

Spring 1994

# Clark Memorandum: Spring 1994

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# CLARK

MEMORANDUM

BRIGHAM  
YOUNG  
UNIVERSITY

J. REUBEN  
CLARK LAW  
SCHOOL

SPRING  
1994

DAY

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SPRING 1994

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Cover Illustration:  
Brant Day







DAY



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# WHY THE FOUNDING FATHERS WOULD CALL

# W ANOTHER *Constitutional Convention* NOW

HAT THE FRAMERS DID IN PHILADELPHIA in 1787 was in response to the situation they confronted. Government under the Articles of Confederation was incredibly weak, indecisive, and totally ineffective both in the formulation and execution of policies.

Another factor in the minds of the men of 1787 was tyranny, not the tyranny of George III, which had dominated their thoughts in 1776, but the tyranny of the state legislatures. Liberated from the control of the royal governors, and without an independent restraining judiciary, there was virtually no control. Those responsible in Philadelphia were determined to create an executive independent of legislative tyranny.

*Illustrations by Brant Day*

## MALCOLM R. WILKEY

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A third reason for creating a strong executive and the separation of powers among the three branches was the fear that an all-powerful legislature would employ patronage for corrupt purposes. Some state legislatures were obviously corrupt, but more undisputed was the fact, visible for many, many years, that England itself was highly corrupt. The Framers in 1787 feared that an all-powerful legislature would insist on placing its henchmen in administrative posts, and, based on the English model, deliberately create jobs for their "place men."

So the objective was to make the executive both powerful and pure, and the device employed was a separation of powers, which provided one more check on the all-powerful legislature by an independent judiciary. Yet by 1879 Woodrow Wilson was writing "there could be no more despotic authority wielded under the forms of free government than our national Congress now exercises. It is a despotism which uses its power with all the caprice, all the scorn for subtle policy, all the wild unrestraint which marked the methods of other tyrants as hateful to freedom."<sup>1</sup>

Today we no longer worry about tyranny of either George III or the state or federal legislature; our overpowering concern is for the undisputed ineffectiveness of Washington governmental structure after 200 years. In a way history has now come full circle. For in 1787 the dominating consideration was that which had summoned them there, the undisputed ineffectiveness of the Articles of Confederation.

### *Concepts OF THE 1787 Constitution*

Let us recall the concepts of the 1787 Constitution that replaced the Articles—first, the concept of the man who would be president. Everyone agreed that this would be Washington, the peerless leader, without political ambition, a man above the fray. The president was conceived of as a man who would represent the whole country, the whole country geographically, and the whole country in all its interests, since he would be outside and above faction. It was never contemplated that the president would be the party leader, for there were no political parties in existence or contemplated.

The concept of the men who would be legislators was that of community leaders, with a basic occupation or profession, thereby belonging to and openly representing "a faction." To this basic concept must be added the interplay of other factors: (1) the distance from the national capital to the legislators' homes, (2) the delay and difficulty of 18th-century communications, and (3) the limited role of the federal government compared to that of the states. All of this meant that the new national legislators would serve a short period in the Congress, at a personal sacrifice in nearly every instance, and then return to their basic profession or occupation with others of the same type replacing them.

All these factors that influenced the 1787 concept of the Congress have now completely changed, as many scholars have frequently noted. But, they rarely ask, did anyone seated by the chimney fire in 1787 even dream of television? The impact of television alone invalidates every assumption of the Framers as to the role of the national legislature and the character and election method of its members.

The Framers' concept of the role of the states was that unquestionably they would continue to be preeminently important. The federal government was strictly a government of limited powers. If there is anything the *Federalist Papers* made clear, it was that.

Perhaps most important for us is that the Framers' concept of defense and foreign relations was attuned to the 18th century. That world of the Framers has been overwhelmed by technology. Our Constitution was drafted by candlelight. In communication and transport, the fastest was by sailing ship, the most fearsome weapon, a broadside by a ship of the line. Today we think of nuclear-tipped intercontinental ballistic missiles, and bombs smuggled by terrorists to kill thousands.

The Framers knew only the dynastic wars of Europe, with petty objectives and petty forces. In the Framers' lifetime they saw the change to the nation-in-arms of the French Revolution. In our 20th century, we have moved from rivalry between nations or dynasties, which was World War I, to the war of ideologies, which was World War II, to another phase of the struggle between ideologies, which was the Cold War. Now perhaps we have moved to a conflict between cultures, between the Christian West of the Renaissance and Reformation versus Islam, Hinduism, Buddhism, etc., of the East.

In 1787 and in 1993 the overpowering responsibility of all government was and is to make *decisions*. The Framers wrestled with the questions: By whom? By what institutions? In what structural framework? and then crafted a structure to make decisions in domestic as well as foreign and military affairs in the time allowed in 1787.

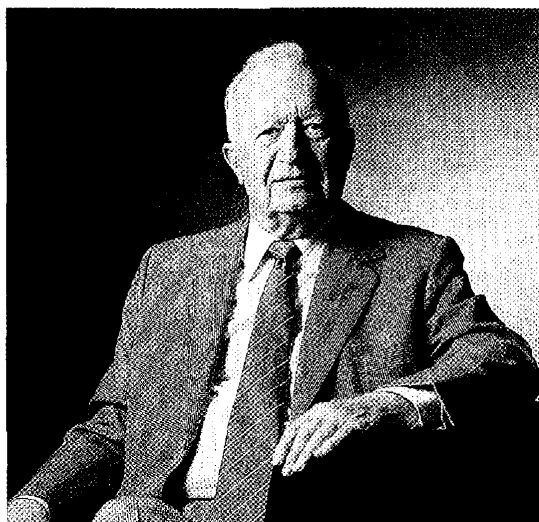
After a brief look at the motivations and concepts of the Framers, let us look at their objectives and structure in 1787.

### *Objectives AND Structure*

Granting that the fundamental *objectives* of the Framers in 1787 would still be the same today—to design a representative government of, for, and by the people—would the Framers now design the *structure* of that government in all respects as we have today?

To say that the Framers would repeat the structural design in all details in anticipation of the 21st century as they did for the 19th is to charge that they would have learned nothing from 200 years of experience and to assert that the world has changed little since the 18th century.

**J U D G E M A L C O L M R . W I L K E Y** THIS ADDRESS WAS GIVEN AS PART OF THE LAW SCHOOL'S 20TH ANNIVERSARY. THE SPEECH WAS THE SIXTH AND CONCLUDING LECTURE OF A SERIES GIVEN DURING JUDGE WILKEY'S NOVEMBER LAW SCHOOL VISIT AS A SCHOLAR IN RESIDENCE, WHERE HE TAUGHT A SHORT CONSTITUTIONAL REFORM COURSE. ● *Judge Malcolm R. Wilkey has had extensive*



*experience in the private and public sectors during his legal career. After graduating from Harvard College and Harvard Law School, he practiced law with a firm in Houston, Texas, for several years and later as general counsel for Kennecott Copper Corporation in New York City.* ● *Most of his profes-*

*sional career, however, has been spent in government service. He served under President Eisenhower as U.S. attorney*

*in Houston, and then as an assistant attorney general in Washington, D.C. In 1970 President Nixon appointed him to the Federal Court of Appeals for the D.C. Circuit, a court that is often called the second most important court in the country. After retiring from the bench in 1985, Judge Wilkey was appointed by President Reagan as the American Ambassador to Uruguay, a position he held for nearly five years. In 1989 President Bush named him the chair of the President's Commission on Federal Ethics Law Reform, a commission that evaluated ethics rules and made proposals for reform. Most recently, Judge Wilkey served as Justice Department special counsel in charge of investigating the House banking scandal.* ● *Judge Wilkey has maintained con-*

*tact with the Law School since he first came for a moot court competition more than a decade ago. Since then he has served on the Law School's Board of Visitors and as a professor during spring term of 1984 and again during winter semester of 1989.*

In 1787 there were only a few crucial tasks that required a national government. What the Framers thought these were can be gathered by looking at the list of powers and prohibitions (Article I, Sections 8, 9 and 10, and in Article II, Sections 2 and 3 of the Constitution). These powers granted to the national government deal mainly with foreign relations, national defense, and regulation of foreign and domestic commerce.

In addition to the *enumeration* of powers, we should look carefully at the *distribution* of the powers. That distribution was consistent with the dominant republican political theory and the technology then.

None of the Framers could have foreseen—any more than John Locke or Montesquieu—the necessary enormous infrastructure and defense capability of the modern state in the nuclear age. Eisenhower got through Congress and launched a nationwide superhighway building program in less than a year; but the debate over whether the federal government had the power to build a national road lasted from Jefferson through Jackson. A president today must decide in minutes whether to respond to a nuclear attack; Jackson fought the Battle of New Orleans with the entire country ignorant of the fact that the Treaty of Ghent had been signed several weeks before.

We will fritter away—or destroy overnight—what the Framers gave us unless we confront our current problems with the same imagination, practicality, courage, and selflessness they displayed in 1787.

### FEW *Structural Changes*

Moving forward from 1787, contrary to what most of the Framers anticipated, amendments to the Constitution have brought almost *no* structural change. Scholars usually say that only the 17th and 22nd Amendments wrought structural changes. I would add the 12th.

The 12th Amendment was caused by the tie vote in the 1800 presidential election between Jefferson and Burr. It has had an impact far beyond that which it is usually accorded. First, the 12th Amendment made inevitable the rise of political parties. Second, it transformed the office of the president and the character of the men who would occupy it. After 1804 the president and vice-president would no longer be the two highest men in respect of their fellow citizens (like George Washington, above the fray). But the president and vice president would be of the same political beliefs and supported by the same group, i.e., political party. The presidents after that had a dual role: leader of the nation and leader of the party, as Woodrow Wilson pointed out.

The 17th Amendment changed the senators' constituency from the legislature to the people of the state. Now it is worth noting that the 17th Amendment originated in Congress only after enough state legislatures had voted to call a constitutional convention—the only time that has happened. Congress got the message and drafted its own

amendment. Has it not had an impact? Can you imagine what senatorial campaigns—especially the use or non-use of television—would be like if senators were still elected by state legislatures?

The 22nd Amendment imposed term limits on any office for the first time. In many ways the two-term limitation was a partisan reaction in 1947 to the success of Franklin Roosevelt. Yet it was also a recognition that professional politicians can be *too* successful in getting elected. The term limit on the president introduced a structural disequilibrium between the president and Congress. The president must now confront professional politicians in Congress who have greater staying power—and comparative unaccountability.

There has been no other structural change to the amendment process. Why? Many think it is because the people who would be affected by change, who would have their powers altered, are precisely those who originate constitutional amendments (Congress).

During my last five lectures, I discussed the remedies that are available and the direction that those remedies would take us.

I mentioned the problems of gridlock, perpetual incumbency, and total nonaccountability. And then I went to the possible remedies—strengthening the Congress, strengthening the president, enacting measures to eliminate gridlock between the two ends of Pennsylvania Avenue, strengthening the political parties, strengthening the judiciary, strengthening the states, and strengthening the people. I also discussed how these remedies would fit into a coherent whole, pointing us toward a system of professional politicians continuing in office with visible political accountability (similar to England's parliamentary system). Or the remedies could point us in a different direction toward a legislature of amateur politicians who had achieved distinction and demonstrated talent in other affairs relevant to government administration. The comparison between those two remedies is something I would hope could be made in a constitutional convention.

I've tried to assess whether it was possible to get certain reforms through Congress or not. And in summary, there is one type of reform impossible to get through Congress—any statute or amendment that alters the power structure to the disadvantage of one or both houses.

Those reforms that Congress will never pass as amendments include three out of the four measures to strengthen Congress because it alters the distribution of powers between the Congress and the president—all five of the measures to strengthen the president, all seven of the reforms to diminish gridlock between the president and Congress, and term limits or a prohibition against reelection to the same office consecutively.

This *only* leaves as reforms that, as a practical and constitutional matter, could be passed by Congress: (1) fixing Congressional salaries, (2) internal leadership reforms, and (3) strengthening political parties.



*Following the*

## FRAMERS' ADVICE

*to a NEW*

## CONSTITUTIONAL

*Convention*

*by later amendment. The Founding Fathers regarded the national government they had organized as an experiment, and they hoped that succeeding generations would correct the mistakes that time and experience revealed. Thomas Jefferson even suggested that the constitution drafting process should be repeated by each generation of Americans.<sup>2</sup>*

I suggest we have a constitutional convention every 20 years as a standard matter. That would be helpful in keeping our governmental processes up to date. Don't forget that the revered Framers changed their structure of government twice in their own lifetime—first, the Articles of Confederation, and, when they saw that changes were needed to create an effective government, the Constitution of 1787.

Since our Constitution has been so amazingly successful compared to that drafted by anyone else—except the British, who never drafted one—the myth has grown that this is virtually a perfect document. The Framers recognized defects, and some were corrected while the Framers were still alive. They were corrected by constitutional amendments and by the creation of institutions, such as the political party system, which bridged some defects in the document itself.

Nothing illustrates this better than the dissatisfaction with the selection method of the president and vice-president, which resulted in the 12th Amendment. Its consequences were not only to designate clearly the choice between president and vice-president: it recognized and contributed to making party slates essential. Gone was the hope of lofty idealism and detached vision for the whole country characterizing those considered for president.

Besides the 12th, no less than *nine* amendments affect the presidency—who votes for him and who can occupy the office. Six determine who votes, through the electoral college system of course—the 14th, 15th, 19th, 23rd, 24th, and 26th amendments. Three deal with who occupies the office—the 20th, 22nd, and 25th. Looking at it another way, only seven—11th, 13th, 16th, 17th, 18th, 21st, and 27th—do not affect presidential election or succession. I'm ruling out, of course, the first ten, the Bill of Rights, which are really part of the original Constitution.

Present day dissatisfaction with the presidency focuses not on the way he is elected, but on what he is not able to do after he is elected.

Now mark this. Except the 22nd, which limits the president to two four-year terms, not one of these 27 amend-

ments have had such limited changes? Would this be a disappointment to the Framers? I think it would.

*In the last Federalist paper, Alexander Hamilton urged ratification of the Constitution despite its imperfection, on the ground that its defects could be corrected*

by later amendment. The Founding Fathers regarded the national government they had organized as an experiment, and they hoped that succeeding generations would correct the mistakes that time and experience revealed. Thomas Jefferson even suggested that the constitution drafting process should be repeated by each generation of Americans.<sup>2</sup>

This is highly significant, because the relative powers of the president and Congress have been exercised in such a way in the last 50 years to produce gridlock, deadlock, and total unaccountability. It is in this area where reforms are most desperately needed, and it is precisely in this area in which the constitutional amendment process has never produced any amendments whatsoever, except the 22nd.

The reasons for this are obvious: the Congress is never going to pass an amendment that will reduce in any way its prerogatives, specifically granted by the Constitution, or acquired through clever political manipulation, e.g., holding hostage a treaty or a cabinet confirmation until the individual senator gets what he wants in the way of the appointment of a U.S. District Judge. Congress has not been willing, and never will be willing, to take any constructive action (such as increasing the House term to four years) that would alter the position of the Senate and the House. So even adjustments between the two branches are impossible by an amendment process that depends on origination by Congress.

Getting down to practicalities, how would a constitutional convention be called?

*Calling A*

## CONSTITUTIONAL

*Convention*

Under Article V of the Constitution, Congress would call a convention after two-thirds of the state legislatures applied (34 states). What would the convention do? It would *propose* amendments to the Constitution, *not* amend the Constitution. The amendments would become valid when ratified by three-fourths of the state legislatures or three-fourths of the states acting through conventions, which amounts to 38 states. The choice of the "mode of ratification" is as "may be proposed by Congress."

How did the Framers create this method of amendment? Originally, in the Virginia Plan and in the thoughts of others, the states *only* should initiate amendments. This yielded to the argument advanced by Hamilton that Congress would be the first to recognize the need for any amendments. George Mason opposed this on the cogent ground that "it would be improper to require the consent of the national legislature, because they may abuse their power and refuse their consent on that very account. The opportunity for such an abuse may be the very fault of the Constitution calling for amendment."<sup>3</sup> What Mason feared is exactly what has happened. Putting the amendment process at the mercy of Congress, the very body whose powers may need to be changed, may have been Alexander Hamilton's greatest mistake, the decision with the most far-reaching consequences for his country.

The Confederate Constitution provided an easier amendment route and, most significantly, left Congress out of the initiating process. Another difference, the ratification by two-



thirds was a lower margin than the three-fourths requirement of our Constitution. If any three states wanted a constitutional convention to consider amendments, they got one, whether the Congress agreed or not. Voting by states in the convention, which was true at Philadelphia in 1787, meant that nothing would be proposed by the convention unless six states of the eleven were for it, and nothing would be finally ratified as a change to the Constitution unless eight states of the eleven wanted it. Change would thus occur only if there was an overwhelming consensus that it was wise, but the initiation of consideration could be made by a minority of the states. The Confederate Constitution is worthy of study and reflection. Americans who had 72 years experience with the 1787 document drafted it—the only instance in 206 years since Philadelphia that the whole constitutional design has been reviewed. Besides an easier amendment process, the delegates opted for a president with a six-year nonrenewable term and a line-item veto. But they left unchanged that magic language vesting “The executive power in a President” intact.

