 6, of the *Nicomachean Ethics*, Aristotle writes, “Excellence, then, is a state concerned with choice, lying in a mean relative to us, this being determined by reason and in the way in which the man of practical wisdom would determine it” (1106b35–1107a2).

4 1107b22–25.
5 See, e.g., W. D. ROSS, ARISTOTLE 202–208 (1923). See also 8 THEOLOGICAL DICTIONARY OF THE NEW TESTAMENT 11–12 (Gerhard Friedrich ed., Geofrey W. Bromiley trans., Wm. B. Erdmans Publishing Co. 1972). Elsewhere, in contrasting the inexperience of youth with the experience of age, Aristotle spoke somewhat more sympathetically about humility:

And youth trust others readily because they have not yet often been cheated; and they are optimistic . . . for they have as of yet met with few disappointments. And they live their lives for the most part in hope; for hope looks to the future and memory to the past, and for youth the future is great, the past brief. . . . And they are great-souled, for they have not yet been humbled by life or learned its necessary limitations. [NANCY SHERMAN, THE FABRIC OF CHARACTER: ARISTOTLE’S THEORY OF VIRTUE 197 (1989) (citing ARISTOTLE, RHETORIC, II, 1389a16–31)]

(Sherman concludes that, for youth, Aristotle views the experience of disappointment or failure as necessary “to knock them out of their naïve trust of others and over-confidence in their abilities.”)

6 See ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 42 (The Belknap Press of Harvard University: Cambridge, Massachusetts 1993).

7 TERREL GIVENS AND FIONA GIVENS, THE GOD WHO WEEPS: HOW MORMONISM MAKES SENSE OF LIFE 109–110 (Ensign Peak 2012). See also Deuteronomy 18:13 (“Thou shalt be perfect with the Lord thy God.”) and Matthew 5:48 (“Be ye therefore perfect, even as your Father which is in heaven is perfect.”).

8 DYLAN THOMAS, THE COLLECTED POEMS OF DYLAN note xiv (James Laughlin 1953).

9 *Winston Churchill Biography*, National Churchill Museum, available at <http://www.nationalchurchillmuseum.org/winston-churchill-biography.html>, accessed January 12, 2013.

10 Gordon B. Hinkley, *Experiences Worth Remembering*, from an address given at Brigham Young University on October 31, 2006.

11 See The Public Committee Against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v. The Government of Israel and Others (2005) HCJ 769/02 (Isr.). My discussion of the Israeli enemy combatant case is based upon Jeremy Waldron, *The War on Terror and the Image of God*, remarks at the Emory University Center for the Study of Law and Religion Conference “From Silver to Gold: The Next 25 Years of Law and Religion” (October 24–26, 2007), as excerpted in W. COLE DURHAM AND BRETT G. SCHARFFS, LAW AND RELIGION: NATIONAL, INTERNATIONAL AND COMPARATIVE PERSPECTIVES (Wolters Kluwer 2010), at 556–562. A revised version of this article is included in CHRISTIANITY AND HUMAN RIGHTS: AN INTRODUCTION (John Witte Jr. and Frank S. Alexander eds., Cambridge University Press 2010).

12 RICHARD CARWARDINE, LINCOLN: A LIFE OF PURPOSE AND POWER 40 (Alfred A. Knopf 2006).

13 This is a reference to Romans 8:16–17, which says, “The Spirit itself beareth witness with our spirit, that we are the children of God: And if children, then heirs; heirs of God, and joint-heirs with Christ; if so be that we suffer with him, that we may be also glorified together.”

GREGORY W. MOELLER

◇ ◇ ◇ ◇ ◇

defending


H O W T O K I L L A M O C K I N G B I R D C H A N G E D M Y L I F E

innocence

◇ ◇ ◇ ◇ ◇

It is an honor to speak to you this evening about a book that literally changed my life. I recognize that may sound like an exaggeration. After all, how can a book, especially a work of fiction, change a life? However, in my case, Harper Lee's *To Kill a Mockingbird* did change my life in a meaningful way by giving me focus and direction. It set my feet upon the path I would follow for the next 30-plus years.

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



Lawyers, I suppose, were children once.

CHARLES LAMB



This
address
was given
at the
Madison
Public
Library's
event
The Big Read:
Harper Lee's
*To Kill a
Mockingbird*
at the
David O.
McKay
Library at
BYU-Idaho
on October
6, 2009.



I might add that a discussion about this book strikes me as very timely, especially for our community. Our nation has passed through the social upheaval of the civil rights movement. We have now witnessed an African American man, President Barack Obama, rise to the most powerful office in the world. Nevertheless, there is still much work to be done. The forces of intolerance are still marshaling against those who cherish justice. Sadly, we have recently heard their echoes within our own community in the inappropriate chants of callow youths on a school bus¹ and in the misguided joke of a local candidate for public office.² I believe there is a message in this book that we still need to hear.

Some of you may not realize that *To Kill a Mockingbird* is one of the most banned books of the twentieth century. According to the American Library Association, it was the 46th most banned book of the 1990s. It ranked behind *The Adventures of Huckleberry Finn* and the Harry Potter series but ahead of *James and the Giant Peach* and *Cujo* by Stephen King. In the 1960s and '70s it was banned mainly by communities that disapproved of its pro-civil rights message. Interestingly, today it is banned mainly in communities that find some of its coarse, racially charged language offensive. Frankly, I am not sure if the evils of racism can be accurately depicted without referencing the ugly language of racism. To me, I stare at the racist expressions in the book with the same horrific curiosity one has when looking at a two-headed snake preserved in a jar of formaldehyde.

I apologize to those who came this evening expecting to hear a detailed literary analysis of this book. Even if I were capable of such an analysis, it is not what I have been asked to do tonight. Instead, I have been asked to do something very personal and intimate: tell you how this book has affected my life and career. In doing so, I will share with you some very private thoughts about a controversial case that ultimately shaped and defined my career as an attorney. I have never publicly spoken about this case before. I know there are people, including some I greatly admire, who feel differently about this case than I do. As I candidly share my personal experiences and perspectives tonight, I mean no offense to those who have a different point of view or opinion about this case.

A PATH REVEALED

I was fortunate to discover very early in high school what I was going to be when I grew up. Lawyers sometimes speak of being “called to the law.” In my case, thanks to Harper Lee, that is exactly what happened to me. During my sophomore year in high school, I saw the movie *To Kill a Mockingbird*. Fortunately, I grew up in an era in which young people did not suffer from the automatic aversion to black-and-white films that many children today seem to have. Although color movies were quite common when this film was made in 1962, given the subject matter of the story, filming in black and white seems apropos. I realize, of course, that this would make a much better story at an event entitled “The Big Read” if I had read the book first. However, there are few movies adapted from literature that capture the essence of the original book as well as *To Kill a Mockingbird*. The movie was a masterpiece. Nevertheless, those of you who have only seen the movie are missing out; the book is even better.

As you know, the story centers on a country lawyer from Alabama named Atticus Finch. Given the many references to birds in the story, the author’s choice of the name Finch can hardly be considered coincidental. Maycomb, Alabama, is a typical Southern town of the 1930s—a simple town filled with simple people living simple lives and tarnished by an ugly undercurrent of institutionalized racism. Atticus is a widower raising his two young children: Jem, a ten-year-old boy, and Scout, his seven-year-old daughter. Atticus is a decent man and a simple country lawyer who believes and lives the ideal that “in this country the courts are the great levelers, and in our courts all men are created equal” (234).³ Long before Martin Luther King gave his “I Have a Dream” speech, Atticus Finch is the type of man who is willing to judge others by the content of their character rather than by the color of their skin.

Like many lawyers, Atticus mentions he has a distaste for criminal law. Yet when the court appoints him to represent an indigent black man, Tom Robinson, who is accused of raping a white woman, he accepts the assignment. While most of the town’s people do not begrudge Atticus’s doing his duty as a lawyer, many of them wish he would not do it so well. However, it is not in Atticus’s nature to do anything less than his best. He teaches his children: “[B]efore

I was only 14 or 15 years old at the time, I knew at that moment with absolute certainty that I would someday become a lawyer. Strangely, somehow I also knew that someday I would be called upon to represent an innocent man in a difficult case. It was a moment of absolute clarity in my life—an epiphany, perhaps—that I will never forget.

Since I was a state champion debater and extemporaneous speaker in high school, my having an interest in the law should not be surprising. However, this became more than just an interest; it was almost a driving obsession. I knew with every fiber of my being that a path had been laid out before me, and I decided at that moment that I would follow it. I attended BYU and majored in the traditional prelaw major: political science. I was later accepted into the J. Reuben Clark Law School at BYU, graduating in 1990. Following graduation, I went to work for a small-town law firm in Rexburg, Idaho. As the youngest attorney in the office, I was immediately thrown into all manner of cases, including many criminal cases. There is no better training ground for a young attorney than the courtroom. There is no better way for a young attorney to get into the courtroom regularly than by practicing criminal law.

THE GRUBE CASE

Atticus tells his daughter: “Scout, simply by the nature of the work, every lawyer gets at least one case in his lifetime that affects him personally. This one’s mine, I guess” (86).

As it turned out, very early in my career I received just such a case—the case I had somehow known years earlier I would try. It lasted for more than 16 years and haunted me almost every day that it lasted. In May 1991, just eight months after I passed the bar exam, I was appointed to represent a man accused of murdering a young woman in 1983. His name was Rauland Grube. I was to serve as cocounsel with my partner, Michael Kam.

From the very beginning Mr. Grube steadfastly maintained his innocence. He would not even consider any talk of a plea bargain. There were no witnesses to the crime, just circumstantial evidence. I had no doubt in my mind that this case was headed for a long and difficult trial. As we visited with our client for the first time in jail, it was also apparent that he had certain very mild limitations—limitations that made him seem a little strange to others. Nevertheless, he seemed to be a very gentle person, one incapable of violence.

The media coverage was pervasive. Feelings and emotions throughout the community ran high. During a preliminary hearing on the case, a man made a menacing gesture with his hand, holding it in the shape of a gun and pointing it at Mr. Grube. At another hearing, an audience member stood up and began yelling threats at our client. As he moved toward the defense table, without even pausing to think, Mike and I immediately pushed our client down to the floor and lay on top of him, shielding him from harm with our bodies. While that might sound very brave to some of you, it may have been one of the most foolish things I have ever done. We had forgotten that earlier in the day, fearing just such an incident, we asked the sheriff’s office to put a bulletproof vest on our client. Mike and I were putting our lives at risk to protect the only person in the room who was wearing body armor. As foolish as that was, I am glad my instincts were noble. It would have looked quite bad in the media to see a photo of two attorneys fearfully hiding behind their client.

