

Fall 1986

Clark Memorandum: Fall 1986

J. Reuben Clark Law School

J. Reuben Clark Law Society

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CLARK

MEMORANDUM

FALL 1986



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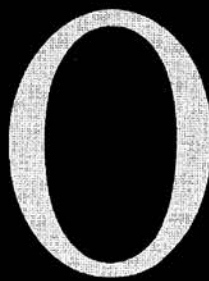
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Fall 1986

The *Clark Memorandum* is published by the J. Reuben Clark Law School of Brigham Young University and the J. Reuben Clark Law Society. The articles do not necessarily reflect the opinions of these organizations.

E

xactly ten years ago, the Law School graduated its first class. Now ten graduations and 1,600 alumni later, we introduce a "new look" for the Clark Memorandum. The school and its alumni association have come of age in many ways, making it fitting that we move to a more substantial level of communication with our graduates. ☛ In one of his most memorable sermons, entitled "To Them of the Last Wagon," J. Reuben

Clark once paid stirring tribute to the rank and file among the early Mormon pioneers. He acknowledged such leaders as Brigham Young, but his central message was, "The building of this empire was not done in a corner by a select few, but by this vast multitude flowing in from many nations." So it is in establishing the long-range mission of the Law School which bears the name of J. Reuben Clark. This school is not an empire built by a select few, but is a constantly unfolding creation, whose purpose emerges in the individual choices and contributions of its graduates. ☛ As one who has watched the establishing of the Law School with great interest, I take genuine satisfaction in seeing what our graduates have accomplished in such a short time. From such a recent beginning, this school has almost overnight become a nationally recognized and widely appreciated member of the community of American law schools. We have had our Brigham Youngs, in the form of Dallin Oaks, Ernest Wilkinson, Rex Lee, and Carl Hawkins. But beyond that, our graduates are now located in positions of substantial opportunity all across the country and in many foreign nations. Among them are judges, legal scholars, government officials, and leaders in the practicing bar. ☛ Just as importantly, there are men and women in many less visible places who serve their clients and their communities with great skill and sensitivity. What President Clark said about church service applies equally to professional service: "It is not where you serve, but how." By living according to that principle, our graduates demonstrate their commitment to it. ☛ As we look forward to a second decade of graduations, we will welcome your questions and suggestions about improving communications with our alumni. We need your help in recruiting able law students, in placing our graduates, and in raising funds to sustain the growth the school has begun. We also invite you to suggest for our mailing list names of attorneys who have attended BYU as undergraduates or have some other tie to the university or the Church that would make them interested in staying in touch with us. DEAN BRUCE C. HAFEN



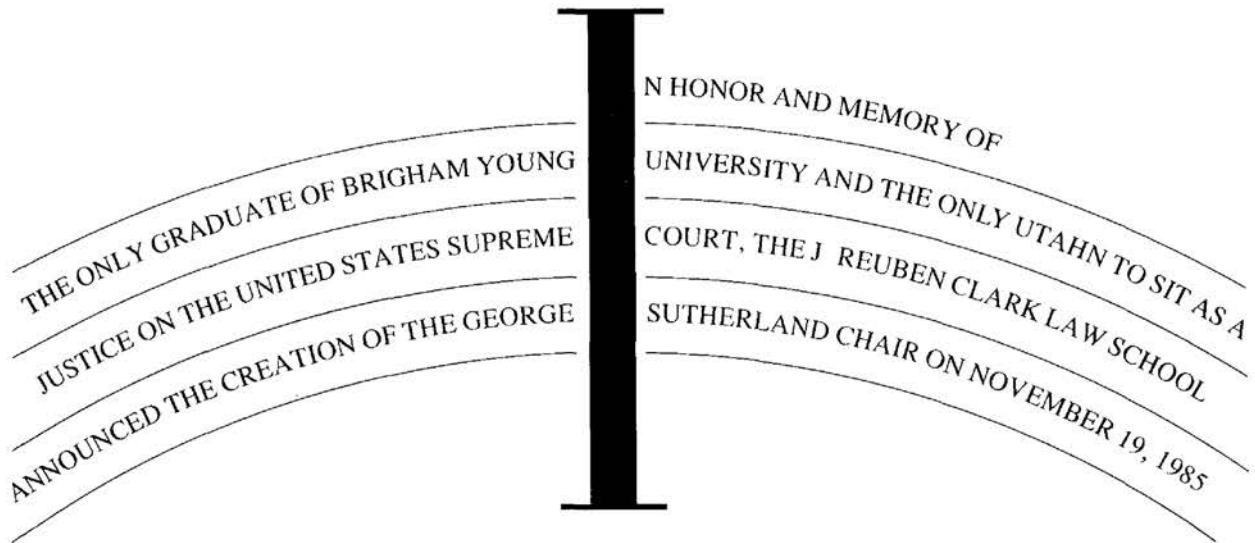
ne of the things I have hanging on my office wall is a picture of my 1976 law school graduating class. The picture was taken on graduation day on the large lawn southeast of the Marriott Center. Occasionally I stop in front of the picture and try to remember names and faces and experiences. In the right half of the picture, several rows back, is Monte Stewart—maybe the smartest guy I ever met.

On the top row three from the left is Richard McChesney—a blind student with unusual determination. Lew Cramer, in the front row on the left, helped convince me to apply to the J. Reuben Clark Law School in 1973. Don Redd was one of the few class members more politically conservative than I. Scott Cameron, on the right side of the picture, once hung a poster of George McGovern on my carrel with the handwritten subscription, "Thanks, Wilford, for all your help in my campaign." All in all, I feel a close relationship with the men and women I see in my graduation picture and with the Law School we attended, and I am sure that each of you feels similarly. The Law Society is the name of our J. Reuben Clark Law School Alumni Association. Its purpose is to maintain and to build upon alumni and law school relationships. During the past year, we have initiated an effort to build a national organization to accommodate that purpose. I am appreciative of the support I have felt from all of you in this effort and the assistance which many of you have given. I think we are off to a good start. One of the functions we will continue to fill as an alumni association is to conduct a program of annual giving. Recently I spoke to a friend of mine whose father is a senior partner in a major Los Angeles law firm and a graduate of Harvard Law School. He had confided in my friend that he has made a contribution to his law school every year since graduation some forty years ago. It seems to me that we should all emulate that commitment and the attitude it reflects. I feel it an honor to be associated with each of you as alumni of the J. Reuben Clark Law School. In the ten years since my graduation, I have never found my relation with the Law School to be anything but a benefit. I hope that as alumni we can establish an identity through our alumni association that will in turn benefit the Law School.

WILFORD W. ANDERSON, 1985-86 CHAIR, J. REUBEN CLARK LAW SOCIETY

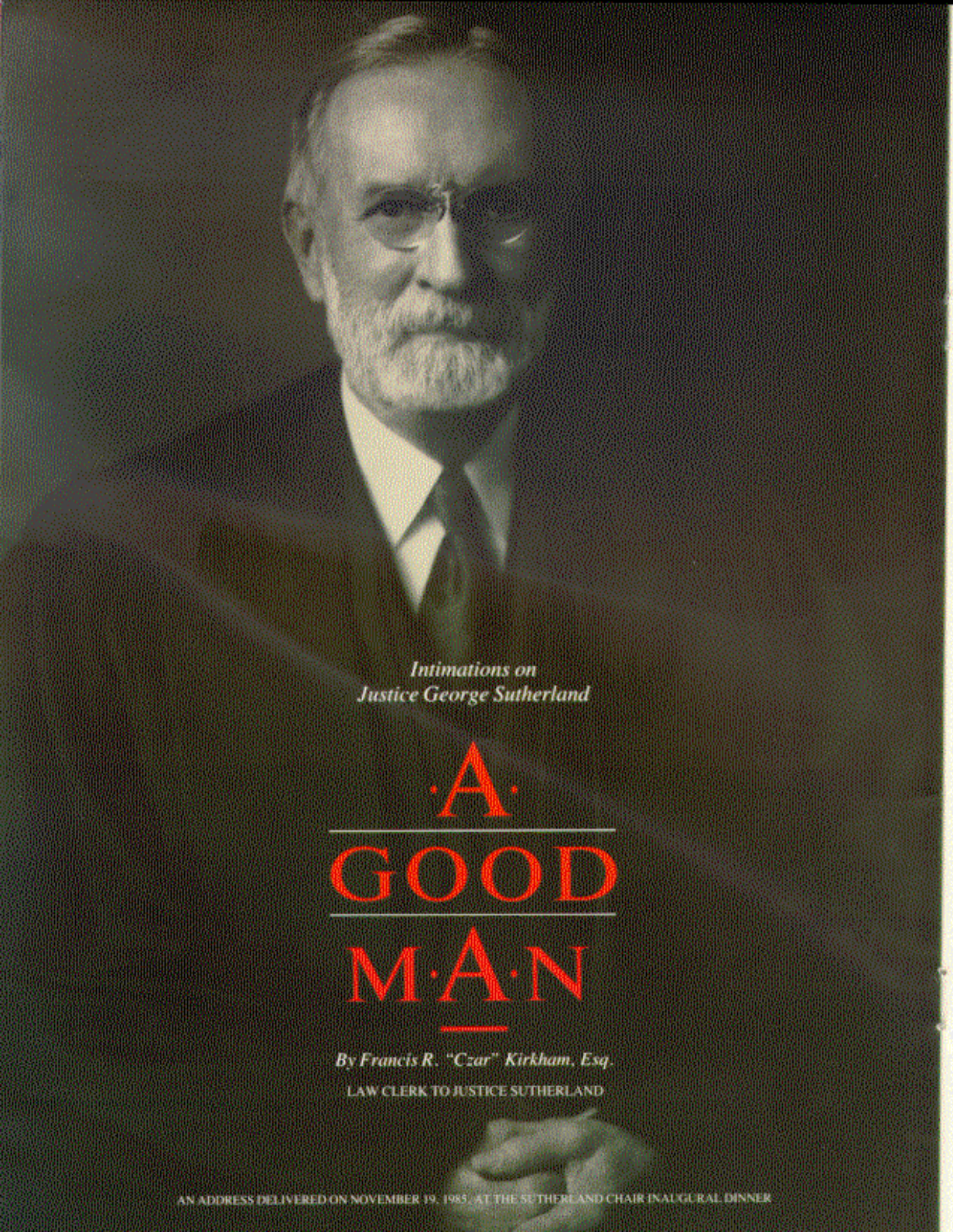


GEORGE SUTHERLAND ENDOWED CHAIR OF LAW



PROFESSOR REX E LEE, founding dean of the law school and former solicitor general of the United States, was named the first occupant of the chair. • Justice Sutherland also served in the House of Representatives and two terms in the United States Senate representing the State of Utah. • Although not a member of The Church of Jesus Christ of Latter-day Saints, Justice Sutherland spent much of his early life in Utah Valley. In a message to the 1941 graduating class from Brigham Young University, Justice Sutherland recalled his experiences as a student of Karl G. Maeser at Brigham Young Academy: • “It would gratify my sense of pride in the old school if I could tell you that the building was a masterpiece of architecture. But candor compels a contrary statement. Besides, although it was destroyed by fire long ago, pictures of it are still extant and prevarication would be useless. Fortunately, the building was not the school, but only the house in which the school lived; and the discovery of the school itself was as though I had opened a rough shell and found a pearl. The soul of this school was Karl G. Maeser; and when I came, as I soon did, to realize the tremendous import of that fact, the ugly structure