In over 200 years there has been no constitutional convention called by the states. Those with entrenched interests in the power structure have found it easier to control and suppress reforms through Congress, either squelching proposals or controlling the drafting, as with the 17th Amendment.

*Ostensible* Those entrenched interests fear change  
 OBJECTIONS and advance all kinds of ostensible objections to a constitutional convention. They advance a whole string of procedural questions. Article V, like most of the Constitution, is drafted in general terms and may need to be fleshed out by legislation. Nearly all these procedural questions can be answered by reference to what the delegates did in 1787 or what the Congress and the state legislatures now do procedurally.

Some objections are troublesome. What would be the role of the courts? Can Congress be *compelled* to call a constitutional convention if two-thirds of the states request it? Confronted with the 17th Amendment, Congress evaded that by proposing its own draft of the

change in the constituency electing senators. What if there is a controversy between the convention and Congress? Can the courts settle it?

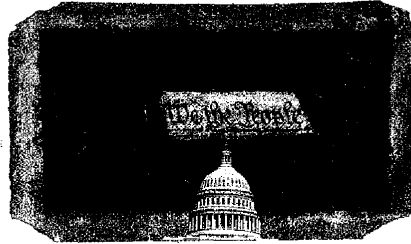
Perhaps most important, how would the delegates be chosen? How many per state? Would they be by political party nominees as we choose regular elected officials? Would current office holders be eligible to be delegates to the constitutional convention?

Also, would the voting be by state, as it was in 1787? Would it be by individual as it now is in Congress—except the significant exception of when the House chooses a president?

The biggest objection by opponents of a convention has been the bugaboo of a “runaway constitutional convention.” This idea, erroneously it turns out, goes back to the alleged “instructions” given to the delegates of 1787. The Congress under the confederation resolve of February 1787 had no legally binding effect, because, in the words of Julius Goebbel, the first-volume author of the History of the Supreme Court of the United States, “It was in the enabling legislation of the states that the source of the delegates’ authority lay.”<sup>4</sup> Eight state legislatures had already called for the meeting in Philadelphia when the Congress of the confederation passed its resolve, which was really preparatory in nature. Quoting Goebbel, “The state legislative instruments, . . . with a single exception were cast in general terms and did not impart specific instruction.”<sup>5</sup> Therefore, the Framers had no binding instructions on the scope of their action. Today, Article V now governs the amending process, but without specific detail.

There is a whole list of horrors conjured up by opponents to a constitutional convention. Abolish the Bill of Rights or portions thereof. Reverse several Supreme Court

decisions. Forbid abortion or legalize abortion. Allow prayer in the schools. Forbid guns or legalize guns for self-defense. An iron-clad balanced budget required, or one with lots of loopholes. Compel revenue sharing with the states. Nearly all these are *social policies* that do *not* belong in the Constitution one way or another. Some might be the subject of a statute, if the consensus could be mustered. All are highly controversial, which is why no consensus has formed to pass them.



WE WILL *fritter away*—  
 or *destroy* OVERNIGHT—  
 WHAT *the Framers*  
*gave us* UNLESS WE  
 CONFRONT *our current*  
*problems* WITH THE  
 SAME *imagination,*  
*practicality,* COURAGE,  
 AND *selflessness*  
*they displayed* IN 1787.



Being highly controversial, how many of these proposed reforms would emerge from a constitutional convention with an agreed text by a delegate or state majority? If any emerged, how many would be adopted by 38 separate state legislatures or conventions? Remember, a constitutional convention can only "propose" amendments under Article V. And, Congress could stall on choosing the method of ratification and never send an amendment to the states.

*Proposed* STATUTES TO  
GOVERN A *Constitutional*  
*Convention*

Whatever the legitimacy of concerns about a runaway constitutional convention, over the years several proposed statutes to govern such a convention have been introduced. The principal ones were by Senator Sam Ervin and Senator Jesse Helms. Each received strong support in the Senate, though the House acted on neither. These statutes spell out the administrative details, the place, funding, and noncontroversial solutions to the details left unexpressed in Article V.

Some of the statutes' answers could be questioned, although the answers given are not unreasonable. First, the convention would be electoral college size, two senators from each state plus the same number as current House members. Second, voting would be by delegate, not by states as in 1787. Third, a majority of delegates would be necessary to propose an amendment, i.e., the same number as to elect a president.

Four provisos to guard against unwelcome subjects rest on shakier ground. First, the statutes require an oath of each delegate not to vote for any amendment on any subject not listed in the concurrent resolution by Congress calling the convention. Second, they forbid the convention from considering any other topic than that specified on the agenda by Congress. Third, they permit the Congress to refuse to submit any proposed amendment to the states that violates the listed agenda. Fourth, they rule out judicial review, leaving all disputes about the convention's actions to Congress. That's self-protection in a big way.

Congress clearly has more authority than the Continental Congress to call and limit a constitutional convention, because now we would be operating under Article V of the Constitution, which says Congress "shall call a convention for proposing amendments." The Continental Congress had no such specific authority because it remained in the separate states.

Such a statute would still be on shaky ground in so limiting a constitutional convention. Note carefully: the wording of Article V *does not require* a convention to be called to consider a *specific* amendment. Look at the parallel language:

"The Congress shall propose amendments to the constitution, or, shall call a convention for proposing amendments."

"The Congress" and "a convention" are treated as alternate bodies for the same purpose, i.e., proposing amendments. Congress can propose any amendment it pleases, why could not "a convention"? Furthermore, amendments coming out of either body are to be treated in the same way: "Amendments which in either case shall be valid when ratified by the legislatures of three-fourths of the several states or by convention in three-fourths thereof."

Efforts to call a constitutional convention have always been associated with a specific proposal. I have never understood this to be *required* by the Constitution, merely a safe political strategy. Yet, this does not seem to have been discussed and analyzed for our future actions.

The question arises as to whether a present Congress can by statute bind a future Congress. The practical answer is found in the experience under the "fast track" procedure on international trade, i.e., it's not binding but it's a useful guide about what procedures ensure political prudence.

*Because OF THESE multiple woes,*  
WHICH ALMOST *everyone* WHO STUDIES  
*the situation* AGREES ARE *horrendous,*  
WE ARE IN *danger* OF LOSING OUR  
*national confidence,* OUR FAITH  
IN *democracy* ITSELF.

So, congressional efforts to limit a constitutional convention agenda may be futile, but Congress may have the *ultimate power* to refuse to submit amendments to the states. Doing so would violate the will of the people and its obligation under the Constitution. Could the Supreme Court effectively challenge Congress's dereliction of duty?

I believe that anything coming out of a constitutional convention, whether an original agenda or not, would require such consensus behind it and would be such a reasonable proposal that Congress would have no practical choice but to submit it to the states. This might be true particularly if the popular measure dealt with Congress's own power.

*How to PROCEED*

Which way to proceed to a constitutional convention? I would suggest these steps: First, Congress should pass a bill regulating the procedure of the constitutional convention. Some legislation would be necessary to deal with housekeeping details, and other provisos might give some reassurance to people who have unwarranted fears of the results of the convention. Second, after passing a bill regulating procedure, a commission outside Congress should be appointed to study and propose reforms. We have had unofficial groups like the Committee on the Constitutional System, various think tanks have studied proposed reforms, but we have had no official commission representing balanced and diverse points of view to make recommendations that might serve as the basis of the amendments themselves. Frequently, the advisory commission route has been followed in changing state constitutions, but not always successfully.

Would a constitutional convention operate in secret (as did the Framers in 1787) or openly (as plenary meetings of each House of Congress)? Many scholars believe the success in framing the Constitution was due to the oath of absolute secrecy during deliberations, which was faithfully observed. Not until the publication of the Madison notes some 50 years later did we really learn what had gone on in the convention, the positions individuals took, and the resolutions that were tentatively taken and then reversed on further deliberation. For example, they reversed themselves seven times on the presidency, the term of office, the method of election, and whether there was to be successive elections or not.

Even now, Congress does its real work in committees, not on the open floor of the House or Senate. And committee meetings, where the real work is done, are frequently closed.

Many scholars say that a constitutional convention could not be held except in the open. Alexander Heard remarked: "Now, in contrast to 1787 our political values, popular expectations, and often legal stipulations require exposed deliberations and a consequent popular influence on constitutional adjustments." Would this work?

What type of people would come forward as delegates? This would be a singular historic event, the century's most important political happening. We would hope that men and women of broad vision, the wisest and most respected in our land, would be chosen by the states to represent them. We would hope that not many current political office holders, with their short-range agenda, would be chosen, but that those who had served with distinction and retired from high office would be available. We now have *five living* former presidents. Talented newcomers to politics should be enlisted. Today, there are people who would never consider running for Congress who would want to serve as constitutional convention delegates. One who has said just that is Milton Freedman.

The American public has been way out in front of Congress in desiring reform. In a 1984 article Austin Ranney surveyed 11 proposed constitutional amendments that had been offered in Congress. Substantial majorities of

the American people supported nine of the eleven. A majority rejected only one proposal (outlawing abortions), and they were evenly divided on the single six-year presidential term. Those enjoying widespread public support included the presidential line-item veto (which I have stressed as essential in gaining control of the budget), limiting terms of senators and representatives, direct election of presidents, and a national initiative for legislation. You will note that these four have a direct and probably deleterious impact on congressional power. So, in spite of majorities ranging between 70 and 80 percent, Congress has never given serious consideration to any of these. Others gaining widespread popular support have included regional presidential primaries, a national presidential primary, a balanced budget, and school prayers. The first three of these also could affect congressional power by enhancing the president's power. In other words, seven of the nine enjoying widespread public support affect Congress adversely. None of the nine has gotten anywhere in our national legislature.

Is it possible, given our present situation in government, which almost everyone deplors, that we could have a constitutional convention that would correct at least some of these obvious deficiencies? I think so, although when the time and events will make it possible, I cannot predict. Certainly the longer the situation continues, the worse it will get.

Because of these multiple woes, which almost everyone who studies the situation agrees are horrendous, we are in danger of losing our national confidence, our faith in democracy itself. A good indication of this is the increasing abstention for the exercise of democracy's most basic action, voting. Another indication is the hope attached to third-party phenomena like Ross Perot. This loss of faith in our democratic institutions is perhaps the best reason why deep constitutional reform is terribly necessary.

Members of Congress are part of the problem, but they are also the victims of the way our institutions have now warped. Instead of sneering at them or the president, as citizens we ought to be considering reforms to make these elected officials accountable, responsive, and effective. Instead of permitting the Congress and the president to abdicate so much of policy making to the courts, we ought to be devising methods to compel them to perform their constitutional duties.

## NOTES

1 Woodrow Wilson, *Cabinet Government in the United States*, "The International Review," August 1879, Reprinted in *Reforming American Government*, *supra*, p. 134.

2 "A Statement of the Problem," by James L. Sundquist and others of the committee for the constitutional system, in *Reforming American Government*, *supra*, p. 68.

3 Max Farrand, *The Framing of the Constitution*, Vol. 1, p. 203, Yale (1913).

4 Julius Goebbel, Jr., *History of the Supreme Court of the United States*, Vol. I, p. 201 (1971).

5 *Ibid.*, p. 202.



Illustrations by Robert Neukirch



G O S P E L  
T E A C H I N G S  
A B O U T

# Typing

— E L D E R D A L L I N H . O A K S

**M**

This fireside  
address  
was given to  
faculty, students,  
and alumni on  
September 12,  
1993

Y BROTHERS AND SISTERS, I AM GLAD TO BE WITH YOU TONIGHT. Before I get to my prepared remarks, I want to say something about the faculty of our Law School. Soon after I went into law teaching, Edward H. Levi, who was then dean of the University of Chicago Law School (later a distinguished attorney general of the United States), became provost of the university and appointed me associate dean and acting dean of the law school. During the nine months I carried that responsibility, Edward Levi gave me a lot of tutoring and counsel. One thing he told me is appropriate for repeating in the wake of the "good old days" nostalgia that has characterized the Law School's 20th anniversary celebration.

"Don't refer too much to the early days and the great faculty members who were here when this law school was founded," Levi counseled. "You have to avoid talking too much about the great faculty members of the early days, lest the students and the public conclude that the great people who have taught at this law school were all in the early days and overlook the fact that the really great ones are those who are here now."

I concur in that counsel as applied to our own circumstance. We have a marvelous faculty at the J Reuben Clark Law School. I pay tribute to them—those who are here and those who have gone before.

That concludes the informal, unprepared part of my talk. Now I will share what I have written for this occasion.

## II



here are few words in the English language with any more beautiful connotations than the word *truth*. The scripture teaches us that "The glory of God is intelligence" and then adds "or, in other words, light and truth" (D&C 93:36). The Psalmist referred to God as the "Lord God of truth" (Ps 31:5).

The children of God have always been commanded to seek the truth and to say what is true. The Ten Commandments the Lord gave the children of Israel include: "Thou shalt not bear false witness against thy neighbour" (Ex. 20:16). Proverbs says, "Lying lips are abomination to the Lord: but they that deal truly are his delight" (Prov 12:22). The 13th Article of Faith declares that "We believe in being honest [and] true." To be "true" includes appearing to be what we really are. To speak the truth is to give an accurate account of the facts (see D&C 93:24).

There is no more authoritative or clear condemnation of the dishonest and lying person than the Savior's description of the devil as a liar and the father of lies (see John 8:44). Modern scripture refers to Satan as "that wicked one who was a liar from

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the beginning" (D&C 93:25). Jacob, the Book of Mormon prophet, declared that the liar "shall be thrust down to hell" (2 Ne 9:34). Similarly, in the great vision on the three degrees of glory, the Prophet Joseph Smith listed those who were to "suffer the wrath of God on earth," and be cast down to hell to "suffer the vengeance of eternal fire" (D&C 76:104–105). He included "liars, and sorcerers, and adulterers, and whoremongers, and whosoever loves and makes a lie" (D&C 76:103). Elsewhere in the Doctrine and Covenants the Lord commands, "Thou shalt not lie; he that lieth and will not repent shall be cast out" (D&C 42:21).

Our General Authorities have spoken repeatedly and sternly about the importance of telling the truth. Elder Mark E. Peterson called honesty "a principle of salvation" (*Ensign*, Dec 1971, p 72). In his stirring sermon titled "We Believe in Being Honest," Elder Marion G. Romney quoted Oliver Wendell Holmes' lines from "The Chambered Nautilus": "Sin has many tools, but a lie is the handle which fits them all" (*Ensign*, Nov 1976, p 36). Elder Gordon B. Hinckley preached against the widespread and fashionable dishonesty that threatens governments, institutions, and our personal dignity. His talk was titled "An Honest Man—God's Noblest Work" (see *Ensign*, May 1976, p 60).

Satan is the great deceiver and the father of lies, but he will also tell the truth when it serves his purposes. Satan's most effective lies are half-truths or lies accompanied by the truth. A lie is most effective when it can travel incognito in good company or when it can be so intermarried with the truth that we cannot determine its lineage.

Suppose, for example, we referred to Paul of Tarsus as "an apostle who went about to destroy the Church." Or suppose we referred to King David as

"an adulterer who was also a prophet." As students of the Bible we can recognize the elements of truth in each statement. Yet we know that each statement, by itself, conveys a lie. These examples show how easily a deceiver can discredit an individual or an organization by mixing different events or different times and packaging the mixture in innuendo.

Satan can use truth to promote his purposes. Truth can be used unrighteously. Severed from their context, true facts can convey an erroneous impression. True statements made with an evil motive, such as to injure another, are used unrighteously. A person who preaches the truths of the gospel "for the sake of riches and honor" (Alma 1:16) commits the sin of priestcraft. Persons who receive facts under obligations of confidentiality, such as lawyers or bishops who have heard confessions, are guilty of wrongdoing if they reveal them. And a person who learns an embarrassing fact and threatens to reveal it unless he is paid commits a crime we call blackmail, even if the threatened disclosure is true. It is not enough merely to refrain from lying. We must be righteous in the way we use the truth.

Up to this point, I have stated what I understand to be the doctrine of our Church. I will now suggest some applications of that doctrine, relying on my personal and prayerful conclusions.

## III.



had a sobering duty as a judge. During my period of service on the Utah Supreme Court, the first case that came before us for the disbarment of an attorney involved a graduate of the Brigham Young University J. Reuben Clark Law School. What had he done? Not to put too fine a point on the sordid matter, he had stolen money from a client, and to conceal his crime he had repeatedly lied to his client and the court. That disbarment made an impression on me. I will never forget it, and I hope you won't, either.