I could spend all evening telling stories about this case. Suffice it to say, as we investigated the case further, Mike and I knew that there was something very wrong. Evidence from 1983 was missing, while new damning evidence had been discovered in 1991. This evidence had somehow escaped the notice of every police investigator since 1983. Our client’s shotgun was tested and retested, with either negative or inconclusive results. Witnesses came forward in droves with evidence pointing to another suspect, a former police officer. Mike and I soon realized we had on our hands every attorney’s dream and worst nightmare: we were representing an innocent man in a first-degree murder case.

I have never shared this publicly before—not even my children are aware of this—but this was a very difficult time for me for another reason. As the trial date approached, I began to get threatening telephone calls at home. Although some threatened just me, several calls contained a recorded voice threatening my children. These cowardly, anonymous threats

I can live with other folks I’ve got to live with myself. The one thing that doesn’t abide by majority rule is a person’s conscience” (120).

As the trial progresses, Atticus skillfully establishes Tom’s innocence. Through effective cross-examinations, Atticus shows that the victim, Mayella Ewell, and her father, Bob Ewell, are clearly lying. In fact, it becomes sadly apparent that it was the victim’s own father, not Tom, who brutally abused her. However, despite Atticus’s best efforts, the all-white jury convicts Tom of the crime.

After the verdict, the courtroom empties. Atticus packs his briefcase while the black community members remain seated in the balcony—the segregated section of the courthouse reserved for so-called “colored people” (198). Jem and Scout are also sitting in the balcony watching intently. The courtroom is silent. As Atticus turns to leave, all the black people solemnly and reverently stand. When Scout does not stand, the black minister gently nudges her and says, “[S]tand up. Your father’s passin’” (242).

As I witnessed this climactic moment of the film, I felt a chill go up my spine. Although



© GARY ALPHONSO / IZART.COM

against me did not worry me much, but I was concerned for my children. Much like Atticus, I did not want to see my children endangered because of my work. However, in a strange way these threats reassured me. I sensed that if such evil was opposing us, we must be on the right track. Faith and prayer saw me through these tough times.

Once the trial began, the evidence came in better than we had hoped. The state’s own ballistics expert changed sides and testified for the defense. He concluded that Mr. Grube’s shotgun could not make the same pellet pattern that appeared in X-rays of the victim’s body. He also concluded that a tool mark on the window frame removed from the victim’s bedroom window could not have been made by the gun recoiling. He testified that he could only recreate the mark by locking the window frame in a vice and deliberately rubbing the shotgun barrel against its surface. In other words, the key evidence had been manufactured. Meanwhile, the state attacked our client’s reputation and character. They twisted the actions of an awkward teenage boy into something dark and evil.

Although I was very young and inexperienced—just 28 years old—I was entrusted with the responsibility of making the closing argument to the jury. For about 20 minutes I felt like Atticus Finch imploring the jury to “do their duty.” To this day it may have been the most important speech of my life—and I have given many speeches. Interestingly, even then I clearly recognized my moment with destiny. I began my closing argument as follows:

Ladies and gentlemen of the jury, . . . the responsibility of giving this closing argument . . . has fallen upon me. As I stand before you now, I actually find myself trembling. I don’t think there will be anything I will ever say in my life that will be more important than the things I’m going to discuss with you in the next few moments. [Supplemental Transcript, 22, lines 19–25]

LIKE DANIEL IN THE LION'S DEN, ATTICUS HAD THE
COURAGE TO STAND FOR HIS PRINCIPLES, BARING NO WEAPON
OTHER THAN THE MORAL STRENGTH OF HIS CONVICTIONS.

Unfortunately, my closing argument was no more successful than Atticus's closing. The jury deliberated for over two days before returning a verdict of guilty. Mr. Grube was later sentenced to life in prison without possibility of parole and sent to the Idaho state prison in Boise. He remained there for more than 14 years.

We immediately appealed the case to the Idaho Supreme Court. Although they found several errors in the trial, they concluded by a five to zero vote that these errors were harmless.⁴ As we waited for the decision on the first appeal, a new witness contacted us. The state had interviewed this witness in 1991 but had not disclosed his identity or the substance of his testimony. This was a serious violation of our client's constitutional rights under the landmark U.S. Supreme Court case *Brady v. Maryland*, 373 U.S. 83 (1963). This witness also helped us discover new evidence that proved that the local police had altered their logs from the night of the murder. With this new evidence in hand, we filed a petition for postconviction relief. When the district court denied our petition, we filed our second appeal. We were greatly disappointed when we lost in the Idaho Supreme Court again, although this time the vote was three to two.⁵ However, we were encouraged by the very strong dissenting opinion of Justice Wayne Kidwell, a former attorney general for the state of Idaho.

Having exhausted our appeals in state court, in 2001 we filed a petition for *habeas corpus* in the U.S. District Court. My partner and dear friend, Mike Kam, died only months after we filed this petition. Since I was no longer being paid by the county, I represented Mr. Grube for the next six years on a pro bono basis. I later had the privilege of working with Dennis Benjamin from the federal appellate public defender's office in Boise.

Finally, after 15 years of appeals and many twists and turns of fate, U.S. District Judge Lynn Winmill ruled that Mr. Grube had been denied a fair trial back in 1991.⁶ Mr. Grube was released from prison on March 21, 2006. The state of Idaho immediately appealed the decision to the Ninth Circuit Court of Appeals. In an astonishing turn of events, during oral argument in April 2007, the three-judge panel from the Ninth Circuit summarily advised the lawyers from Idaho's Office of the Attorney General to dismiss their appeal or face a scathing decision upholding Judge Winmill's ruling. The case was remanded and set for a new trial in the fall of 2007. As Dennis and I were gearing up to retry the case, the Idaho Office of the Attorney General proposed a very favorable plea agreement, one that would eventually allow all charges to be dismissed and would restore Mr. Grube to his full constitutional rights. The offer was simply too good to reject. He accepted it, and his case was finally dismissed in November 2007.

Sadly, Mr. Grube's story does not have a happy ending. In February 2009 he suddenly passed away after suffering a massive stroke. Although his brief period of freedom was short-lived, my client and his family enjoyed and cherished the almost three years they had together before he died. Unlike Tom Robinson, my client did find vindication and freedom, although it happened much too late and lasted much too briefly.

REFLECTIONS

Every few years I try to get my children to watch *To Kill a Mockingbird* with me again. In fact, we watched it just last week. Perhaps the fact that I am now a judge has changed my sensitivity a little, because I noticed something about the movie this last time that I had never noticed before. I had always thought that Atticus and Boo Radley were the only adult heroes in the story. However, after my most recent viewing I realized there was a second hero—Judge Taylor.

In the book Jem asks Miss Maudie, "Who in this town [besides Atticus] did one thing to help Tom Robinson, just who?"

She thoughtfully responds: "Did it ever strike you that Judge Taylor naming Atticus to defend that boy was no accident? That Judge Taylor might have had his reasons for naming him?" (247). While he could have appointed any lawyer in town to represent Tom, Judge Taylor chose to appoint the best lawyer in town—Atticus.

I took an unusual path to the bench. In Idaho, most judges are former prosecutors, not defense attorneys. Although criminal defense was only a small part of my legal practice, it was an important part. I wish all judges could have had the privilege of representing at least one innocent man back when they were lawyers. For the system to work, judges should have sufficient imagination to see every person brought before them to answer criminal charges as innocent until proven guilty. Sometimes that takes a lot of imagination: most defendants brought into court either plead guilty or are found guilty based on overwhelming evidence. Unless a judge understands that there are actually innocent people out there, it is easy to become cynical and

jaded. While I will not hesitate to impose an appropriate sentence on a felon—even a harsh sentence if justified by the circumstances—I still strive to ensure that every defendant, even if apparently guilty, receives the fairest possible trial. I have already witnessed one innocent man go to prison during my career as an attorney. I do not want to ever see that happen again while I am a judge.

I have tried to imagine what would have happened to Atticus later on in his life. If there had been a sequel to the book, what would the future have held for Atticus Finch? I can envision several different scenarios:

- 1 Perhaps Atticus would have become disillusioned after the attack on his children and moved away, starting a law practice in the state capital or somewhere up north. I think this is unlikely. Despite Maycomb’s flaws, Atticus seems to be a part of his hometown. I think he would have been more inclined to stay and try to improve things by being a force for good.
- 2 Given his career as a representative in the Alabama state legislature, perhaps Atticus would have someday run for a statewide office, like governor or attorney general. I think this is also unlikely. Any state capable of electing a segregationist like George Wallace to four terms as governor would have been unlikely to elect a man like Atticus Finch.
- 3 I can picture Atticus, after his children were grown, becoming a judge. This is my preferred scenario right now. However, I am unfamiliar with Alabama’s judicial selection process, and I have my doubts that a man with Atticus’s progressive views on race could have been appointed or elected to the judiciary. However, what a judge he would have become! His wisdom and fairness would have blessed the lives of so many.
- 4 In all likelihood, I suspect Atticus would have stayed in Maycomb and remained what his children knew him to be: a simple country lawyer who dispensed sound legal advice and justice to a small community badly in need of his goodness and wisdom. He would not have grown old and rich, but he would have grown old and at peace with himself. If so, I think that this would be a happy ending.

ONE OF THE REASONS ATTICUS APPEALS TO

SO MANY OF US—BOTH LAWYERS AND NON-

LAWYERS ALIKE—IS THAT HE SO CLEARLY

DEMONSTRATES THE CHARACTERISTICS

WE ALL BELIEVE LAWYERS SHOULD HAVE.

TRAITS OF A GOOD LAWYER

Atticus is a remarkable literary figure because he is a lawyer-hero. Lawyers are uncommon protagonists in current literature. More often than not, lawyers are often the villains or the punch line to some oft-repeated lawyer joke. One such joke currently making the rounds is that it has been observed that 99 percent of all lawyers give the other 1 percent a bad name. While I have found that the reverse is far more likely to be true, there is no doubt that Atticus would be among the top 1 percent of all lawyers.

The reason lawyers often undeservedly get a bad reputation is due to the nature of their work. They often work for unhappy, stressed-out people facing a crisis in their life. Another lawyer, representing an equally distressed client, usually opposes them. It is hard to make a good impression when you are in the middle of such contention and acrimony. Nevertheless, my experience has shown me that while most people often see the attorney for the other side as an unethical weasel, they usually like their own lawyer—until they receive the bill.

