

Fall 1994

Clark Memorandum: Fall 1994

J. Reuben Clark Law Society

J. Reuben Clark Law School

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CLARK

MEMORANDUM



BRIGHAM
YOUNG
UNIVERSITY

J. REUBEN
CLARK LAW
SCHOOL

FALL
1994

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FALL 1994

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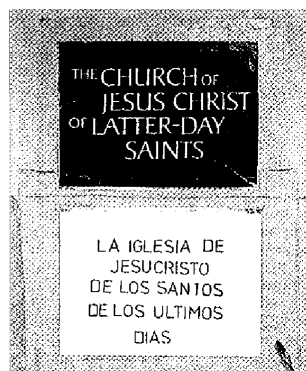
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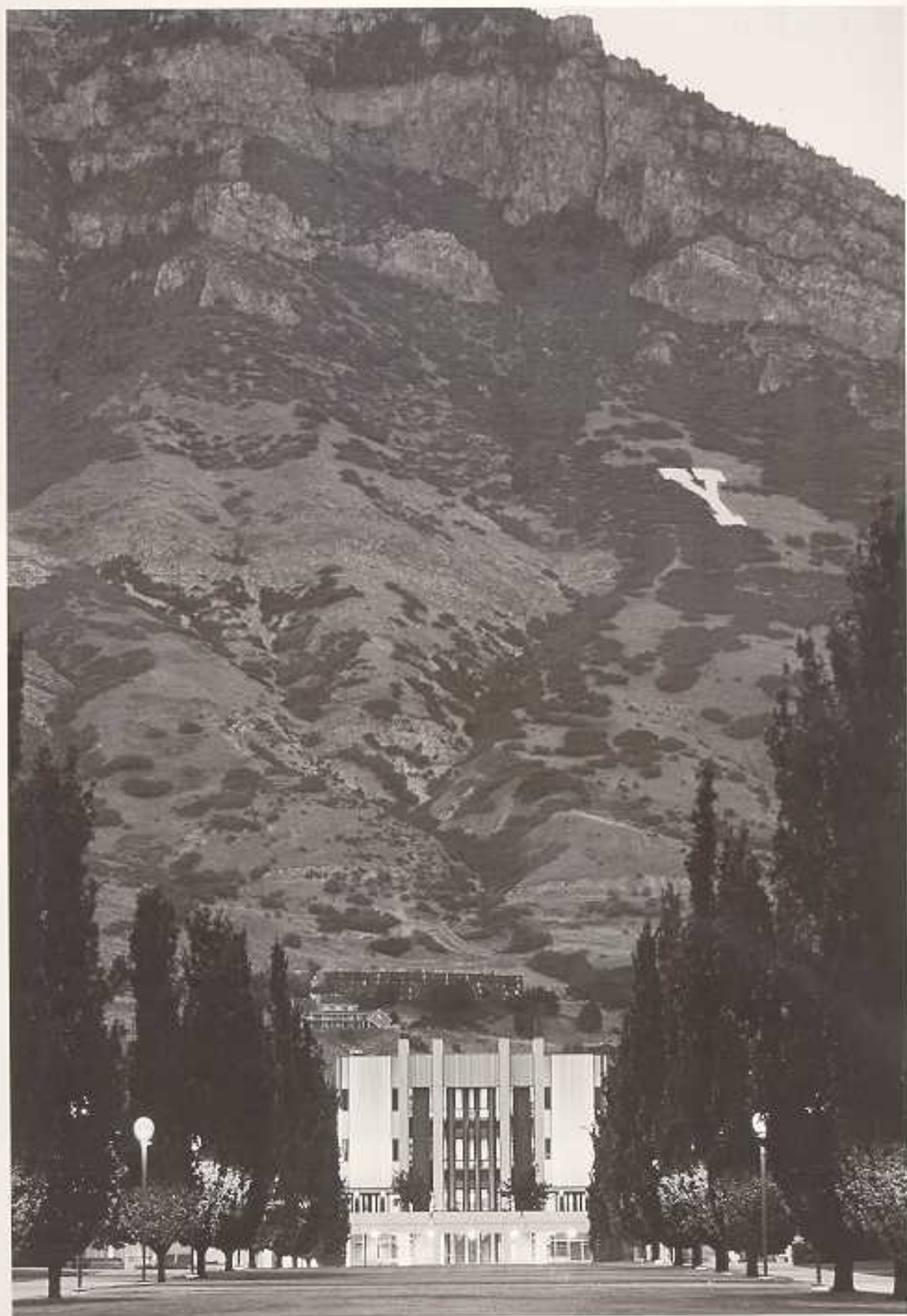
FALL 1994

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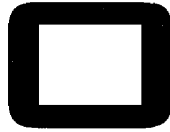
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Cover Illustration:
Alan Cober





MESSAGE FROM THE DEAN



On behalf of the J Reuben Clark Law School and the J Reuben Clark Law Society, I would like to pay tribute to President Howard W Hunter

President Hunter has assisted both the Law School and the Law Society since their inception. He was present when the Law School opened its doors 21 years ago and when the Law School Building was dedicated two years later. He has also spoken at several Law School firesides and Law Society annual meetings.

A few years ago the Law School established the Howard W Hunter Professorship, funded primarily by the Law Society's Los Angeles Chapter. Income from the endowment funds faculty research. The professorship honors President Hunter as both an outstanding lawyer and church leader. He superbly represents the delicate balance between professional excellence and human service for which the Law School stands and which it strives to instill through quality legal education. He is a model in the profession and in his personal life to each of us.

In speaking at a Law School fireside on February 28, 1988, President Hunter said:

As we consider the many subjects of the law—contracts, torts, property, and the others—we need to remember that in the application of each there needs to be the overriding principle of integrity, which includes honesty, moral soundness, and freedom from corrupting influences—"there is a spiritual grandeur about one who has a pleasant, personal, dependable, satisfying integrity."

President Hunter went on to use the example of Job. Throughout his trials, Job would not compromise his integrity:

While my breath is in me, and the spirit of God is in my nostrils;

My lips shall not speak wickedness, nor my tongue utter deceit.

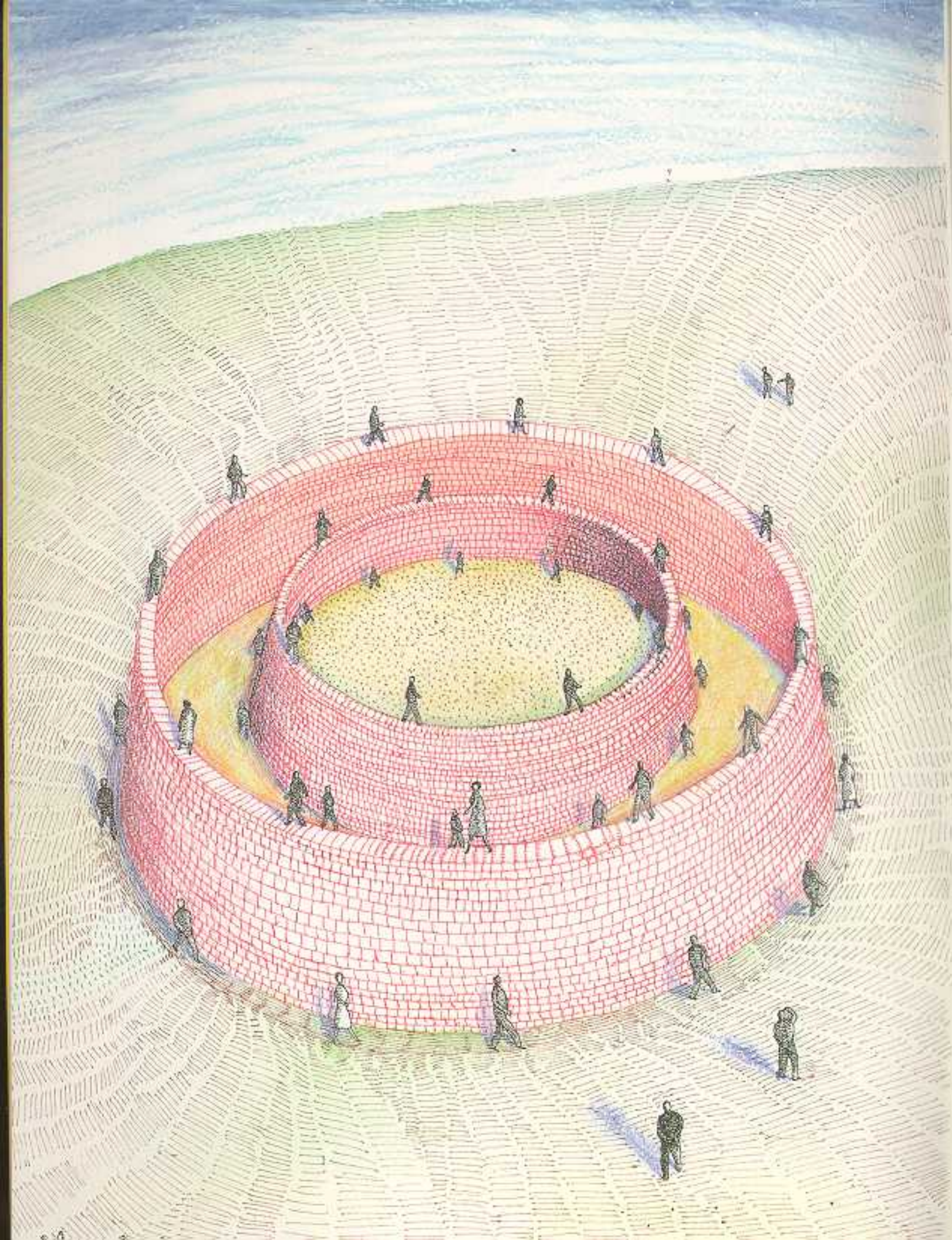
My righteousness I hold fast, and will not let it go: my heart shall not reproach me so long as I live [Job 27:3-6]