On the subject of what lawyers should know about lying, I wish to quote the words spoken by a prominent lawyer in a law school graduation this spring.

*The reputation you develop for intellectual and ethical integrity will be your greatest asset or your worst enemy* [quoted in *Washington Post National Weekly Edition*, August 23–29, 1993, p. 7]

*Following the bar exam, your most difficult test will not be of what you know but what is your character. Some of you will fail. The Class of 1971* [this was the speaker's own class and he had ranked first in it] *had many distinguished members who went on to achieve high public office. But it also had several who forfeited their license to practice law. Blinded by greed, some served time in prison. I cannot make this point to you too strongly. There is no victory, no advantage, no fee, no favor which is worth even a blemish on your reputation for intellect and integrity* [quoted in *Salt Lake Tribune*, July 27, 1993, p. A6]

Those words, spoken at the University of Arkansas Law School graduation, are true. The sad sequel is that just a few months after he spoke those words, Vincent Foster, Jr., left his law office in the White House and drove to a lookout point over the Potomac River, took out a revolver, and ended his life. We may never know the exact reason for his action, but his words and his action provide a poignant reminder of the vital role of truth in the life of the law and its practitioners.

While no one deplores lawyer lying more than I do, I believe that the sins of the legal profession should be seen in context. In our society the members of many groups are notable for lying, but none is punished more severely than lawyers. What is unique about lawyer lying is not that it is more widespread or more important than the lying of members of other groups, but that it is more severely condemned and more severely punished.

We have no way of measuring the extent of lying among the members of society's different groups, but it is prob-

ably true that the category of lies most highly publicized are those told by public officials. Hardly a day passes without a newspaper article concerning deceptions by public officials, including (to cite only a few examples that come to mind) law enforcement personnel, prosecutors, county commissioners, mayors, presidents, governors, legislators at every level, and an assortment of government administrators too numerous to list. The lies of public officials may be the most damaging lies in terms of the number of people they mislead and the consequences of the deception.



The lies of public officials, like the lies of religious leaders, are also extremely damaging in the way they degrade the moral tone of the entire community. Officials' lies and clergymen's lies are especially damaging to impressionable young people.

Dishonest business practices are also widespread. From time to time someone speaks out on that subject. A recent *Wall Street Journal* opinion piece gives this harsh assessment:

*Deception and dishonesty in business surround us. We find them in the half-truths and distortions of fact in advertising, in package labeling, and in merchandise markdowns. We find them in shoddy goods that fail when still new. Is there any*

*wonder that business has garnered a reputation for being less than honest?* ["Do the Right Thing in Business," *Wall Street Journal*, June 21, 1993, p. A10]

A petroleum industry publication responded to this editorial by predicting that global competition will compel more honesty in the practices of both industry and service companies:

*Companies are discovering that when they do the right thing, their integrity is beneficial in subtle ways. Employees feel proud of their company simply*

*because they can feel proud of themselves. An honest company is one you can depend upon. While it may keep some doors closed to new business, your current customers will give repeat business, and your client list will grow.*

*Half-truths, distortions of fact in advertising, package mislabeling, merchandise markdowns, and shoddy merchandise are no longer acceptable business practices. In the new world of globalized markets, only those companies which incorporate integrity and honesty as a by-product of their goods and services will survive* ["World Energy Update," June 30, 1993, p. 12]

The same should, could, and I hope will be said of lawyers and law firms.



## IV



ome have suggested that it is morally permissible to lie to promote a good cause. For example, some Mormons have taught or implied that lying is okay if you are lying for the Lord. There is ancient precedent for this argument, and it will not surprise you to know that Professor Hugh Nibley brings it forward and condemns it in his discussion of the use of "fabrication" in the writing of early Church history. I quote him:

*Just as physicians must sometimes tell fibs to patients to help them along, and as those tending small children or the feeble-minded can handle them and help them more effectively by making up stories as*

*It was common practice for Christian scholars in the Middle Ages both "without scruple [to] put forward older texts, with slight alteration, as their own compositions," and to put forth their own compositions without scruple as ancient texts [Mormonism and Early Christianity, The Collected Works of Hugh Nibley, vol. 4 (Salt Lake City: Deseret Book Co., 1987), pp 220-221]*

As far as concerns our own church and culture, the most common allegations of lying for the Lord swirl around the initiation, practice, and discontinuance of polygamy.

It is clear from the record of history that Joseph Smith introduced the doctrine and practice of polygamy to a select few in the 1830s and 1840s, but it was not announced publicly by the Church until the revelation was read

a season. It appears that polygamous marriages also continued for about a decade in some other areas among leaders and members who took license from the ambiguities and pressures created by this high-level collision between resented laws and revered doctrines.

The whole experience with polygamy was a fertile field for deception. It is not difficult for historians to quote LDS leaders and members in statements justifying, denying, or deploring deception in furtherance of this religious practice.

My heart breaks when I read of circumstances in which wives and children were presented with the terrible choice of lying about the whereabouts or existence of a husband or father on the one hand or telling the truth and seeing him go to jail on the other. These were not academic dilemmas. A

### **The Prophet said their lives had been**

**jeopardized by revealing the wicked purposes of their enemies. . . .**

**Joseph affirmed that all they had said was true, but he observed that**

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*they go, so the Christian priest was to cultivate a useful deception as an essential tool in dealing with the laity, according to John Chrysostom. "When Jacob deceived his father," he explains, "that was not deception but oeconomia [economy]"*

*Jerome admits to employing "a sometimes useful deception," and admires others for the same practice: "how cunning, how shrewd, what a dissimulator!" And he cites Origen as teaching that "lying is improper and unnecessary for God, but is to be esteemed sometimes useful for men, provided it is intended that some good should come of it."*

Nibley condemns this theory and then describes some of its manifestations

aloud at a Church conference in Salt Lake City in 1852. It is also clear that during the federal prosecutions of the 1880s, numerous Church leaders and faithful members were pursued, arrested, prosecuted, and jailed for violations of various laws forbidding polygamy or cohabitation. Some wives were even sent to prison for refusing to testify against their husbands, my grandfather's oldest sister being one of them.

It is also clear that polygamy did not end suddenly with the 1890 Manifesto. Polygamous relationships sealed before that revelation was announced continued for a generation. The performance of polygamous marriages also continued for a time outside the United States, where the application of the Manifesto was uncertain for

father in jail took food off the table and fuel from the hearth. Those hard choices involved collisions between such fundamental emotions and needs as a commitment to the truth versus the need for loving companionship and relief from cold and hunger.

My heart also goes out to the Church leaders who were squeezed between their devotion to truth and their devotion to their wives and children and to one another. To tell the truth could mean to betray a confidence or a cause or to send a brother to prison. There is no academic exercise in that choice!

I do not know what to think of all of this, except I am glad I was not faced with the pressures those good people faced. My heart goes out to

them for their bravery and their sacrifices, of which I am a direct beneficiary I will not judge them That judgment belongs to the Lord, who knows all of the circumstances and the hearts of the actors, a level of comprehension and wisdom not approached by even the most knowledgeable historians

I ask myself, "If some of these Mormon leaders or members lied, therefore, what?" I reject a "therefore" which asserts or implies that this example shows that lying is morally permissible or that lying is a tradition or even a tolerated condition in the Mormon community or among the leaders of our Church That is not so

I suppose most mortals employ some exaggeration and a little of what someone called "innocent after-mind-ness" But does this mean we condone deliberate and important misrepresentations of fact in a circumstance in which they are clearly intended to be believed and relied upon? Never! Lying is sinful, as it has always been, and there is no exempt category for so-called "lying for the Lord" Lying is simply outside the range of permitted or condoned conduct by Latter-day Saints—members or leaders



## V.

Some of those who have commented on the alleged lies told in connection with polygamy have failed to distinguish between the wrongfulness of asserting something that is untrue and the very different circumstance of not telling everything one knows I wish to comment on that distinction because it is an important one for the legal profession and indeed for all participants in commerce and public affairs

I begin with an example from Church history About ten years after the event, a friend of the Prophet Joseph Smith recalled a statement Joseph made on the morning of the day he was murdered. According to Cyrus Wheelock, the Prophet said

their lives had been jeopardized by revealing the wicked purposes of their enemies He counseled that they not make such complete disclosures in the future Joseph affirmed that all they had said was true, but he observed that it was not always wise to recount such truths (Cyrus H Wheelock to George A Smith, Dec 24, 1854, Church Historical Department; the substance of this statement is found in *Teachings of the Prophet Joseph Smith*, p 392 )

When I read this suggestion of the prophet, I thought of the Savior's teaching his disciples: "Give not that which is holy unto the dogs, neither cast ye your pearls before swine, lest they trample them under their feet, and turn again and rend you" (Matt. 7:6 ) The Savior also instructed his newly called apostles: "Behold, I send you forth as sheep in the midst of wolves: be ye therefore wise as serpents, and harmless as doves" (Matt. 10:16 ) Also important on this subject are the many instances in the scriptures where a prophet was instructed by the Spirit of the Lord not to teach or write some important truth (e.g., 1 Ne 14:28; Ether 3:21; D&C 10:34–37)

These scriptural instructions establish that the obligation to tell the truth does not require one to tell everything he or she knows in all circumstances The scriptures teach that there is "a time to speak," and "a time to keep silence" (Eccl 3:7) Indeed, we have a positive duty to keep many things secret or confidential But this principle does not condone violating the ninth commandment, "Thou shalt not bear false witness" (Ex 20:16) When the truth is constrained by other obligations, the outcome is not falsehood but silence for a season

Nibley discusses the Christian origins of this distinction. While criticizing the clergy's censorship of early Christian documents, Nibley quotes St Augustine as saying:

*It is permitted for the purpose of building up religion in things pertaining to piety, when necessary, to conceal whatever appears to need concealing; but it is not permitted to lie, of course, and so one*

*may not conceal by way of lying.* [Nibley, *Mormonism and Early Christianity*, vol 4, pp 228]

(I believe that statement of St Augustine would have been clearer if he had said, "so one may not lie by concealing")

In a quoted document, to omit parts of the quote without noting the omission is to perpetrate a lie Earlier standards of authorship may not have required this, as the above quotes suggest, but the standard is clear today A lie is also furthered when one remains silent in a circumstance where he or she has a duty to speak and disclose. In other words, a person lies by concealing when he or she has a duty to reveal Some relationships and some circumstances create such a duty

In contrast, when there is no duty to reveal all and when one has not made an affirmative statement implying that all has been revealed, it is simply incorrect to equate silence with lying Nibley explains this distinction He justifies the withholding of some religious knowledge, such as the Savior directed when he told his disciples not to cast their pearls before swine Nibley writes:

*A well attested Logion preserved in the Clementine writings quotes Peter as saying, "Let us remember that the Lord commanded us saying, 'Guard those secret things [mysteria] which belong to me and the sons of my house'" "The Mysteries of the Faith," says Clement of Alexandria, "are not to be disclosed indiscriminately to everyone, since not all are ready to receive the truth"*

Nibley continues:

*There is a sound pedagogical principle involved here: "The teaching of all doctrine," says Peter in the Recognitions, "has a certain order, and there are some things which must be delivered first, others in the second place, and others in the third, and so all in their order; and if these things be delivered in their order, they become plain; but if they be brought forward out of order, they will seem to be spoken against reason" That is why he*

**It requires a sophisticated analysis of the circumstances and a finely tuned conscience to distinguish between the situation where you are obliged by duty to speak and the situation where you are obliged by duty, commandment, or covenant to remain silent.**

*rebuked the youthful Clement for wanting "to know everything ahead of time" [Nibley, Since Cumorah, The Collected Works of Hugh Nibley, vol 7, pp 96-97]*

Consistent with that direction, there are many sacred things we do not discuss. I will give two illustrations, and you can easily supply many more.

Before the Saints came to the Rocky Mountains, Wilford Woodruff saw in a dream that he would come west with the Saints, that a great temple would be built of cut granite stone, and that he would attend the dedicatory services. He wisely kept that knowledge confidential—even when his file leader Brigham Young was speaking of building the Salt Lake Temple of adobe or brick. He revealed his dream in 1880, when a granite temple was under construction. (See *Journal of Discourses*, vol 21, pp 299-300.) As we now know, it was Wilford Woodruff who had the high and holy duty, as president of the Church, of dedicating the Salt Lake Temple. I suspect this was also part of his dream, but he left it unsaid in 1880, since another was then president of the Church.

To cite a more personal example, many of us have had the experience of having the spirit whisper that we would be called to a particular position. Quite a few of the stake presidents I have installed, and some of their wives, have had that foreknowledge. Did they tell me in the initial

interview? Obviously not. To share that knowledge out of season would be seen of men as aspiring and could be seen of God as trifling with sacred things.

These examples contain important lessons for Church members. There are things we simply should not discuss or reveal. Sometimes we are silent out of loyalty to those we love. Sometimes we are silent because the Lord has confided in us, and we know we are not appointed to be the means of disseminating the knowledge to others. Sometimes there are other reasons.

There is an important scriptural instruction on this subject. It appears in the revelation the Lord gave the Prophet Joseph Smith about the loss of the initial 116 manuscript pages from the Book of Mormon translation. Here the Lord warned the Prophet Joseph Smith not to retranslate those manuscript pages.

The Lord explained that the "wicked men" (D&C 10:8) who had taken the manuscript had altered the words from what Joseph had translated and caused to be written, "And, on this wise, the devil has sought to lay a cunning plan, that he may destroy this work" (v 12). Specifically, if Joseph retranslated the record and brought forth the same words, the plotters would produce what they would say was the original, show contradictory words, and say "that he has lied in his words, and that he has no gift, and that he has no power," all for the purpose of destroying Joseph Smith and his work "that [they] may get glory of the world" (vs. 18-19; also see vs 13 and 31).

The Lord used these words to describe Satan's plan:

*Yea, [Satan] saith unto them: Deceive and lie in wait to catch, that ye may destroy; behold, this is no harm. And thus he flattereth them, and telleth them that it is no sin to lie that they may catch a man in a lie, that they may destroy him [v 25]*

The Lord's answer to Satan's teaching is, as the lawyers say, "on all fours" as a precedent on the subject of lying versus not telling all you know.

First, the Lord said: "Verily, verily, I say unto you, wo be unto him that lieth to deceive because he supposeth that another lieth to deceive, for such are not exempt from the justice of God" (v 28).

Second, the Lord instructed the Prophet what he should do next. He should not retranslate the words that had gone forth out of his hands (v 30), but he should proceed to translate "the remainder of the work" (v. 3). Then the Lord gave this interesting instruction: "show it not unto the world until you have accomplished the work of translation . . . that you may be preserved" (vs. 34-35). "Hold your peace," the Lord concluded, "until I shall see fit to make all things known unto the world concerning the matter" (v 37).

Here we see that although a man is not justified in lying to detect a liar, he is justified (indeed, Joseph Smith was commanded!) to withhold things from the world in order to preserve himself and safeguard the work in which he is involved. In other words, we must not lie, but we are free to tell less than we know when we have no duty to disclose.

It should hardly be necessary to point out that these principles also apply to the legal profession. If you tell everything you know about a client's affairs, you will not be praised for honesty. You will be disciplined for professional misconduct. The attorney-client privilege and the comparable privileges



of other professionals safeguard confidential disclosures and give legal recognition to the principle that one is not a liar when one remains silent in a circumstance in which there is no duty to disclose.