ceased to trouble my eyes, my doubts vanished, and were replaced by the comfort of certainty and a feeling of deep content.” • With the addition of the Sutherland Chair, the Law School now has three endowed chairs. The first chair, occupied by Professor Carl Hawkins, honors the memory of Guy Anderson. Professor Edward Kimball occupies the chair named in memory of President Ernest L. Wilkinson. Endowed chairs are designed to attract and retain legal scholars of extraordinary accomplishment and commitment who will enhance the prestige, exposure, and impact of the Law School faculty and program. The chairs also provide inspired, innovative teaching opportunities, encourage and facilitate research in the law, and help to prepare men and women for constructive, service-oriented legal careers. By providing, in perpetuity, salary, research, travel, and office-support funds for its occupant, an endowed chair unencumbers Law School funds to be used for other purposes. • The Board of Trustees and the president of the university hosted a dinner on November 19, 1985, to announce the chair and its first occupant. Francis R. “Czar” Kirkham, an advisory partner in the San Francisco firm Pillsbury, Madison & Sutro and former law clerk to Justice Sutherland, delivered the keynote address.

A black and white portrait of Justice George Sutherland, an older man with a white beard and glasses, wearing a dark suit, white shirt, and dark tie. The portrait is centered and occupies the upper half of the page.

*Intimations on
Justice George Sutherland*

A.
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GOOD
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M·A·N
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By Francis R. "Czar" Kirkham, Esq.
LAW CLERK TO JUSTICE SUTHERLAND

AN ADDRESS DELIVERED ON NOVEMBER 19, 1985, AT THE SUTHERLAND CHAIR INAUGURAL DINNER

He said that his goal had been not merely to be a good lawyer, or a good legislator, or a good judge. These, he said, were nothing compared to the ambition of being a good man.

Although more than half a century has gone by, I remember it as though it were yesterday. I telephoned my twenty-year-old bride and told her I was bringing Justice Sutherland's law clerk home for dinner. She started a mild protest about such short notice, but I told her just to dress up a little, and we would take him out for dinner. When I arrived I knocked at the door. She came out and looked around and said, "Where is Justice Sutherland's law clerk?" I said, "You are looking at him."

It was a wonderful dinner that followed and wonderful years succeeded it.

I knew, of course, when I was fortunate enough to receive my appointment, that I would be working with one of the greatest of living statesmen and jurists. But I soon learned something else that immeasurably enhanced the joy and reward in my work. I learned that to his great legal abilities, Justice Sutherland added a warm and kindly nature, a delightful sense of humor, an always over-generously expressed appreciation for the small contributions his law clerk was able to make, and, above all, a mature scholarship in the humanities, which was an inspiration to one privileged to share his thoughts and labors.

Through all his years on the Court—including a period when feelings ran high as the nation experienced an upheaval in constitutional law and when Justice Sutherland's views were strongly contested by other members of the Court—the respect accorded Justice Sutherland by his brethren and the affection in which they held him never wavered.

I do not know whether any writing in the Court's history more warmly expresses deep feelings than Chief Justice Taft's letter to Justice Sutherland when the justice was almost forced to resign because of a severe illness which kept him bedridden for several months. The chief justice wrote, simply, "We all love you, George," as he hoped for his speedy return.

Justice Roberts, whose chambers were next to those of Justice Sutherland in the old Capitol Building, once told me that at the commencement of the conferences of the Court, Justice Holmes often strolled over to Justice Sutherland and pleaded, "Sutherland, J., tell us a story." And the ensuing stories, often from his boyhood in the West, would bring roars of laughter.

I already have related to the students of the Law School another incident which to me epitomizes the high esteem in which Sutherland was held by his brethren. When Justice Brandeis returned his copy of Justice Sutherland's great dissenting opinion in the *Minnesota Mortgage Moratorium* case, Brandeis had inscribed on it

"My Dear Sutherland.

"This is perhaps the finest opinion in the history of American constitutional law.

"Regretfully, I adhere to my error. —Brandeis."

Years later, when Justice Sutherland finally retired from the bench, his colleagues sent him an unusually touching letter expressing their "warm affection" and their "high appreciation" for his "distinguished ability," "unvarying kindliness" and "unfailing humor."

George Sutherland was born on the old Roman road known as Watling Street, in the little town of Stony Stratford in Buckinghamshire, England, on March 25, 1862. Incidentally, only three justices before him, and none for more than 100 years, were of foreign birth. While he was still an infant his father embraced the Latter-day Saint faith and emigrated with his new family to Springville, Utah. After a short time the elder Sutherland renounced his faith and moved on to Montana. By 1869, however, he had returned to Utah to remain there for the rest of his life.

Young Sutherland, though not reared in the Mormon faith, held it always in highest esteem and numbered its followers and leaders among his close friends and partners in the practice of law. I well recall the warmth with which he and President Heber J. Grant used to greet each other when President Grant would stop by the justice's chambers in Washington, D.C., for a visit. And it was Sutherland's great speech in the Senate which saved Senator Smoot his seat when it was threatened by a resolution to bar him, engendered by bitter anti-Mormon forces. Sutherland's ringing defense eloquently states his belief in a "fundamental justice" which exists apart and above the laws of men. He told the packed Senate and galleries,

"In one sense the power of this Senate to deal with the accused Senator is plenary. It may be exercised arbitrarily. In a legal sense, the Senate is not accountable to any other authority or tribunal for its action. Right or wrong, wise or unwise, just or unjust, its decisions become the unappealable law of the case. But in another sense, and in a higher and better and juster sense, its action is restricted by those considerations of fundamental justice which find an abiding place in the conscience of every man."

Nothing could be more fitting than to have a chair in jurisprudence established in honor of Justice Sutherland at Brigham Young University, Utah, of the Mormon pioneer era, and this institution were the decisive influences in shaping his life and philosophy. His boyhood was typical of the pioneer days. At the age of twelve the necessity of earning his own living forced him from school. But, five years later, entirely as a result of his own industry and frugality, he was able to return to the classroom at the Brigham Young Academy. Here Karl G. Maeser touched his life with an inspiration that never diminished.

In 1936, when the Court and the Constitution were under attack as perhaps never before, Justice Sutherland wrote to a friend, "I recall . . . the words of Professor Maeser, who declared that [the Constitution] was a divinely inspired instrument—as I truly think it is."

Industry, thrift, honesty, independence, unimpeachable character, and respect for the law—these were the learned attributes of his early years, and they became and remained the foundation of his great career. To the students of this school, in an address shortly before his death—I think his last public utterance—he said that his goal had been not merely to be a good lawyer, or a good legislator, or a good judge. These, he said, were nothing compared to the ambition of being a good man.

From BYU he went to the University of Michigan Law School under the deanship of Judge Thomas Cooley. After a year's study he was admitted to the bars of Michigan and Utah and returned to Provo to start the practice of law at the age of twenty-one.

From the very outset Sutherland was interested in government and public service. While still in his twenties he ran for mayor of Provo, worked with Reed Smoot and others to organize national political parties in Utah, and was a delegate to the National Republican Convention in Minneapolis. He served in the Utah Senate from its first year of statehood to 1900, as a representative from Utah to Congress from 1901 to 1903, and as the senator from Utah, following election by unanimous vote of the Utah Legislature, from 1905 to 1917. He was appointed to the Supreme Court in 1922 and served until his retirement in 1938. He died four years later in 1942 at the age of eighty.

But this simply states the bare framework of a career which was filled with brilliant achievement in service to his state and nation. In Utah's first senate he chaired the Judiciary Committee and sponsored the act extending the right of eminent domain to the mining and irrigation industries, so essential to the development of his state. In the House of Representatives he aided in framing the Reclamation Act under which the arid lands of the West have been made to blossom. In the Senate his work on the Revision and Codification of Law and the Judiciary and Foreign Relations committees brought him national acclaim. The federal Criminal Code and Judicial Code were largely his handiwork. He was the acknowledged leader of the forces in the Senate fighting for women's rights. He introduced the Susan B. Anthony Resolution in the Senate and the Women's Suffrage Amendment to the Constitution and was praised by women's organizations throughout the country as a "powerful and generous ally" in achieving women's suffrage.

He was the principal actor in the passage of the Seamen's Act of 1915. Andrew Fureseth, president of the Seamen's Union, wrote of him.

"I learned to know a lover of freedom, a man who understands thoroughly what freedom means, and a man who, in the protection of freedom to all men, regardless of their station in life, may be trusted and relied upon under all possible conditions."

I remember well Andy Fureseth, nearly twenty years after he wrote those words, calling on Justice Sutherland. After a pleasant visit he came back through my office adjoining the Justice's Chambers, shook my hand and said, "Young man, your Justice is the greatest friend the American seaman ever had."