Working in the legal profession usually changes how a person thinks and acts. After all, one of the oft-stated purposes of law school is to train students to “think like a lawyer.” Therefore, it is no surprise that a life in the law can sometimes affect a lawyer’s personality—and not always for the better. For example, contrast the differing models of how the world views effective lawyers with the traits of a spouse or close friend:

Perceived Traits of an Effective Litigator	Traits of a Good Spouse or Friend
Wins at all cost	Compromises
Cross-examines to discover truth	Trusts others
Never admits he is wrong	Acknowledges his mistakes
Argues any position	Looks for common ground
Attacks vulnerability	Strengthens others
Denies any weakness	Readily admits faults
Thinks for others	Thinks of others ⁷

One of the reasons Atticus appeals to so many of us—both lawyers and nonlawyers alike—is that he so clearly demonstrates the characteristics we all believe lawyers should have. Those traits are empathy, courage, and a strong sense of justice. These are illustrated in many passages throughout *To Kill a Mockingbird*.

Empathy

Atticus has an innate ability to understand the world from the perspective of others. This not only makes him an outstanding trial lawyer but, more important, makes him a great human being. For example, he teaches his daughter, “You never really understand a person until you consider things from his point of view. . . . [U]ntil you climb into his skin and walk around in it” (33). When Atticus’s sister, Alexandra, complains that the members of the African American community often gossip about white people, Atticus responds firmly but with humor, saying, “Maybe if we didn’t give them so much to talk about they’d be quiet” (179).

After the trial, when Bob Ewell spits in his face, Atticus takes no revenge; he merely replies, “I wish Bob Ewell wouldn’t chew tobacco” (249). Atticus understood that Bob Ewell had been humiliated by the trial and allowed him to save face. I cannot help but feel that by bearing this indignity with such grace, Atticus may have unintentionally added to Bob Ewell’s humiliation.

Another example involves Mrs. Dubose, an elderly woman who bad-mouths Atticus in front of Jem. She is described as having a Confederate pistol under her shawl (*see* 114). Her character’s role in the story is much more pronounced in the book. When Jem responds to her derogatory comments against his father by angrily destroying her flowers, Atticus makes him apologize and arranges for Jem to read stories to her every day as she lies in her sickbed. When she later dies, Atticus refers to this bitter, racist woman as “a great lady” because of all the trials she overcame in her life (128). He understands her well enough to see past her obvious faults and discover her hidden strengths.

Courage

Whatever misplaced courage Mike Kam and I showed in protecting our threatened client in the courtroom, it is insignificant compared to the courage displayed by Atticus before the lynch mob. Perhaps few, if any, lawyers have had an opportunity to display such courage.

On the eve of Tom Robinson’s trial, fearing danger to his client, Atticus spends the night in front of the jail. Not even having brought a gun, he just sits outside the door to the jail in a chair from his office while reading a newspaper by the light of a bare lightbulb connected to a very long extension cord. As the mob approaches with murderous intent, they demand to know if Tom Robinson is in

the jail. Atticus bravely replies, “He is, . . . and he’s asleep. Don’t wake him up” (172). Like Daniel in the lion’s den, Atticus had the courage to stand for his principles, baring no weapon other than the moral strength of his convictions.

I feel, however, that these overt acts of bravery are overshadowed by the most profound act of all—the fact that Atticus was willing to represent a black man. He not only represented Tom, but he represented him with extreme diligence and zeal. By so doing he not only put his career at risk but also his own life—and the lives of his children—at risk. Having experienced this myself to a much smaller degree, I can appreciate the terrible dilemma he faced.

Of course Atticus would never define courage by his own actions. Instead he points to the life of his foul-mouthed, racist neighbor, Mrs. Dubose, and her long battle with a terminal illness, teaching his children:

I wanted you to see what real courage is, instead of getting the idea that courage is a man with a gun in his hand. It’s when you know you’re licked before you begin but you begin anyway and you see it through no matter what. [128]

No sentence in the book better describes the heart and spirit of Atticus Finch.

Justice

Earlier I quoted Atticus as saying, “[B]efore I can live with other folks I’ve got to live with myself. The one thing that doesn’t abide by majority rule is a person’s conscience” (120). It made no difference to Atticus if everyone thought something was acceptable. If it offended his conscience, it was not right. When Scout is told not to use the *n* word, she responds, “[E]verybody at school says [it].”

With great clarity and authority, Atticus simply replies, “From now on it’ll be everybody less one” (85).

His conscience, or sense of justice, manifested itself in many interesting ways. For example, when he kills the rabid dog with just one shot, his children discover that their father is an expert marksman. They are shocked because he had never told them of his skills, let alone professed any interest in guns or hunting. Their neighbor, Miss Maudie, explains: “I think maybe he put his gun down when he realized that God had given him an unfair advantage over most living things” (112). He taught his children never to assume they were better than anyone, even if they were smarter, richer, or better mannered. He taught them that it is simply wrong to take advantage of others just because they are not as richly blessed.

Atticus rarely resorts to religion to define what is right and wrong, so when he does, it is striking. Upon giving Jem and Scout their first air rifles he tells them: “I’d rather you shot at tin cans in the back yard, but I know you’ll go after birds. Shoot all the bluejays you want, if you can hit ’em, but remember it’s a sin to kill a mockingbird” (103).

Miss Maudie, once again, provides insight for the children and readers into Atticus’s meaning: “Mockingbirds don’t do one thing but make music for us to enjoy. . . . [T]hey don’t do one thing but sing their hearts out for us. That’s why it’s a sin to kill a mockingbird” (103).

Only as the story progresses do we understand that these words, which find their way into the title of the book, refer to more than just birds. They refer to the Boo Radleys, the Tom Robinsons, and the others among us who are disadvantaged. The mockingbirds are those upon whom justice has given us a special stewardship to protect—people like a special young man falsely charged with murder in a small town.

MY NAME

Before concluding, I should share with you one more interesting footnote about the impact this great story has had on my life. I strongly suspect that it is the source of my first name: Gregory. After *To Kill a Mockingbird* was first published in 1960, it was made into a movie that debuted in December 1962. The Academy Award ceremonies took place on April 8, 1963, about three weeks before I was born. Although it was a masterpiece, the movie faced tough competition for the best movie award, which eventually went to *Lawrence of Arabia*, a well-deserving film. However, *To Kill a Mockingbird* was recognized and rewarded. It not only received an Academy Award for best screenplay adapted from a literary work, but its leading actor, Gregory Peck, also won the award for best actor for his masterful depiction of Atticus Finch.

Since no one in either my mother’s or father’s families had the name Gregory, I often wondered where it came from. Whenever I asked my mom, she always said she had just liked the name. When I got much older, I realized that this movie was a hit right before I was born, and Gregory Peck



“[T]HERE ARE

was then at the apex of his stellar career. I asked my mom if there was any connection between my name and the movie. With a mysterious smile on her face, she said she was not sure. She just remembered that she liked the name. Mere happenstance or not, according to U.S. Census Bureau records, more babies were named Gregory in 1963 than in any other year on record. I am pretty sure this is not a coincidence.

CONCLUSION

In conclusion, I would like to end by referencing the first words of *To Kill a Mockingbird*. Rather than beginning with a lengthy and boring introduction, Harper Lee insisted that her work remain without prefatory comments. She claimed that they “inhibit pleasure, they kill the joy of anticipation, they frustrate curiosity.”⁸ Instead, she began her work with a brief epigraph, a quote by Charles Lamb: “Lawyers, I suppose, were children once.”

By telling her story through the eyes of a child, Harper Lee showed us the hypocrisy inherent in any form of bigotry and prejudice. She did so not only by realistically portraying the racial prejudice that pervades her story but also by depicting other pervasive forms of discrimination. For example, she exposed the Southern caste system that labeled poor whites without established family pedigrees as “white trash,” the custom of locking away the mentally ill in the home, the burgeoning anti-Semitism in Germany before the Second World War, and even the strict gender norms that required little girls like Scout to wear dresses and prevented them from playing football. The hypocrisy of their elders is obvious to young Scout and Jem, even if most of the adults are oblivious to it. There is nothing new in this. Even today, I have noticed that the idealism of young children often makes them walking and talking hypocrisy detectors. What parent has not had their own inconsistencies pointed out by their children? Atticus understood this and wisely advised his brother: “When a child asks you something, answer him, for goodness’ sake. But don’t make a production of it. Children are children, but they can spot an evasion quicker than adults” (99). Atticus always spoke to his children as if they were adults. They responded by showing him not only love and obedience but also maturity and understanding beyond their years.

I am grateful that when I was still a young man I was introduced to this great story. It influenced my life in profound and basic ways. I know that it has impacted the way I raise my

SOME MEN IN THIS WORLD WHO WERE BORN TO DO OUR UNPLEASANT JOBS FOR US. YOUR FATHER'S ONE OF THEM."

children, the way I serve my community, the way I practiced law as an attorney, and, hopefully, the way I administer justice as a judge. This great book is both timeless and timely as our nation and community deal with issues of race and tolerance today. Hopefully, those motivated to read this book will gain a richer understanding of such matters. I know it has been a great gift in my life.

Not only does Harper Lee teach us of principles and ideals we should earnestly seek to emulate, she introduces us to a man who embodies these characteristics: Atticus Finch. Although a fictional character, no doubt based in many ways on Harper Lee's own father, he is my hero too. There is simply so much in him worthy of emulation. Miss Maudie once wisely explained to Jem: "[T]here are some men in this world who were born to do our unpleasant jobs for us. Your father's one of them" (246).

May the world never run out of such men and women.

AFTERWORD

On December 8, 2009, a few months after I delivered this speech, I received an email from Thomas L. Butts, a Methodist pastor from Monroeville, Alabama. He informed me that Mr. Grube's older brother, David, had located him through Harper Lee's publicist and sent him a copy of this speech. Pastor Butts told me Ms. Lee was living in a nursing home, recovering from a serious stroke. As her friend and minister, he visits her weekly, often taking her for walks and reading to her. She is very frail and sees few visitors.

Pastor Butts explained that he took my speech to the nursing home and read it to Ms. Lee. He then wrote:

She asked me to thank you for your kind words about To Kill a Mockingbird. . . .

She does not sign books anymore, except on rare occasions for close friends or family, and almost never personalizes a signed book anymore. I asked her to sign a book for you today, and she did. We placed the book under a powerful magnifying glass with a light shining through it, and the signing turned out pretty good. Tomorrow, she will not remember signing the book.

A few days later I received a hardbound copy of *To Kill a Mockingbird* in the mail. The inscription reads, "To Judge Gregory Moeller with best wishes, Harper Lee." Pastor Butts also enclosed a handwritten letter of authenticity, which he signed. The book and postage were paid for by David. This may be the greatest Christmas gift I will ever receive.

My own story has now come full circle. The woman whose book inspired me to become a lawyer so that I could one day represent an innocent man has now sent me a signed copy of the very same book after she heard my story. Of all the miracles of my life, I will always be amazed and humbled as I recall how my involvement in Mr. Grube's case became entwined with the story of Atticus Finch and Tom Robinson.