I will conclude with some summary thoughts suggested by the familiar oath by which a witness in a formal proceeding is sworn to "tell the truth, the whole truth, and nothing but the truth"

To tell the truth is a general religious obligation, whether we are sworn or not. "Thou shalt not bear false witness against thy neighbour" (Ex. 20:16) The apostolic letters command: "Lie not one to another" (Col 3:9), and "Wherefore, . . . speak every man truth with his neighbour" (Eph 4:25) In his condemnation of the lawless and disobedient, the apostle Paul listed liars and perjured persons (see 1 Tim 1:9-10)

to matters relevant to the proceeding. It does not extend to other subjects The duty to tell the whole truth is also limited by special legal protections, such as the privilege against self-incrimination

Whether a speaker is morally or legally obliged to speak "the whole truth" is therefore determined by the extent of the speaker's duty to disclose. Such a duty can be imposed by the speaker's relationship to the person(s) addressed or by other circumstances A lawyer obviously has a duty to his client to reveal the whole truth about any matter pertaining to the representation, such as a potential conflict of interest or the receipt of settlement offers Failure to do this can result in professional discipline A public official has a duty to reveal to the public the whole truth about many matters of public concern. A trustee has a duty to make full disclo-

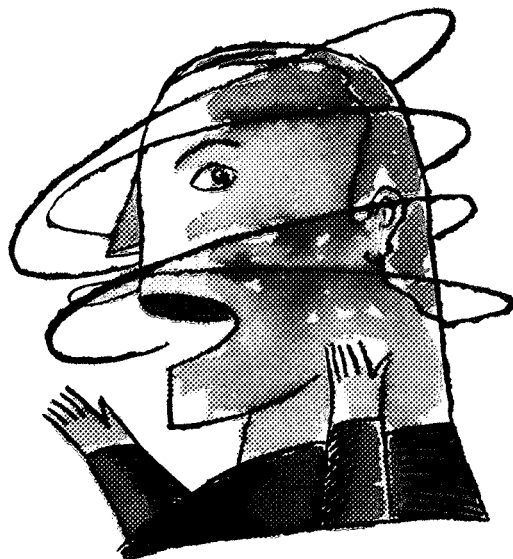
disclose, we are morally responsible to do so Where there is no duty to disclose, we have two alternatives We may be free to disclose if we choose to do so, but there will be circumstances where commandments, covenants, or professional obligations require us to remain silent

In short, my brothers and sisters, the subject of lying is clear cut in a majority of instances But there are a lot of situations where people are sometimes charged with lying where the charge is not well founded You will read that kind of charge in the literature and in current commentary, as if a person were under a duty to tell everything he or she knew, irrespective of any other duties or obligations

I urge you who are lawyers and lawyers-in-preparation to be sophisticated as you think about these subjects Be unqualified in your commitment to the truth Be unqualified in your determination to tell the truth and nothing but the truth But also be prepared for circumstances that may be painful and contrary to your personal interest and comfort where you must keep confidences, even if someone calls you a liar It requires a sophisticated analysis of the circumstances and a finely tuned conscience to distinguish between the situation where you are obliged by duty to speak and the situation where you are obliged by duty, commandment, or covenant to remain silent

I'm grateful to be with you tonight I know that the work in which we are involved as members of The Church of Jesus Christ of Latter-day Saints is the work of God. It is a work carried out by mortals, and is therefore bound to have a fringe of imperfections around the edge that may unravel here and there because of mortal weakness or mistake When this happens, I am glad that the whole garment can be put back together by the glorious principle of repentance, owing entirely to the atonement of our Lord and Savior

May God bless you in the wonderful work you are doing May we be committed to truth and to duty and to service, I pray in the name of Jesus Christ, amen



To tell "nothing but the truth" is a clear and invariable application of that principle Proverbs says, "A false witness shall not be unpunished, and he that speaketh lies *shall not escape*" (Prov 19:5; emphasis added)

In contrast to the obligation to tell the truth and nothing but the truth, the obligation to "tell the *whole* truth" is subject to an important qualification. In a judicial proceeding, the sworn duty to tell the whole truth is confined

sure to the trust beneficiaries of all matters pertaining to the trust property. Many other examples could be given

In the matter of lying, the essential question is not whether we have a duty to tell the truth and nothing but the truth We clearly have that duty We must not lie. I know of no category of justified lies.

The difficult question is whether we are morally responsible to tell the whole truth When we have a duty to

*A G A I N S T*

T H E

*C U R R E N T*



*Written and Photographed by John Snyder*

*BYU's first tribal judge encounters a maelstrom within  
the Omaha tribal government and tribe—a society surrounded by,  
but not reconciled to, the prevailing legal system.*

Driving 85 miles to Macy each workday, Ed Zendejas, '91, chief judge of the Omaha Indian Tribal Court, follows his tribe's ancestral path. The Omaha were "Maha" to the tribes around them, "the people up river," or "those who move against the current."

In a red, four-wheel-drive Nissan truck, he first picks up fellow BYU law grad Chris Robison (also '91), his public defender. Leaving Omaha about 8 a.m., he crosses the Missouri River into Iowa and heads north on Interstate 29. Dropping off the freeway he turns west, passing through lands no less interesting than other flat parts of the world. A sign points north to the tribal casino, "CasinOmaha," a small sign, disproportionate in its impact to the effect of the casino on the tribe. Then he recrosses the river into Nebraska over a toll bridge at Decatur, entering the reservation over hilly, snow-covered farmland. The trip—one of Zendejas's two complaints about the job—takes, in all, about an hour and 20 minutes.

Of the winter, Zendejas (pronounced zen DAY hoss) says, "It hasn't been too bad this year," but on this day, cold winds and snow suggest what the Omaha traditionally endured. One of five eastern tribes that moved west along the Missouri in the 17th century, they are said to have had the best of both worlds, augmenting their woodland life through winter buffalo hunts on the plains. But, under pressure, they relinquished control of most of their native lands, retaining a part of what is now Thurston County, centered on Macy—a name clipped from two words, *Maha Agency*. Pushed north, precariously close to the hostile Sioux, they were, by accounts, "not altogether pleased" to be there. They were, however, the only Nebraska tribe to keep any of their original holdings, and that had two distinct results—it knit them closely together and they retained a greater sense of their traditional culture. Both factors may bear on the work Zendejas does among them.

The Tribal Courthouse, perhaps representative of the larger cultural tide that hemmed in the Omaha, is a recent addition to Macy—there was no such thing until the mid-1970s. A modern brick and cinder-block structure, which also houses the police department, it stands on a rise west of town.

The town consists of small houses, a few trailers, a hexagonal Tribal Council building, the school, post office, several churches, a swimming pool, and what appears to be the focus of the town, Jump's Food Barn, also known as Cliff's Used Cars, where the mechanic is the cook. Hepatitis broke out in the town a few months ago and spread to the rest of the reservation. Not that Jump's was the cause but,

since then, Zendejas hasn't eaten food cooked in Macy. "I told them there's no way I'm going to eat in any place where the cook doubles as the mechanic." He doesn't drink the water either. Rather, with remarkable consistency, he goes to Jump's around noon and buys some grape juice and cookies to bolster him until his return to Omaha after the court closes at 4:30 p.m.

Hepatitis is not the only scourge of the reservation. Alcohol is the biggest problem among the people here—alcohol compounded by diabetes—according to Ed's aunt, Elsie Clark, a resident of the town. She works as a youth counselor on the reservation, sponsoring activities to gather support for drug education, such as a run to and from the town of Walt Hill to protest the bars there. Bars were outlawed when the reservation was established, she says, yet they exist in the primarily white farming community eight miles to the west. She has a vested interest. Of her four siblings, only she and Ed's mother remain. The other three died of cirrhosis of the liver, all before they were 40—one of them only a month ago.

Alcohol provides most of the Tribal Court agenda. Zendejas says, "Conservatively, 90 percent of my cases are alcohol related." Whether this derives from the poverty of Thurston County, the "second poorest" county in Nebraska, he cannot say.

Tuesdays and Thursdays are reserved for trials, the other days for arraignments and other business. Only one in 10 cases will ever go to trial—most are plea bargained, or there is a change of plea. But there is an additional challenge. It's difficult to get people to testify. "That's one of the biggest problems we have here. I don't know how many cases I've had where some serious assaults, stabbings, have occurred, but they were between family members or husband and wife: They have a party; someone pulls a knife, breaks a bottle, cuts someone up pretty bad. Police will go over and haul everyone in, then set it for trial. Two months down the road people forget. When they're back together [they say], 'We don't want to testify; we don't even want to prosecute.'"

Although it wasn't so when he started the job, Zendejas seems confident and collected at the bench. In the first month or two he was nervous. "I didn't know what to do. I was just kind of fumbling around at first."

Now after nearly a year, he seems intent, sometimes humored, as he takes notes. Above him is the seal of the court—a Plains headdress serving as background to the scales of justice.

Observing him at work and in the decisions he makes, he doesn't appear intent on the arbitrary use of authority.

Rather he seems to want the good of not only those on his docket, but the Omaha tribe as a whole. Norman, an Omaha man with braids, works off his fine in the court office.

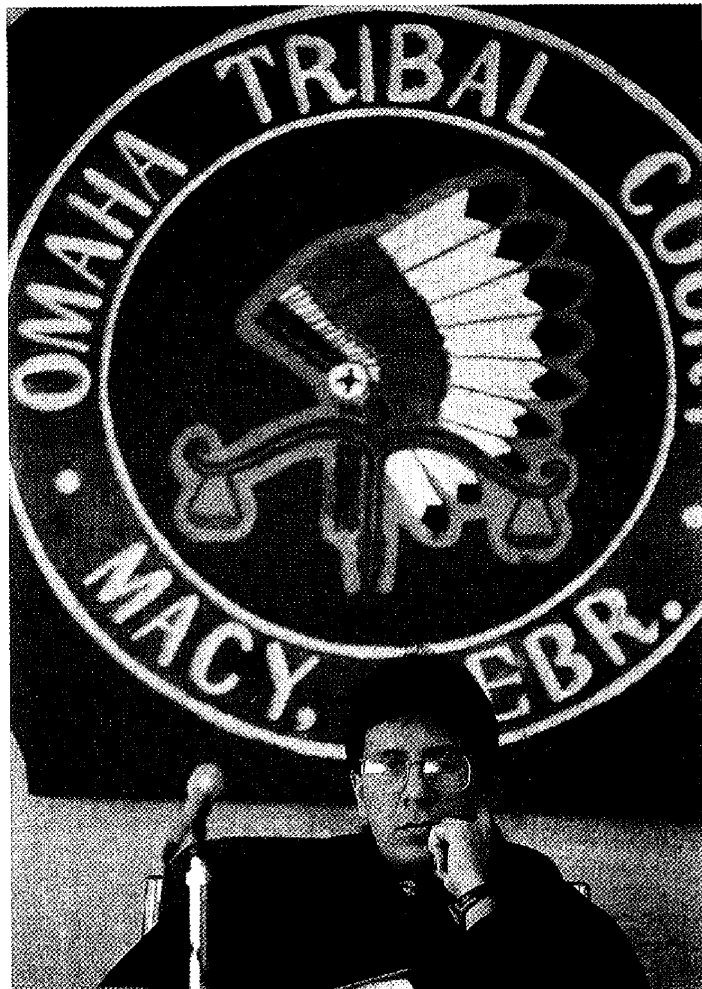
Unless revised upward according to a recent federal law, penalties assessable in Indian tribal courts are limited to \$500 and six months, but Judge Zendejas rarely approaches even those bounds and seems often to suspend sentence, something he calls "a stick." "If they don't do what they're supposed to do, they'll do the time." Not every one has taken him seriously. "But I've been pretty consistent with it, and, I guess to some extent, it's been successful because I've had more complete what they're supposed to." It isn't just a matter of leniency—if they don't comply they'll be back in court. And he's accommodating that way too: after a woman calls him asking to get on the next day's docket, he says, "It's the only court where you can call one day and get in the next. I probably shouldn't do this. It gives people unrealistic expectations about coming to court."

If he can prevent the need to come to court at all, he'll do that too. He has talked to local groups about alcohol abuse and participated in the run last summer to Walt Hill. Barry Webster, a first counselor in the local LDS branch, calls Zendejas a "role model and an inspiration. He's having a tremendous impact." Webster, currently pursuing a degree at a local trade college, was influenced simply by knowing that Zendejas was highly educated. He says, reflecting his initial surprise, "He's a lawyer *and* he's Omaha!" In fact Zendejas is the first law-trained Omaha chief judge. There have been Omaha judges, or judges who have gone to an accredited law school (all of them white)—but never both. And it means something to the 2,200 Omaha living on the reservation. "I don't think that people hold it against me when I send them to jail," says Zendejas, "I have people, my regulars, that I see on the street. They'll wave to me. I can't think of too many people who do or would [hold a grudge]."

In his noontime trip to Jump's Food Barn, several young people recognize him, saying, "Here comes the judge." One of them shakes his hand. Donald Blackbird, presently a probation officer in the Tribal Court, himself chief judge four times, has told Zendejas, "The people like you, and the fact that they're being judged by one of their own instead of a white man—

that hasn't happened here for a while." Zendejas says he enjoys the work. He doesn't, however, enjoy the politics of the work. In that, he broaches his only other, and more serious, complaint, besides the long drive—the Tribal Council. It seems odd with his growing rapport with the people that he would be in conflict with the council. But of any judge, Indian or white, law trained or untrained, none has lasted more than 18 months.

On Thursday after finishing his docket, he returns to his office and two memos, both from the Tribal Council. One



Zendejas at the bench: *I was just kind of fumbling around at first*

calls for installation of a \$1,500 time clock in his court, apparently to track not only his staff, but him. The other threatens "severe disciplinary action" if he doesn't come to meetings scheduled by the council, unattuned to his court schedule. Noticeably subdued afterward, he says, "It's like



that all the time. I guess I shouldn't let myself be affected by it as much as I do." Responding to pressure he has felt, he nearly asked the Tribal Council to have a recall election a month and a half ago. "I'm not so in love with this job that I'll stay if I'm not wanted here." But he also had enough confidence in his popular support to consider such a request. His wife and grandfather had counseled him "not to make it easy for them" by quitting. "Put it to a vote."

Reasons for conflict between tribal councils and their courts range from the obvious to the obscure. A key to the conflict lies in the phrase "their courts." The Tribal Court exists at the behest of the Tribal Council, described by Zendejas as "all powerful." What it gives it can also take away. There is no constitutional separation of powers. The most evident reasons for conflict: his salary—if it had been thought to be too low, it wouldn't have been questioned, but that wasn't likely the suspicion. His qualifications: again, it probably isn't lack of education that would subject him to scrutiny. Many tribal judges nationwide have no legal education at all. A 1978 study of the tribal court system observed, "Councils perceive courts as alien institutions and do not consider them part of the tribal government structure." Someone well trained in "alien Anglo legal systems" would by implication be an outsider, especially within a group that retains a greater than ordinary sense of its traditional culture.

Wearing his hair in a ponytail, Zendejas seems indistinguishable from any other Omaha, but he might be considered an outsider for other reasons. When he first came to the reservation, he says, "I would always get these stares because I hadn't been raised around here." His mother had left the reservation at 15 and moved to Omaha. His name also stands out among the Omaha, many of whom were gratuitously renamed in the mission schools for victorious American generals—Grants, Fremonts, Tyndales, Sheridans, Robinsons, and Hastings are common on the reservation. Zendejas's father is not Native American, but Mexican, and, when Ed started the job, people said, "They hired a Mexican," which was, of course, only half true.

Barry Webster says Zendejas "was looked at as an outsider when he first came." Here was an Omaha he had never seen. "I thought, 'Who is this guy?'" That they are both LDS would more readily acquaint Webster and Zendejas, but, says Webster, "Mormons are labeled"—in a potentially negative way. Does his religion have any effect? "I think yes," Zendejas responds. "I think it's viewed in a negative light. They've been suspicious of the Church ever since the placement program." Zendejas himself participated in the LDS placement program, spending six years in Boise, Idaho. A strong presence of the Native American Church on the reservation also influences attitudes toward Mormons. According to Zendejas, some leaders of the Native American Church were formerly Mormon, engendering some hostility toward Latter-day Saints now. On the reservation "you just know who the Mormons are, and there's a perception of that



Adele, the judge's sister, tweaks his ponytail: *In a small community like this, connections and accountability are inherent to the structure.*

being 'the white man's church' and that the Native American Church is our church."

While conflict with the council may only be intrinsic to the work he does and tension may be inherent in the decisions he makes, those decisions represent his upbringing, his education, his religion—all that he is. And, in that, he is going against the current. "One of the most frustrating things is seeing the conditions that people live in back here, and it doesn't necessarily have to be that way." Does he see himself trying to exercise an influence over the Omaha people? "I've tried, and I think that's the biggest source of contention between the council and me. I've been told they view me as a threat." While he may seek the good of the people, attempting to nurture rather than break down, through his decisions, the council may not always agree with his means. He isn't afraid to take unpopular positions, such as the time he put a pregnant woman in jail. In response to a complaint from the pregnant woman's mother the council passed a resolution barring such action, but didn't tell him. "Someone called up complaining about me having so and so in jail, and said, 'The council passed the resolution.' I said, 'show me a copy,' and they sent up a copy of what they'd passed." Was he supportive of the resolution? "No, no," he says. Considering it a "bad call," he was "adamantly opposed to it. Fetal alcohol syndrome is such a problem around here—and on other reservations as well. I figured if they were in jail, at least they weren't drinking. At least I knew they would get prenatal care, which was part of the sentencing for some of the women." One pregnant woman he let out "was back in a couple weeks on a drunk driving charge. I put her in jail, and I kept her there. I guess I challenged the council on that one. I told them that they were giving pregnant women a license to do as they pleased—so I put her in jail." She protested enough as she left the courtroom that he called her in contempt. "She got a little too belligerent, so I slapped another 10 or 15 days on her."

He has even ruled against the tribe several times, but his stance toward one attraction—a lucrative addition to the Plains landscape—has generated more controversy than any other: the casino.

S ometime late in the last century the Missouri River changed course, rearranging the boundary of the Omaha Reservation. The battle, in federal court, was fought over how the river had acted: Was it a slow change over time through “accretion”? If so, the tribe lost any right to the land. Or did the river “avulse,” quickly tearing off a section? Then the tribe had a claim.