During his years in the Senate, as president of the American Bar Association, and in the private practice of law, he delivered a number of notable addresses on the Constitution, the courts and the principles and powers of government, including the Blumenthal Foundation lectures at Columbia University on "Constitutional Power and World Affairs." He also served as a member of the Advisory Committee of the International Disarmament Conference in 1921 and was counsel for the United States in the Norway-United States arbitration at The Hague in 1922.

By this time Sutherland had become a national figure, "recognized as a leading exponent of constitutional theory and practice," and admired for the "lucidity and vigor of his

intellect." As Nicholas Murray Butler of Columbia phrased it, he was a "statesman of high capacity and vision." President Taft characterized him as the "greatest constitutional lawyer in the Senate," and James Bryce described him as "the living voice of the Constitution."

His elevation to the Supreme Court in 1922 was expected and widely acclaimed.

While Justice Sutherland was on the Court no other justice spoke for the majority in so many great cases, extending to every sphere of government. He wrote with great clarity of expression and with a style that was simple, yet elegant. I have long treasured a copy of a letter he wrote to his friend Dean Bates of the Michigan Law School which illustrates his simple, beautiful, yet powerful prose, and at the same time well epitomizes his philosophy:

"The world is passing through an uncomfortable experience. In many respects it will have to retrace its steps with painful effort. The tendency of many governments is in the direction of destroying individual initiative, self-reliance and other cardinal virtues which I was always taught were necessary to develop a real democracy. The notion that the individual is not to have the full reward of what he does well, and is not to bear the responsibility for what he does badly, apparently is becoming part of our present philosophy of government."

Justice Sutherland was a conservative, but a conservative in the sense of one who cherishes the fundamental principles that underlie our democracy.

He believed in a written constitution setting forth precepts which can be altered only by the people—the sovereignty that created the Constitution—and not by executives or judges, else we will have a government of men and not of laws, or even by legislatures, else the liberties enshrined in the Constitution by the founders as unalterable guarantees of freedom can be abridged or destroyed by the whim of the moment.

He believed that the right to life and liberty were rights conferred by a Supreme Being which are, as the Declaration of Independence declares, inalienable. They can not be taken away by the state, or even bargained away to the state by those who possess them. He believed and wrote in his opinions that while the Constitution does not protect property as such, it does protect the right of men to own, possess, and use property rightfully as a basic ingredient of individual freedom. He stoutly defended in a number of great opinions the rights of men enumerated in the Bill of Rights and comprehended within the Due Process Clause of the Fourteenth Amendment. His dissenting words in the *Associated Press* case continue to ring through the years:

"Do the people of this land—in the providence of God, favored, as they sometimes boast, above all others in the plentitude of their liberties—desire to preserve those so carefully protected by the first amendment: liberty of religious worship, freedom of speech and of the press, and the right as freemen peaceably to assemble and petition their government for a redress of grievances? If so, let them withstand all beginnings of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time."

Chief Justice Stone, at the memorial services for Justice Sutherland held at the Supreme Court in 1944, magnificently summarized Sutherland's principles and work on the Court:

"During the sixteen years when Justice Sutherland served on this Court he exercised a profound influence on the development of constitutional law, and especially on the interpretation of the Fourteenth Amendment. . .

"In a time when it had become the fashion to classify men by labelling them, Justice Sutherland was labelled a conservative. . . . He saw in the encroachments of government on the freedom of the individual, the perils of the oppressive exercise of governmental power which he held it was the design of the due process clause to prevent. He gave vigorous expression to these views in a series of opinions which stirred widespread public discussion of some of the most fundamental problems of constitutional government. . . . Let it be said that the so-called conservative temper of these opinions was not inspired by any antagonism to progress in the law, but rather by the emphasis which Justice Sutherland placed on the constitutional protection of the few from the tyranny of the many. Indeed, these opinions were but steps in the process of finding solutions of what perhaps has been the greatest problem of constitutional interpretation throughout the twentieth century, the need to bring into proper balance the competing demands, on the one hand that constitutional sanctions shall safeguard the individual from the abuse of power by the majority, and on the other that the Constitution be not so interpreted as to clothe the individual with power to restrict unduly the welfare and progress of the community as a whole "

And then the chief justice concluded—and let me interpolate that I was privileged to attend those services as a member of the Committee on Resolutions, and I have never heard Chief Justice Stone speak with deeper emotion and sincerity

"The time will come when it will be recognized, perhaps more clearly than it is at present, how fortunate it has been for the true progress of the law that, at a time when the trend was in the opposite direction, there sat upon this bench a man of stalwart independence, and of the purest character who, without a trace of intellectual arrogance, and always with respectful toleration for the views of colleagues who differed with him, fought stoutly for the constitutional guaranties of the liberty of the individual."

Many years after I listened to those words by Chief Justice Stone, my friend, Phil Neal, dean of the University of Chicago Law School, telephoned me to ask if I would be interested in interviewing the brightest scholar he had known in his many years of teaching at Stanford and Chicago. I of course arranged to meet the young man and tried my best to get him to come with our firm. He decided, however, to practice in his home state of Arizona, and this he did, with distinction, as a member of one of the state's leading law firms, until this university persuaded him to become the first dean of its new law school

You know what has happened since.

Rex Lee, it has been a privilege to know you and to follow your brilliant career. You come to us from the highest office a practicing lawyer can hold in this nation—or in the world. If Justice Sutherland could be with us today, he would, I know, rejoice at your selection as the first occupant of the chair established in his honor. He would appreciate your brilliant scholarship and achievements, but most satisfying of all to him, beyond any doubt, would be your unqualified integrity, strength of character, and dedication to those great principles of freedom and democracy which Justice Sutherland so greatly cherished and so stoutly defended.

Lee Returns As First Occupant of Sutherland Chair



The "prodigal son" is coming home. Rex E. Lee, founding dean of the J. Reuben Clark Law School and solicitor general of the United States from 1981 to 1985, began teaching constitutional law at the Law

School the fall of 1986. Lee has accepted an appointment to an endowed professorship at the Law School named in honor of George Sutherland, a BYU graduate who served as associate justice of the United States Supreme Court from 1922 to 1938.

Lee officially left his post as solicitor general on May 31, 1985. Since then, he has spent the bulk of his time working as a partner with Chicago-based Sidley & Austin in their Washington, D.C., office. However, Lee has been involved in various activities at the Law School.

On various sojourns to Provo this past year, Lee has lectured at a symposium on the religion clause of the First Amendment, taught several sessions of constitutional law, interviewed students for positions with Sidley & Austin, lunched with the Law Women, and most significantly, directed the introduction to law course offered to beginning first-year students. In his opening session with first-year



students, Lee was interrupted by an entourage of Law School faculty bearing gifts and presenting an "ode to BYU's prodigal son."

Returning to Provo as the Sutherland honoree, Lee will spend most of his time at the Law School. However, he is still involved in some appellate work for Sidley & Austin. "I can do that as well from Provo as anywhere," Lee said.

In a public statement, BYU President Jeffrey Holland said that BYU was delighted to have Lee back. "Rex is a superb teacher and will give the students special insights into the most challenging questions of constitutional law."

*Judging from press reports, Lee considers his time at the solicitor general's office to have been successful. "We won a lot more than we lost," he said. According to Lee, his greatest accomplishment as solicitor general was his victory in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), which eliminated Congress' use of legislative vetoes to control executive action. The case was heavily publicized.*

Among other successes as solicitor general, Lee persuaded the Supreme Court to tighten rules on standing, narrow the scope of the Exclusionary Rule, and allow the government to be more accommodating to religions without violating the First Amendment's Establishment Clause.

*Lee's biggest disappointment, he said, was his loss in the 1983 abortion decisions, *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).*





TO TEST OR NOT TO TEST

Mandatory drug testing of athletes—An ACLU official calls it un-American; a BYU law professor contends it's within our legal tradition.

Reprinted from *The New York Times*, Sunday, February 4, 1986

THE RIGHT TO PRIVACY IS A BASIC PRINCIPLE

By Ira Glasser, Executive Director, American Civil Liberties Union

Bob Stanley pitches for the Boston Red Sox. As if that were not punishment enough, now his employers want him to submit to periodic urine tests. Stanley's reaction was swift and to the point: "I don't take drugs," he said, "and I don't believe I have to prove I don't."

With that statement, Stanley aligned himself squarely with one of America's oldest traditional values: the idea that general searches of innocent people are unfair and unreasonable.

The tradition began in colonial America when King George's redcoats had the intrusive habit of searching everyone indiscriminately in order to uncover those few who were violating the Stamp Act or otherwise committing offenses against the Crown. Indeed, it is not an exaggeration to say that those general searches were deeply hated by the early Americans and were a leading cause of the resentment that fueled the Revolution.

After the war for independence was won, there was a government to build. Fresh from the experience of the unfairness of general searches, but sensitive to the need to enforce the law against criminal conduct, the founders wrote, and the people ratified, the Fourth Amendment to the Constitution. It struck a reasonable balance between privacy and law enforcement. The police would be permitted to search people in their homes, but only if there was good reason to believe that a particular individual was involved in a crime or possessed evidence of a crime. In other words, before you search a particular individual or place, you have to have some evidence against that person to justify your suspicions.

The key requirement of the warrant procedure established by the Fourth Amendment is particularized suspicion. You can't search everyone, innocent and guilty alike, to find the few who are guilty. This basic American principle has been abandoned by those who advocate urine tests for everyone. Bob Stanley was right. Why should he be searched because a few others have used drugs?

Compulsory blood tests and urine tests are bodily searches. In 1966 the United States Supreme Court said so.

One of America's oldest traditional values [is] the idea that general searches of innocent people are unfair and unreasonable.



It ruled that the Fourth Amendment applied to such searches and that a compulsory blood test could be conducted only if there is "a clear indication that in fact . . . evidence will be found." In other words, there has to be a specific reason a particular person is suspected of using drugs before such a test can be compelled.

That seems fair. Why subject the many innocent to periodic and intrusive searches in order to find the guilty few? And although the Fourth Amendment only applies to government officials, and does not legally limit the power of private employers, certainly the same principle of fairness ought to apply.