Although Atticus may not have saved Tom Robinson's life, in a strange yet real way he gave Mr. Grube his freedom—even if it was for only a few short years. As this wonderful book continues to inspire a rising generation of young lawyers, I am sure Atticus will save many more lives.

Gregory W. Moeller graduated from J. Reuben Clark Law School in 1990. He has been a district judge for the state of Idaho since 2009.

- 1 Shortly after the 2008 presidential election, Rexburg made national news when a local paper reported that a few elementary school students chanted "Assassinate Obama" on a school bus. See Nathan Sunderland, *Rexburg Becomes Center of the Storm*, STANDARD JOURNAL (Rexburg), Nov. 20, 2008, at 1A.
- 2 Gubernatorial candidate Rex Rammell, while answering a question about purchasing hunting tags for wolves, joked that he would like to purchase an "Obama tag." See John Miller, *GOP Leaders Slam Rammell*, POST REGISTER (Idaho Falls), Aug. 28, 2009, at A1.
- 3 All page references from the book *To Kill a Mockingbird* are from the 40th anniversary edition (HarperCollins Publishers 1993) (1960).
- 4 State v. Grube, 126 Idaho 377, 882 P.2d 1069 (1994) (initial appeal denied).
- 5 Grube v. State, 134 Idaho 24, 995 P.2d 794 (1997) (petition for post-conviction relief denied). See J. Kidwell, dissenting.
- 6 Grube v. Blades, 2006 WL 297203 (D. Idaho, Feb. 6, 2006) (petition for *habeas corpus* granted).
- 7 Inspired by FIONA H. TRAVIS, SHOULD YOU MARRY A LAWYER: A COUPLE'S GUIDE TO BALANCING WORK, LOVE AND AMBITION (2004).
- 8 Foreword to the 40th anniversary edition of *To Kill a Mockingbird* (February 12, 1993).

MARTIN LUTHER KING AND THE

Good Samaritan

GOODWIN LIU¹

A few months ago I was asked to speak to a group of lawyers in observance of Martin Luther King's birthday. Had he lived to the present day, Dr. King would have been well into his 80s and, no doubt, a continuing force for justice in our nation and the world. Eighty years is more than twice the length of his actual life, but King's example confirms the adage that what matters is not the years in one's life but the life in one's years.

PAINTINGS BY J. KIRK RICHARDS



It's not hard to write a speech about King. His words and deeds are familiar to all of us, and his legacy was recently memorialized in a monument in Washington, DC. But for this occasion I took the opportunity to read some of King's writings that I had not read before, including his 1963 book *Strength to Love*,² a collection of sermons he preached as pastor of the Dexter Avenue Baptist Church in Montgomery, Alabama, and later as pastor of the Ebenezer Baptist Church in Atlanta. I thought I might share with you a few reflections on King's legacy—in particular, the powerful message he had for each one of us to be a force for good and a force for justice in society.

ON BEING A GOOD NEIGHBOR

The year 1963 was a turbulent one in the civil rights movement. That spring King led the Southern Christian Leadership Conference (SCLC) in its campaign to end segregation in Birmingham, Alabama—at the time one of the nation's most racially divided cities. That campaign of boycotts, sit-ins, and marches produced some of the most memorable images of the civil rights era, including the use of police dogs and water hoses against nonviolent protestors by Birmingham sheriff Bull Connor.

In April, King and his supporters defied an injunction against the protest, and King was arrested for the 13th time, just two weeks after his wife had given birth to their fourth child, Bernice.³ During his incarceration, King wrote his "Letter from Birmingham City Jail" using the margins of a newspaper and scraps of paper supplied by a black janitor. His letter responded to eight local clergymen who had accused King of being an outsider agitator.

King began his letter by answering why he had come to Birmingham. He said his organization, the SCLC, had a local affiliate that had asked him to be there to engage in nonviolent protest. King wrote:

So I am here . . . because we were invited here. I am here because I have basic organizational ties here.

Beyond this, I am in Birmingham because injustice is here. . . .

*. . . I cannot sit idly by in Atlanta and not be concerned about what happens in Birmingham. Injustice anywhere is a threat to justice everywhere.*⁴

That phrase would be just one of King's quotable statements from 1963, for in August of that year King gave his "I Have a Dream" speech on the steps of the Lincoln Memorial as part of the March on Washington for Jobs and Freedom.

Against the backdrop of 1963, King's book *Strength to Love* is more contemplative and more philosophical. It is a religious work. As King wrote in his preface, "I have sought to bring the Christian message to bear on the social evils that cloud our day and the personal witness and discipline required."⁵ But the genius of King's theology was its universalism—its relevance to believers and nonbelievers alike.

I'd like to focus on one sermon in the book called "On Being a Good Neighbor."⁶ In it King retells the parable of the good Samaritan, which, according to the Gospel of Luke, is told by Jesus in response to a lawyer who asks, "Teacher, what shall I do to inherit eternal life?"

Jesus says to the lawyer, "What is written in the law?"

And the lawyer replies, "The law says to love the Lord and to love your neighbor as yourself."

To which Jesus says, "Well, there you have it. Just follow the law."

But the lawyer, being a lawyer, follows up by asking, "Who is my neighbor?"

From there Jesus tells the story of a man, most likely a Jew, traveling the road from Jerusalem to Jericho. He was assaulted by robbers, who beat him and left him for dead. After a while, a priest happened to be traveling the same road, but when he saw the man, he passed by on the other side. Next, a Levite came down the road, but he, too, passed by the injured man. Finally, a Samaritan came by, and when he saw the injured man, he bandaged the man's wounds, put the man on his donkey, brought the man to an inn, and paid the man's tab.

At this point Jesus asks the lawyer, "Who was a neighbor to the injured man?"

And the lawyer said, "He who showed mercy on him."

"Injustice

Then Jesus said, "Go and do likewise."⁷

The simple lesson of this story is that we should be good neighbors and do good deeds, like helping an injured man on the side of the road. And it's true; we should. But King wanted us to see some broader lessons in the story, and today I will mention three virtues he thought important. The first is courage. The second is duty. And the third is justice.

COURAGE

It's one thing to help an injured man when it's not inconvenient, but it's another thing to do so when it may involve a significant cost. In retelling the parable, here is what King said:

The Jericho Road was a dangerous road. When Mrs. King and I visited the Holy Land, we rented a car and drove from Jerusalem to Jericho. As we traveled slowly down that meandering, mountainous road, I said to my wife, "I can now understand why Jesus chose this road as the setting for his parable." . . . Many sudden curves provide likely places for ambushing and expose the traveler to unforeseen attacks. Long

anywhere is a threat to justice everywhere."

ago the road was known as the Bloody Pass. So it is possible that the priest and the Levite were afraid that if they stopped, they too would be beaten. Perhaps the robbers were still nearby. Or maybe the wounded man on the ground was a faker, who wished to draw passing travelers to his side for quick and easy seizure.⁸

While acknowledging the danger, here is how King pivots to make his point. He said:

I imagine that the first question which the priest and the Levite asked was: "If I stop to help this man, what will happen to me?" But . . . the good Samaritan reversed the question [and asked]: "If I do not stop to help this man, what will happen to him?" . . .

We so often ask, "What will happen to my job, my prestige, or my status if I take a stand on this issue?" . . . The good man always reverses the question. . . . Abraham Lincoln did not ask, "What will happen to me if I issue the Emancipation Proclamation and bring an end to chattel slavery?" but he asked, "What will happen to the Union and to millions of Negro people if I fail to do it?" The Negro professional does not ask, "What will happen to my secure position, my middle-class status, or my personal safety if I participate in the movement

to end the system of segregation?" but "What will happen to the cause of justice and the masses of Negro people who have never experienced the warmth of economic security if I do not participate actively and courageously in the movement?"⁹

No doubt this is a very high standard. All of us possess some instinct toward self-preservation, and King understood that you have to pick your battles. Standing up for the cause of justice may expose you to criticism, retaliation, or worse, and often it may seem prudent or more comfortable to just play it safe. But as a friend of mine once said, no one goes to his grave seeking an epitaph that reads, "He kept his options open." King put it this way:

The ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy. The true neighbour will risk his position, his prestige, and even his life for the welfare of others.¹⁰

Although few of us have taken the kinds of risks King took, his message rings true: we need courage if we are to conquer injustice.

DUTY

Here is the second lesson King drew from the parable. The conduct of the good Samaritan is thought to exemplify altruism or charity—a kind of generosity that is praiseworthy in part because it is optional. In first-year torts many law students learn that today we have so-called "good Samaritan laws" that limit the liability of voluntary rescuers in order to encourage this kind of altruism. But recall the parable. A *lawyer* asks the questions, and Jesus tells him to follow the law. When the good Samaritan helps the injured man, he is doing what the law requires—but not the kind of law you can take to court. As King put it, "True neighbors . . . are willingly obedient to unenforceable obligations."¹¹

The term *altruism* does not capture the element of duty in the conduct of the good Samaritan. His good deed is not merely a good deed; it has a moral inflection. Helping the injured man is not something we do when we are feeling generous. It is something we *must* do because of our obligations to one another. Those obligations are unenforceable, but they are obligations nonetheless.

The notion of unenforceable obligations may seem odd or even artificial, especially to law students and lawyers who are trained to seek enforcement of the law. But consider for a moment our everyday obligations to one another and to society—to keep our promises, to refrain from causing injury, to pay our taxes, and, in the case of lawyers, to uphold one's oath to support and defend the Constitution. Do we discharge these legal obligations because of an ever-present threat of enforcement? I would submit that most of us do not obey the law out of fear—whether it is fear of a lawsuit, fear of an audit, or fear of sanctions. Indeed, I would be quite worried, and reluctant, to live in a society in which the primary reason that people obey the law is the threat of enforcement. What kind of society, and what kind of state, would that be? Certainly not one that cherishes liberty as much as we do and not one in which law and morality have much to do with each other.

The legal philosopher H.L.A. Hart famously argued that brute force alone does not make for a system of law. For a legal system to exist, Hart said, people



must generally obey the law. A totalitarian regime might be quite effective in exacting such obedience. But a system of law must have something else. Obedience, he said, must be premised upon acceptance of the law. To loosely borrow Hart's phrase, the law must have authority—it must command our obedience—from “an internal point of view.”¹² In other words, we discharge our legal obligations not simply because we fear enforcement but primarily because those obligations make sense to us as participants in the legal system and as members of a political community.