Whatever the intricacies of the dispute, by the midwifery of the federal courts, the Missouri delivered a bundle of Omaha land on the other side of the river. Though aspects of the 1980s decision are still being appealed, the Omaha found themselves with 10,000 acres in Iowa, a result first thought to be inconsequential. Simultaneously, Iowa, hoping to use the Missouri and Mississippi Rivers as lures to tourists, approved “riverboat” gambling, thinking they could limit it to that. It didn’t work. Under the complexities of federal, state, and Indian law—what has been called a “jurisdictional jigsaw puzzle”—Indian tribes could now offer casino gambling. Zendejas says, “It’s been an economic boon to not only this tribe, but the other tribes that have land on the Iowa side of the river.”

It was last fall, when Zendejas ruled against the tribe in a \$2.3 million suit against the casino construction company, that things “really got crazy.” In addition to his general budget from the Bureau of Indian Affairs, he has a “court fines account.” When he fines people, that money is used for the benefit of the court—to train people or to pay oper-



*The casino: The Omaha found themselves with 10,000 acres in Iowa, a result at first thought to be inconsequential*

ating expenses: postage, supplies, and office equipment. After his ruling the council froze the fines account. It may only be coincidence, he allows, but after issuing the opinion, Zendejas met with the Tribal Council and, “Things

didn’t work out there.” They had decided that they were going to be in control of all the accounts, and Zendejas would have to submit any expenditures to them to be approved.

Then came the Tribal Council elections and, at least for Zendejas, a sorrowful demonstration of the way the earnings of the casino were being used. Since its opening in July, drawing people from throughout the region, it has produced \$500,000 to \$800,000 a month—a conservative estimate, he says. Being immensely profitable, the casino became the center of the election. The existing council, representing the Ten Clans Party, lauded itself for bringing the casino to the reservation. They also offered \$750 to every adult member of the tribe. The opposition enticed voters with its plans for the revenue and upped the offer to \$1,000. By Zendejas’s account, about four o’clock the Friday before the Monday election, the existing council, realizing that they couldn’t be outdone, announced a \$250 payment. “And only registered voters got it.” There wasn’t time for others to register. “When I heard that was happening, I couldn’t believe it.” He waited, he said, to see if it was really true, and if anyone would file an injunction against it. No one did and the money was passed out. In spite of their ploy, the traditional Ten Clans slate lost. Of the seven seats on the council, the Omaha Rights Council took six. Zendejas thought that might be good for him. Their platform had promised not only money, but open government and no favoritism in job appointments—the best jobs in the area are tribal jobs, and there had been complaints about the previous leadership. Most important to him was a proposed separation of powers between the council and the court. First things first, though—he was dangerously close to not running a court at all.

Nothing had gotten done during the election, he says, “No one was doing anything around here but campaigning and handing out checks.” The new council had pledged to open the fines account but later told him, “We don’t have a quorum yet.” The court languished. “We didn’t have any postage stamps. The Post Office had pulled our box. Our phone was about to be disconnected. We were down to our last box of paper, and we were running out of toner for the printer.” They didn’t have any pens either. Not having stamps, they couldn’t deliver court notices, but tried to have the police serve them. And the court didn’t have a public defender. “We were pretty humble,” he says.

Then the heat in the court building went off.

It was early December. By then he had no direct contact with the Tribal Council. The relationship had degenerated to such a point that he went to the chief of Tribal Operations, Kay Kearnes, and told her, “I can’t run a court this way and I’m not going to. I’m suspending court, taking people’s pleas, and then I’m sending everybody home, and you’re going to pay them administrative leave until we get heat and money for postage so we can operate.” He didn’t know if they took him seriously. But he wasn’t concerned “if they wanted to fire me or not or recall me or not—I was ready to quit anyway.”

Shortly after the ultimatum he got heat, stamps, and a six-month appointment for a public defender "They didn't get around to trying to advertise for or hire one, so that's how I got Chris Robison in here"

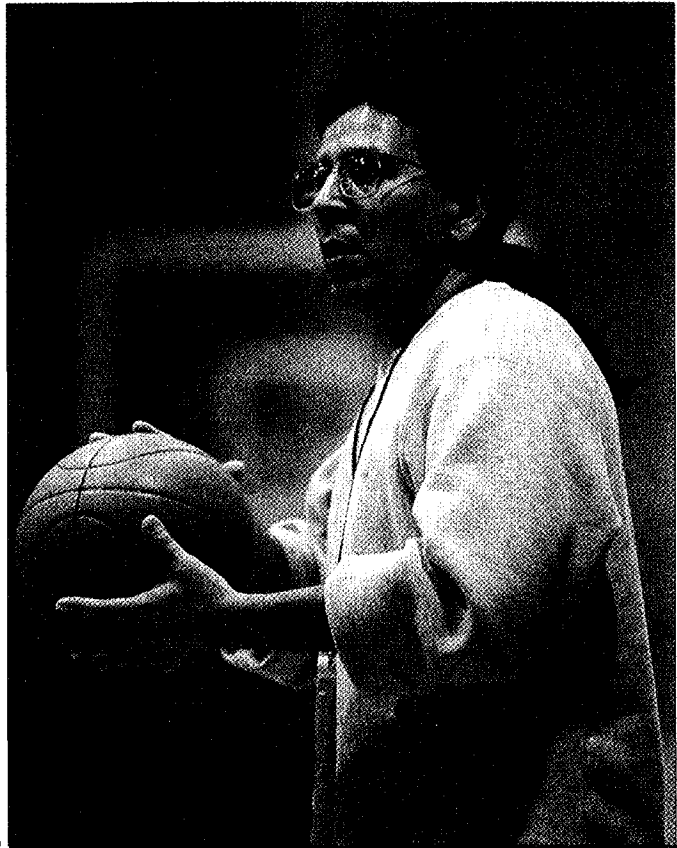
If the Tribal Council was failing in its pledge of separation of powers, one campaign promise was not so easily forgotten: the \$1,000 payment to all adult members of the tribe, a pledge requiring \$3 million—money the tribe now didn't have By Zendejas's assessment the previous council had squandered it trying to sway the election—making loans, grants, and a cash offer of its own "Money was going out just as soon as it was coming in." So they decided to borrow it Zendejas's response to such a move may have been another twist in the tourniquet that had been applied to his court

Just after the election, the new council had approached him about being the tribal attorney. He was one of two being considered His initial meeting with them was matter-of-fact "I wasn't going to tell them what I thought they wanted to hear" He had seen other attorneys who had simply advocated for the tribe—even if theirs wasn't a strong position—gotten them into a lot of trouble, and cost them a lot of money "I told them I'd tell them what I thought was best for the tribe" Some council members said, "We want one of our own to represent us" When they asked Zendejas to go with them to the bank in Omaha and sit in their negotiation for the \$3 million, it sounded like they'd committed to hiring him On the way to the meeting he asked the new tribal chairman, "Is it worth taking out a \$3 million loan at 7 percent? What is it going to do to the tribe?" They may not have appreciated the question, he concedes, "because that was something they'd already decided" And though they didn't hire him as their counsel, they didn't release him as their judge Since then, he says, "Things aren't well They're practicing evasion."

The result of the ensuing \$1,000 payment resounded throughout the reservation Zendejas relates a sequence of effects: "Most people on the reservation are on some kind of public assistance, and any outside income has to be reported Public benefits are cut in proportion to how much income comes in If someone gets \$1,000, that's what their assistance will be cut by "It was like putting a dollar in somebody's pocket and taking a dollar out of the other pocket We gave the state millions of dollars" Complicating matters, the money came a few days before Christmas Rather than using it to pay any bills or buy necessities, "it was one big party and Christmas shopping binge" Many people with tabs at local grocery stores didn't pay their bills Store owners, knowing of the recent windfall, cut off their credit

"The Tribe called the other day," Zendejas says, "wanting to establish an emergency assistance program I said, 'You're creating another supplemental welfare program that is not going to be supplemental after a while It's going to be a big mess.'" And there is perhaps more He can only speculate but suspects that the payment led to his uncle's recent death "He died of cirrhosis He was on a month-long drunk, and I would attribute a lot of that to the \$1,000 He was just able to go out—and he threw it away"

He hasn't seen any indication that the payment actually helped anyone. It might have, used properly, accomplished much good. But for Zendejas it raises larger questions about



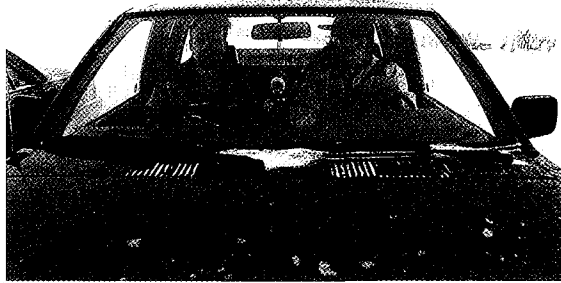
On a different court, Zendejas referees a local basketball tournament:  
*I'll continue to do whatever I can do*

the casino and the money it generates He sees the "wangling over control and power" that surrounded it in the election and illegality in its operation "They're often violating their code and constitution." He told people when the casino opened, "It's like a rope that's tied up in a loop. Either you can bring it down around your waist and use it to pull yourself out of the mess you're in, or you can open it just a little bit and it will fit right around your neck Then you're going to choke yourself—the tribe's going to kill itself"



Without lifestyle changes, "just getting a lot of money and throwing it around won't solve all of the problems here." He feels he could write a persuasive argument against Indian gaming. He calls lotteries "a can of worms" opening up other problems with Indian gaming. "It doesn't stop. This is something for Utah or any other state that's thinking about opening up a lottery. If you think, 'Well, we're just going to limit it to this,' you're opening up almost everything."

Yet he also sees that several of his relatives, including a brother, work at the casino. In a small community like this,



Zendejas and Robinson leave the court for Omaha: *Cold winds and snow suggest what the Omaha traditionally endured*

connections and accountability are inherent in the structure. Banter in the courthouse office includes questions about kinship. AG-O (sounds like "Eggle") Sheridan, also a probation officer, asks Donald Blackbird what his clan is, volunteering that the complexity of the Omaha kinship system would take days to explain. Norman, the man with the braids, is his nephew, but by the traditional reckoning he would be AG-O's "Little Grandpa." Indeed, Omaha kinship has attracted the attention of notable anthropologists such as Margaret Mead and the Frenchman Claude Levi-Strauss. "Omaha Alliance" has come to signify a particular variety of patrilineal descent. Levi-Strauss, seeing numerical relationships in all things, thought only math could describe the complexity of the Omaha. "There are some things Ed didn't quite understand about that when he first came here," adds Sheridan, asserting that it might have made things easier for him. "Still don't," says Zendejas.

Reflecting, he doesn't see anything changing here "until the Second Coming." He had hopes with the new Tribal Council. The new chair, called Dr. Rudy by the people, has a PhD. "I thought the tribe was moving in the right direction, but I guess I've been disappointed in his leadership. Instead of raising the level of competence of the Tribal Council, I think he's stayed at everybody else's level."

Regarding himself, Zendejas doesn't know how long he'll last—he has other possibilities in Omaha. Officially,

his appointment lasts four years. He doesn't fear rejection, something he has had considerable experience with, having applied to law schools—first in Nebraska, then at BYU—four times before he was accepted by BYU. He applied two times for his present position after being turned down several times for other tribal positions. His reason for persisting wasn't obscure. "I needed a job," he says. And, finally having been appointed chief judge, that is the job he really wants to do—without the politics. "I don't think any state or federal judge has to ask after ruling, 'Is the governor or the mayor or somebody going to come down, or give them a call, or threaten to cut off their budget?'" Although he doesn't see anything changing, he says, he "isn't going to throw up his hands and wait for the Second Coming." He will persist. He waits for the council to review and approve the revisions to the Tribal Code that he submitted to them at election time. He will also go before the council and petition them to keep their promise of separation of powers. It has to be achieved through the tribal constitution, and he realizes that, given recent violations, "the constitution only has as much meaning as the people want to give it." It would be to the tribe's advantage, though. "Tribes are saying we want to encourage business and outside development—those are the buzzwords. And to do that, businesses and outside developers need to feel comfortable with their investment dollars." They need, he says, to be reassured that the Tribal Court is neutral and independent. "And that's the feeling around here—that they won't get a fair shake in a tribal court."

His dismissal of the \$2.3 million suit filed by the tribe was merely on procedural grounds. Though not the primary reason for dismissal, the construction company also had a clause specifying that any dispute would be handled in the state courts. With separation of powers, the tribe could say, "We have a court. We have a judge. We have no power or influence we can extend. We don't control their purse strings, so if we're not happy we can't cut court funds and suffocate them until they submit." That would be encouraging to business, enabling to the tribe and, no doubt, reassuring to Zendejas, who considers it "vital to the tribes."

Wrested forcibly from the past, though still affected by their traditions, the Omaha have yet to adjust to the society that engulfs them. In trying to bring tribal legal practices into compliance with a broader standard, the standard of an external and alien system, perhaps Zendejas represents an inexorable and unavoidable current. The Omaha still move against it—even if they are only treading water. He says, "I'll continue to do whatever I can do, and to help in whatever way I can. It's just a question of what, if any, help they want from me. I can only do as much as people want me to do."

Donald Blackbird, having experienced Zendejas's frustration, has urged him on. "He's doing a really good job—he doesn't think he is, but he is. There has always been pressure. It's discouraging at times, but he's young. He'll survive." The term, says Blackbird, is "hang in."

Zendejas says he tells people he is like an alcoholic: "I take it one day at a time."

## Epilogue: *From Bad to Worse to Unbearable*

Judge Zendejas is gone. Chris Robison and Doug Haymore, '91, another BYU law grad hired by Zendejas as a prosecutor, are also gone. To Zendejas's knowledge, only one of his former staff remains at the Omaha Tribal Court.

Increased tension between the tribal council and court prevented publication of this article as intended in the Spring 1993 *Clark Memorandum* on Native American issues. About that time the Tribal Council fired the health center staff. When the chief of police, who had just resigned under pressure, came to Zendejas, saying, "You're next," Zendejas reconsidered: Fearing that the council might sacrifice his staff to get to him, he asked that the story not run.

What made a bad situation worse, finally unbearable? Two smoldering issues—council concern about his salary and a desire for more control of the court—proved inflammatory. The council sought to "re-evaluate the budget," which was, to Zendejas, a euphemism for "cut my pay." Then, in April, while he was in Albuquerque for a Federal Indian Law Conference, an emergency arose. Zendejas took care of it by fax, he says, but "they were concerned I wasn't there to handle it." After putting court travel on hold pending evaluation, the council also revealed plans to hire an associate judge using a portion of his salary to do it. In a heated exchange Zendejas responded, "You came in here promising separation of powers. I don't think you understand what that means. If you did you wouldn't be interfering the way you are."

When Chris Robison gave notice he would be leaving in July, Zendejas, having been without a public defender before, provided for a replacement. Undermining his efforts, the council refused to sign any contracts until after their proposed, but never completed, budgetary review. By August the man Zendejas had hoped to hire couldn't wait longer and moved on. The council had, however, submitted tribal budgets—except for the court's—to the Bureau of Indian Affairs. A source close to the tribal government, "right nine times out of ten," relayed that the council was threatening to give the court back to the BIA.

Tribal leaders again approached him about being their in-house counsel, something he wouldn't consider until they found a replacement for him. Suggesting Chris Robison, Zendejas met with the council on several occasions, but made it clear, he says, that he was "still judge and hadn't left the court." The council interviewed Chris, but nothing came of it. The anonymous source conveyed that it might be a ploy to get rid of Zendejas. Losing his constitutional protection, he would be "just an employee."

Relations between the tribal government and the Omaha community were also precarious. Learning that council members were paying themselves salaries—in violation of the tribal constitution—and that a member of the council had failed to report a felony conviction on the election petition, community members brought an injunction against the council. The case would have been heard in his court but, Zendejas says, he would have recused himself.

Hearing of a possible takeover of the Tribal Council building, Zendejas contacted the Department of Justice to provide mediation. He was caught in the middle: The council felt he was siding with the community for having suggested that they "take the high road" and admit their wrongdoing. Only becoming more entrenched, "They told me I was resigning and would be their attorney," Zendejas countered, telling them, "I wasn't leaving. I had never resigned and was going to stay at the court. I didn't want the community to think I was being bought off." It was a showdown. But immense casino revenues had tipped the political balance on the reservation. Fortified by profits recently reported at \$16 million for 1993, the council showed its hand. "They wanted me off the bench and sent their attorneys after me." The tribe had been paying a large Omaha firm approximately \$100,000 a month, according to Zendejas, mostly to monitor gaming issues. And "if they didn't want someone around, they could send their attorneys after them," he says, expressing concern that a law firm could exercise such influence in the tribe's judicial affairs.