Some have argued that the

innocent have nothing to fear from such searches. That is not true. For one thing, the most commonly used urine test is not by itself very reliable. Sports employers, like Baseball Commissioner Peter Ueberroth, for example, have claimed that urine tests are accurate and reliable. That is not so. Although a negative result almost certainly means the person tested is drug free, a positive result cannot by itself be used to infer impaired ability to perform, drug addiction, or even recent intoxication. Moreover, the most commonly used test cannot distinguish among a wide variety of drugs and medications. It will often show a positive result if it detects small amounts of marijuana as well as cocaine or a

wide variety of allergy or other medicines available without a prescription. False positives are far from uncommon and can damage the reputations of innocent people.

The most commonly used tests also cannot tell us much about the extent or recency of use. A single positive test result indicates that some chemical substance was used, but it cannot tell us what the substance was, how much was used, or when it was used. Suppose a baseball player smoked a marijuana joint on an off day and tested positive a week later. Does that impair his ability to perform? If not, why is it his employer's business? And if smoking a marijuana joint on an off day is not permitted, why is drinking the night before a game part of the accepted lore of the sport? Indeed, if impairment of ability to function is the issue, why is it permissible for sports executives to have a couple of martinis at lunch, but not permissible for their employees, including ballplayers, to smoke a marijuana joint during a lunch break? It seems to depend on what your drug of choice is.

Surely public image is not an issue, or else sports commissioners would not permit ex-ballplayers and managers and coaches to do beer commercials. Nor would they encourage the sale of beer in ball parks, which demonstrably creates and implicitly condones public drunkenness.

There is one legitimate issue: job performance. Every employer, including sports employers, has the right to expect their employees not to be drunk or stoned or high on the job. But employers do not have the right to monitor their employees' conduct off the job or to subject people to bodily searches who are not

suspected of drug use affecting their performance.

In demanding general searches of all their athletes, sports employers subscribed to the policy that "if you hang 'em all, you'll get the guilty." They do that to satisfy what they perceive as a public-relations problem, and they are willing to sacrifice the rights and interests of the majority of players, who are innocent of any misconduct. They are like those prosecutors who defend warrantless wiretapping by suggesting that people shouldn't mind being wiretapped by the government if they've got nothing to hide. But innocent people do have something to hide: their privacy. And they have something to protect: their interest against being recklessly stigmatized and accused as a result of a mistake.

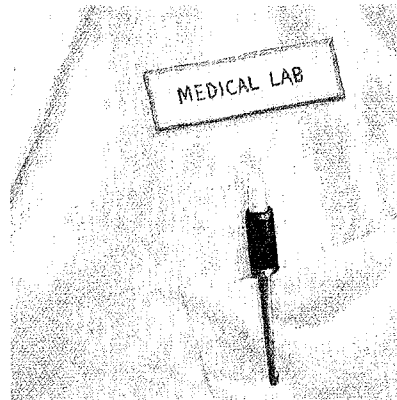
Proposals to conduct periodic body searches of everyone would require the innocent to prove themselves not guilty. That is not the American way.

Tests can be useful as part of an overall program, but they should be narrowly limited to those players who are reasonably suspected of using drugs in a way that impairs job performance.

Professional sports may indeed provide role models for society. But one of the things that sports employers ought to think about when they talk about role models is the role model they are providing by abandoning fundamental rules of fairness and subjecting innocent and guilty alike to intrusive procedures.

In that respect, Bob Stanley's reaction provided a better role model for traditional American values than Peter Ueberroth's attempt to coerce the innocent to abandon their rights.

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reasonable.*



Reprinted from *The New York Times*, Sunday, February 4, 1986

LAWS PROVIDE FRAMEWORK FOR PROCEDURE

By Michael Goldsmith, Associate Professor of Law, BYU

The availability of reliable scientific procedures for detecting the presence of controlled substances in professional athletes has predictably stirred legal controversy. Initially used to discern illicit means of attaining a competitive edge, the tests are now being adapted to detect the residue of "social drugs" capable of adversely affecting on-field performance and, not infrequently, of destroying lives. Although these procedures have been attacked on privacy

grounds, such tests are well within our legal framework.

All employers obviously have strong incentives to take precautionary steps against drug abuse. In addition to diminished productivity, drug-dependent employees file disproportionate numbers of worker compensation claims and endanger the safety of others on the job. But sports employers, in particular, have an inherently stronger motivation to combat drug abuse, because athletic competition is directly dependent upon the physical and mental well-being of its participants. As such, the sports employer has the same right to know about a player's drug problem as he does to know about a knee injury.

Under federal and state statutory law, private employers are given broad leeway to control their work force. The obvious rationale is that the workers are there voluntarily and that, either individually or through their union, they have negotiated the terms of their employment. So long as an employer does not violate anyone's civil rights by discriminating on the basis of "race, color, religion, sex or national origin"—plainly not an issue here—he or she may properly undertake measures to insure that employees are operating at optimal efficiency. In addition, drug dependency affecting job performance may legally constitute "just cause" for dismissal.

These statutory principles comport with constitutional doctrine. Admittedly, chemical tests raise privacy concerns, but the legal argument in support of these concerns fails to recognize

distinctions that are fundamental under our system of law. Most obvious—but so often overlooked—is that the Bill of Rights is simply inapplicable to the private sector; its focus and intent was on governmental abuse. This central point settles the privacy issue except in those relatively rare situations, such as boxing, in which testing is sometimes mandated by state law. Even so, rather than rest the argument on a technical, albeit critical, point of constitutional law, examination of the privacy principle likewise supports the propriety of drug testing procedures.

From a constitutional perspective, it is useful at first to recognize which legal principles are not relevant to the privacy issue. Thus, for example, under prevailing jurisprudence the privilege against self-incrimination is inapplicable because no *testimonial* information is being compelled from the test subject.

Likewise, due process concerns are not triggered so long as there is ample opportunity to contest the accuracy and significance of any test result. And equal protection guarantees are not abridged so long as drug testing is rationally based and does not have an unfair impact on any “suspect class” (for example, race or religion).

On the merits, drug tests do not violate either “the right to privacy” or the Fourth Amendment prohibition against “unreasonable searches and seizures.” Arguments based on privacy tend to be couched in absolute terms. This tendency, however, ignores the qualified nature of both the privacy doctrine and one of its underlying predicates—the Fourth Amendment.

Thus, the Supreme Court has stated that “the privacy right cannot be said to be absolute.” Indeed, Justice Brandeis, widely regarded as author of the privacy doctrine, focused his concern only on the “unjustified” or “unwarranted invasion of individual privacy.” Moreover, in another context, Justice Brandeis suggested that public figures may be somewhat less deserving of privacy protection.

Similarly, from a Fourth Amendment perspective, only “unreasonable searches and seizures” are prohibited. As such, Justice Frankfurter once cautioned that “to tear ‘unreasonable’ from the context and history and purpose of the Fourth Amendment . . . is to disregard the reason to which reference must be made when a question arises under the Fourth Amendment.” With this in mind, whether a search is “unreasonable” has traditionally been resolved by balancing the extent of the intrusion against the nature of the privacy interest involved. On this basis, no less a civil libertarian than Justice Brennan has observed that “where the court has found a lesser expectation of privacy or where the search involves a minimal intrusion on privacy interests . . . the Fourth Amendment protections are correspondingly less stringent.” This line of reasoning has legitimized the use of airport searches and road blocks against drunken drivers as well as a wide variety of other warrantless searches conducted in a nondiscriminatory manner.

Applying this analysis to drug testing in professional sports compels a finding of constitutionality. At stake is the integrity of professional

competition, which is already vulnerable to external corruption. Loss of faith in any sport can have devastating economic and social consequences for owners, players, and many others as well—thousands of people depend upon the viability of sports institutions.

Drug testing can promote institutional integrity through reliable procedures that are safe and convenient as well as nondiscriminatory and highly confidential. Significantly, these procedures do not encroach upon traditional privacy concerns: the sanctity of inner thought or intimacy of relationships. The tests are geared specifically for one category of conduct: the use of controlled substances. As such, these procedures are far less intrusive than other searches traditionally deemed constitutionally reasonable.

Perhaps a professional athlete has a privacy interest of sorts in his urine, or in what the urinalysis will reveal. But given the interest at stake and the minimal effect of testing on legitimate privacy concerns, the constitutionality of these procedures is manifest. Rather than debate and litigate the propriety of drug testing, professional sports ought to be encouraged in its efforts. Much of what can be accomplished now furthers true rehabilitative goals and can ultimately serve to make far more intrusive procedures—by law enforcement—unnecessary in the future.

Years ago, when a recalcitrant attorney contested the judiciary’s authority to police the integrity of the legal bar, Justice Cardozo responded that “in the long run the power . . . will make for the health and

honor of the profession for the protection of the public. If the house is to be clean, it is for those who occupy and govern it, rather than for strangers, to do the noisome work.” I have no doubt how Justice Cardozo would have resolved the issue under consideration.



Ira Glasser



Michael Goldsmith



Hafen Selected As Dean

By Todd Maynes

Imagine Snoopy huddled over a pile of law books. Peppermint Patty approaches him and says, "Snoopy, we need to go to court. I got in trouble again at school." Sadly, Snoopy casts a longing gaze at his casebooks and treatises. "How can I study my law books if my clients keep bothering me?" he wonders.

"That cartoon expresses the story of my life," says Law School Dean Bruce Hafen. "For years I've wanted more time to teach and write, but life is just an

interesting series of interruptions."

It doesn't look like he'll have too much time to teach and write in the future either. As the new dean since fall 1985, Hafen is a very busy man. "I didn't realize when I came back to BYU this year how much more would be going on than went on ten years ago," he says. "The Law School is now a fast-paced, mature institution. I'm just now getting up to speed."

Dean Hafen originally came to the Law School at its very inception. After graduating in 1967 from the University of Utah Law School and practicing for four years with a Salt Lake City law firm, he was asked to be an assistant to BYU

President Dallin Oaks, with the specific assignment to help create the Law School. From there, Rex Lee asked him to stay on as assistant dean and a member of the original faculty. Then, the hiatus from the Law School began. Dean Hafen spent two years on leave, working for the LDS Church Correlation Department, and then seven years as president of Ricks College. During his summers he returned to Provo to teach and do scholarly research at the Law School.