We are aware of the physical challenges President Hunter has faced, and we honor him for his Job-like integrity. President Hunter concluded his 1988 fireside remarks with a rhetorical question and a clear answer:

Can you pursue the study and practice of law and still be a Latter-day Saint? Of course you can, without any question. And your knowledge and experience will benefit your family, your community, your country, your church, and your fellowmen.

During his 20 years in law practice and 35 years as a general authority, President Hunter has proved that lawyers can have integrity and give significant service to their communities, churches, countries, and fellowmen. We pay tribute to President Howard W Hunter both for his example and for his leadership.

DEAN H. REESE HANSEN



W

E LIVE IN A TIME OF
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order feels unstable. Individuals increasingly claim the right to establish their own moral and legal autonomy. It is a time when "every [person] walketh in his own way, and after the image of his own God" (D&C 1:16). Yet we also live in the day of the regulatory state. Laws, government regulations, and lawyers are everywhere. How is it that with so much law we could be surrounded by a sense of pervasive and unprecedented lawlessness?

For example, James B. Stewart tells us in *Den of Thieves* that the insider trading and corporate takeover manipulations of the 1980s were "the greatest criminal conspiracy the financial world has ever known."² And the recent S&L crisis led to \$300 billion in losses and the collapse of 2,800 banks and thrifts in ten years, a record annual rate of failure.³ Thirty percent of the failed thrifts were infected by unlawful conduct—the

industry's highest-ever rate of illegality. Since 1988, federal lawyers have obtained over 1,200 indictments and have a 95 percent conviction rate.⁴

The level of public trust in other spheres also suggests a time of moral lawlessness. NBC last year shook our confidence in the mass media by admitting that it staged its filming of alleged defects in General Motors trucks. And during the 1992 presidential campaign, a news story entitled "Lies, Lies, Lies" reported that 75 percent of Americans now believe there is less honesty in government than only a decade ago. Forty percent said they thought George Bush did not usually tell the truth, and 36 percent believed the same about Bill Clinton. This article then continued,

"Lies flourish in social uncertainty, when people no longer understand, or agree on, the rules governing their behavior toward one another."⁵

Even so, American institutions have been reemphasizing ethics. The American Bar Association published its first code of professional responsibility in 1969 and then reinforced those standards in 1983. The world of politics has witnessed post-Watergate reforms, changes in campaign finance laws, and tough new standards for using Washington's revolving doors.

Corporations now publish "codes of corporate conduct." ITT's code seeks "to take all action necessary to maintain ITT's reputation for conduct in accord with the highest levels of business ethics and law compliance." Black & Decker's code instructs managers to comply with employment, antitrust, safety, accounting, and insider trading laws. Its managers sign a pledge "to be ethical and honest in all business dealings."

However, I wonder if growing ethical codes and new laws on every subject from air pollution to sexual harassment reflect a culture in which citizens take law seriously, or a culture whose moral decay makes more law an act of last resort. After comparing future U.S. business prospects with those of Asia, *Wall Street Journal* editor Robert Bartley recently offered this commentary on American decline: "If America is to decline [compared with Asian competition], it will not be because of military overstretch. Not the trade balance, Japanese management secrets, or even the federal deficit. If a decline is under way, it's a moral one. Not [a] petty morality about nanny taxes, but the profound morality of whether

a community can insist that its members bear certain responsibilities, and enforce them when necessary."⁶

As these illustrations suggest, we now face the dilemma of having developed an increasingly regulated society while also experiencing a reduced sense of community and shared moral frameworks. This dilemma has a history, and it has many implications for the future. I want to suggest a simple analytical model that may serve as a departure point for further thought about that history and its implications.⁷

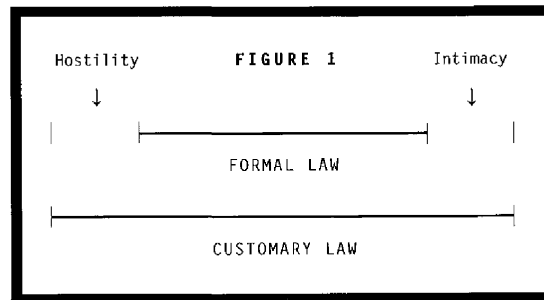
We must first define two key variables in this model—*customary law* and *formal law*. Legal philosopher Lon Fuller once described customary law as the unwritten expectations that govern all human interaction. Customary law is "not

the product of official enactment, but owes its force to the fact that it has found direct expression in the conduct of men toward one another" over extended periods of time.⁸ Two different elements account for the strength of customary law—the sheer force of long-term habits and the tendency to see customary law as normative; that is, custom often reflects not only what is, but what people believe *ought* to be.⁹

Examples of customary law include such notions of fairness as "first come, first served" or "take your place in line." The custom that "a person's word is as good as his bond" is an essential basis of trust in many commercial fields.¹⁰ Even the side of the road on which we drive is a reflection of long-standing custom. The deeply ingrained nature of customary law is captured in the question a little girl asked a friend of mine: "Mom, do we have to do this because that's just the way things are?"

Formal or "enacted" law, on the other hand, includes not only constitutions, statutes, and regulations, but also legally enforceable contracts. Formal law typically arises from the experience of custom; hence, Justice Holmes said, the life of the law has not been logic, but experience. And we can best understand a formal law by knowing its origins in custom.

Yet some level of community disintegration usually precedes the emergence of formal law. Only when people begin to question or violate an accepted "customary" practice is it necessary to develop legally formulated rules. As legal philosopher Roberto Unger put it, the "further one moves away" from customary consensus, "the more acute the need for *made* standards" that a state can enforce.¹¹



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Unger's insight gives rise to a logical extension: Can formal law stray too far from its origins in custom? Unger answers this question only indirectly by warning that a general system of formal law is seriously threatened when a state's rulers try to impose laws that reflect the leaders' needs but lack inherent or "customary" validity in the eyes of its citizens. We will return to this issue after considering the historical relationship between customary and formal law.

Consider how far each kind of law reaches across the total spectrum of human interaction. Customary law spans the entire spectrum, while formal law spans only its middle part (see Figure 1). Within the range between "hostility" and "intimacy" lies the broad middle ground where formal law governs relationships among "friendly strangers," drawing at times on the customs that underlie the formal rules. However, when relationships reach the extremes of hostility or intimacy, formal law breaks down and people rely solely on custom.

For example, international relations are often governed by formal treaties. But when a nation's sovereign interests conflict with a treaty's command of formal law, custom will prevail. No international tribunal has enforceable legal power to override any nation's sovereignty. Thus the ultimate customary remedy in the realm of hostility is war. Short of war, national economic and political interests as well as world opinion will influence behavior—but only at the level of custom.

At the other end of the spectrum, formal law is also

unable to govern intimate relationships, such as those within a family. Attempts by members of an intact family to legally enforce their "rights" or "duties" will undermine the "organization" and "consciousness" of the family.¹² When formal law intrudes excessively into family relationships, it can destroy the continuity without which there is no intimate relationship. However, because customary law "is at home [across the entire] spectrum of social contexts," it successfully regulates intimate associations in informal, customary ways, including expectations about "roles and functions" that contribute to "stable interactional expectancies."¹³

As with war between nations, the ultimate customary remedy for an impaired intimate relationship is to end the relationship. This remedy will obviously destroy the prior intimacy, which shows how the premature intervention of formal law can put at risk the intimate relationship it may seek to help. The legal system has long recognized this reality, as reflected by cases in which judges refuse to resolve disputes within families that do not rise to the level of true abuse or grounds for divorce.