At the start of the fiscal year in October, the court budget still hadn't been submitted. The council quit paying Zendejas and, with his salary, appointed two new judges of their own. Zendejas, the tribe's lawyers contended, had "effectively" resigned as judge when he met as potential in-house counsel. "That's crazy," says Zendejas, who continued to assert his rights as judge. To resign "effectively," he would have had to miss work, without excuse, for three days. He met with the council using vacation time, he says, or on tribal holidays. In response, Zendejas filed an affidavit alleging official misconduct. The "new tribal judge that heard it dismissed it. He used a rule of civil procedure to dismiss a criminal case. That's how far he stretched." The council, meanwhile, had filed a petition in the court to have him removed as judge. Not optimistic about his chances with either of the newly appointed judges, Zendejas accepted a settlement—part of which precludes his discussing the terms—and resigned December 1, 1993. To him, it was a case of "economic blackmail."

The community had been supportive, he says. One tribe member "told me, 'If you don't stand up to them, nobody will.'" But no one offered to pay his bills. Unpaid, without resources to fight them, and knowing that a protracted law suit wasn't in the best interest of his family, he conceded.

Away from it now, he has "no regrets about the job or work. I got to know a lot of good people." But of the council he adds, "The only thing that bothers me is they got what they wanted. The Tribal Council wanted me out." Though freed of his biggest complaint, the politics, he misses making the long drive upriver. He navigates smoother waters now. Teaching criminal law and Indian law at the Omaha campus of the University of Nebraska feels like vacation to him. But that may not last long. As irony might have it, politics beckon. He is considering running for local office or the state legislature. Others have offered to pay his bills.

# THE HURLER OF STARS TO SERVE AND TO REVERE

Elder Marion D. Hanks

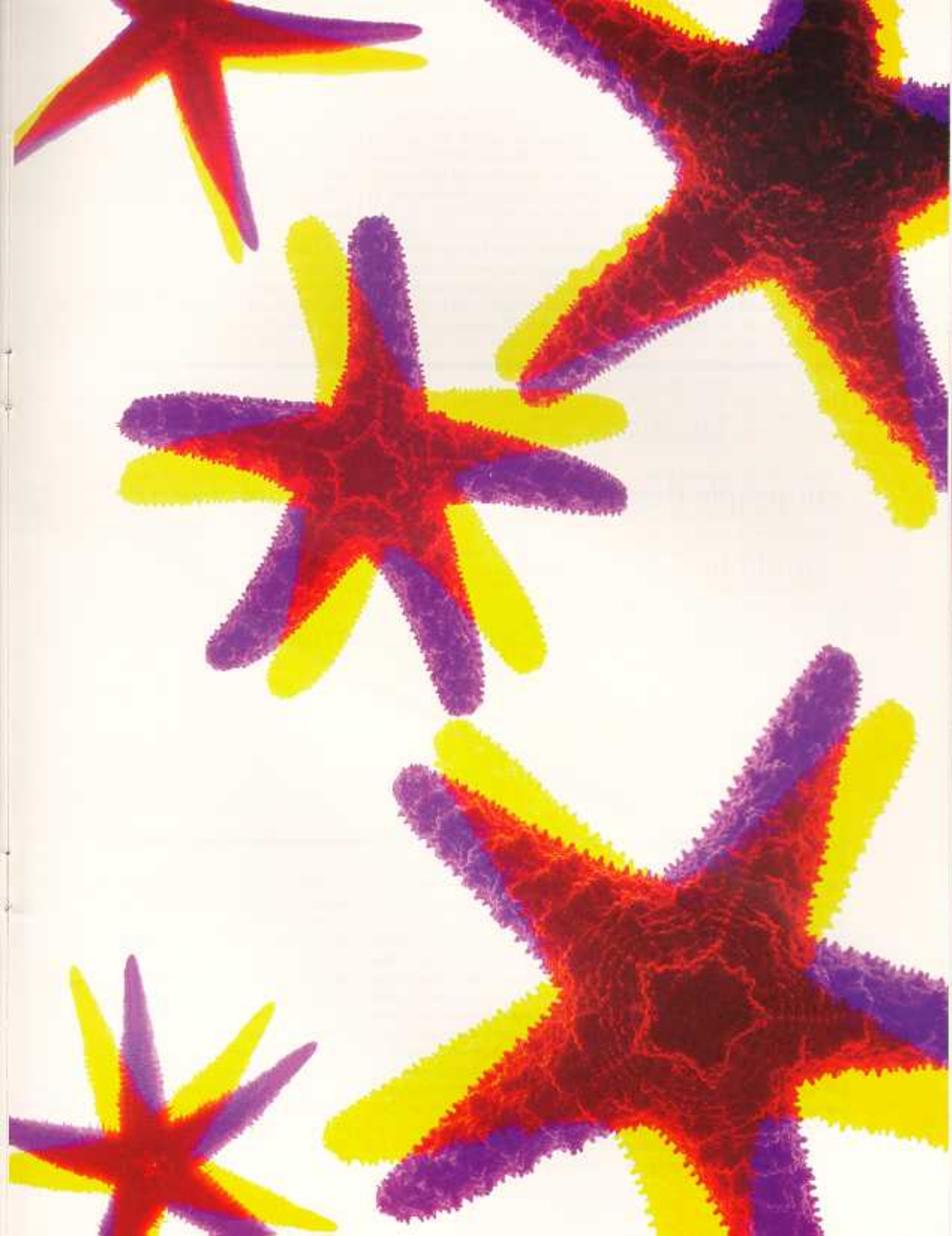
**W**hat I intend to do this evening is to offer a small slice of the core of my experiences and observations over the past several years, involving family, schools, missions, wars, work, civic involvements, reading, Church service touching all the continents, and the privilege of being a blessed and grateful, though too frequently absentee, husband and father. If this modest expression

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This address was  
given at the  
Annual Law  
Society/Alumni  
Association  
Dinner on  
October 22, 1993.

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Photography by John Snyder





of some of my clearest convictions engages your thoughts and your gears, I will be content

Three matters of pressing concern have occupied my attention this past week: (1) my return from a visit in the Philippines for a private foundation which serves to train, prepare, and place people in employment or in small business; (2) the moving memorial service this week after the passing of Obert C Tanner; and (3) preparations for a

One week ago on my birthday we made a safari into the hilly areas of Cebu, 65 kilometers outside the city, past the rice paddies and up the rough stone-cut steps of a primitive area to find the tiny wooden shack of Judith Naneo. Judith Naneo is a little lady about the size of a large pencil, dressed in a ragged but clean T-shirt and long skirt and cloth slippers, shepherding eight shoeless and in some cases bare-bottomed little children while she

1,000 pesos each Monday morning from a benevolent local loan shark to buy materials, and returning to him each Saturday evening the sum of 1,300 pesos. When Enterprise Mentors learned of her circumstance, this group, led by local volunteer citizens, Mormon and non-Mormon, arranged to help her, including obtaining financing from a bank at a sensible interest rate. (At current rates 1,000 pesos is about \$35; 300 pesos about \$12.)

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Dr. Albert Schweitzer told a group  
of people that he did not know what their future  
would be. "But," said he, "this one thing I know:  
The only ones among you who will  
really be happy are those who have sought  
and found how to serve."

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Sunday departure with my son and six local citizens in a different humanitarian project in Quelessebougou, Mali, West Africa

You can fully believe me when I tell you that I am pleased to be here tonight; actually, I am pleased to be anywhere near home after spending the last two near sleepless weeks in some of my old territory in southeast Asia. I survived a few days of driving the streets and byways of metro Manila, the city and outlands of Cebu, and the always fascinating politically complex territory of Mindanao, where rest geographically the cities of Davao and Zamboanga

operates in her tiny dirt-floored shack the shoe and slipper-making business, which feeds the family and provides footwear for sale to the less financially blessed people on Negros and other islands. She gets there by carrying packs of her product on her back through the jungle to the road where she climbs aboard a crowded jeepney for transport to the bay four kilometers away, across which she takes the ferry to sell her goods to the poor people who live on Negros. She has been doing this for nearly 20 years.

Until last year Sister Naneo has financed her business by borrowing

We visited many other individuals now in their own small businesses or otherwise earning a paycheck to care for their families. The foundation has favorably affected several thousand individuals in the last two-and-a-half years.

And after flying Philippine Airlines from place to place those many days, I understand why the little Asian lady sitting next to me one day was fingering her prayer beads and fervently praying, head bowed, as we took off!

I was more responsive to the personal application of a note I read in the Salt Lake morning paper "Orbiting

Paragraphs" column the morning I arrived home: "Prayer has been eliminated from many graduation ceremonies but remains an important part of final exam week."

Sunday my son and I will depart for our second annual October excursion to the villages of Quelessebouyou, Mali, West Africa, where we will help them prepare the ground and plant seeds. We will check the 66 wells they have dug with the support of the Quelessebouyou-Utah Alliance (a different private humanitarian effort involving some of our local citizens); will sit in on some of the 46 classes where 1,000 of the villagers are being taught to read and write in their own Bambara language, being instructed by some 200 or so fellow villagers who have previously qualified themselves as teachers; and will help in the construction of the first of 10 schools now authorized by the government for children of the villages. We are scheduled to visit the president of Mali, who a year ago said to us that the real future of Mali is closely related to the work being done in the villages in helping to provide clean water, gardens, health care, and literacy training. "You are like a rope lowered from heaven to bring us what we desperately need," he said.

Two medical expeditions will follow this year, one for eye surgery, primarily implanting lenses, and to provide eye glasses. The second health mission involves Utah gynecologists who will help to correct very serious disfigurements imposed by tribal custom upon some young girls in the villages. A fourth building expedition will occur the first of the new year. It will be devoted chiefly to completing the school buildings.

Having spoken now of some concrete, ongoing examples of useful service, for the next few minutes I have in mind two ideas and some suggestions.

Let me keynote the ideas by reference to statements by special men, rabbis of uncommon wisdom, and by Albert Schweitzer, great compassionate "Physician of the Jungle." Without elaborate expostulation, they will establish the substance of my remarks.

First, from Rabbi Susya: "God will not ask me, 'Why were you not Moses?' He will ask me, 'Why were you not Rabbi Susya?'"

From Rabbi Herzog:

*A prominent visitor stopped by the home of the revered rabbi. In his room was a table, a chair, a cot, a washbasin, and many books.*

*"Why, Rabbi," said the visitor, "Where is your furniture?"*

*"Where is yours?" said the Rabbi.*

*"But I am only passing through," the visitor said.*

*"So am I," replied the Rabbi.*

From Dr. Abraham Joshua Heschel, teacher:

*Two things a man needs—information and appreciation. When I look at our educational system and many other institutions for civilization, I see a tremendous emphasis upon information but hardly any cultivation of the sense of appreciation. Mankind will not die for lack of information. It will perish for lack of appreciation. Unless there is appreciation there is no mankind. The great marvel of being alive is the ability to discover the mystery and wonder of everything. The real dignity of anything that is, is in its relationship to God who created it. Unless we learn how to revere, we will not know how to exist as human beings.*

Dr. Albert Schweitzer told a group of people that he did not know what their future would be. "But," said he, "this one thing I know: The only ones among you who will really be happy are those who have sought and found how to serve."

The quotes from Rabbi Herzog, Rabbi Heschel, and Dr. Schweitzer seem simple and understandable, though each has a connotation of immense meaning and importance. We are all "just passing through," and we will leave all of our furniture when the time comes. The Bible teaches us that we are on earth to work hard, live simply, learn to love, and discover soon or late that we are not here to serve our own interests exclusively, or chiefly. Happiness is a choice, and we make

that choice when we appreciate our blessings and develop and unselfishly express the habit of helpfulness, serving others who need.

But what of the intriguing statement from Rabbi Susya? "God will not ask me, 'Why were you not Moses?' He will ask me, 'Why were you not Rabbi Susya?'"

The Obert Tanner memorial services brought me to again examine that question for myself. The incredible breadth and balance of this public benefactor's life was astonishing. He deliberately built his life on the values Plato made famous: the good, the true, and the beautiful. Some of his own writings reflect Plato's values:

*God is the author of beauty, as He is of truth and goodness. Beauty is a revelation of Him. Beauty is one of the confirmations a reflective person will add for his belief in God.*

Obert and Grace had their share of difficulties. He grew up in poverty, a tenth child, battled for his education, started his business in the basement of his mother's home, lost three sons, and went on to become a teacher, philosopher, and a wealthy businessman. "We determined that we would not let grief define our lives," he said after the loss of their third son.

He spoke of the blessing of affluence ("it is a blessing to give") and of its dangers:

*Of the many hazards in the possession of wealth, one is the loss of sympathy for the poor. People with means find it hard to know where the shoe pinches the less fortunate. They may analyze it, but they do not feel the pinch. It is a terrible risk to rise above the poor and the needy; terrible because we may not feel their wrongs and cruel inequities. And failing to feel them, we do nothing to correct them, thereby losing our own souls—lacking in sympathy and humility our willingness to sacrifice. . . .*

*We all marvel at handicapped men who rise above great adversities. But should we not marvel even more at fortunate men who rise above prosperity? Christ apparently thought so. He pointed*

out that it was nearly a superhuman task for the rich man to gain spiritual mastery over the success he has won [Obert C. Tanner, *Christ's Ideals for Living* (Deseret Sunday School Union Board, c. 1955)]

Perhaps most of us here are not overburdened with wealth, yet we may struggle still with the burden of sharing what we have—money, patience, concern, kindness, time, knowledge, faith, warmth, compassion, encouragement, a listening ear—a few dollars sent halfway across the earth to help dig a well, a few minutes to comfort the ill or the frightened or the bereaved. Pro bono publico remains a constant principle for a lawyer, as visiting a friend in a hospital does in his avocational life.

Once in another part of the country, I accompanied some local leaders to visit one of their members who was slipping away. The elderly man was pleased that the visitor from Salt Lake had come to the hospital to comfort him, but his tears of gratitude were directed chiefly to his own associates and leaders: "You came!" he said, "You came!"

On that same weekend I heard the tender story of an older man who had taken his 1974-model automobile to a garage for repairs. The projected work was more costly than he or the conscientious mechanic had contemplated, and the garage owner wondered if the man really wanted to spend that sum on an older car.

Said the car owner, "Could you take a credit card that isn't mine?"

"Whose is it?" asked the garage man.

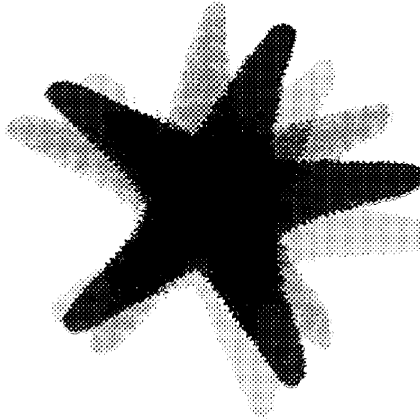
"It is my daughter's," the man said. "She wants me to have my automobile in good, safe condition. It is the only thing I have."

As the son of a father of whom I have no conscious memory, and as a father of loving children, I weep over that. There is no neighbor, after all, closer than the ones in our own families. And in this incident, knowing no more details, one does not get the impression of a casual check written on

ample funds, but of a loving daughter, very possibly sacrificing to preserve the self-esteem and precarious independence of a cherished father.

We are speaking, of course, of that second commandment, linked inseparably by Christ with the "first and great commandment," both centering in love of God and neighbor, the two together declared to be the heart principle upon which depends the validity of all other of our convictions and commitments—"all the law and the prophets."

Rabbi Susya's sobering thought came with special impact to me when I first read it. It emboldens me to sug-



gest to you, substantial and successful and able as you may be and will be, that all of us can profit from periodic consideration. An ancient sage left us a helpful standard: *To be, and not to seem*. If our purpose is being and not seeming, and if any course correction is suggested, then a thought from Samuel Johnson might be useful:

*The fountain of content must spring up in the mind, and he who has so little knowledge of human nature as to seek happiness by changing anything but his own disposition will waste his life in fruitless efforts and multiply the griefs which he purposes to remove.*

The reality is that none of us is at any point in this mortal experience a finished product; all of us are still and always will be in the process of creation. If disposition is the key, then it is well to

remember that *happiness is a choice*. None will escape pain, but we can choose not to be miserable. Botanist Julius von Sachs gives a key if we are ready to open our minds and hearts to a broader, more balanced base: "All originality comes from reading," he said.

Alfred North Whitehead has given us the thought that "Effective knowledge is professional knowledge, supported by a restricted acquaintance with useful subjects subservient to it." He observed that the rate of progress in fields of knowledge is so accelerated that the individual human being living an ordinary span of life must face what he calls "novel situations which find no parallel in his past. The fixed person for the fixed duties, who in older societies was such a godsend, in the future will be a public danger." In his book *Science and the Modern World* he offers us this observation:

*The modern chemist is likely to be weak in zoology, weaker still in his knowledge of the Elizabethan drama, and completely ignorant of the principles of rhythm in English versification. It is probably safe to ignore his knowledge of ancient history. Of course I am speaking of general tendencies, for chemists are no worse than engineers or mathematicians or classical scholars.*

He then speaks of the pitfalls of such a situation, which he said, "produces minds in a groove," and inevitably restrains serious thought beyond the groove. "The remainder of life is treated superficially, with the imperfect categories of thought derived from one profession."