Law School alumni and friends are wondering what will be the theme of Hafen's deanship as he follows in the footsteps of people like Rex Lee and Carl Hawkins. "I'm committed to seeing that the Law School is seriously contributing to the national policy debates over legal issues," he says. "We have the capacity to do that among faculty, students, and alumni. And the perspective of our people is needed in the contemporary dialogue."

To reach that goal, Dean Hafen feels a need to reach out to the Law School's alumni. "The alumni are part of the mission of the Law School," he says. "Indeed, the mission of the Law School unfolds in their individual lives. We need their input on what this school should be doing. We need their help in placement and in the recruiting of both students and faculty. And we need their help with fundraising, by making contributions and by encouraging others to contribute. We need a better financial base to sustain our commitment to serious scholarship. We need the faculty here during the summers doing research, not off practicing law."

Dean Hafen has several ideas on how to obtain that input. "The J. Reuben Clark Law Society is off to a good start, but it needs to be further developed. We need to have more frequent gatherings throughout the country, and we need a strong alumni publication. Any good law school maintains close ties with its alumni."

Furthermore, the dean is making an effort to get to know today's law students, tomorrow's alumni, on a personal level. For example, this past year he invited all the members of the second-year class to come to his home in groups of thirty for evenings of food and conversation.

"There are a lot of very interesting people in the student body," he says. "I'm impressed by the students and amazed at their maturity and diversity."

Another important area in the development of the Law School, according to the dean, is the recruitment of top faculty. The dean notes that several outstanding faculty members have left the Law School since the first class graduated in 1976. "Woody Deem has retired, and people like Frank Smith, Dale Whitman, Gordon Gee, and Monroe McKay have accepted other positions. But those vacancies are being filled by other very able people. This institution has reached the stage where the future does not depend on one or two individuals.

"Turnover is not a problem; it is the exact opposite. We're complimented when our people are sought after by important institutions elsewhere. Some will come back to us with valuable new experience—like Rex Lee, who returns this fall,

and Doug Floyd, who is on leave for another couple of years. And the new people we're attracting are tremendous. The list of top-flight faculty prospects is twice as long as it used to be. Look at Michael Goldsmith and Jim Gordon, who are our newest full-time appointments. Many law schools would love to have these two promising young teachers "

Finally, Dean Hafen wants to continue his own teaching and research while being dean "I'll take my turn at doing administrative work, and I've enjoyed my experiences outside the Law School, but I'll continue to spend a lot of my time doing research because policy analysis and writing are my favorite parts of the law. I also believe that even if it weren't so interesting, the dean should be actively involved in legal scholarship "

The dean's research interests are in family law and education law. He recently published an article in the *Michigan Law Review* on the constitutional status of marriage, kinship, and sexual privacy, which has been cited by the Supreme Court. He recently returned from presenting a paper to a conference on children's rights at Harvard Law School and will publish a book review essay on children's rights in the *Harvard Law Review* later this year. He is coauthoring a chapter with Professor Robert Riggs in Matthew Bender's forthcoming treatise on privacy law. Also, a paper on the constitutional issues underlying recent attempts in Congress to broaden federal civil rights jurisdiction over private colleges will be included in another forthcoming book.

Hawkins Steps Down As Dean

Although Carl Hawkins has now stepped down from his position as dean of the Law School, he has not stepped out of the mainstream of legal teaching and scholarship.

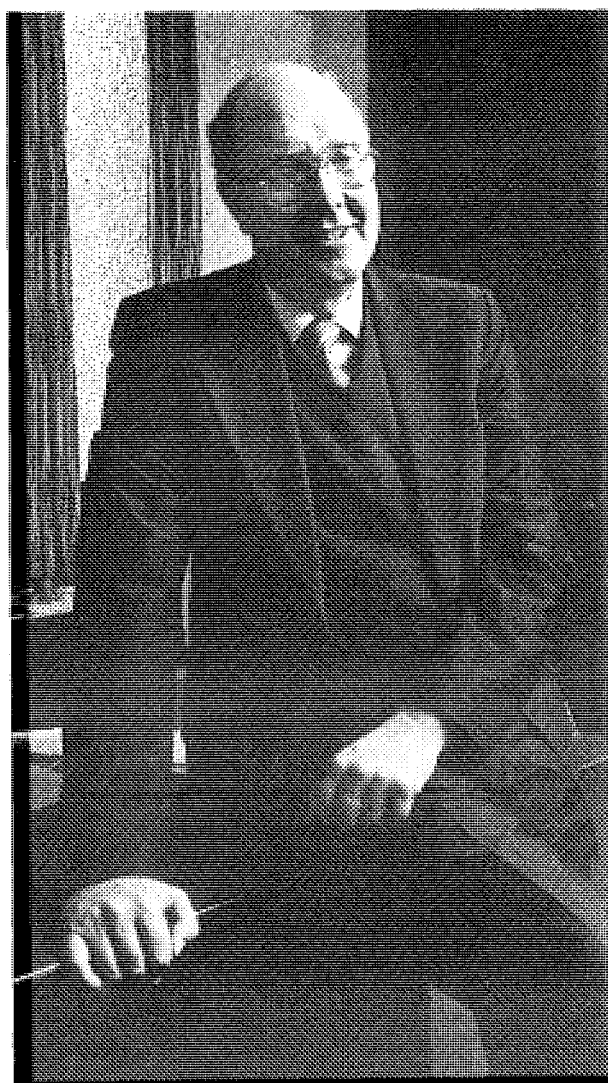
"I'm surprised at how busy I've managed to stay," he says. "I'm teaching torts and advanced torts, and a professional seminar. I'm updating my torts casebook, and I'm participating on a number of committees at the Law School, at the university, and on the state and national level."

He also plans to do some traveling and will teach next winter at the University of Florida Law School. "I've got five good years left until retirement," he says.

Elder Dallin H. Oaks and Dean Rex E. Lee remember Carl Hawkins' decisions to join the fledgling faculty of the J. Reuben Clark Law School as "the critical event" in the first year after Lee's appointment as the founding dean in 1971. Elder Oaks and Dean Lee shared their memories of that year at a fall dinner honoring Dean Hawkins as he concluded his service as the school's second dean from 1980 to 1985.

Hawkins had earlier served as acting dean, then was dean during the time Rex Lee was solicitor general. He resigned the deanship in early 1985 to return to full-time teaching.

"It was clear from the beginning that the quality of our initial faculty was the single most important factor affecting the success of the Law School," recalled Dean Lee. "With the right



faculty, we would be credible enough to attract good students and the acceptance of the profession. Without them, the school would be a lost cause. But there were so few Mormon law teachers of national stature that I quickly saw one man as the key to what other faculty prospects would do. That man was Carl Hawkins. Carl had earned the admiration of legal educators across the country, had a brilliant record of scholarship and teaching, and was respected for his impeccable judgment. If that domino fell, all the others would follow."

Lee told of a "depressing" trip to Michigan in the

winter of 1971-72, where he visited Professor Hawkins at the University of Michigan Law School. He noted that Hawkins was also serving as stake president in Ann Arbor. "After that trip, I was as depressed as I've ever been in my life, because I was convinced Carl would never leave Michigan to join us," continued Lee. "But within a few weeks, I began to feel that somehow everything would be all right."

Elder Oaks, who had known Hawkins since their law teaching days on the neighboring faculties at Chicago and Michigan, remembered the day later

that year when Carl Hawkins called to say he had decided to join the BYU faculty. "After talking to Carl, I thought to myself that the Lord must be very interested in this Law School, and he wants it to be first rate. Carl's tremendous contribution since coming here has clearly confirmed those early impressions."

In retrospect, Dean Hawkins feels a lot of satisfaction because of the achievements of the Law School while he was dean. "I was dean when much of the growth and development here came to a natural fruition. Of course, credit for that has to be shared with Dean Rex Lee and the first faculty."

Among Dean Hawkins' accomplishments were bringing the faculty to its full size, seeing the Law School accredited by the Association of American Law Schools, and the acceptance of the Law School as a member of the Order of the Coif. "We didn't have to give up anything we considered important or valuable in order to be accredited," he says. "There was some debate about the school's church connections, but in the end we didn't have to give up the code of honor, the tuition differential, or the right to make our own decisions about Mormons and non-Mormons on the faculty and in the student body."

"I don't think those achievements are so important on their face, but they are important since they recognize the fact that this Law School is growing and improving."

One of the improvements of the Law School which occurred during his tenure

was the development of computer systems for students and faculty. Dean Hawkins considers that to be a great irony. "At professional association meetings, everybody congratulates me on that development," he says. "I have to laugh about that, since I had very little to do with it. I had little knowledge about computers; I just told the people who knew about it to go ahead. That development was accidental as far as I'm concerned."

Despite the changes that occurred during his term, Dean Hawkins has no trouble discussing the single most satisfying aspect of having been dean of the Law School. "It is a very heart-warming thing to see what our graduates are doing in cities and towns all across the country, in their professions, their church, their public service, and their communities. Graduates everywhere, from Florida to Oregon, in small towns and metropolitan areas, are doing very worthwhile things."

Fleming Appointed Associate Dean

Upon his return from Washington, D.C., where he has served for the past year as professor in residence of the Chief Counsel of the Internal Revenue Service, Professor J. Clifton Fleming, Jr., will assume the duties of associate dean of the J. Reuben Clark Law School. He will replace Mary Anne Q. Wood, who is taking a leave of absence from the Law School. The appointment was made by



the university president, Jeffrey Holland, on recommendation of Dean Bruce Hafen.

Commenting on the appointment, Dean Hafen said, "I am excited about working with Cliff, he is a superior teacher, a mature scholar, and a person of unusually sound judgment."

Dean Fleming will assume primary responsibility for law school academics. His assignments will include coordination of faculty recruitment efforts and curriculum coordination. Planning for the annual meeting of the Board of Visitors will also be one of

his duties. In addition to his administrative duties as associate dean, Fleming will teach courses in tax.