Now consider the relationship between customary law and formal law in American history, because our recent experience simply extends certain long-developing trends. During the colonial period, custom exerted a stronger force than did law. The gradual trend since then has been for custom to decline and for formal law to increase. In a complete reversal of dominance, formal law is now a more significant force than is customary law.

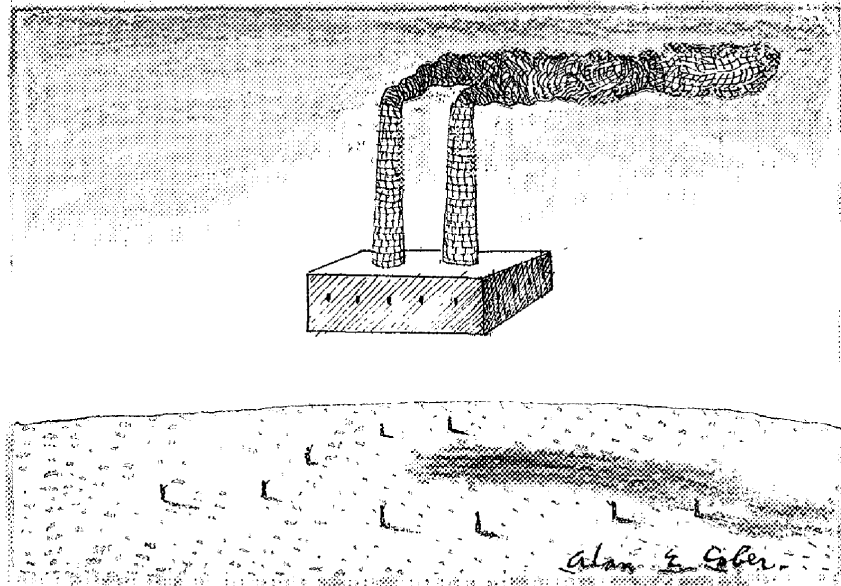
THE U.S. CONSTITUTION, ADOPTED IN 1789, WAS A SIGNIFICANT EXPRESSION OF FORMAL LAW — A WRITTEN DOCUMENT THAT SUPERSEDED MANY

customary colonial patterns. But throughout the 18th and 19th centuries, custom was a stronger force than law among white Americans, who shared a Protestant, European heritage and a pattern of rural, agrarian life. We resolved this era's most divisive problems—states' rights and slavery—only after our weak system of formal law failed, and we resorted to the ultimate customary remedy: war. Immediately following the Civil War, we amended the Constitution in ways that laid the foundation for powerful 20th-century expansions of the formal law dealing with federal supremacy and personal equality. But these laws could not be fully accepted until after the customary norms of American society could accommodate greater racial diversity.

Consider a few headlines since 1865 that chronicle a decrease in the power of custom and an increase in the

power of formal law. By 1890 growing weaknesses in our unregulated "customary" market economy prompted the first antitrust laws. The labor union movement revealed that unregulated, customary assumptions about freedom of contract left individual laborers with inadequate bargaining power. And the gradual urbanization and immigration patterns of this era sowed early seeds of a growing religious, ethnic, and cultural diversity at the level of custom.

During the first half of this century, the combined effects of a great economic depression and two world wars led to vast increases in federal power and formal business regulation. The U.S. Supreme Court accommodated its philosophical stance to these expanded state powers because the events of history had profoundly shaken the nation's (and the Court's) confidence in our customary social and



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economic remedies. By 1950 the downward trend line of customary law and the upward trend line of formal law were clearly crossing (see Figure 2).

Since 1960 we have witnessed a widening gap between custom and formal law. Despite a few modest declines during the 1980s, governmental regulation has now become an accepted reality at every political level and in every public and private sector. Formal law has also become the primary medium for dispute resolution, as "the lawyering of America" and complex economic factors have brought us the litigation explosion and the liability insurance crisis. The successes of the Civil Rights movement spawned an entire generation of rights-oriented groups that alleged a variety of social injustices at the levels of both formal and customary law. Formal law moved further into the sphere of customary intimacy; individuals and groups won greater access to federal laws and federal courts, where procedural formalities and symbolic victories also reinforced the importance of formal law in public policy disputes.

Many of these developments were enormously positive, bringing some people into the social and economic mainstream who had been systematically and wrongly excluded from it by our customary law's inability to protect minority

interests. When entrenched customs protect patterns of prejudice and oppression, formal law can be a great liberator. In an age of growing pluralism and diversity, formal law has eloquently expressed our traditional ideas of liberty and justice for all.

Yet formal law can be a destructive bull in the china shop of customary intimacy, shaking our delicate sense of trust and cooperation with such force that we jeopardize our deepest and most personal sources of moral order. This destabilizing tendency is increased in times of cultural change. And during the recent era of formal legal empowerment, our cultural consensus has simply been falling apart, not merely because of formal law, but as part of a massive cultural shift. This process of disintegration within the last generation represents a sharp focusing of trends that had been under way for years.

The entire history of Western civilization since the medieval era reflects a gradual separation of the individual from communal forces—a movement that carries elements of both progress and decline. For a relatively recent example, 20th-century art, music, literature, and philosophy signify a questioning and sometimes a fracturing of traditional or "customary" forms that had been stable for centuries. These

abstract expressions have mirrored and anticipated, as art generally does, the movement of fundamental cultural assumptions. While that process was long since in motion beneath the surface, it has now erupted for all to see. Robert Bellah and his colleagues plaintively describe these social changes as an "ontological individualism" that has produced a "culture of separation"¹⁴ in which—using John Donne's words—"tis all in peeces, all cohaerence gone." Or as Hugh Nibley once put it, "our culture has been privatized, then polarized, then pulverized."

At the level of customary consensus, our entire culture now feels the sense of fragmented incoherence reflected in the arts. In the last 30 years, our primary social institutions have all felt its impact: corporations, governments, schools, families, and churches. As described by future forecaster Morton Darrow, "Every major institution found itself dealing with people unwilling to blindly accept customary responses." Responding to this eroding confidence, our political, economic, and educational institutions heightened the rhetoric of their promises in attempts to satisfy public criticism. But these responses often only created an irreconcilable gap between expectations and fulfillment. The resulting disillusionment has led to an even greater "lessening of institutional authority which, in turn, caused increased institutional fragmentation."¹⁵

One vivid example of this disintegration has occurred in the public schools, where formal law has invaded the intimate sphere of a once very custom-based world. As educational researcher Gerald Grant put it, "the new adversarial and legalistic character of urban public schools" over the past few years is "a shift of profound dimensions."¹⁶ With the presence now of hall guards and police officers in the schools, "all behavior is regarded as tolerable unless it is specifically declared illegal." Students did not cause this loss of control by themselves; it has arisen because "many adults—in school and out—are no longer sure that they know what is right, or if they do, that they have any right to impose it."

Grant's empirical studies led him to conclude that "the crisis of authority in the American school is that in many places we no longer have any agreement on what morality ought to be, or we feel that any attempt to provide it is a form of indoctrination. [We now believe] that children are adults capable of choosing their own morality as long as they do not commit crimes."¹⁷ This is what I mean by the loss of customary consensus.

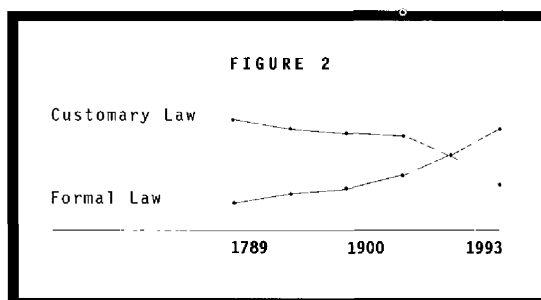
One perverse way of dealing with this loss of consensus is to change society's definitions of what conduct is considered "deviant." In a disturbing recent essay entitled "Defining Deviancy Down," Senator Daniel Moynihan argues that

American society has simply chosen "not to notice behavior" that a generation ago would have been "controlled, or disapproved, or even punished."¹⁸ He cites several examples of this "moral deregulation": our redefining of mental illness, which has played a major role in creating current levels of homelessness; our acceptance of single-parent families as a perfectly "normal" alternative, despite the evidence of social, educational, and personal harm that flows from single-parent homes; and our yawning at exploding crime rates that in 1960 "would have been thought epidemic."¹⁹ Assessing society's response to all this, Moynihan finds that "there is a good deal of demand for symbolic change," but "none of the marshaling of resources that is associated

with significant social action."²⁰ Our preoccupation with rhetoric and formal law at only symbolic levels strikes him as a collective denial akin to drug abuse: "Societies under stress, much like individuals, will turn to painkillers of various kinds that end up concealing [the] real damage."²¹ Is formal law a painkiller? At some level, perhaps it is.