In describing this internal point of view, Hart stopped short of saying that acceptance of the law necessarily arises from a sense of moral duty.¹³ For King, however, the notion of unenforceable obligations was deeply intertwined with his moral vision of an integrated society. The subtext of the parable is that the Samaritans and the Jews were enemies, dating back to Israel's division into two kingdoms 600 years before Christ.¹⁴ When the Samaritan helps the injured man, a Jew, he is obeying the principle, eloquently expressed by King, that “[w]e are caught in an inescapable network of mutuality, tied in a single garment of destiny.”¹⁵ King urged us to recognize that network of mutuality because that is what makes our obligations to each other make sense from an internal point of view.

King was, of course, a vigorous advocate for civil rights laws. But he recognized that “the ultimate solution to the race problem lies in the willingness of [people] to obey the unenforceable.”¹⁶ The solution must make sense from our perspective as insiders within the legal system. It must proceed from an acceptance, as King put it, that “I must not ignore the wounded man on life's Jericho Road, because he is a part of me and I am a part of him.”¹⁷

JUSTICE

The example of the good Samaritan helping an injured man is admirable. But it is told as an isolated act, limited in scope and cut off from what happened before and what happens after. It is akin to volunteering once a year in a soup kitchen. The volunteer performs a commendable service, but a lack of context can distort its significance. Imagine,

for example, a soup kitchen volunteer who, after working a satisfying day, exclaims, “Wow, that was such a great experience that I hope my kids and grandkids have a chance to do it someday!”

When the good Samaritan encounters the injured man, he is right to bandage his wounds and bring him to safety. It is an act of courage and it is an act of duty, but would we call it an act of *justice*? King understood the parable as an opening for further inquiry. He, of all people, was interested in tackling root causes, not merely Band-Aid solutions. And so he saw the parable as incomplete:

*On the one hand we are called to play the good Samaritan on life's roadside; but that will be only an initial act. One day we must come to see that the whole Jericho road must be transformed so that men and women will not be constantly beaten and robbed as they make their journey on life's highway. True compassion is more than flinging a coin to a beggar; it is not haphazard and superficial. It comes to see that an edifice which produces beggars needs restructuring.*¹⁸

A single good deed can, in many situations, be an act of justice. But justice has other facets as well. The philosopher John Rawls wrote that “the primary subject of justice is the basic structure of society”—by which he meant the institutional architecture of the legal system; the economic system; the system of production, exchange, and transfer; and the system of allocating rights, duties, opportunities, powers, and offices in society.¹⁹ The good Samaritan is not immediately concerned with that kind of justice. But the plight of the injured man, if we were to encounter him today, should cause us to ask some questions: What were the circumstances that required the injured man to walk a dangerous road by himself? Did the road have warning signs that might lead travelers to take appropriate precautions? Why did it take a good Samaritan to respond to his injury instead of law enforcement or some other public institution? And what about the robbers who caused his injury? What were the circumstances that led them to assault and steal from travelers on the Jericho road? Were there any police to patrol the road and deter such robberies? Would the robbers be apprehended, and

would they receive a fair trial and, if convicted, just punishment?

We are duty-bound to be good Samaritans, but King urged us not to lose sight of the bigger picture. “Philanthropy is commendable,” he said, “but it must not cause the philanthropist to overlook the circumstances of . . . injustice which make philanthropy necessary.”²⁰

THE DRUM MAJOR INSTINCT

I hope you draw inspiration, as I have, from these meditations on King’s legacy. Perhaps no one captured his legacy better than King himself, so I will close with a passage you’ve heard before. It’s from his sermon called “The Drum Major Instinct,” which he gave at the Ebenezer Baptist Church in Atlanta on February 4, 1968, exactly two months before his death.

All of us, he said, have basic human desires for attention, recognition, and importance. King called this the drum major instinct—an instinct “to be important, to surpass others, to achieve distinction, to lead the parade.”²¹ King acknowledged that he too had the drum major instinct, but he went on to explain how the instinct can distort one’s personality and produce a false sense of greatness so powerful that it can undergird a system of racial caste.

So King sought a different definition of greatness, and it is in that sermon that he said, “[E]verybody can be great. Because everybody can serve.”²² At the end of the sermon, prophetically he imagined his own funeral:

[I]f you get somebody to deliver the eulogy, . . . [t]ell them not to mention that I have a Nobel Peace Prize. . . . Tell him not to mention where I went to school.

I’d like somebody to mention that day, that Martin Luther King, Jr., tried to give his life serving others. I’d like somebody to say that day that Martin Luther King, Jr., tried to love somebody. I want you to say that day that I tried to be right on the war question. I want you to be able to say that day that I did try to feed the hungry. And I want you to be able to say that day that I did try, in my life, to clothe those who were naked. I want you to say, on that day, that I did try, in my life, to visit those who were in prison. I want you to say that I tried to love and serve humanity.

*Yes, if you want to say that I was a drum major, say that I was a drum major for justice; say that I was a drum major for peace; I was a drum major for righteousness.*²³

Those words speak for themselves, and I think King’s ultimate message was that we can all have those things said of us if we live a life of courage, duty, and justice.

NOTES

- 1 Associate Justice, California Supreme Court. Justice Liu was a Jurist-in-Residence at the J. Reuben Clark Law School on March 1–2, 2012. Reprinted here are remarks he gave to the BYU Law School community during his visit.
- 2 MARTIN LUTHER KING JR., *STRENGTH TO LOVE* (1963).
- 3 For an overview of the events, see *Walker v. City of Birmingham*, 388 U.S. 307 (1967).
- 4 Martin Luther King Jr., *Letter from Birmingham City Jail*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 289, 289–290 (James Melvin Washington ed., 1986).
- 5 KING, *supra* note 2, at ix.
- 6 Martin Luther King Jr., *On Being a Good Neighbor*, in KING, *supra* note 2, at 16.
- 7 See Luke 10:25–37.
- 8 KING, *supra* note 6, at 20.
- 9 *Id.*
- 10 *Id.*
- 11 *Id.* at 23.
- 12 H.L.A. HART, *THE CONCEPT OF LAW* 88–99 (2d ed. 1994). I say *loosely* because commentators have differed on what Hart meant by “internal point of view.” For helpful background, see Scott J. Shapiro, *What Is the Internal Point of View?*, 75 *FORDHAM L. REV.* 1157 (2006).
- 13 See HART, *supra* note 12, at 203.
- 14 See KING, *supra* note 6, at 19 (“If the Samaritan had considered the wounded man as a Jew first, he would not have stopped, for the Jews and the Samaritans had no dealings.”).
- 15 KING, *supra* note 4, at 290.
- 16 KING, *supra* note 6, at 23.
- 17 *Id.*
- 18 Martin Luther King Jr., *A Time to Break Silence*, in *A TESTAMENT OF HOPE*, *supra* note 4, at 231, 241.
- 19 JOHN RAWLS, *A THEORY OF JUSTICE* 7 (1971).
- 20 KING, *supra* note 6, at 19.
- 21 Martin Luther King Jr., *The Drum Major Instinct*, in *A TESTAMENT OF HOPE*, *supra* note 4, at 259, 260.
- 22 *Id.* at 265.
- 23 *Id.* at 267.

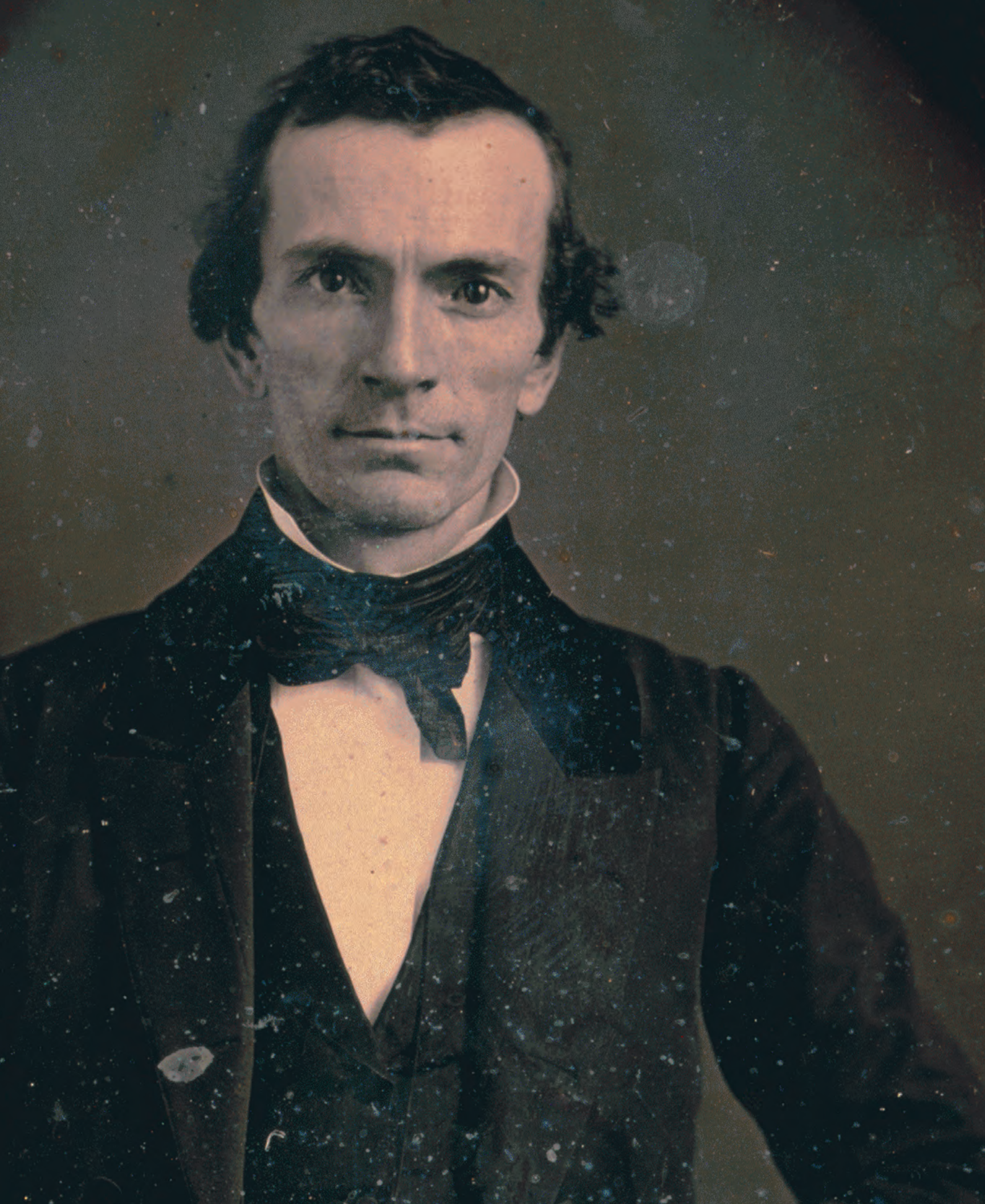
OLIVER COWDERY

> > > > > > > > >

BY JEFFREY N. WALKER

The First Mormon Lawyer

Among the founding elders of Mormonism, Oliver Cowdery was the only lawyer. That intrigues me. In 2006, as a group of fellow historians¹ started preparations to celebrate Cowdery's 200th birthday,² I decided to learn more about his law practice. As I gathered materials about Cowdery,³ I found only passing references to his practice of law. This was understandable, since most of the time during which he practiced law he was out of the Church. My interest led me to Tiffin, Ohio, about 115 miles southwest from Kirtland, Ohio, where Cowdery practiced law for about eight years, from 1840 to 1848. There, to almost everyone's surprise, we located in a closed courthouse basement thousands of pages of filed documents written in Cowdery's own handwriting, still tied together with conventional blue ribbons.⁴



More than 2,000 pages of his law practice have now been digitized along with thousands of additional pages from minute and record books.⁵ As these new sources have been organized and transcribed, a window into early 19th-century frontier law has emerged, and Cowdery has arisen as a capable and respected attorney.