An honors graduate of George Washington University Law School, Dean Fleming practiced in Seattle, Washington, in the late 60s and early 70s. He began his teaching career at the University of Puget Sound in 1973. In 1977 he taught at the University of Nairobi, Kenya, as the Fulbright-Hays Visiting Professor. He continues to serve as a member of the Corporate Stockholder Relationships Committee of the ABA Section of Taxation.

Zobell Assumes Position of Assistant Dean

Dean Bruce C. Hafen has announced the appointment of Claude E. Zobell, Jr., a 1979 J. Reuben Clark Law School graduate, as the new assistant dean of the Law School. Dean Zobell assumed his new position in January of this year.

"As the operation of the Law School has become more complicated," Dean Hafen said, "we have found it necessary to expand our administrative force. The addition of Dean Zobell to the administration of the Law School will allow us to become more aggressive in a number of critical areas."

Zobell's major areas of responsibility include admissions and student recruitment, applicant counseling, alumni relations, development, and public and press relations.

Prior to accepting the position of assistant dean, Zobell served as administrative assistant/legal counsel in Washington, D.C., to Congressman Harry Reid of Nevada. He also practiced for four years in a Las Vegas litigation firm.

During the years he practiced in Nevada he taught continuing education courses in pharmacy law for the Nevada Board of Pharmacy and served as vice-president/legal counsel for the American Diabetes Association, Nevada Affiliate.

Goldsmith and Gordon Join Law Faculty

Michael Goldsmith, a 1975 graduate of Cornell Law School, and James D. Gordon III, a 1980 graduate of Boalt Hall School of Law, have become members of the faculty at the J. Reuben Clark Law School. Professor Goldsmith teaches evidence, criminal procedure, and a seminar on RICO. Professor Gordon teaches contracts, securities, and directs the first-year legal writing program.

Goldsmith comes to BYU from Vanderbilt Law School in Nashville, Tennessee, where he served as an assistant professor from 1980 to 1984. Prior to entering his academic career he was an assistant U.S. attorney in Philadelphia, Pennsylvania, senior staff counsel on the U.S. House of Representatives Select Committee on Assassinations, and deputy state's attorney for Chittenden County in Vermont. After graduation from Cornell he served as law clerk to United States District Judge Albert W. Coffrin in Burlington, Vermont. In 1983 he was appointed counsel to the New York State Organized Crime Task Force.

During law school Goldsmith served as a note and comment editor of the *Cornell Law Review* and was selected for membership in the Order of the Coif. He received a bachelor of science in 1972, also from Cornell.

Goldsmith coauthored with Professor Irving Younger the 1984 text *Principles of Evidence*. He has

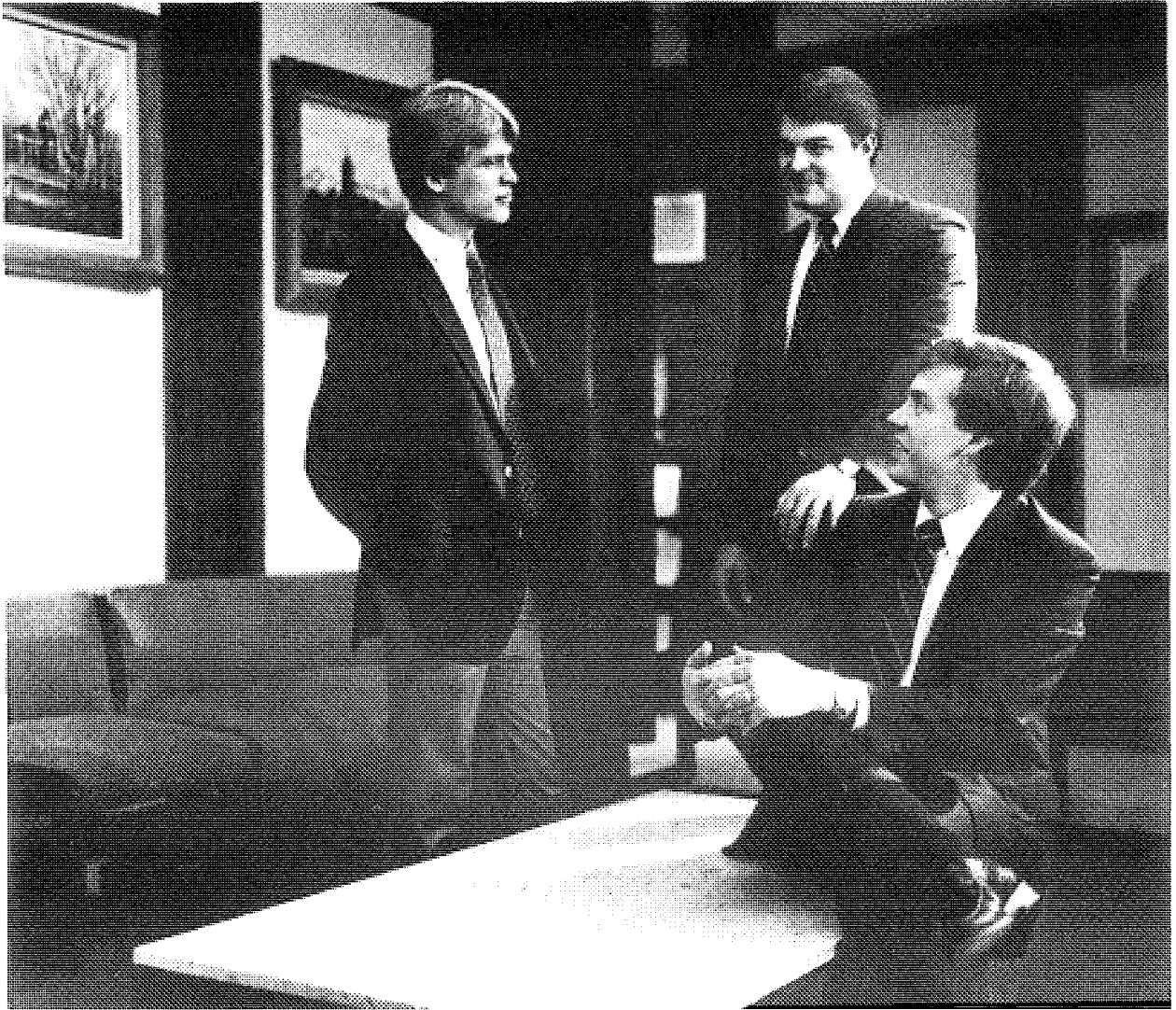
published in the *Journal of Law & Criminology*, *Vanderbilt Lawyer*, *Michigan Law Review*, and the *Cornell Law Review*. He has presented lectures at an ABA RICO symposium, Vanderbilt Medical School, National Association of Attorneys General, Vermont Law School, New York University, Notre Dame Institute on Organized Crime, and others.

Professor Gordon served as associate editor of the *California Law Review* while attending law school at Berkeley. He was also a legal research and writing instructor at Boalt Hall. He graduated from BYU in 1977, summa cum laude, with a B.A. in Political Science and was a Hinckley Scholar.

Prior to coming to the Law School, Gordon was an associate with the Salt Lake City law firm of Larsen, Kimball, Parr & Crockett. He served as law clerk to Judge Monroe G. McKay of the Tenth Circuit United States Court of Appeals. Gordon also had internship experience with the Utah Fourth Judicial District Court and Congressman Fortney H. "Pete" Stark in Washington, D.C. He has published in the *California Law Review*.

Professor Gordon was selected "Professor of the Year" by the first-year students in the Student Bar Association's annual election. Professor Goldsmith was given the same honor by the second- and third-year students.





Greg Bishop, Larry Laycock and Steven Olsen, all third-year students, competed in the thirty-sixth annual moot-court national competition, which involved twenty-eight teams.

Moot Court Places among Top Four in the Nation

This year's moot-court team placed among the top four teams in the nation at the Moot Court National Competition in New York City held in late January.

Greg Bishop, Larry Laycock, and Steven Olsen, all third-year students, competed in the thirty-sixth annual national competition, which involved twenty-eight teams.

The Association of the Bar of the City of New York, Young Lawyers

Committee, sponsors the national competition. The first round of competition pared the field from twenty-eight to sixteen teams. The second round reduced the number to eight. Only four teams, including BYU, remained after the third round. The University of Oklahoma ultimately won first place.

BYU's written brief was judged best in the competition.

"The team's unprecedented performance reflects the outstanding quality of student skill that has developed at the Law School," Dean Bruce Hafen said. "This is another indication

of how BYU is taking its place among the nation's foremost law schools."

To earn a place in the nationals, a team must place either first or second in its regional competition. BYU qualified in a regional contest involving thirteen teams from six western states.

There are fourteen regions in the United States, with 157 schools vying for the 28 slots in the national competition.

Moot Court competition requires the preparation of a legal brief and presentation of oral arguments on an assigned case before a panel of state and federal judges. The competition is designed

to develop and demonstrate skills of oral and written appellate advocacy. This year's assigned topic concerned cable-television franchising issues.

After graduation, team member Greg Bishop joined the Washington, D.C., firm of Nixon, Hargrave, Devans & Doyle. Larry Laycock joined Snow, Christensen & Martineau; and Steve Olsen returned to Idaho to practice with Holland & Hart in Boise.

Moot Court Teams Achieve National Prominence

Combining to produce the best year ever experienced by the Law School, the moot-court teams sponsored by the Board of Advocates achieved national prominence in several competitions.

In addition to the third-place finish in the National Moot Court Competition (see accompanying story), BYU teams advanced to the quarterfinals in the National Mock Trial Competition Regionals, placed third in the William B. Spong, Jr., Invitational Moot Court Tournament, achieved second and advanced to the finals in the Giles Sutherland Rich Patent Law Moot Court Competition Regionals, and placed third in the Irving R. Kaufman Securities Law Moot Court Competition.

Garth Ferrell and Sheila Page, both third-year students, and Julie Trent, a second-year student, represented the Law School in the National Mock Trial Competition regionals in Denver, Colorado. The competition was hosted by the University of Denver.