During the late 19th and early 20th centuries, formal and customary law moved into a relatively productive—perhaps even optimal—balance between the need for personal liberty and the need for social order. There was then an appropriately dynamic tension between the "is" of formal law and the "ought" of custom. But as the two sources that guide our conduct have grown further apart, we may already be in a "post-formal" time when the gap between the commands of formal law and the disarray of customary norms is unbridgeable. Emile Durkheim wrote of such times, "When mores are sufficient, laws are unnecessary. When mores are insufficient, laws are unenforceable." Yet, as Edmund Burke put it, "Society cannot exist unless a controlling power upon the will and appetite be placed somewhere, and the less of it there is within, the more there is without." What happens when customary law, the source of mores, has become too weak and formal law has become too strong?

As an illustration, consider the issue of school prayer. In 1985, the Supreme Court held that a school violated the First Amendment when it provided for a "moment of silence" in its classrooms each day. Chief Justice Rehnquist's dissent showed that the founding fathers intended to prohibit only the establishment of a state religion and the preference of one religion over another. They never intended to require "neutrality on the part of government between religion and irreligion."²² Justice Stevens' majority opinion made no serious attempt to refute Rehnquist's historical argument. Stevens simply wrote that "when the [establishment clause's] underlying principle has been examined in the crucible of litigation," the Court has moved from a con-



cern over "intolerance among Christian sects" to "intolerance among 'religions,'" and finally to a concern with "intolerance of the disbeliever and the uncertain."²³

Justice Stevens' summary reflects the ongoing fragmentation of the American consensus on the meaning of religion—not only as a legal term of art, but as a meaningful concept in our national life. Now that traditional religion has lost much of its customary meaning, prayer in the schools has become a great battleground at the level of formal law. The very shrillness of the recent debate reflects the frustration of those who sense that religion has lost much of its influence as both a personal and a cultural force at the level of custom.

This disintegration of the normative consensus makes us yearn to recapture the place of religious meaning in society. We naturally reach for some tangible signal having the authority of formal law—the one force that seems to verify religion's public approval and protection. Even people who believe in the value of religion can feel ambivalent about the hopes for such action, because mere legal formalities will hardly create serious religious attitudes and may even imply that religion is mostly a matter of superficial ritual. On the other hand, a tangible statement of law, even if only symbolic, may be more necessary in times of fragmented consensus than at other times.

Formal law often reflects public posturing designed to send symbolic messages. Such laws may be unenforceable, partly because they do not arise from deep enough customary roots to be taken seriously, and partly because those who write them may be more concerned with "making a statement" than they are with crafting rules that will work in practice. We push formal law in this direction when we believe, as many now do, that the battle for the American soul must be waged at the level of appearances and media influence.

Consider now some implications of our modern plight in the business world. Many business managers, public accountants, and corporate lawyers worry every day that their industry practices involve technical violations of the law—yet these violations may be neither enforced nor enforceable. In part, this occurs because much modern legislation arises from well-intentioned but vague legislative desires to "make a statement" or "send a message" at the important symbolic level of formal law. But these laws are not always designed to address specific problems in practical ways. This problem is compounded by the sheer volume and complexity of new regulatory fields, from environmental and safety issues to employment practices, taxation, and disclosure requirements.²⁴

For example, the *Wall Street Journal* has described the massive new Americans With Disabilities Law as "so complicated and unclear that the only way managers can know exactly what it requires of them is to be told by a judge."²⁵ In the equal employment area, where America has "the most far-reaching equal employment laws found anywhere in the world," managers must now avoid not only intentional discrimination, but the *appearance* of statistical dis-

parities that imply *unintentional* discriminatory effects. Yet, while economic complexities and political sensitivities make judgments difficult, our current laws are arguably hurting minority workers more than helping them. *Forbes* magazine estimates that employment law compliance costs range up to \$19 billion annually in the U.S.—despite evidence that current market forces coupled with older, less intrusive laws would benefit minority workers more than do today's quota-based requirements.²⁶

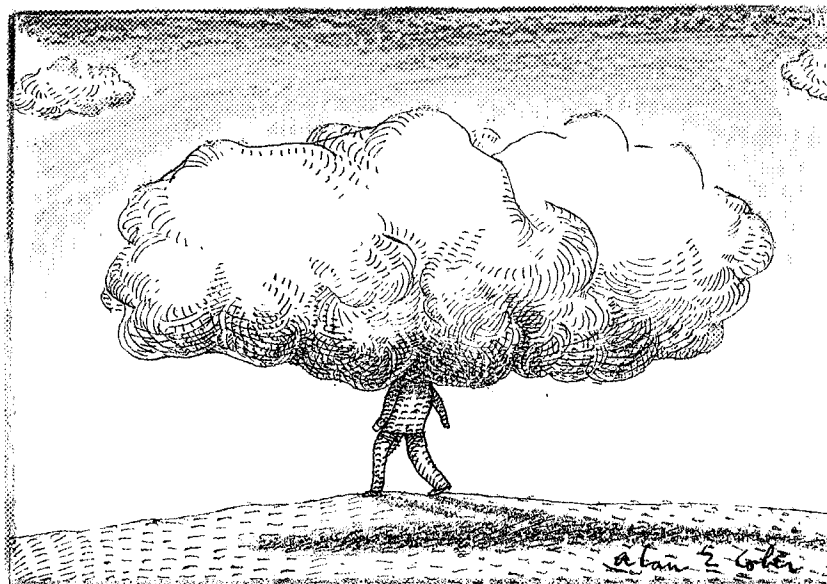
We noted earlier the recent and extraordinary failure rates among U.S. financial institutions. Was this primarily an ethical failure? Blatant fraud was clearly involved in some cases. But much of what happened resulted from natural market risks and competitive behavior related to major economic change. Some experts argue that the traditional banking industry was being rendered obsolete by an irreversible decline in traditional banking services. With the rise of cheaper and better alternatives for both depositors and borrowers, banks were forced to expand into riskier segments of the market.²⁷

Similarly, the deregulation of the savings and loan industry in 1984 was probably a good idea, but the new ability this gave the S&Ls to make speculative investments attracted entrepreneurs who took risks that were intolerable for institutions that enjoyed the unique protection of federal deposit insurance. Some analysts argue that the industry was insolvent before deregulation occurred, because residential mortgage loans had been booked years earlier at fixed rates but were being funded with deposits that paid much higher current interest rates.²⁸

As some S&Ls offered economically unrealistic rates of return, others followed their lead just to stay competitive, and the industry crawled collectively out on a limb of speculation. Then when the real estate market took a sharp cyclical fall after a 15-year boom, the limb broke and chaos followed. Although regulators found some evidence of hard-core fraud, most of the ensuing litigation was a search for deep pockets to help cover the losses; and our complex regulatory scheme offered endless theories of illegal and fraudulent activity sufficient to justify damage claims.²⁹

This regulatory scheme may be designed less to protect against intentional fraud than to create a system of insurance and risk distribution. When the market is healthy, the laws are not consistently enforced; when the market falls, new enforcement pressures reveal that many transaction participants arguably violated some law. If the primary effect of this approach is to spread the risk of loss as far as possible, do these laws and regulations raise fundamental ethical issues—or is this mostly a formalistic legal regime that renders genuine ethical virtue not very relevant?

We saw the political version of this same phenomenon in 1993, when two candidates for U.S. Attorney General were disqualified by "nanny law" problems. Most people have ignored household help laws, because, as one observer wrote, the laws are "so complicated, so unrealistic and so morally ambiguous that in the normal course of business the government doesn't dare to enforce" them.³⁰ So why the right-



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to live in this bewildering ethical climate while avoiding the extremes
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eous indignation about Zoe Baird and Kimba Wood? One explanation was that the attorney general must enforce immigration laws. Another was that Ms. Baird's disclosures provoked more public criticism than had been anticipated.

But a less obvious explanation may be that Ms. Baird was too conservative to suit some critics,³¹ so they found a justification for rejecting her that would not have mattered if she had had different philosophical views. And once her technical legal flaw had become a rallying point, even the appearance of a similar problem doomed Judge Wood. A *Washington Post* writer described this affair as Washington's "crime du jour," noting that by contrast, smoking marijuana and committing adultery just weren't the "in" crimes in 1993, although marijuana and adultery had ruined earlier candidates for high office.³²

Other recent writers have echoed this theme, suggesting that "when too many rules exist, the law becomes capricious and unsettling," resembling "a lottery." They further affirm both elements of our thesis by noting that there is more law breaking today than in the past, partly because "there are so many laws," and partly because "in a nation that is increasingly multicultural, many laws don't represent shared values."³³

To bring law and custom closer together, we must work at both levels to reduce the growth of formal law and to increase the influence of customary morality. As we do, I suggest four sample issues for consideration.