In my efforts to understand his legal practice, I found myself almost having conversations with Oliver Cowdery about the facts, procedures, and legal precedents of the cases he handled. His practice encompassed the full spectrum of a country lawyer's practice, representing both plaintiffs and defendants in criminal and civil matters. His pleadings evidenced a keen understanding of the unique nuances of practicing law in the 1840s. His practice came at a unique period in the development of the "American System" of law.⁶ Before 1848 American courts followed practices principally derived from the English courts of the King's Bench and Common Pleas.⁷ Commencing a case was done through a complex use of writs. Exacting language was required, thereby making formbooks a necessity. Dozens of available writs were separated into real,⁸ personal (further divided into contracts⁹ and torts¹⁰), and mixed claims.¹¹ Cowdery's practice evidenced a creative and broad understanding of the law and available procedures. At times I was surprised at his skill in approaching his cases, as he sometimes used obscure writs or processes.¹²

THE SECOND ELDER OF MORMONISM

The path that led Oliver Cowdery to the legal profession is inherently intertwined with his pivotal role in the Restoration. He is remembered as the second elder of Mormonism and the sole companion to Joseph Smith at foundational moments, such as during the translation of the Book of Mormon, the restoration of the Aaronic and Melchizedek priesthoods, and the vision of Christ and the Old Testament prophets in the Kirtland Temple. No one else stood in a more unique position to either testify for or against the Prophet. And Cowdery clearly understood the unique position he held. "Being the oldest member of the Church,"¹³ he wrote to Phineas Young in 1848, "and knowing as I do what she needs, I may be allowed to suggest a word for her sake, having nothing but her interest in view."¹⁴ As a consequence of his being present during these seminal moments, his credibility is most significant, and his character and reliability can be defined by his professional practice and legal reputation.

Cowdery's years in Kirtland marked the pinnacle of his career within the Church. He led the first missionary efforts through Ohio in 1830, and his successes there soon led to Kirtland becoming the headquarters of the Church for more than seven years. His converts included Sidney Rigdon, Edward Partridge, Isaac Morley, John Murdock, Lyman Wight, Frederick G. Williams, and others who became key leaders. In December 1834 he was called by Joseph Smith to be the assistant president of the Church, a position he held until his excommunication in April 1838. During the years 1830 to 1838, Cowdery was involved in virtually every aspect of the Church in both Missouri and Ohio.

During this time Oliver saw the value and importance of the law. Building on his interests as a schoolteacher and a publisher, he devoted his professional efforts for much of his adult life to the law. For a three-month period in 1836, Cowdery kept a diary. On January 18, 1836, in what appears to be his first recorded indication of his interest in practicing law, he wrote:

Recorded blessings until evening, when a man came in by the name of Lee Reed, and said that he had been sued for an assault, and that his opponent had sought thus to destroy him: he urged me to go before the court and plead his cause. On examining the same before the court, I saw the man was guilty of a misdemeanor, and could not say but little in his behalf. He was finally bound over to await his trial before the court of common Pleas [sic]: this descission was just, for he was guilty of throwing a stick against a little child.¹⁵

On May 15, 1837, Cowdery was elected by an almost unanimous vote to serve as a justice of the peace for Kirtland, a position he held until August 1837, when he decided to move his family to Far West, Missouri.¹⁶ During these three months Cowdery heard approximately 240 cases.¹⁷

In Missouri he aligned himself with his close friend and brother-in-law David Whitmer, president of the Church in Missouri.¹⁸ By January 1838 Cowdery began making definite plans to practice law. That month he wrote to his brother Warren that he had obtained some law books to study, including “Black Stone 2 Vols. Kent 4 Vols., Commy and Doc., Starkie on Evidence 2 Vols., Story’s Commentaries I Vol., Wheaten’s International, Ohio’s reports, Missouri Doc. Statute 1 Vol. and have sent and expect in March between 50 and 60 vols more.”¹⁹ On March 10, 1838, he again wrote from Missouri to his brothers, Warren and Lyman, in Ohio, confirming that he anticipated receiving “some 55 volumes,” stating:

When I become acquainted more familiarly with the leading lawyers of the county, and the practice of the courts, if you are not here in the interim, will write you more fully. I have read some of the Supreme Court reports of this state, and think, generally, they will evince a very good knowledge of law. How I shall like the practice of the inferior courts, I cannot say. . . . I am pursuing my study as fast as health and circumstances will permit and hope I may feel competent to apply for a license in this summer.²⁰ If I do I shall have to go down the country to see one of the Judges of the Supreme Court, or attend the court itself which does not sit very near. The circuit attorneys are elected by the people—I have no doubt if L. [Lyman] was here he could get the office very soon.²¹ If we can live here in peace we can grow up with the country and have our full share of publick matters.²²

This letter also noted that Cowdery apparently was already lining up legal work: “We [Cowdery and Lyman E. Johnson] have some four or five suits to attend to at the next term of the Circuit Court (2nd of April); but we will have to employ some one to advocate the suits in open court.”²³ At this point neither Cowdery nor Johnson were members of the Missouri bar, but they had already started to get clients. Perhaps this was the reason Oliver was trying to entice his brother Lyman, already a lawyer in Ohio, to come to Missouri. The statutes governing the practice of law were very clear, and Cowdery and Johnson apparently understood that they could not appear in the circuit court (which were courts “of record”) without a law license.²⁴ Lower justice-of-the-peace courts were not courts of record, however, and no license was required to represent parties there.

By spring 1838 Joseph Smith, his family, and other key leaders had left Kirtland and moved to Far West. Simultaneously, antagonism of Thomas B. Marsh and David W. Patten (members of the Twelve) and the Far West high council reached a head against David Whitmer, W. W. Phelps, and John Whitmer of the Missouri presidency. Cowdery aligned himself with his Whitmer relatives. The disputes between these men and groups festered into the apostasy and excommunication of Cowdery, the Whitmers, and several others.

On April 12, 1838, Oliver Cowdery was tried in absentia before the Far West high council court and excommunicated. He did not attend the hearing, claiming that the high council lacked jurisdiction over him because of his position as assistant president of the Church.²⁵ Nine charges were brought against him, counts one and seven dealing with his interest in being a lawyer: “1st, For stirring up the enemy to persecute the brethren by urging on vexatious lawsuits²⁶ and thus distressing the innocent,” and “7th, For leaving the calling, in which God had appointed him, by Revelation, for the sake of filthy lucre, and turning to the practice of Law.”²⁷ John Corrill and David Patten testified that Cowdery had “used his influence to urge on lawsuits.” Beyond that, Frederick Williams reported that some people had implicated Cowdery in a “bogus money” counterfeiting business in Kirtland, which Cowdery had denied, but he had not stayed in town to exonerate himself in court, as Joseph had told him to do if he was innocent. While Cowdery did not substantively defend himself against all these charges, he did submit a letter, also dated April 12, 1838, addressed to Bishop Partridge, explaining himself on several points, declaring that he had “no disposition to contend with the Council,” and requesting that they “take no view of” the nine points raised against him other than the accurate remarks about his views on “the outward governments



The Susquehanna River, near the home of Joseph Smith Jr., where Oliver Cowdery and Joseph Smith were baptized after the Aaronic Priesthood was conferred upon them by the angel John the Baptist.

Wolf v. Bishop (Seneca County, Ohio, Court of Common Pleas, June term 1844) involved a Writ of Debt action. Pleading is in the handwriting of Oliver Cowdery.

The State of Ohio, } Court of Common Pleas
Seneca County, ss. } of said County, June term, A.D.
1844.

John S. Wolf }
& Japhet Bishop } Action of Debt.

vs. }
John Klein } Asnigable Debt, to wit: the said

Plaintiffs, } vs. the said John Klein is defendant, commenced in a plea of Debt. And therefore the said plaintiffs, by O. Cowdery, their attorney, complain for that whereas the said defendant hath, to wit, on the 27th day of April A.D. 1844, at the County of Seneca of said, made his certain writing obligatory of that date sealed with his seal, and now to the Court here shown, and then and there delivered the same to the said plaintiffs, and thereby then and there acknowledged himself to be bound to the said plaintiff in the said sum of one hundred and seventy nine dollars, to be paid to the said plaintiff; yet the said defendant, (though often requested so to do) has not, as yet, paid the said sum of one hundred and seventy nine dollars, or any part thereof, to the said plaintiff; but has hitherto idly neglected and refused, and still doth neglect and refuse so to do, to the damage of the said plaintiff of one dollar and seventy nine cents wherefore he brings, &c.

O. Cowdery, this atty

of the Church.”²⁸ Cowdery also expressed the conciliatory wish that “those charges might have been deferred until after my interview with President Smith,” but unfortunately they were not.