Merrill Clark, Christa Crapo, and T.J. Rudman traveled to Williamsburg, Virginia to compete in the William B. Spong, Jr., Invitational Moot Court Tournament hosted by the College of William and Mary.

This year marked the first time the Law School has entered a team in the Giles Sutherland Rich Patent Law Moot Court Competition. Steve Sumsion, a third-year student, and Todd Zenger, a second-year student, distinguished themselves with their second-place showing in the regional competition.

Three third-year students, Sterling Brennan, Gary Kuhlmann, and Larry Laycock, represented BYU in the Irving R. Kaufman Securities Law Moot Court Competition hosted by the Fordham University School of Law in New York City. Thirty-four teams competed in this final tournament.

Admissions

Despite the general decline in law-school enrollment throughout the nation, the Law School enrolled a full class of 151 students in the 1986 entering class. The median undergraduate grade point average for the class was 3.5 and the median score on the Law School Admission Test was in the eighty to eighty-fifth percentile.

The Law School's efforts at diversification of the student body resulted in the enrollment of fourteen minority students. Twenty-five members of the first-year class are women. The class includes students from twenty-four different undergraduate institutions, twenty-three states, and three foreign countries.

Employment of New Graduates Diverse

Members of the 1985 graduating class obtained employment in a number of diverse and exciting positions. From Washington, D.C., to Southern California, twenty-eight members of the class of 1985 are employed in judicial clerkships for the 1985-86 year. Anna Mae Goold, Law School Career Services and Placement coordinator, reports that this is the largest number of judicial clerkships ever obtained by a single class at the Law School. Most of the clerkship positions are with federal courts. Several students, however, are clerking for state supreme and district courts.

Other members of the class of 1985 went directly into practice after graduation. Ten members of the class joined firms of more than 100 members. Six are employed in firms of fifty-one to 100 members. Medium-sized firms of twenty-six to fifty members employ thirteen members of the 1985 class. Forty-one new alumni are employed by small or very small firms, and three members of the class are self-employed. Firms hiring members of the class of 1985 include: Evans Kitchel & Jenckes, Streich, Lange, Weeks & Cardon, and Lewis & Roca—all of Phoenix; Alston & Bird in Atlanta; Kim & Chang in Seoul, Korea; Vinson & Elkins in Houston; Latham & Watkins in Newport Beach; Willian, Brinks, Olds, Hofer, Gilson & Lione Ltd in Chicago; and Fine, Waltzer & Bagneris in New Orleans.

Twelve students assumed positions in business or industry. Two of the twelve are employed by Dow Chemical in Midland, Michigan, and one of the twelve now works for Reynolds Electrical Engineering.

In addition to the students employed in judicial clerkships, fourteen members of the class chose government employment, including work in administrative agencies, the military, and prosecution. Two members of the class are working for legal services organizations.

"We are especially proud of the geographic diversification achieved by the 1985 class," Mrs. Goold remarked. "Less than one third of the class chose to remain in Utah." California, Arizona, and Nevada continued to attract a substantial number of recent graduates. Interestingly, the South has become a more fertile area for BYU placement. Four 1985 graduates are working in Georgia and three are in Florida. Other southern states former students are calling home include Alabama, Louisiana, Tennessee, and Texas. Six students went to Washington, D.C.

Mrs. Goold also reports a marked increase in the number of law firms that interviewed on campus during the fall of 1985. More than 100 firms came to the Law School last year in search of potential associates and employees.

One of the most promising recruitment tools we have, Mrs. Goold points out, is the alumni. Many firms that are now selecting BYU as a source of new associates are doing so because of the fine example shown by earlier graduates.

Faculty Notes

Each issue of the Memorandum will report on recent activities of selected faculty members

James H. Backman

Jim Backman returned in 1984 from a two-year leave as European Area Legal Counsel for the LDS Church, working often with local counsel on real estate, labor, banking, tax, and immigration problems. He spent a good deal of his time on property and physical facilities matters, including legal and policy supervision work on three temple construction projects.

Reflecting his international experience, Professor Backman has initiated review by the Law School and the university of a proposal to create a master's of comparative law program. If approved, the new program would invite lawyers from foreign countries to spend a year on campus, sitting in on selected courses and taking some special instruction designed to familiarize them with the American system in a comparative perspective.

Matthew Bender Company has invited Mr. Backman to become part of the team of experts who will prepare periodic updates on the multivolume real-property treatise, *Powell on Real Property*.

Jim also served recently as faculty advisor to the *BYU Journal of Legal Studies*, one of the Law School's student cocurricular programs. The journal has published a series of book-length, practitioner-oriented topical summaries of Utah law, the latest volume dealing with probate law. Beginning fall 1986, the journal will change to a quarterly format.

Ray Jay Davis

During the 1984-85 academic year, Professor Ray Davis published an article in the *Journal of Weather Modification* entitled "Federal Liability for Negligent Maintenance of Weather Modification Equipment." He also prepared a series of four videotapes for Video Audio Educational Leasing Corporation on weather-modification law.

Mr. Davis' most recent publications include a chapter on "International Law of Weather Modification," in Max Planck Institute for Comparative Public Law and International Law, *Encyclopedia of Public International Law*; "The 1985 Utah Lake and Jordan River Operating Procedure Compromise Agreement," in "Proceedings of Conference on Climate and Water Management;" and "A

Legal History of Weather Resources Development" in "Proceedings of the Tenth Conference on Planned and Inadvertent Weather Modification."

Professor Davis has also completed a high school textbook for government classes that is ready for publication, and he is completing a draft of a text on Utah workers' compensation. The Rocky Mountain Center for Occupational and Environmental Health, College of Medicine, at the University of Utah asked him to make a presentation on Utah workers' compensation law.

BYU Law School cohosted the summer 1985 Rocky Mountain and Southwest Regional Institute of the Council on Legal Education Opportunity (CLEO) under Ray's direction.

In addition to his Law

School activities, Mr. Davis served as a member of the Citizens Advisory Committee to the Utah Center for Water Resources Research, as a trustee and member of the law teaching committee of the Rocky Mountain Mineral Law Institute, as a committee and task group member of the Irrigation and Drainage Division of the American Society of Civil Engineers, and as a director and secretary/treasurer of the Consortium for Atmospheric Resources Development. He also served as a trustee and member of the executive, legislation, awards, and planning and goals committees of the Weather Modification Association and as a member of the legislation committee of the North American Interstate Weather Modification Council.

<H. Reese Hansen

Professor H. Reese Hansen continues in his service to the Law School as associate dean. His long-term interest and activity in law school admissions policies is reflected in his continuing association with the Law School Admissions Council. He is a member of the board of trustees of the council and serves as chair of the External Affairs Committee.

The Association of American Law Schools has also tapped his admissions expertise and has selected him to serve as chair and executive committee member of the Section of Pre-legal Education and Admission to Law School.

Reese has also served the Utah community as a member of the Utah Commission for Law and Education, as a



member of the Board of Directors of Utah County Boys Club, and as a director of Utah Legal Services.

Because trusts has not been taught at the Law School since Professor Oaks was appointed to the Utah Supreme Court, Professor Hansen has agreed to assume the teaching responsibility for this course. Preparation for this new teaching assignment consumes much of his research time.

Carl S. Hawkins

Having resumed a position as full-time professor after a stint as dean of the Law School, Professor Hawkins continues to be involved in a number of projects. He is completing a revision of the torts casebook he coauthored and is doing research on several law-review articles in the torts field.

In 1985 he prepared a revised edition of *Professional Seminar: Becoming a Lawyer*, an intramural publication used as course material for a professional seminar.

He served as a member of the American Association of Law Schools Committee on Law Libraries, was a member of the ABA/AALS Reinspection Team for the Albany Law School, was an ex officio member of the Utah State Bar Commission and served on the advisory council for Lawyers' Assistants Program at Utah Technical College, Provo-Orem.

Professor Hawkins also serves as chairman of the Utah Administrative Law Advisory Committee. This committee is working on a draft of the Administrative Procedures Act for the State of Utah. The Utah Supreme Court has invited him to



serve on two committees: the Utah Supreme Court Advisory Committee on Rules of Civil Procedure, and the Utah Supreme Court Ad Hoc Committee on Lawyer Discipline Procedure. Mr. Hawkins also serves on the Drafting Committee for a Proposed Multistate Essay Exam for the National Conference of Bar Examiners.

Edward L. Kimball

"Of Crime and Punishment," published in *BYU Today*, and "Utah Rules of Evidence 1983, part I," published in the *Utah Law Review*, were two of Professor Edward L. Kimball's research efforts over the past year. He also continued his work of documenting the life of his parents by preparing a videotape on Spencer and Camilla Kimball for a BYU Women's Conference

and writing an article entitled "Remembering Mother," published in *This People*.

Other pieces Kimball prepared include *The Story of Spencer W. Kimball. A Short Man, A Long Stride*, published by Bookcraft, a chapter on Spencer W. Kimball for the Deseret Book publication, *The Presidents of the Church*, and an article on Spencer W. Kimball for *BYU Studies*. Following his father's death he prepared an article of remembrance for *Dialogue*.

He also developed a substantial part of a computer-assisted instruction package on evidence.

Professor Kimball served on a test-development committee for the National Conference of Bar Examiners and has served as a member of the Utah Board of Pardons

<Douglas H. Parker

During the past year Professor Parker participated in the establishment of the Utah Section of the International Association of Jewish Lawyers and Jurists. The members of the section honored Mr. Parker by electing him section chairman.

His major research interest currently is the completion of a survey of recent literature for inclusion in the *Jewish Law Annual*. Professor Parker continues work on his long-term project to prepare an encyclopedic dictionary of Jewish law, patterned after Berger's *Encyclopedic Dictionary of Roman Law*.

Professor Parker, along with Professor Sam Thurman, has served on a special subcommittee of the Ethics Advisory Opinion Committee of the Utah State Bar. The subcommittee reviewed approximately eighty written ethics opinions and prepared them for publication.

Doug spent six weeks this summer in New Mexico as a professor for the Council on Legal Education Opportunity (CLEO) Program.