First, could some federal office responsibly assess the "environmental impact" of any proposed new law or regulation? During his campaign, Bill Clinton promised the nation's mayors that as president he would stop the government from "regulating you to death." He also warned of the threat to small businesses of "crushing governmental regulations."³⁴ Previous presidents have taken similar positions, but the regulatory state keeps rising. Is it out of control?

Second, managers and professionals must learn to live in this bewildering ethical climate while avoiding the extremes of both cynicism and naiveté. Students of business and law learn soon enough that some modern laws are unrealistic and unenforceable. They also find that many professionals are groping without a strong compass of conscience in a time of moral uncertainty. When someone enters this environment naively, the sudden discovery of legal and moral ambiguity can be so shattering that it moves a person all the way from innocence to cynicism.

At the personal level, this state of affairs creates two different problems: (1) the temptation to do something a morally alert person would know is wrong, simply because many other people are yielding to the temptation; and (2) the very different dilemma of not knowing what to do when the circumstances make it totally unclear to a morally alert person what is right and what is wrong. Those who enter this confusing climate with the mentality that "things are either black or white" probably could handle the first of these problems, but will have trouble dealing with the second. Moral relativists, by contrast, will not understand the first dilemma, but will have few problems with the second. Both groups must see that moral principles still exist, yet not every difference of opinion over the meaning of a technical regulation is a major moral crisis. We must take the formal law seriously enough to obey it, even while being realistic about it—even while trying to change it. We must also beware of those who ignore the formal law by claiming that they live by a more fundamental ethical code. Cynicism can damage our view of both formal law and custom.

Third, let us not be confused about the basic purpose of ethical standards, which is to develop personal character. As that happens, we develop through natural aggregation the character of the body politic. For both individuals and society, these developments occur primarily at the level of customary law. If we look for our ethical constructs primarily in the formal law, we may never develop a genuine feel for the personal values that lie embedded only in the untidy and unenforceable realms of custom. And if we focus only on formal law, the embarrassing gap between what that law asks and what it enforces may cause us to become so cynical that we abandon any attempt to take rules of conduct seriously, at either the formal or the customary level.

A related problem is the recent rise of what Christina Hoff Sommers calls "ethics without virtue." This is the view that individual character is strictly a matter of personal choice, and that therefore ethics today should be concerned only with the *social* morality of institutional and other public policies. Sommers explains that in this view of ethics "a student soon loses sight of himself as a moral agent and begins to see himself as a spectator," because "the contemporary . . . moralist is concerned with what we are to advocate, vote for, protest against, and endorse," not with how we are to behave. This argument assumes that ethics belongs at the level of formal law, for formal law defines our public policy. This is one consequence of losing our customary vision. We no longer realize that the

Western philosophical tradition about ethics "assumed that the practical end of all moral theory was" not better public policies and formal laws, but "the virtuous individual."³⁵ When custom nourishes the virtuous individual, ethics at the formal law level will take care of itself.

Fourth and finally, we must rediscover and nourish the wellsprings of customary understanding, for the "mores" of which Durkheim wrote will originate at the customary level or not at all. Alexis de Tocqueville called these mores "the habits of the heart." For him these habits—we could call

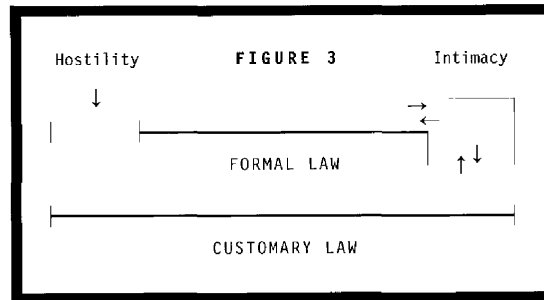
them customs—reflect "the whole intellectual and moral state of a people."³⁶ And Tocqueville found that the Americans cultivated this sense of civic and personal virtue through voluntary "mediating institutions" that he called "intellectual and moral associations." He was referring to churches, families, schools, and other small-scale mediating structures that have long been the

value-generating and value-maintaining agencies of a free society.

A primary loss from the rise of formal law and the decline of customary law is that the institutional strength of the mediating institutions has drastically declined. This is a major loss, because these associations are the key link between formal law and custom, between private morality and social stability. Consider this relationship as diagrammed in Figure 3.

The primary transmission of influence between formal law and customary law occurs within mediating structures at the intimacy end of the spectrum of interaction. The mediating institution mediates between the formal law and the world of private interaction, while functioning primarily within the realm of intimacy. Inside the "box" of the mediating entity, relationships are governed by customary law, but the exterior legal structure is created by formal law. Thus the mediating institution interacts with both the customary law and the formal law. It draws upon the custom-based wellsprings of commitment that characterize intimate relationships and then teaches, in largely unenforceable ways, what Robert Bartley called the profound morality of personal responsibility to the community.

For this process to occur, the formal law must resist the temptation to invade the intimate sphere. This is because formal law's coercive force tends to disrupt the fragile trust that is crucial in sustaining all bonds of intimacy, whether in a family, a teacher-student relationship, membership in a church, or in any other mediating institution. Yet formal law must uphold the institutional authority of the mediating institution, so that the "box" of its structure is strong enough to protect its individual members and resourceful



enough to nourish its members' personal development. That nourishment is the vital element by which individual citizens learn to accept membership in communities of trust and love enough to obey the unenforceable. Then the influence that flows from the mediating institution into the formal law will both nourish and moderate the formal law, so that it does not stray too far from its origins in custom.

When these processes and relationships are in place, the "intellectual and moral associations" of mediation will *teach*—not *command*—those ethical habits of the heart, without which neither personal character nor social survival is possible. When mores are sufficient, laws are unnecessary. When mores are insufficient, laws are unenforceable.

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Endnotes

- 1 Originally presented at a Conference on Ethics and the Management of Financial Institutions, Brigham Young University Marriott School of Management, March 25, 1993, and published in *Vital Speeches*, Sept 15, 1994, p. 719.
- 2 James B. Stewart, *Den of Thieves*, (New York: Simon & Schuster, 1991), p. 15. In only one of his typical heyday years, Michael Milkin earned \$550 million—and when he later confessed to six felonies, he agreed to pay the government \$600 million in fines and penalties. *Ibid*. Some writers judge Milkin's junk bond activity less harshly, given its positive value in financing needed telecommunication innovations. Roger E. Alcaly, "The Golden Age of Junk Bonds," *The New York Review of Books*, May 26, 1994, p. 28.
- 3 "GAO Faults Bush for Bank Woes," *Deseret News*, February 6, 1993.
- 4 Harris Weinstein, Chief Counsel, Office of Thrift Supervision, Washington, D.C., remarks in panel on "Financial Institutions and Consumer Financial Services," Annual Meeting of the Association of American Law Schools, San Francisco, Jan. 9, 1993. In many of these cases, however, the defendants escaped long prison terms by agreeing to make large penalty payments that now appear uncollectible, suggesting that the fines provide little more than "the appearance of government action." "Steep fines, prison time avoided by savings and loan defendants," Associated Press as reported in *Daily Universe*, February 25, 1993, p. 1.
- 5 *Time*, October 5, 1992, pp. 32, 37.
- 6 "A Traveler's View of Morality, American Decline," *Wall Street Journal*, February 10, 1993, editorial page.
- 7 I first attempted to describe some elements of this model as it applies to family law in "Law, Custom, and Mediating Structures: The Family as a Community of Memory," in *Law and the Ordering of Our Life Together*, ed. Richard John Neuhaus (Grand Rapids, Michigan: Eerdmans, 1989), p. 82.
- 8 Lon Fuller, "Human Interaction and the Law," *The American Journal of Jurisprudence*, 1969, pp. 1-2.
- 9 See Roberto M. Unger, *Law in Modern Society* (New York: Free Press, 1976), p. 49.
- 10 For example, I read a few years ago about a group of Jewish wholesale diamond dealers in New York City who have always conducted—and still conduct—their business by loosely carrying merchandise worth thousands of dollars in their pockets and making strictly verbal agreements with other traders. They enforce their agreements informally through internal discipline that includes expulsion from the group.
- 11 Unger, pp. 61-62.
- 12 Unger, p. 55.
- 13 Fuller, p. 33.
- 14 Robert Bellah, *Habits of the Heart* (New York: Harper & Row, 1986), p. 277.
- 15 Morton Darrow, "Changing Values: Implications for Major Social Institutions," in *Current Issues in Higher Education* (American Association for Higher Education, 1979), p. 13.
- 16 Gerald Grant, "The Character of Education and the Education of Character," *American Education*, Jan./Feb., 1982, pp. 37, 41.
- 17 *Ibid* at p. 44.
- 18 Daniel Patrick Moynihan, "Defining Deviancy Down," *The American Scholar*, Winter, 1993, pp. 17, 19.
- 19 Quoting Judge Erwin Torres, *Ibid* at p. 26.
- 20 *Ibid* at p. 22.
- 21 *Ibid* at p. 30.
- 22 *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985) (dissenting opinion).
- 23 *Wallace v. Jaffree*, majority opinion.
- 24 According to recent estimates, the number of federal regulatory employees grew to a record 125,000 people under President Bush; and the federal budget for regulation has grown in constant dollars from \$6.6 billion in 1973 to \$11.3 billion in 1993. John Cuniff, "Federal Regulations Exact a Hefty Price," *Deseret News*, March 3, 1993, p. D7.
- 25 Julie C. Janofsky, "Whoever Wrote AIA Regs Never Ran a Business," *Wall Street Journal*, March 15, 1993, p. A12.
- 26 Peter Brimelow and Leslie Spencer, "When Quotas Replace Merit, Everybody Suffers," *Forbes*, February 15, 1993, p. 80.
- 27 Jonathan R. Macey and Geoffrey P. Miller, "The Once and Future American Banking Industry: Parts I and II," *American Enterprise*, September/November, 1991.
- 28 James R. Barth, *The Great Savings and Loan Debacle* (Washington, D.C.: AEI Press, 1991), p. 2.
- 29 *Ibid*.
- 30 Editorial, "Zoe's Lesson, and Bill's," *The Wall Street Journal*, January 18, 1993, p. A12.
- 31 *Ibid*. President Clinton's third nominee, Janet Reno, became attorney general. In selecting Ms. Reno, the president "has selected, unlike his first two choices, an experienced prosecutor of plainly liberal view." Terry Eastland, "Attorney General and Social Worker," *The Wall Street Journal*, March 10, 1993, p. A15.
- 32 David Von Drehle, "Illegal Nannies are D.C.'s Crime du Jour," *Deseret News*, February 7, 1993, p. A16.
- 33 Stephen J. Adler and Wade Lambert, "Just About Everyone Violates Some Laws, Even Model Citizens," *Wall Street Journal*, March 12, 1993, pp. A1, A4.
- 34 John Cuniff, "Federal Regulations Exact a Hefty Price," *Deseret News*, March 3, 1993, p. D7.
- 35 Christina Hoff Sommers, "Ethics Without Virtue: Moral Education in America," *The American Scholar*, Summer 1984, pp. 381, 388.
- 36 Alexis de Tocqueville, *Democracy in America*, ed. J. P. Mayer (Garden City, New York: Doubleday, 1969), p. 287.