After his excommunication in April 1838, Cowdery continued to explore practicing law in Missouri, possibly moving from Far West to Daviess County. These options ended abruptly in June 1838 when Sidney Ridgon purportedly authored a lengthy ultimatum to the recent dissenters, including Oliver Cowdery, threatening, “You shall have three days after you receive this communication . . . for you to depart with your families peaceably; which you may do undisturbed by any person; but in that time, if you do not depart, we will use the means in our power to cause you to depart; for go you shall.”²⁹

A STUDY OF THE LAW IN ERNEST

While a number of those purged during this time actively turned against the Church, Cowdery bowed out gracefully, temporarily relocating to Richmond, in Ray County, where he concentrated his efforts on leaving Missouri, possibly to go to Springfield, Illinois, to further his preparations to practice law. In a letter dated June 2, 1838 (before his departure from Far West), Cowdery explained to his brothers his disappointment at having not received the law books as anticipated: “I suppose I could get some yet, but if I go to Ill. soon, I think I better defer for the present, as I presume they can be had cheaper there than here, besides a transportation back.” He continued, “I have already written you all the books I have. I shall probably get Chitty’s Criminal Law, Russell on Crimes, Selwyn’s Nisi Pricas, Hawkin’s Pleas of the Crown & some one on Chancery Practice—may be Maddock’s or Story’s Equity, and perhaps some others.”³⁰ Cowdery summarized his professional ambition to base his practice of law on solid treatises and skillful writing:

*I take no satisfaction in thinking of practicing law with [only a] half dozen books. Let us get where people live, with a splendid Library, attend strictly to our books and practice, and I have no fear if life and health are spared, but we can do as well as, at least, the middle class. I have had little or no law practice to test my skill or talent; but were it editing a paper, or writing an article for the public eye, I should feel perfectly at home. . . . My present wish is to place myself in a situation to support my family, and help my friends, without addressing any more responsibility than possible. Were it not for the situation of things I should never want to leave this State [of Missouri].*³¹

Cowdery also showed his collegial personality as he solicited others to join him in relocating to practice law with him:

*L. E. Johnson writes this mail for his father or brother to help him to a law library; and probably will also write to W. Parrish and invite him to come to Ill. and go into the profession of law with him. Now, if <bro.> Lyman and myself were in a spirited place, bro. Warren near, with our old friends scattered about in the adjoining counties, we could be of material benefit to each other. I am satisfied, that we can live together as well as to live separate. What is life without society? And where is that to be found more agreeably than in the company of relatives, if dictated by the principles of honor and honesty?*³²

By August 1838 Cowdery finalized plans to leave Missouri. Yet instead of going to Illinois he decided to return to Ohio to be near his family and practice law with his brother Lyman. In this regard, Lyman wrote:

Yesterday the Supreme Court commenced its Session in this County, I was admitted <an Atty> to all the Courts in this state, and to day have Rec^d \$7.00 in cash if you had been hear you would now of been admitted to, and not only that, you would of earnt sufficient to supported yourse<lf>

& family Silvester has more than don it and besides made great proficiency in his study, he would have a good examination.³³

Lyman further encouraged Cowdery's move "back home," noting, "I would go to your place but I do not see as I could do you the good that you would do your self by comeing here."³⁴ Cowdery moved back to the Kirtland area by late 1838.³⁵ There he started his study of the law in earnest under the tutelage of Benjamin Bissell,³⁶ a prominent attorney in Painesville.³⁷ Cowdery was well acquainted with Bissell, who previously represented the Church's interest in various lawsuits while headquartered in Kirtland.³⁸ Oliver studied law through 1839, was admitted to the Ohio bar,³⁹ and commenced practice with his brother Lyman as early as January 1840.⁴⁰

During this time Cowdery became politically active in the Democratic Party in the Kirtland area. He was chosen as a delegate for Geauga County for the bicounty senatorial convention in which Benjamin Bissell was elected a state senator. It appears that these political activities led him to the city of Tiffin, Ohio, in 1840. William Lang, who studied law under Cowdery, described Cowdery's introduction to Tiffin:

In the spring 1840, on the 12th day of May, he [Oliver Cowdery] addressed a large Democratic gathering in the street between the German Reformed Church of Tiffin and the present residence of Hez. Graff. He was on a tour of exploration for a location to pursue his profession as a lawyer. . . . In the fall of the same year he moved with his family to Tiffin and opened a law office on Market Street.⁴¹

A TENACIOUS ADVOCATE

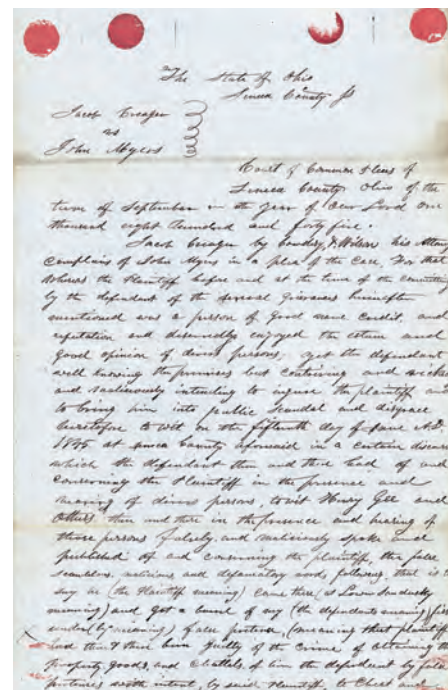
The first known case filed by Oliver Cowdery in Tiffin is dated August 31, 1840, and captioned as *Cronise v. Betz* (Seneca County, Court of Common Pleas), an assault and battery case representing the defendant. The second is *Stucky v. Stucky* (Seneca County, Court of Common Pleas, September 19, 1840), a complicated case of partitioning real property. Cowdery's name alone appears on these pleadings. Court files⁴² show that by mid-November 1840 Cowdery had partnered with Joel W. Wilson.⁴³ They would remain partners throughout Cowdery's eight years in Tiffin.

Consider this interesting sample of cases from Oliver Cowdery's practice, demonstrating the breadth of his frontier law practice:

1. *Boyer v. Shawhan* (Seneca County, Court of Common Pleas, January 10, 1842). In this case Boyer sued Shawhan, alleging that Shawhan stole a yoke of oxen. Boyer claimed damages of \$75 for the loss of his oxen, another \$75 to acquire a replacement pair of oxen, and a final \$75 for expenses incurred due to having the oxen stolen. Cowdery successfully defended Shawhan, and costs of \$14.39 were assessed against Boyer. Boyer appealed the judgment. After the filing of the appeal the parties settled the matter, with Shawhan agreeing to pay the court costs.

2. *Briggs v. Tyler* (Seneca County, Court of Common Pleas, May 7, 1845). The first part of this case was brought before a justice of the peace by Catherine Briggs, a young unmarried woman who delivered a child on April 7, 1845. Catherine alleged that Asa Tyler was the father. The justice of the peace found that Tyler was the father and ordered him to pay to Catherine \$40 and \$2.80 in costs. In the second part of this case, Cowdery represented Catherine's father, Joseph Briggs, against Tyler under the writ of "seduction of a servant." Under this writ, Briggs sought damages due to Tyler impregnating Catherine and leaving her unable to perform her duties to the family, claiming damages of \$1,000. After taking a series of depositions and protracted settlement discussions, the case settled, with Tyler paying court costs.

3. *Creager v. Myers* (Seneca County, Court of Common Pleas, September 3, 1845) was a slander suit. Creager, Cowdery's client, claimed that Myers had slandered him by asserting that Creager had stolen a barrel of fish. Creager sought \$1,000 in damages. Discovery was



Declaration (complaint) in *Creager v. Myers* (Seneca County, Ohio, September term 1845) to bring a slander action. Pleading is in the handwriting of Oliver Cowdery.

completed, including taking four depositions. The case was tried over four days. Seventeen witnesses were called. Judgment was found for Creager, and he thereafter assigned \$255 of the judgment to Cowdery for the attorney's fee—a considerable amount in the 1840s.

4. *Munger v. Munger* (Seneca County, Court of Common Pleas, May 15, 1846). Cowdery, representing the husband, filed a petition for divorce on the basis that Munger's wife had left him for more than three years. He also sought the custody of the five children—all girls. As Mrs. Munger had apparently abandoned the family, notice (or service) of the petition was published in the local newspaper. Cowdery took four depositions of witnesses supporting Mr. Munger's petition. Five months later Cowdery presented the depositions in court, and the petition was ultimately granted.



The Oliver Cowdery Monument,
Richmond, Missouri.

As with most legal practices, Cowdery spent a great percentage of his time seeking collections for various clients. While these cases may be considered simple, as most attorneys can attest, collection work often requires considerable creativity, and Cowdery's collection efforts show creative ability. In *Cornell v. Wayman* (Seneca County, Court of Common Pleas, November 27, 1843), Cowdery was retained to seek collections against Moses Cornell for a judgment entered against Thomas Wayman on June 24, 1837, for \$28 in a Justice's Court. Cornell had initially sought to avoid the execution on his property by allegedly transferring his property to his father immediately prior to the judgment being entered. Six years later Cowdery brought this action in the chancery division of the Court of Common Pleas to seek an equitable rather than legal remedy, because by that time the property was back in Wayman's name but mortgaged. The mortgage was the result of Wayman having been elected as a constable, which required Wayman and two other sureties to post a bond. These sureties placed a mortgage on the property as collateral for liabilities they might incur as sureties during the tenure of Wayman's appointment. Arguments by Cowdery included that Wayman's term had expired, therefore any such need for the mortgage had expired. Further, Cowdery argued that as a result of the expiration of the term, the chancery court could determine if the sureties were subject to any financial liability and whether any proceeds from the sale of the property should be allocated to them. Ultimately

the court agreed with Cowdery's analysis, finding that \$15.84 be allocated to the sureties and \$39.76 be allocated to Cornell (which included interest and costs). Ironically, no attorney's fees were allocated to Cowdery for his efforts. Cowdery filed an exception over this omission, and the court thereafter amended the ruling by adding \$10 for attorney's fees. As this case demonstrates, Cowdery was a tenacious advocate for his clients.

A MAN OF INTEGRITY AND HONOR

A survey of the 10 years that Cowdery spent outside of the Church (1838–48) permits an examination of his character independent of any influence of Church dynamics. In his own words he gave an accounting of this decade to the Saints upon his return and rebaptism in early November 1848 in the vicinity of Council Bluffs, Iowa:

*I feel that I can honorably return. I have sustained an honorable character before the world during my absence from you, this tho a small matter with you, it is of vast importance. I have ever had the honor of the Kingdom in view, and men are to be judged by the testimony given.*⁴⁴

On this occasion, Cowdery further assured the high council that he was not seeking to be reinstated to his position within the Church: "I am out of the Church. I know the door into the Church, and I wish to become a member thro[ugh] the door. I wish to be a humble member. I do not come here to seek honor."⁴⁵ He concluded:

Daguerreotype of Oliver Cowdery (on contents page and pages 38–39), circa 1846, by James Presley Ball from Cincinnati, Ohio; discovered in 2006 by Patrick Bishop in the Library of Congress and Photographs Division.

The home where Oliver Cowdery died, Richmond, Missouri.