"The leading intellects lack balance," he concludes.

The suggestion seems obviously to encourage all of us to broaden our capacity to appreciate, to read, and to learn and be glad in God's beautiful world, to work to acquire what is sufficient for our needs, and to share time, talents, and means with those who need them most. As we respond to the needs of others, we open doors to incredible blessings. Let me share one example.

I had a dear friend who has been gone for some years now, one whom I look forward to visiting should I ever qualify to be where I am sure she is. In her active, energetic, participating, young-mother years she was stricken with polio and spent the next 40 years in a wheelchair. She struggled valiantly, was honored as the Handicapped Person of the Year in the United States and traveled around the world seeking to help other people with special problems. Over the years the body grew more ungainly and difficult to manage. Yet she lived alone largely, managing I don't know how, but maintaining a sweetness of spirit that lifted a multitude of other lives, including those who were invited to bless her. After one such blessing she wrote something in her journal that she invited me to read at a subsequent visit on a similar errand. As I read, her purpose in having me read became obvious. She wanted me to speak for her to the Lord, thanking him for this imperfect body which was part of her eternal soul. This is a brief extract from what she had written:

*I have been commanding this inconvenient, twisted body for years to function, not appreciating its struggling efforts to perform and its great worth to me. I have realized what the past performance of this incapacitated body has really meant to me. It has been magnificent, and I say that humbly. My prayers for bodily strength to meet the days' activities have been gloriously answered. It has in excellence carried me as I have traveled in the service of my fellow men. Oh, I know we can progress with the aid of a healthy tabernacle, but in physical misery and discomfort the spirit can be refined to spiritual heights more rapidly and thus permit one to rise to greater calls in the service of the Master.*

*Overnight, as it were, I have come to respect and cherish this body. More than ever I desire to increase a gift of faith that I may, as soon as I grow worthy, experience the reuniting of my spirit and my renewed flesh and bones. I want no other body—just this one, cleansed and strengthened, and spiritually refined. It is part of me.*

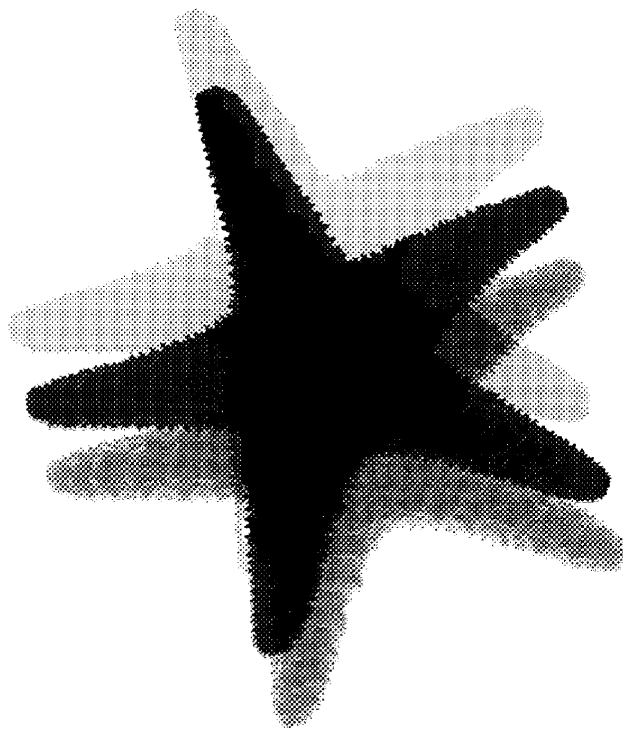
This school of law bears the name of President J. Reuben Clark, Jr., a man of great intellect and passion and legal and diplomatic skills. If you are acquainted with a statement he made in a general conference about 56 years ago, you may well find in it whatever encouragement you need in your Christian commitments and more particularly your pro bono work and your consistent service in behalf of those with special needs:

*When the Savior came upon the earth he had two great missions: one was to work out the Messiahship, the atonement for the fall, and the fulfillment of the law; the other was the work which he did among his brethren and sisters in the flesh by way of relieving their sufferings. He left as a heritage to those who should come after him in his church*

In this great commission, members of The Church of Jesus Christ of Latter-day Saints are bound with all other true Christians to reach out to those who are hungry, thirsty, naked, homeless, sick, and in prison, and to seek to supply comfort and encouragement and hope and vision to those who may suffer for want of these things. For those who may not bear allegiance to Christ, there is that tie to other humankind that is expressed by the Emperor Marcus Aurelius who said:

*We ought to do good to others as simply and as naturally as a horse runs, or a bee makes honey, or a vine bears grapes season after season without thinking of the grapes it has born.*

For years I have nurtured a story I have wanted to share. I will do that



*the carrying on of those two great things—work for the relief of the ills and the sufferings of humanity, and the teaching of the spiritual truths which should bring us back into the presence of our Heavenly Father [President J. Reuben Clark, Jr., Conference Report, April 1937, p. 22.]*

tonight, referring to part of a chapter about a star thrower from the book *The Star Thrower* by the late Loren Eiseley, eminent anthropologist. The story is of a man who has a reverence for life, all life, but it is a testimony also of Eiseley's own dilemma when he thinks with his heart rather than only with his



professionally trained, scientifically oriented mind. Ultimately, it is a testimony of the vitality of acting to serve life, all life.

Eiseley leaves his seaside hotel and observes the sea creatures littering the sands. Thrown from mother ocean to shore, the sea life struggles to return through the surf.

As he walks before dawn along the beach the author observes with disgust collectors carrying their sacks of shells with life still in them to the outdoor

man that he does not "collect," neither the living nor the dead. "Death is the only successful collector," he says and walks away.

From a distance he sees the thrower skillfully sailing the starfish into the ocean. "For a moment, in the changing light, the sower appeared magnified, as though casting larger stars upon some greater sea. He had, at any rate, the posture of a god."

But he roughly reminds himself that the star thrower is only a man

*ventured out at dawn resented others in the greediness of their compulsive collecting. I had also been abrupt because I had, in the terms of my profession and experience, nothing to say. The star thrower was mad, and his particular acts were a folly with which I had not chosen to associate myself. I was an observer and a scientist. Nevertheless, I had seen the rainbow attempting to attach itself to earth.*

Eiseley finds the star thrower and joins him in spinning still-living

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"I set my shoulders and cast, as the thrower  
in the rainbow cast, slowly, deliberately, and well.  
The task was not to be assumed lightly, for it was  
men as well as starfish that we sought to save.  
For a moment, we cast on an infinite beach to-  
gether beside an unknown hurler of suns."

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kettles "provided by the resort hotels for the cleaning of the specimens."

Distressed, Eiseley picks his way through the remains of life toward a distant rainbow where he sees, near its foot, a figure picking up something from the sand and throwing it vigorously back into the ocean. Eiseley reaches him as he lifts another dying starfish and spins it far out into the sea.

"It may live," he said, "if the offshore pull is strong enough."

Eiseley asks him if he "collects," and the man answers, "Only like this, and only for the living." "The stars throw well. One can help them."

Eiseley, uncomfortable, tells the

engaged in a fruitless task, and cynically returns through the collectors and the steaming kettles to his room where he struggles through the night, battling the shadows "which might be said to have been released by Darwin, Einstein, and Freud," these shadows of famine, war and death, of opposition, of the dark side of nature.

But the scientist had seen the star thrower and now at next dawn sets out again to find him.

*Somewhere far up the coast wandered the star thrower beneath his rainbow. Our exchange had been brief because upon that coast I had learned that men who*

starfish far out into the water. "I spoke once briefly. 'I understand,' I said. 'Call me another thrower.'"

*I flung another star. Perhaps far outward on the rim of space a genuine star was similarly seized and flung. It was like a sowing—the sowing of life on an infinitely gigantic scale. Small and dark against the receding rainbow, the star thrower stopped and flung once more. I never looked again. The task we had assumed was too immense for gazing. I flung and flung again while all about us roared the insatiable waters of death.*

*But we, pale and alone and small in that immensity, hurled back the living*

stars Somewhere far off, across bottomless abysses, I felt as though another world was flung more joyfully. I set my shoulders and cast, as the thrower in the rainbow cast, slowly, deliberately, and well The task was not to be assumed lightly, for it was men as well as starfish that we sought to save. For a moment, we cast on an infinite beach together beside an unknown hurler of suns

I went my lone way up the beaches Somewhere, I felt in a great atavistic surge of feeling, somewhere the Thrower knew. Perhaps he smiled and cast once more into the boundless pit of darkness. Perhaps he, too, was lonely, and the end toward which he labored remains hidden—even as with ourselves

From Darwin's tangled bank of unceasing struggle, selfishness, and death, had arisen, incomprehensibly, the thrower who loved not man, but life. It was the subtle cleft in nature before which biological thinking had faltered We had reached the last shore of an invisible island—yet, strangely, also a shore that the primitives had always known. They had sensed intuitively that man cannot exist spiritually without life, his brother Somewhere, my thought persisted, there is a hurler of stars, and he walks, because he chooses, always in desolation, but not in defeat

In the night the gas flames under the shelling kettles would continue to glow. I set my clock accordingly. Tomorrow I would walk in the storm I would walk against the shell collectors and the flames I would walk remembering Bacon's forgotten words "for the uses of life." I would walk with the knowledge of the discontinuities of the unexpected universe. I would walk knowing of the rift revealed by the thrower, a hint that there looms, inexplicably, in nature something above the role men give her. I knew it from the man at the foot of the rainbow, the starfish thrower on the beaches of Costabel [Excerpts from Loren Eiseley, *The Star Thrower*, (New York: Harcourt Brace Jovanovich, Inc., 1978)]

The Almighty has put before us perfection as the ultimate goal and laid out the path of eternal progression that leads to it. It doesn't seem necessary to remind anyone here that none of us is a finished product yet, but that we still

are in the process of creation, a process involving our free agency and the opposition that makes it so meaningful, and the principles and ordinances which can take us up that path toward the maturity enjoyed in fullness by God and his Holy Son Jesus Christ. They

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God loves  
being God  
because it  
permits him  
to be merciful,  
and he waits  
for us to  
open the door  
to his  
graciousness!

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are full of light and love, have no malice, are free from selfishness and resentments and ego One of my greatest comforts came early with learning what the Almighty has taught us—that he is a God of "loving kindness, judgment, and righteousness in the earth," that he waits to be gracious unto us, and that he delights in his own exaltation because it permits him to be merciful

And therefore will the Lord wait, that he may be gracious unto you, and therefore will he be exalted, that he may have mercy upon you: for the Lord is a God of judgment; blessed are all they that wait for him [Isaiah 30:18]

Thus saith the Lord, Let not the wise man glory in his wisdom, neither let the mighty man glory in his might, let not the rich man glory in his riches:

But let him that glorieth glory in this, that he understandeth and knoweth me, that I am the Lord which exercise loving kindness, judgment, and righteousness, in the earth: for in these things I delight, saith the Lord [Jeremiah 9:23–24]

God loves being God because it permits him to be merciful, and he waits for us to open the door to his graciousness!

It is perhaps the general assumption that all of us are so keenly conscious of our limitations and shortcomings that we look with sorrow and regret upon our own record and stage of development. Yet we understand enough about the Savior and his mission and the principles of faith and repentance and obedience, and the supreme importance of forgiveness, that we are trying honestly to move forward on the path toward that ultimate maturity of which I spoke

The great duke of Wellington was one of a group of famous personalities who was asked near the conclusion of his life what he had learned from his years of superior, successful leadership His answer was: Had I to do it again, I would give more praise and credit to my associates and my subordinates"

It is reported that Aldous Huxley, asked the same question, replied that what he had learned was that the chief need of the world is more kindness.

And Karl Barth, theologian, made his reply by singing the first words of a well-known Christian hymn: "Jesus loves me, this I know, For the Bible tells me so"

I believe these things. I also believe that you who are associated with the law are in a critical and honorable profession I pray for you that you will honor it and bring honor to it by truly serving God through serving his children.

**PROFESSOR SHERMAN  
ROGERS FROM HOWARD  
UNIVERSITY ENJOYS FALL  
VISITING PROFESSORSHIP**

In 1989, during a discussion with Howard University Law School's Dean Clay Smith, Associate Dean J. Clifton Fleming suggested that BYU and Howard establish a faculty exchange. Within one year BYU Law Professor Lynn Wardle was a visiting professor at Howard. That same year it was decided that the exchange would include students, and Kristine Keala, a second-year student, visited Howard.

During fall semester 1993, with the visit of Howard Professor Sherman Rogers, the faculty exchange has come full circle. In an interview with the *Clark Memorandum*, Professor Rogers reflected on his experience in the law, his semester at BYU, and his hopes for his students.

*Professor Rogers would you introduce yourself to Clark Memorandum readers?*

I graduated from Oakwood College, a small, private college in Huntsville, Alabama. Serving as senior class president, I graduated at the top of my class. I enrolled at the Howard University School of Law in 1973 and graduated in 1976 and served on the law journal. After graduation, I had a public interest law practice in Birmingham, Alabama for two years and then returned to George Washington University to pursue an LL.M. degree with the possibility of completing an SJD. While I was working on the LL.M., I was also working as an appellate litigation attorney for the Equal Employ-

ment Opportunity Commission. I argued cases for that agency in almost all of the Federal Circuits.

In 1983 I received an offer to go to the Thurgood Marshall School of Law, Texas Southern University, to become a professor. I taught at Texas Southern for three years and then went to Howard as a visiting professor in 1986, where I was offered a tenure track position and decided to stay. Of course, during 1993 fall semester I've been a visiting professor at BYU, which has been a very enjoyable experience—one of the most enjoyable times I've had in legal education.

*Do you have a creed that has been central to your life?*

Yes, it can be described in one word—service. I have always been taught that as human beings we are here for a purpose. We are not to serve ourselves or to please ourselves as such, but we are here to serve others—to make life a little better for our neighbors and those around us. If that were everyone's creed, to be of service and to be of help to one's neighbor, the world would be a better place.

Another central theme of my life is that I should try to be a peacemaker. I have always believed that the world's problems could be ameliorated or at least lessened if people were a little more concerned about giving some of their own cherished possessions and ideas to find some middle ground, making life a little bit better for someone else. I don't mind making certain compromises to help people get along a little better—as long as I do not compromise what I call

“nonnegotiable principles.” I have always seen myself as a facilitator, helping people reach a common ground of understanding. It is not always possible, but I will do whatever I can to bring people together, as opposed to being an agent of disruption.

*What were your expectations when you decided to spend a semester at the BYU Law school as a visiting professor?*

I had been told about the various codes and standards—no coffee, no smoking, no drinking. That suited me because my particular moral and religious beliefs suggest that we not partake in any of those activities. I had met Lynn Wardle while he visited Howard and found him to be a very nice person, and I realized that we shared many values. I felt it would be a good experience to visit the BYU Law School. Because BYU is largely Caucasian and Howard is largely African-American I thought it would be different. Having taught in minority situations since entering legal education, I thought it would be an interesting experience. What I have discovered is that students are pretty much alike no matter where you go. Race was never any factor for me in teaching at BYU.

I found the students to be extremely friendly and very nice. The same can be said of the faculty. The faculty members were very supportive, kind, and willing to do anything to make my stay at BYU comfortable. That is one thing that makes BYU special: the people who attend this law school and work here have shared values.

While the competition among students is intense,

they have a remarkable sharing attitude. They are not stingy with their notes; they share outlines; there is a sense of trust. The 24-hour access to the library is also remarkable because it, too, requires a sense of trust among faculty and students. I'm not sure whether that system could work at many law schools in the United States—that says a lot about BYU.

Even the faculty meetings at BYU are congenial. I never saw any rancor, any harsh words spoken. Individuals are usually very respectful of each other; there is a good relationship between the dean's office and the faculty. It is a very congenial place and I was impressed.

*Do you think the BYU law students benefit from the faculty exchange?*

On the East Coast some think that students at BYU have never had an African-American teacher or professor. In view of all the negative media about people of African-American descent, despite the significant achievements of African-Americans, my colleagues and I thought it would be good for students to take a class from an African-American Howard professor.

Coming to BYU has been a heartwarming experience. The students warmly accepted me from the first day. From all I can see, they have responded very well and seem to have enjoyed the experience. It has been a nonracial experience, totally. I was interested in the students as persons, as individuals. To me they were another group of law students who came to learn, and I was here to guide and

help them understand the subject matter.