STEVEN A. WEST

We are brought together tonight by virtue of two shared faiths—faith in the Church and faith in the law. When I was asked to speak to you, I thought it would be relatively easy to talk to Church members about the Church or to lawyers about the law but not as easy to find common threads that tie the two together. To try to fulfill that responsibility, I would like to share with you some gospel-related experiences and then connect them with the law.

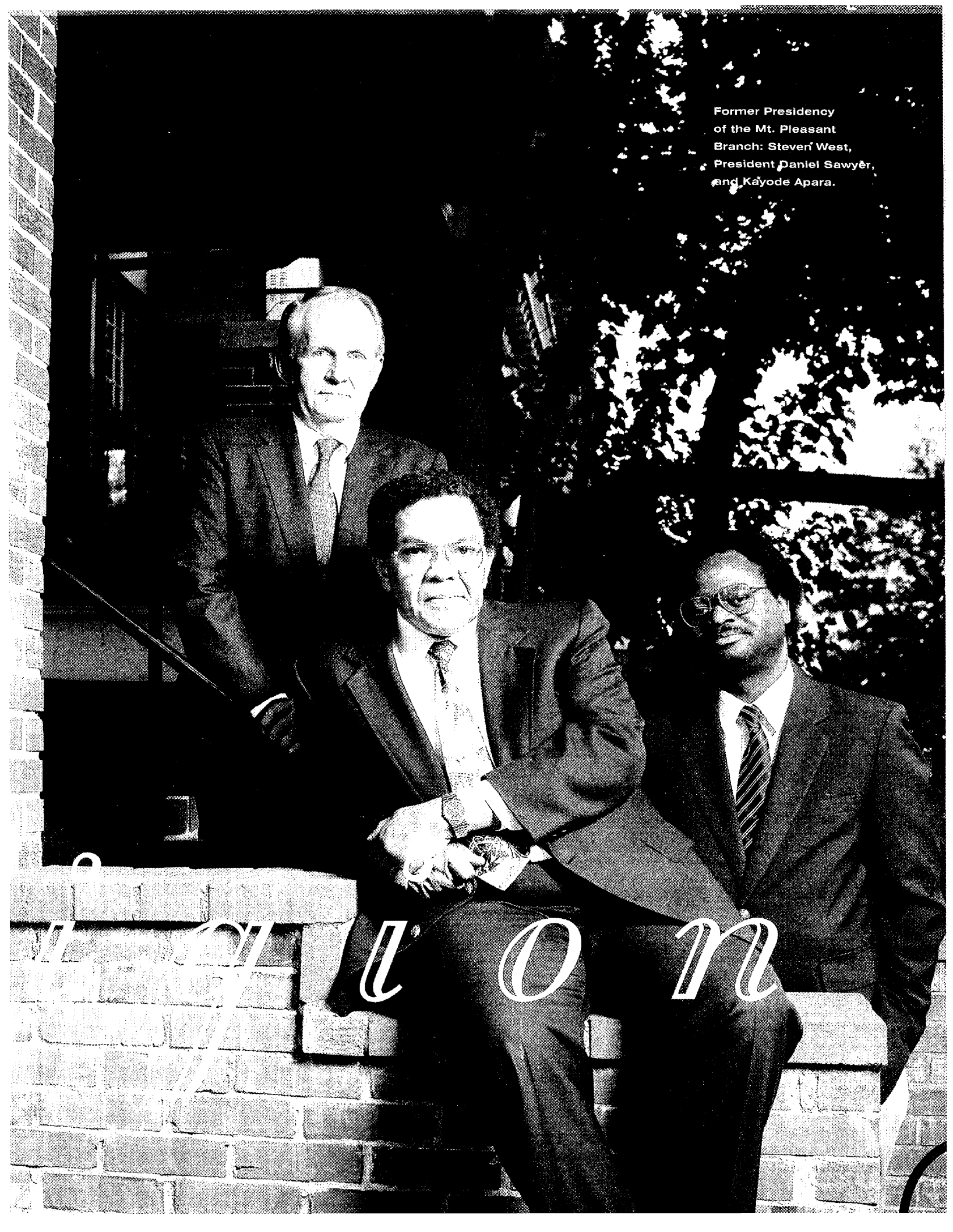
These experiences all came as a result of an exceptional opportunity for service that my wife Martha and I completed last November. We were called to work with our brothers and sisters in the Mt. Pleasant Branch of the Church, where I worked as a counselor in the branch presidency and Martha helped with the Relief Society. Martha's and my roles were to be shadow leaders and to help implement the programs of the Church in the branch. For both of us

This address was given to the Washington, D.C., Chapter of the J. Reuben Clark Law School on May 24, 1994.

PHOTOGRAPHY BY JOHN SNYDER



Former Presidency
of the Mt. Pleasant
Branch: Steven West,
President Daniel Sawyer,
and Kayode Apara.



HONOR

this was a great learning experience. We learned wonderful things about attitudes, approaches, and people during the 18 months of our service. The entire branch membership is 20 to 35 individuals: one Spanish American, four whites, (which included the two of us), and the remainder black members of the Church. Approximately half of the black members were born or grew up in the United States and the other half were born or grew up in Africa.

Let me set the scene for you. The branch is located in a rented row house in the District of Columbia at 14th and Newton Street. A Vietnamese

and the other shootings took place within a few blocks of our building. A number of businesses, both large and small, were once located in this neighborhood; but many of them have remained boarded up ever since the 1968 riots that accompanied Martin Luther King Jr.'s assassination.