*I have not come to seek place, nor to interfere with the business and calling of those men who have borne the burden since the death of Joseph. I throw myself at your feet, and wish to be one of your number, and be a mere member of the Church, and my mere asking to be baptized is an end to all pretensions to authority.*⁴⁶

Cowdery was rebaptized that November by Orson Hyde, who was president of the Quorum of the Twelve Apostles—a calling that Cowdery, David Whitmer, and Martin Harris had ordained him to February 15, 1835. Cowdery stayed in the Council Bluffs area for several months, assisting Orson Hyde in setting up a printing business and making plans to open a nursery in Utah. He and his family then traveled to visit his wife’s family back in Missouri in January 1849, with the plan to make the trek as soon as possible to Utah. As they tarried in Richmond, Missouri, with David Whitmer’s family, in an effort to earn some money for the trip west, Cowdery was admitted to the Missouri bar on March 7, 1849.⁴⁷ Yet his health was failing. He was asked by the First Presidency of the Church to travel with Almon W. Babbitt to Washington, DC, to seek the admittance of the “State of Deseret into the Union.”⁴⁸ However his health continued to deteriorate, preventing him from traveling to Washington on behalf of the Church.

Early in 1850 he was visited by Jacob Gates, an old Mormon acquaintance, to whom he testified in legal tones:

*Jacob, I want you to remember what I say to you. I am a dying man, and what would it profit me to tell you a lie? I know . . . that this Book of Mormon was translated by the gift and power of God. My eyes saw, my ears heard, and my understanding was touched, and I know that whereof I testified is true. It was no dream, no vain imagination of the mind—it was real.*⁴⁹

On March 5, 1850, Oliver Cowdery died at David Whitmer’s home, surrounded by his family and friends. He was 43 years of age.

Although he was one of the significant founding fathers of Mormonism, Cowdery spent nearly half of his adult life outside the Church. During that decade when he was silent in Church history, he made important contributions to his community as an attorney. In studying Cowdery’s legal practice, his integrity, ability, reputation, concern, and capacity as an attorney are evident. Documents from his law practice in Tiffin demonstrate his intellectual and professional skills. Echoing this sentiment is William Lang’s remembrance of Cowdery, his mentor and colleague, written in 1880:

*Mr. Cowdery was an able lawyer and a great advocate. His manners were easy and gentlemanly; he was polite, dignified, yet courteous. He had an open countenance, high forehead, dark brown eyes, Roman nose, clenched lips and prominent lower jaw. He shaved smooth and was neat and cleanly in his person. He was of light stature, about five feet, five inches high, and had a loose, easy walk. With all his kind and friendly disposition, there was a certain degree of sadness that seemed to pervade his whole being. His association with others was marked by the great amount of information his conversation conveyed and the beauty of his musical voice. His addresses to the court and jury were characterized by a high order of oratory, with brilliant and forensic force. He was modest and reserved, never spoke ill of any one, never complained.*⁵⁰

Oliver Cowdery’s professional life as an attorney complements—indeed supports—the unique place that he filled as Joseph Smith’s scribe, companion, editor, assistant, and friend. Oliver Cowdery should be honored as the first Mormon lawyer and as a professional person any aspiring attorney can look to as an example.



NOTE

This article was originally published as a brochure to accompany the unveiling of the portrait *Oliver Cowdery*, painted by Ken Corbett in 2006. Presented to the Law School on November 5, 2013, by the Church History Department, the painting was commissioned by the Mormon Historic Sites Foundation from the daguerreotype on pages 38–39. The notes for this article are available in the brochure, located online at www.law2.byu.edu/site/files/info/CowderyWeb1.pdf.



IN DEFENSE OF RELIGIOUS FREEDOM

Facing the Pressing Religious Issues of the Day

HANNAH CLAYSON SMITH

Hannah Clayson Smith graduated with honors from BYU Law School in 2001. She served as executive editor of the BYU Law Review, as a research assistant for the BYU International Center for Law and Religion Studies, and as president of the BYU Federalist Society. She filled two clerkships at the U.S. Supreme Court, for Justices Clarence Thomas and Samuel A. Alito Jr. Currently she works as legal counsel for the Becket Fund, a public interest law firm based in Washington, DC, that is aimed at defending religious liberty. The recipient of one of BYU's 2013 Alumni Achievement Awards, Smith lectured at the Law School on August 29, 2013. Excerpts from her remarks are printed here.

The Latter-day Saints' commitment to fight for religious freedom for people of all faiths began at our beginning. The Prophet Joseph Smith said:

The Saints can testify whether I am willing to lay down my life for my brethren. If it has been demonstrated that I have been willing to die for a "Mormon." I am bold to declare before Heaven that I am just as ready to die in defending the rights of a Presbyterian, a Baptist, or a good man of any other denomination; for the same principle which would trample upon the rights of the Latter-Day Saints would trample upon the rights of the Roman Catholics, or of any other denomination who may be unpopular and too weak to defend themselves. [History of The Church of Jesus Christ

of Latter-day Saints, ed. B. H. Roberts (Salt Lake City: The Church of Jesus Christ of Latter-day Saints, 1932–51), 5:498]

In 2007 I chose to join the Becket Fund because it is the only nonprofit, nonpartisan public interest law firm that defends the religious freedom of people of all faiths. We were founded almost 20 years ago, and since then we have represented the Amish, Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Sikhs, and Zoroastrians. We believe that religious freedom is a God-given right for all people and that in a pluralistic society with many different views on religion, protecting this basic civil right of religious expression is an essential part of our constitutional order.

The Ministerial Exception

A couple of years ago the Becket Fund represented Hosanna-Tabor Evangelical Lutheran Church and School before the Supreme Court in a case that involved an effort to restrict the freedom of churches and faith-based associations to organize and choose their own leaders based on religious criteria. The LDS Church filed an amicus brief in the case, as did the International Center for Law and Religion Studies.

For 40 years all of the federal courts and many state supreme courts had recognized the existence of a ministerial exception—a constitutionally based rule that exempted certain religiously based employment decisions from the reach of certain employment laws. In the Hosanna-Tabor case, the Department of Justice argued that these ministerial exceptions should not exist and that if they did, they should apply only to those employees who performed exclusively religious functions.

All nine justices on the Supreme Court rejected these two arguments and called them extreme, remarkable, and untenable. I was sitting in the courtroom during oral argument for this case, and it was quite striking to me that there was such unanimity among the justices—which is quite rare, especially in cases that involve religious freedom. Justice Elena Kagan leaned forward and said, "Is that really what you're arguing?"

On Equal Terms

We represented the Islamic Center of Murfreesboro, Tennessee, when they wanted to build a bigger mosque. There was a ground swell of opposition.

The county planning commission had approved the new mosque at a regular meeting held with regular public notice. All of the i's had been dotted and the t's had been crossed, but a state court judge held that this public notice was insufficient because of the "tremendous public interest" surrounding the mosque. The judge decided that the county commission's approval process should have met a heightened legal standard.

We filed a federal lawsuit, along with the Department of Justice, to complete the building permit process, arguing that applying a tougher legal standard than for a Christian church violated the Constitution. The federal judge ultimately agreed with us, and the mosque was completed in time for Ramadan.

Faith or Profession: A Forced Choice?

We represent several religious pharmacists in lawsuits in Illinois and Washington, challenging state regulations that require them to stock and dispense Plan B and Ella, two abortion-inducing drugs, even when doing so violates their religious conscience. In Washington the state licensing board for pharmacists initially supported a rule that would protect the conscience of these pharmacy workers and permit them to refer clients to other nearby pharmacies if they had a religious objection to fulfilling the request for the drug. Then the governor got involved, pressuring the board, and it reversed course.

In the proceedings it became clear that there was no evidence that anyone in the state had been unable to obtain medication due to the religious objection

of any pharmacist. Yet despite this lack of evidence, the board issued a regulation that required pharmacists to stock the drugs and dispense them, even if it violated their conscience.

We sought to prevent this new regulation from forcing our clients to choose between their faith and their profession. One had already lost her job and the other was threatened with losing hers. We successfully persuaded the trial court to find the Washington regulations unconstitutional, and we continue to represent these clients on an appeal.

Redefining Antidiscrimination Laws

There is a concern that state court decisions and new state statutes redefine antidiscrimination laws to prohibit discrimination on the basis of sexual orientation or conduct but lack sufficient corresponding protections for religious freedom. For example, in Massachusetts, Illinois, and the District of Columbia, faith-based adoption agencies such as Catholic Charities have been forced to stop placing children for adoption, and in some cases they have had to even close their doors rather than capitulate to these new legal requirements that violate their religious teachings on the family.

On the issue of same-sex marriage and religious liberty, we at the Becket Fund don't take a position only to the extent that it touches on religious freedom. In December 2005 we hosted a conference of noted First Amendment scholars that represented a wide view on this issue and looked at the religious freedom implications of same-sex marriage. The conference resulted in a book called *Same-*

Sex Marriage and Religious Liberty: Emerging Conflicts. It remains the touchstone of scholarly discourse on this subject.

Religion in the Public Sphere

Some seek to expunge all visible evidence of religion from public life. This effort is manifested in lawsuits that, for example, try to strip the words *under God* from the Pledge of Allegiance or remove religious symbols from any area in the public square. We have been actively defending the words *under God* in several Pledge of Allegiance cases around the country. In California we successfully argued before the Ninth Circuit Court of Appeals that the phrase "under God" affirms a foundational political premise in the American tradition of law and rights—mainly that human rights are not bestowed by the state but are rather derived from a source beyond the state's discretion. Thus, the words *under God* do not unconstitutionally advance religion but rather reflect the deeply rooted political philosophy of the founding fathers, who believed these rights derived from a source greater than the government made of men. The Ninth Circuit agreed with our arguments, and it reversed course.

Fighting the Blaine Amendments

The Blaine Amendments are state constitutional provisions rooted in discrimination against faith communities. Yet these amendments, which have been passed in many states around the country, are more restrictive than the current federal establishment clause of jurisprudence. The Supreme Court recognized in a previous

opinion that the passage of these amendments several generations ago was rooted in anti-Catholic bigotry. Today these amendments are used as an obstacle, for example, to block school choice programs that allow students attending religious private schools to benefit from public funds on an equal basis with students in public schools—simply because these schools are religious.

We have represented several disabled children and their families in lawsuits in Oklahoma. The school districts wanted to prevent these children from using state scholarship funds to attend religiously affiliated private schools tailored for their disabilities. The argument relied on the state's Blaine Amendments. Last fall the Oklahoma Supreme Court ruled on a technical ground in favor of the scholarship program and in favor of our clients, and these disabled children were able to continue attending these schools.

The Next Generation of Advocates

I am incredibly grateful for the work that the BYU Law School does to prepare the next generation of advocates, who are going to be versed in religious freedom law and who will be able to make the arguments and articulate the reasons we need to defend religious freedom. I am grateful for the experience that we had here at the Law School, for the ways in which it prepared us to move forward into the world and to practice law in areas that have such meaning. I am grateful for the many people here who have helped us along the way and who have been so instrumental in giving us opportunities and supporting us in our careers.



*With the bridge and patio torn down and summer's construction over,
the J. Reuben Clark Law School Building more readily welcomes students to enter and learn.*