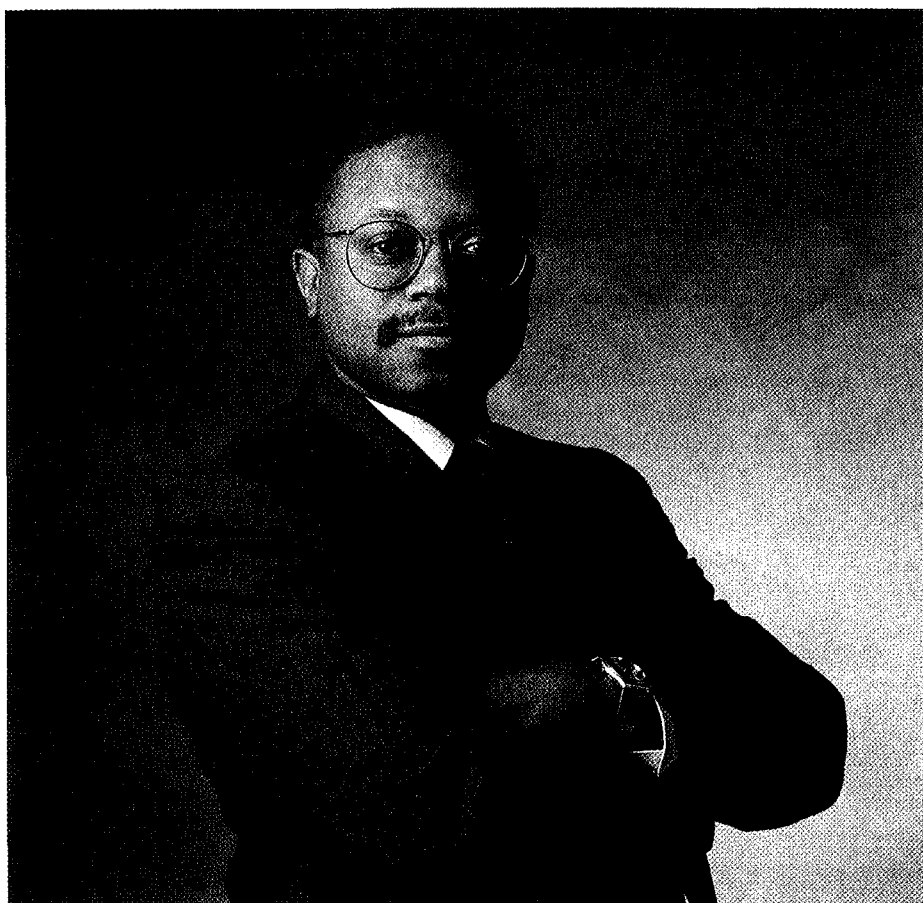
*Are there strengths and weaknesses involved with a predominantly African-American student body or a predominantly LDS student body?*

A potential problem is that people may tend to become isolated. They may be more insular than they were as part of the general population. In life there is always the danger that individuals may isolate themselves within their groups and not really understand the big picture.

The positive side is that when individuals have shared values there is a tremendous support mechanism for them. For African-Americans the theory is that these students could study in a nonhostile environment, developing relationships with individuals who often have similar backgrounds. I think the same is true about the BYU law students. Because of the shared values, individuals can study law in a context compatible with those values, and I think there can be a higher comfort level. There are pluses and minuses, which is an excellent reason for having the BYU/Howard exchange program. It is an eye-opener for students from both Howard and BYU.

*Near the close of the semester, you endured a personal tragedy with the unexpected passing of your wife. Did that have an effect on your relationship with the students?*

The students dealt with me as a human being, which has been amply demonstrated since then. The BYU Law students did more than sympathize with my losses. They



Howard Professor Sherman Rogers

were really empathizing with me. They made a huge scroll with personal wishes for my wife's speedy recovery before they found out she had passed away. Many, many cards were sent. It was amazing. Also, the students at BYU Law School, through the Student Bar Association president, contacted the SBA president at Howard and they are planning a joint ceremony to dedicate a tree to the memory of my wife.

It went beyond me being a professor and they being my students. I think we developed true friendships. It happened on a grand scale and is an experience I will never forget. That is what has made this experience at BYU so unique and so great. I honestly believe I devel-

oped many friendships that will last a lifetime.

*If you were given one last lecture to your students at the BYU Law School, what advice would you give?*

I would say that no matter how much money they make, no matter how successful they become, they need to always remember that life is short and they are here for a purpose. They should never get confused between themselves and their possessions. In addition, I have challenged each student in my classes at BYU to always remain humble. It is pride and self-sufficiency that usually precede a downfall.

It can be difficult to keep one's pride in check when things are going great. No

matter what happens they have to stay in touch with themselves. They must remember their purpose is to serve. This is important to me—material things are short lived and will eventually perish. A well-developed character is something that you will always be remembered by. While it may be great to get book knowledge, it is more important to develop one's character. We must try to be the best we can as human beings.

*The BYU Law School community was enriched by the visit of Professor Sherman Rogers and looks forward to another opportunity for him to spend at least a semester and preferably an academic year with us.*



## WITHOUT WALLS

Many alumni from the J Reuben Clark Law School have now gone beyond traditional law practice. Whether working in a narrow specialty, with out-of-the-ordinary clients, or in a unique workplace, these alumni give us a glimpse of the many directions available to those trained in law.

## FAMILY TIES

Four years ago, after sustaining a serious injury in a car accident, Jorge H. Galvez II '88 left his California law firm to recuperate at home in Utah. While there, immobilized for nearly a year, Galvez helped a few clients with immigration cases, and from there the word spread. Galvez had established a home practice.

Galvez, happy with the way his practice has developed, specializes in immigration law, representing people and companies wanting to transfer from other companies into the United States either temporarily or permanently. About 70 percent of his work is family related. When necessary, he also does criminal law and employment-discrimination civil rights law for his immigration clients.

Originally an immigrant himself, he feels a natural inclination to immigration law. "I came to this country with a \$20 bill and a promise that if I tried I could do something with my life—the classic story. Eventually, I helped my brother and mother immigrate. Now both live here in America. My brother graduated from dental school and

is a dentist. We just feel very, very fortunate."

For Galvez, the best part about immigration law is "the ability to help someone stay in this country or have the opportunity to bring family. It's a very personal area of the law, and I really enjoy feeling that I'm helping people."

Galvez immigrated to the United States in 1981, immediately following his LDS mission. During his absence, civil war had erupted in his native El Salvador, preventing his return, so after obtaining a student visa, he went to Weber State College. Asked what made him choose law school after graduation from Weber State, Galvez laughs, "When I first came to America, I thought I wanted to become an engineer so I could go home to build bridges—whatever would help the people of El Salvador. But when I took all the required engineering courses, I hated them. During the same period, however, I took a required political science course, and knew I had found my love. So after graduation I could either sell shoes at the mall or go to law school. As it turned out, law school was the best thing I ever did. Law developed naturally from my interest in government issues." Galvez's intermediate career choice, being an ambassador, also indirectly helped him into immigration law, leading him to learn four languages besides his native Spanish: English, Italian, French, and Portuguese.

Working with family immigration cases, Galvez experiences exhilarating highs and heartbreaking

lows. "The pinnacle of my experience since law school was a criminal case where I was able to acquit a woman from a first-degree murder charge. In my view it was a clear-cut case where someone shouldn't go to jail. I just woke up at four in the morning with the answer."

A less happy case involved the adoption of a three-year-old Mexican orphan by an American family. Because the attorney processing the adoption



Jorge H. Galvez

neglected to consult an immigration attorney, when the child was five years old the immigration service decided to deport him. Galvez had to tell the family of the decision at Christmastime, and every Christmas since he has thought of them. Although the family made the extraordinary decision to go to Mexico with the child, Galvez says, "I just can't get them out of my mind."

Galvez dates his legal self-discovery to a 1987 immigration course taught by Professor Jim Elegante. "It was one of those courses where I not only read the cases, but I read the cases that were referred to in the cases. I really got into it and

enjoyed it." Although Galvez has enjoyed other areas, too, immigration law has been the most exciting.

Galvez hastens to explain that though his practice is exciting, it isn't glamorous; instead, the sense that he is helping people keeps him enthusiastic about his profession. "If I worked for a law firm doing the same kind of work I could probably double my income, because many of these people cannot afford an attorney. But if someone is not motivated by income and wants to serve well, there is tremendous need in this area."

—Allison Yauney

## ON THE HOME FRONT

By practically any measure, Jill Taylor '80 has an enviable legal practice. A busy mother of three, Taylor set up a small practice at home following graduation, only recently renting office space three mornings a week to get some time away from home interruptions. Taylor's specialty? Employment-based immigration, a very narrow area of the law that enables her to keep her practice the way she wants it—part-time. Occasionally she might do a family-based petition for somebody she's already done employment-based work for, but for the most part she avoids family-based work. By keeping her specialty narrow, she can limit her practice.

Asked how she found her particular niche in the law, she answers, "It was just a happy accident. My husband is an emergency physician. Shortly after I graduated from law school he needed to recruit a

Canadian physician. Then I had a couple of foreign friends who needed work visas. The practice just developed from there." Employment-based immigrants typically have a unique skill or profession for which there is a shortage in the United States. Taylor must prove there's not an American able or willing to take the job, which "is a bit of a fiction," she points out. "You have to show that they're not taking the job from an American." Taylor also arranges temporary H-visas, where she must show that the position requires a bachelor's degree equivalent and that the client possesses that.

Taylor feels that her specialty has a few advantages over others. "First, the clients are all very well educated and interesting. Some of my best friends are former clients. Secondly, they all have jobs, which means they can pay you. And that's nice." Of Galvez's specialty she says, "Family-based immigration work is satisfying too, because you're helping people get together. Employment-based immigration is usually more lucrative than family-based because applicants already have a job. So collecting fees is one thing I don't have to worry about. Also, the heartbreaking stories in immigration law are usually family-based. The employment-based ones are generally easier, and there's not as long a wait on priority dates. Generally it is a much more upbeat practice."

"Immigration involves administrative law, which means I don't have to appear in court. The only time I ever have to be some-

where is for an interview for final adjustment of status before INS in Salt Lake City."

Everything else I can just handle through the mail or over the phone. That gives me great flexibility to work around my family situation. There are not many deadlines."

Taylor particularly likes the fact that her chosen specialty is not necessarily adversarial. "I feel like I'm helping somebody through the red tape, and in the end it's a win situation for the person and a win situation for the U.S. government. These people will be taxpayers. They'll contribute to the economy. These are people that have a lot to offer."

In many respects, these are



Jill Taylor

the cream of the crop from their countries. They are highly educated, well-motivated people who have a lot on the ball and will do extremely well. It's like doing adoption work, because everybody's happy."

Taylor's excellent record of obtaining successful results for her clients does not happen without effort, however. "I don't like to give people false hope, and if I don't think they have a shot

at it, I won't take the case. For the most part, I have an extremely successful track record of getting people through the process, but I do have to say it's because I'm selective in whom I take. I don't take the person I know is going to get rejected. I tell clients that there's a small fee up front to get started, and if it doesn't work out, we just drop it. I'm not going to run up legal fees for them in something that's fruitless."

Besides client selection, Taylor's specialty also has other challenges. "You have to work your way through the regulation maze and ferret out the mind of the certifying officers, trying to figure out how you can convince them that you've met all the standards. The arguments are not always black and white, so often it becomes a gray area as to how you structure the job. You can't make it too restrictive, and yet you can't make it too general. It's a real balancing act. But it also involves a lot of legal writing, which I enjoy. Everything I do is written argument. I enjoy sitting down at the word processor and composing."

Like Taylor's choice of legal specialty, her decision to go to law school was also quite accidental. "I got an invitation from the Law School. My undergraduate degree was art. So it was quite a leap. I went into law school mainly for lack of a better option. I had finished my B.S. in art and it wasn't too marketable." Immediately following graduation, she served as an Emery County deputy assistant for about a year, until she had her first child. Her home

immigration practice developed at the same time.

Taylor's employment-based immigration practice worked out ideally for her because it was something she could do in her home while her children were young. Initially, she had only four or five clients. Now she has more than 40. She cautions that employment-based immigration follows the economy. "All my clients might dry up tomorrow if Utah had a recession. It doesn't matter to me because I can rely on my husband's income. If I quit practicing tomorrow, I'll go back to painting. I can practice successfully and have fun because I don't have to worry about paying the mortgage—that's a luxury. If I don't want to take clients, I can just refer them to someone else and have more free time at home. I practice because I enjoy it. If I had to take every client that came in the door and then charged some of them for petitions that I knew would be unsuccessful, I wouldn't enjoy the practice as much."

—Allison Yauney

#### ACROSS THE WATERS

For the past 14 years, Bill Wingo '76 has been employed by the Salt Lake firm of Kirton, McConkie & Poelman, the firm that serves as the LDS Church's Office of General Counsel. Hired by the firm in 1980, Wingo spent his first three years in San Jose, Costa Rica, managing the Church's legal affairs in Central America and the Caribbean. For ten years he has been based in Salt Lake City, doing work in various foreign countries for the

Church and other corporate and institutional clients.

In July 1993 Wingo left on a two-year assignment to his firm's Frankfurt, Germany, office as part of a team of three lawyers handling Church legal affairs in Europe and the Middle East. Most of his work is in the former Soviet Union and Eastern Bloc countries.

Wingo admits that this is a challenging assignment. Many legal concepts, systems, and institutions taken for granted in the West are still in their formative stages in Eastern Europe. He laments the lack of expertise in many substantive areas of law, since there was no demand for it under the Soviet system. For example, it is not easy to find a seasoned real-estate lawyer in countries that have only recently permitted the private ownership of land and in which there is no reliable land-title registry system. While searching for an experienced attorney in the capital of one country, Wingo obtained a list of recommended lawyers from the commercial officer of the U.S. Embassy. Ninety percent of lawyers on the list gave their specialty as criminal law.

The court systems are also a source of frustration according to Wingo. "They didn't generally handle the resolution of private disputes, so now they are not equipped with either the personnel or the systems to accommodate the volume of litigation that is generated by a free-market economy." As a result, Wingo says that safeguards or remedies that exist under the law may not provide

any practical benefit because of the lack of a timely dispute-resolution process.

Although there have been many revolutionary changes in Eastern Europe, many of the old laws, institutions, and government officials remain in place.



Bill Wingo

The middle-level and lower-level officials who make most of the day-to-day decisions find it difficult to change attitudes developed over many years in an authoritarian system. Although new constitutions may speak of religious liberty and due process, these concepts remain foreign to many in government.

Because of these systematic differences, Wingo's foreign responsibilities are doubly heavy. Much of his time is spent in obtaining authorization for missionaries to enter new countries, resolving immigration problems, registering the Church with national and local governments, setting up and maintaining legal entities through which the Church can conduct its activities. At first blush these duties appear more ambassadorial than legal, but they definitely call forth the skills of per-

suation he learned at the knee of Woody Deem and the negotiating skills taught so ably by Gerry Williams.

Most of Wingo's work for the LDS Church involves obtaining authorization for it to go into a country where it doesn't currently have a presence. Though such a task may sound simple, the process required to accomplish it is often frustratingly complex, especially when one has to rely on the work of foreign attorneys. Though the list of requirements to establish the Church in a new country is long, Wingo says, "That's what's intriguing about the job. There is an extremely wide scope of legal matters that are handled, so it stays interesting."

Another of his main duties is to select and train local counsel in each country where the Church has activities. Since American lawyers like Wingo are not licensed to practice law in foreign countries, they must rely on local attorneys to do their client's international work.

After Wingo and his colleagues train local attorneys for each area they visit, most of their work is administrative, delegating legal assignments to local attorneys and ensuring the quality of the work done. This is work for a "generalist" and Wingo frequently uses the foundation of legal knowledge he gained in his first year at the Law School. He often thinks about Dale Whitman as he spends time leasing facilities for meetings, offices, and residences and purchasing sites for chapels and temples.

With all of its frustrations, Wingo wouldn't trade

jobs with anyone. "It's a wonderful opportunity to learn about different legal systems and to meet fascinating people. I enjoy becoming familiar with the different countries of the world, and I enjoy the substance of the work."

Wingo particularly likes working for the LDS Church. "You feel that you're involved in building something that is going to last beyond your own lifetime. It also happens to be a work in which I strongly believe. So that's been very gratifying. I feel like the benefits that come from the work I am doing mean more than just making more money for the shareholders of the corporation or increasing the profitability of the company. It has a long-term benefit in the lives of the people who are affected by the work I do."

"For example, a couple of weeks ago I returned from the Ukraine, and as I was visiting there with some highly educated people who had joined the Church just within the last year or two, I talked with them about the difference the Church had made in their lives. It was really humbling to hear them talk about how now they have hope, where before they had no hope. Life has meaning now, where before it had no meaning. That's quite rewarding personally to feel I can use the education I received in law school and the experiences that I've gotten over the past several years to get the Church into a position where it can go into some countries and start blessing the lives of the people. That's what it's all about."

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