Professor Parker was recently selected to receive the Karl G. Maeser Distinguished Teaching Award. This award, presented by President Jeffrey R. Holland on behalf of the Brigham Young University community and alumni, recognizes members of the BYU faculty who have demonstrated superior teaching skills. In making the presentation, President Holland emphasized Doug's efforts in developing new courses at the Law School in American Indian law and Jewish law.

Professor Parker is the first member of the Law School faculty to receive this prestigious award.

Robert E. Riggs

Professor Riggs has completed a chapter, coauthored by Dean Hafen, to be included in the Matthew Bender Treatise on the Constitutional Law of Privacy.

The *Arizona Law Review* published Professor Riggs' article: "Indecency on the Cable: Can It Be Regulated?" Additionally, the *Florida Bar Journal* published his article on the regulation of Indecency on Cable Television.

Professor Riggs also prepared six short articles for "The Guide to American Law," a ten-volume reference work published by West Publishing Co. in 1984.

The *BYU Law Review* has published "The United Nations and International Law." Duke University Press will include a chapter by Professor Riggs entitled "The United Nations and the Politics of Law" in its book *Politics of the United Nations at Forty*, and *Dialogue* has published Professor Riggs' article on government-sponsored prayer in the classroom.

Professor Riggs' book *The United Nations: The Politics of International Organization*, coauthored by Jack C. Plano, will be published by Dorsey Press in early 1987.

He is now beginning a study of judicial protection of civil rights in Britain in preparation for taking professional development leave in London, England, during the 1987 winter semester. He will be affiliated with the Law Department of the London School of Economics.

David Thomas

Professor David Thomas continues his law-library development efforts in addition to producing a prolific amount of scholarly material.

During the past academic year he prepared a 250-page supplement to his treatise on Utah Civil Procedure. His publication list included: "Peaceful Partnerships: Suggestions for Law School Libraries Sharing Local Computer Systems," published in the *Law Library Journal*; "The Disappearance of Roman Law from Dark Age Britain," published in the *BYU Law Review*, and "The American Law School and its Library: A Unique Relationship," published in the *Law Library Journal*. The *BYU Law Review* recently published Mr. Thomas' articles "Anglo-Saxon Antecedents of the Common Law," and "Common Law Under the Early Normans." His most recent publication was "The Paperless Law Library in the United States," published in *Law Librarian*.

In addition to his solo scholarly efforts, Professor Thomas contributed to or provided editorial assistance to *Real Property, Probate and Trust Journal*; *Manual of Procedures for Private Law Libraries*, and *Legal Research for Law Students*. He has also prepared revisions of three chapters in *Powell on Real Property*.

His other activities include membership in the accreditation site inspection team of the American Bar Association to Gonzaga University School of Law and the Constitution and By-laws Committee of the American Association of Law Libraries. He was appointed director of the 1986 Institute on British Legal History, Legal Bibliography and Law Librarianship, sponsored by the American Association of Law Libraries.

Lynn D. Wardle

Professor Lynn Wardle continues his extensive research in family law. He is completing the manuscript he is coauthoring for a multivolume treatise on family law which will be published by Callahan and Company in 1987.

Professor Wardle's testimony and statement, *The Impact of the Equal Rights Amendment: Hearings on S.J. 10 before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate*, has been published. The *Journal of Family Law* has also published a related article by him entitled "The Impact of the Proposed Equal Rights Amendment upon Family Law." *BYU Law Review* has published another of his articles, "Rethinking Roe v. Wade."

In addition to his research interests in family issues, Professor Wardle serves on the board of directors of three nonprofit organizations: Hospice of Utah County, Utah Valley Family Support Center, and the Americans United for Life Legal Defense Fund. He is also a member of the Pro-Life Advisory Committee to the General Counsel, U.S. Catholic Conference.

John W. Welch

For the past several years Professor John W. Welch, together with Professor Ed Firmage of the University of Utah School of Law, has been preparing a consolidated work on Ancient Near Eastern and Biblical Law in relation to the Book of Mormon. An extensive bibliography of ancient legal materials has been prepared and a book, *Law and Religion: Middle East-*

ern Influences on the West, has been submitted for publication. Additionally, he is serving as general editor of the *Collected Works of Hugh Nibley*. This effort should result in a fifteen to seventeen volume series. Volume one has recently appeared, and volume two is prepared for release in the near future.

Professor Welch pursued his long-term interest in the Book of Mormon and other Church topics through other avenues as well. He is coauthoring with Stephen D. Ricks a book on King Benjamin's speech. He also is writing a script for the BYU Motion Picture Studio on ancient temples.

During the 1986-87 school year, Professor Welch has, in addition to his faculty responsibilities at the Law School, accepted a half-time appointment as a director of the BYU Religious Studies Center in charge of special projects.

Professor Welch published a number of articles in Church publications. He also wrote several articles for publications of the Foundation for Ancient Research and Mormon Studies (F.A.R.M.S.). For example, one paper deals with theft and robbery in ancient near-eastern law and in the Book of Mormon. He serves as president of F.A.R.M.S.

With his wife, Jeannie Welch, he wrote a book entitled *The Doctrine and Covenants by Themes*. He also edited and introduced John L. Sorenson's book *An Ancient American Setting for the Book of Mormon*.

Class Notes

Jon D. Anderson '77

Jon Anderson became a partner at Latham & Watkins in February, 1985. He specializes in litigation and labor law and has been in the firm's Newport Beach office since 1978. Jon and his wife, Leanne, have five boys, ages eleven, nine, six, four, and seven months. Little League and soccer seasons keep their family very busy. They attended seventy-five Little-League games this year. Jon is the gospel doctrine teacher in their ward.

Steven G. Forsyth '77

Steven Forsyth has moved from Houston, Texas, to Kuala Lumpur, Malaysia. He is employed by Esso Production Malaysia, Inc., an affiliate of Exxon Corporation.

Lee G. Caldwell '78

Lee Caldwell passed the Texas Bar in the spring of 1978 and began working as a title officer for Stewart Title Corporation in Houston, Texas. In the summer of 1978 he accepted a position with Gulf States Utilities in the real estate department. In the fall of 1979 he was appointed an assistant professor of business law at Sam Houston State University. He also commenced work on a Ph.D. in management policy and strategy from Texas A&M University. He completed the degree in 1982 and accepted a position at the University of Utah as assistant professor of management. In addition to his professorial duties, Lee manages academic and research computing for seven colleges at the "U" and serves as assistant dean for computer education

in the College of Business. He is serving as stake financial clerk and has two children, Alicia, age five, and Lee David, age two. Lee also plays the trombone in the Salt Lake Opera Theater Orchestra.

Randall S. Feil '78

Randall Feil has been with Fox, Edwards, Gardiner & Brown in Salt Lake City since graduation. He became a partner in the firm on July 1, 1983. Randall has specialized in general civil litigation. He served as a bishop and is now on the activities committee in his ward. He and his wife have five boys and have completed a new home in Bountiful.

Jeffrey A. Dahl '79

Jeffrey Dahl is a partner in the law firm of Lamb, Metzgar & Lines, P.A., in Albuquerque, New Mexico. He practices general civil litigation with emphasis on defense work, bankruptcy, and business litigation. In his spare time he still enjoys running and outdoor activities such as backpacking, cross-country and alpine skiing, and hiking. Jeff has four beautiful blonde daughters. He recently completed a new home in Albuquerque with room to grow.

Bruce E. Babcock '80

Bruce Babcock moved from Ohio to Salt Lake City and is a shareholder in the law firm of Jones, Waldo, Holbrook & McDonough. His practice specializes in tax and ERISA matters. Bruce, his wife, Susan, and their three children are enjoying their new home in Utah, which is closer to the mountains and family. He serves as elders quorum president in his ward.

Forrest Fountain '80

Forrest Fountain joined the Legal Department of Security Pacific National Bank in November of 1983. There are thirty attorneys in the Los Angeles office. Security Pacific is the seventh largest bank in the country and is second only to the Bank of America in number of branch offices. Forrest's wife, Marla, passed away in November of 1985.

Kevin B. Christensen '81

Kevin Christensen is a partner in the Las Vegas, Nevada, firm of Sabbath & Christensen, Chartered. His portion of the practice involves a great deal of labor-union representation and Taft-Hartley Trust Fund collection work. He has served as chairman of the Nevada State Apprenticeship Council for nearly two years by appointment through the State Labor Commissioner. He and his wife have two girls and one boy, with one on the way. He serves as a high counselor in his stake. Kevin takes full advantage of the warm southern Nevada weather and enjoys a great deal of tennis, golf, and other warm weather sports.

Brent D. Ellsworth '81

Brent Ellsworth accepted a position after graduation with the Phoenix law firm of Snell & Wilmer, where he spent four years practicing law with special emphasis in estate planning. He recently left the firm and opened the law office of Jackson & Ellsworth in Mesa with Eric M. Jackson, a 1978 BYU law graduate. Brent's education continues as he is about to complete a two-year course to become a Certified Financial Planner. Richard White '81 recently

joined the firm that is now called Jackson, Ellsworth & White. Brent and his wife, Linda, are the parents of three daughters and a son. Brent is the stake executive secretary and his wife is in the ward Relief Society presidency.

Erven T. Nelson '83

Erven Nelson served a clerkship for a federal district judge in Las Vegas, Nevada, for one year following graduation. He is now living in Glendale, California, and works for Spensley, Horn, Jobas & Lubitz, an intellectual-property firm. Erven indicates that his employment with the firm does not indicate that he is an intellectual or that he has an engineering background. The firm needed a Japanese-speaking lawyer to deal with their burgeoning Japanese clientele who keep getting sued for patent infringement. He and his wife, Lisa, have two sons, Joel and Derek. Erven is second counselor in his ward bishopric and his wife is the primary president and a seminary teacher.

Robert C. Martin '83

Robert Martin recently published "A Comparison of the Pennsylvania and Delaware Corporation Statutes" in the *Dickinson Law Review*. Dickinson is located in Carlisle, Pennsylvania.

George D. Menden '85, Craig R. Pett '85, Richard A. Russell '84

George Menden, Craig Pett, and Richard Russell have all joined the Alston & Bird law firm in Atlanta, Georgia.

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