On the other hand, there are positive things about the neighborhood. It is a place where many of the current residents have always lived. As a result, they know grandmothers, parents, and children of families that also have remained in this area for years. They can easily distinguish between the

The other counselor in the branch presidency is a younger man about three or four years out of college. He grew up in Africa. One of his grandfathers was a minister, and the other was a radical leader. He was offered admission to several American universities, including the University of Idaho, which he attended. While in college, he met Mormon missionaries, but he did not "connect" with them at that time. Subsequently, he decided to go to law school and attended Howard; but he was expelled from the law school for being "too radical." As he explains, "It is quite an accomplishment to be too radical at Howard Law School." In his bitterness, he decided to file a *pro se* law suit against Howard. He was on a bus on his way to the courthouse when he noticed two Mormon missionaries who soon started talking to him. When he reached his destination, the mis-



MEMBERS OF THE BRANCH PARTICIPATE IN A TUESDAY NIGHT BOOK OF MORMON STUDY GROUP

branch, a Hispanic branch, and our central city branch all meet in this facility. This is a difficult neighborhood. Recently the members of a gang called the "Newton Street Crew" were arrested. The gang was composed of residents of Newton Street who lived between 14th and 16th Streets who allegedly had been selling drugs and committing other related crimes in that area. Many of you who are from the Washington area may remember the Shotgun Stalker who, within the past year, shot at eleven people in this small Mt. Pleasant neighborhood. Four people were hit, and three others were killed; one of them was murdered in the alley that runs behind the branch,

"good guys" and the "bad guys." There is a small Spanish church on the corner near our building. In front, during the warmer months a vendor sells papayas, mangos, watermelon, and other fruits from a pushcart to the many people who congregate there.

The branch president has been a member of the Church for about five or six years. He is a man of my age, a father and a grandfather. He is a college graduate, has taken a number of post-graduate courses, and works as a teacher and consultant. He was a civil rights activist during the 1960s. His father was a minister. When he joined the Church, he was the only one of his family to do so.

he branch member took his money from his pockets and handed it over to the assailant, adding, "If you need the money that badly, I have more."

sionaries got off with him. As they sat and talked for awhile in the park, he said he felt the hatred and animosity drain out of him. As a result, he continued to talk to the missionaries; they began to teach him some of the discussions. He later joined the Church and abandoned his efforts to fight with Howard Law School. He is now a consultant for an international organization.

As we worked with the good members of the branch, our old thought patterns were continually being challenged and reshaped. From these humble people, we learned lessons of faith and courage. For instance, one day in Sunday School we were discussing when we should pray and when we should act. During the course of that discussion, one of the members told us that soon after he and his wife had come to the United States from Africa

his wife came to him and said, "We must kill our baby because there is not enough to feed three of us, and we must stay alive." We subsequently found out that when his wife had said "kill" she meant that she must have an abortion. He told us that his response to her was, "No, we will pray about

pregnancy and have the baby." He concluded, "We named her Victoria, because we had prayed and we were victorious." Today she is an outstanding grade school student. Moreover, she is teaching her parents how to live in the United States, giving them knowledge that they never would have known if she had not been born.

In another discussion in Sunday School, we learned about charity. We were talking about when it is appropriate to give to the poor and needy. One brother told us that as he was walking home one evening he was approached by a man who put a pistol to his chest and demanded all his money. The branch member took

his money from his pockets and handed it over to the assailant, adding, "If you need the money that badly, I have more." He then proceeded to open his briefcase, remove additional funds and hand them to the robber. As he did so, he said, "You are not taking this from me; I am giving it to you in the spirit of the Lord because you need it." The robber looked at him in amazement, put the pistol in his belt and said, "Where do you live? I'm going to walk you home because you're too good a man to be on these streets—you are not safe here." As they started to walk to his apartment, suddenly they were surrounded by police cars because a woman had seen the stickup from her window and reported it. The police arrested the robber and took him away. This member, who was the victim, was asked to be a witness at the trial. In his testimony, he stated that although the defendant had demanded his money, he had told him that he gave it to him in the spirit of the Lord and that if he needed it that badly he wanted him to have it. As a result, the judge found the robber guilty but put him on probation, and he did not have to serve time.

In another Sunday lesson I observed what living by the spirit can mean as we teach in the Church. We had a man in his mid 30s attend the class for the first time. At the end of the lesson the Sunday School teacher, who was a woman about 20 years his senior, asked him to say the closing prayer. I probably would never have had the temerity to ask someone who I

had never seen before to say a closing prayer. Nevertheless, she encouraged him with a smile, and he replied, "No, I haven't prayed for years and years, and I could not do it." She answered, "Sure you can. Go ahead, and I will hold your hand." She came over and took his hand and then said, "And if you don't do a good job, that's fine. We will ask somebody else to say a prayer after you if your prayer isn't adequate." Given that reassurance, he bowed his head and gave a wonderful prayer. When he had finished, she put her arm around him



AFTER SUNDAY MEETINGS, YOUNG MEMBERS OF THE BRANCH SEARCH FOR FOUR-LEAF CLOVERS BY THE CHURCH

this and place it in the hands of the Lord." He said they prayed fervently and prayed for help with this decision. He continued, "Within three days of our prayers, I received a job. Subsequently I was promoted on that job, and we were able to complete the

need the money that badly, I have more." He then proceeded to open his briefcase, remove additional funds and hand them to the robber. As he did so, he said, "You are not taking this from me; I am giving it to you in the spirit of the Lord because you need it." The



A FRENCH-SPEAKING ELDER FROM TORONTO TRANSLATES FROM THE BOOK OF MORMON FOR WEST AFRICAN INVESTIGATORS

and said, "See, that was a great prayer. We don't have any need for anyone else to say something after that." What an effective thing to simply take his hand to support him while he prayed and to tell him that someone else could pray if needed to take the pressure out of the situation.

I learned a great deal about sacrifice from a humble sister in the branch. One day this sister came to sacrament meeting, clutching a baggie containing a piece of bread that was hard and stale and partially moldy. She said to me, "If you are going to belong to a church you ought to contribute, and I can't contribute much, but one thing I can do is bring the sacrament bread." There was no way we were not going to use that bread for the sacrament that day. I sensed that her "contribution" was like the widow's mite. In Mark 12:41-44 we read:

he was not able to speak because of her stroke; but suddenly she started to make a gurgling sound in her throat. We couldn't understand what she was saying, but as we looked at her face and saw the tears running down her cheeks, we knew that she was bearing a strong testimony.

And Jesus sat over against the treasury, and beheld how the people cast money into the treasury: and many that were rich cast in much. And there came a certain poor widow, and she threw in two mites, which make a farthing. And he called unto him his disciples, and saith unto them, Verily I say unto you, That this poor widow hath cast more in, than all they which have cast into the treasury: For all they did cast in of their abundance; but she of her want did cast in all that she had, even all her living.

I continually learned from the courage and commitment of our branch president, the missionaries, and the members. Typically, we would hold



CLARENCE BENNETT, ONE OF THE FIRST CONVERTS IN THE M1 PLEASANT AREA, SERVED AS WARD CLERK

the traditional sacrament, Sunday School, priesthood, and Relief Society meetings on Sundays. Then one evening during the week, we would have a scripture study class, which

seen. They must know that they can't intimidate us. This is the time that we should hold our meetings and that we should be out in the neighborhood standing up for what we believe.

So we continued with our full calendar of meetings. Our missionaries remained very visible on the street, meeting and talking to people as always.

And these brave missionaries also became my new heroes. I watched young men

included playing some games and having refreshments, somewhat like a family home evening meeting. At the time the Shotgun Stalker was at large in the neighborhood, I wondered if we should cancel many of our meetings; but our wise branch president stood before the congregation and announced:

To cut back or curtail our meetings is exactly what the person or persons who are perpetrating these crimes wants to accomplish. They want to take the good people off of the streets and have them hiding and not coming out. Now is the time when it is most important that we as members of the Church be visible, that we be on the streets, and that we be

from small towns in Arizona, Utah, Idaho, and Nevada come into the neighborhood, into a totally new environment. I saw them walk down the street "high-fiving" the people and visiting with them. I watched the neighborhood people respond by slapping the missionaries' hands and saying, "How are you doing, elders?" The missionaries were not alarmed when people would warn them, "You are not safe here." They would respond with a smile, offer the reassurance that they were happy to be there, and go on about their work.

I learned who the branch members' heroes were as I heard their talks in our meetings. For example, when John Wilson, the D.C. city councilman, died

it was obviously very important for many people to speak of what a great man he had been. They explained how he had influenced their lives, how he had helped their neighborhood, how he had helped their schools, how he had helped increase their job opportunities, and how he had been an example to them. As they spoke of John Wilson, they remembered him and worked through the grief that they felt at his death.

People were quoted in our meetings who are not normally quoted in other LDS congregations. The members often quoted Martin Luther King Jr. I recall one of those quotes in particular: "Death is not a period at the end of life, but a comma before a more glorious clause." What an interesting and comforting description of death!

I also learned new ways of listening. One day a woman who had suffered a stroke that had confined her to her apartment for a long period of time was brought to our fast and testimony meeting. She was being cared for full-time by another branch member. Her caretaker brought the sister to this meeting in a wheelchair and placed her in the front of the room. She listened intently to the proceedings. She was not able to speak because of her stroke; but suddenly, at an appropriate time, she started to make a gurgling sound in her throat. We couldn't understand what she was saying, but as we looked at her face and saw the tears running down her cheeks, we knew that she was bearing a strong testimony. I learned that day that when words are not discernible, the heart can interpret.

I repeatedly learned new ways of seeing people during my time in the branch. The door to our little row house opens right onto the city sidewalk. One Sunday, in the middle of the high councilor's talk, a homeless woman who was wearing dirty, ragged clothes, coughing up phlegm, choking and carrying a filthy handkerchief appeared at the door. She announced, "I want to sing. I want to pray." She then walked on into the room and proceeded to the front row. She selected a seat next to a sister in the branch who was wearing a white blouse and placed

her head on the woman's shoulder. The sister immediately put her arms around this new arrival and held her throughout the remainder of the meeting. The high councilor had been relating the parable of the Good Samaritan as the homeless woman joined us. As this woman coughed and used her dirty handkerchief, the speaker contin-

meeting had ended, I commented to the high councilor, "What better visual aid could you have of the parable of the Good Samaritan than the woman who put her arms around our visitor?" We both reflected upon the fact that it was probably the first time in a long time that someone had put their arms around our visitor in affection.



SISTER LILLIAN JONES WITH HER GRANDDAUGHTERS ANDREA AND JAKIA ON CHURCH STEPS

ued with the parable. When he came to the end, he quoted part of the relevant scripture and suddenly our visitor completed the verse the high councilor had begun quoting. Later as we sang, the woman sounded off-key every word of the hymn. I found myself wondering how she knew that scriptural passage, how she knew that hymn. After the

My "vision" was tested on other occasions. One evening at Christmas time we were going to take all our members up to the Washington Temple Visitors Center to see the lights and to enjoy the various church choirs that performed there. As I walked into the branch chapel, I saw a man that I had never met before sitting in one of

our folding chairs. He had on high top boots, a long overcoat, and a leather aviator's hat with flaps sticking out on either side of his ears. As he looked up at me, he said, "Hi, chief—what's up?" I went over to talk with him, and he asked, "What are we doing, chief?" I told him of our plans, and he said, "I dig it; let's go."

When we arrived at the visitors center, we sat down and listened to a Presbyterian bell choir perform. At intermission he said, "Chief, can we go up and talk to the head man?" I replied that I thought that would be fine, so we went up and talked to the conductor. Right away, my companion started discussing the tonic fifths that

how completely I had misjudged this individual based on my first impression of him.

On another occasion, in the middle of our sacrament meeting, the door of our building opened and in came a man wearing black Nikes with the shoes unlaced, long baggy levis and an underwear top. As he sat down, I noticed the very tough, very grim expression on his face. I watched him throughout the meeting, thinking, "here comes trouble." When we finished sacrament meeting and moved directly into Sunday School, he remained in place, still frowning. At about the mid-point of Sunday School, he got up and walked out.

mother gave me when I graduated from high school. It accompanied me on my mission, and I keep it close with me today. The leather cover has come off, it is tattered, it just has the cardboard backing left, and sections of the book are separating from other sections. Many of the people I encountered during my service in the branch are like my Book of Mormon—tattered, worn, damaged on the outside; but they have great and important things on the inside. They may have been classified by some as "low-income types," but I came to know that they all were first class.

After hearing of the lessons I have learned through this church service, you may be asking yourselves, "What does all this have to do with the law?" Let me try and weave my themes together now. Earlier, I told you that our branch president's father had been a minister—he preached in a church in Topeka, Kansas. He also was the head of the local chapter of the NAACP. In this role, he initiated a lawsuit to integrate the junior high schools of Topeka. The resistance came quickly. The sisters of our branch president's father and his attorney, both teachers in the Topeka school system,



PRESIDENT DANIEL SAWYER GREEIS MEMBERS ATTENDING THE TUESDAY NIGHT BOOK OF MORMON STUDY GROUP

the bell choir had been playing. I thought, "How in the world does he know what a 'tonic fifth' is?" He proceeded to have a detailed discussion of baroque music theory with the conductor, a music teacher. As we returned to the branch, I asked the young man how he knew about tonic fifths and baroque music. He told me that he was a music major at the University of the District of Columbia. He explained that he had sold most of his belongings to buy more drums and that he hoped to graduate with a degree in music and do some composing. I was struck by

The following week he joined us again in the middle of a meeting. This time I thought, "Well, he has cased us out and now he's back to cause us trouble." After the meeting he came up and said to me, "Isn't today testimony meeting? I have come to bear my testimony." When I inquired, he said, "I'm a member of the Church and belong to the Capitol Hill Branch." Once more, my vision had needed correction.

As I reflect upon what I have learned about people through this experience, my thoughts turn to a 40-year-old Book of Mormon my grand-

were asked to persuade their brothers to drop the suit. When their fathers did not give in to the pressure, the two women teachers were fired. However, the suit progressed and succeeded in integrating the junior high schools.

A subsequent action was initiated to broaden the effects of this first suit, to try to integrate the entire school system of Topeka. Unfortunately, the health of our branch president's father was failing, and he was not able to participate actively in the second suit. When he passed away, the suit was picked up by Ollie Brown, the assistant

pastor of the congregation presided over by our branch president's father.

That case, which was the result of collaboration by individuals who were trained in religion and individuals who were trained in the law, continued up



MARCIA GOMEZ, RELIEF SOCIETY PRESIDENT, MEETS WITH ANTOINE NTUMBA FROM NIGERIA, A COUNSELOR IN THE ELDERS QUORUM

through the appellate system until it was finally decided in May 1954 by the court you will be admitted to practice before tomorrow, the Supreme Court of the United States. Its name was *Brown v. the Board of Education*, the landmark case that held that separate but equal schools cannot be equal while separate. It was the case that resulted in the nationwide integration of the public schools, the Supreme Court opinion that we mark the 40th anniversary of this week. "And now you know the rest of the story," as Paul Harvey might say.

Early last year at a memorable event, I was reminded of our obligation to the next generation to pass on this combining of faith in religion and faith in the law. I served as vice chair of the Interfaith Conference of Metropolitan Washington that sponsored this city wide service to commemorate the birthday of Martin Luther King Jr. This Conference is made up of representatives of the Catholic, Protestant, Jewish, Mormon, Muslim, and Sikh religions. The service was held in a large Baptist church in a center-city neighborhood. During the course of the program, about 60 sixth-grade students

walked across the front of the sanctuary, holding a large butcher paper banner that spanned the entire front section of this big church. Across the top of the banner the legend, "I Have a Dream" was printed. Underneath that the children had dipped their hands in paint and then pressed them onto the banner. Under each palm print, the owner had written his or her own dream. The words read: "I want to be a pharmacist. I want to be a lawyer. I want to be a beautician. I want to be a professional basketball player. I want to be a lawyer. I want to be a truck driver. I want to be a lawyer because of the good I can do

for my people. I want to be a teacher. I want to be a dairy owner," etc.

As far as I could see across the Church, fully one-third of these young black children had expressed their desire to be a lawyer. No other occupation was mentioned as often. At a time when we as lawyers are part of a profession under siege and when lawyer jokes

A religion true to its nature must also be concerned about man's social conditions. Religion deals with both earth and heaven, both time and eternity. Religion operates not only on the vertical plane but also on the horizontal. It seeks not only to integrate men with God but to integrate men with men and each man with himself. [Martin Luther King, Jr., *The Words of Martin Luther King, Jr.*, Selections by Coretta Scott King (New York: Newmarket Press, 1987), p. 66.]

John W. Davis, one of the named partners in the New York City law firm of Davis, Polk, spoke about the blending of law and service:

True, we build no bridges. We raise no towers. We construct no engines. We paint no pictures—unless as amateurs for our own principal amusement. There is little of all that we do which the eye of man can see. But we smooth out difficulties; we relieve stress; we correct mistakes; we take up other men's burdens and by our efforts we make possible the peaceful life of men in a peaceful state. [John W. Davis, as quoted in Fred R. Shapiro, *The Oxford Dictionary of American Legal Quotations* (New York: Oxford University Press, 1993), p. 273.]

As I began, I spoke of our two



any of the people I encountered during my service in the branch are like my Book of Mormon—tattered, worn, damaged on the outside; but they have great and important things on the inside.

and lawyer bashing are prevalent, these sixth graders saw something that so many of our contemporaries have missed—the importance of the role of the lawyer, the ability it provides to make a difference, and the vehicle it offers to help all people.

In conclusion let me leave you with two quotations that capture the complementary joining of the religious and the legal. The Reverend Martin Luther King Jr. spoke of religion and service:

shared faiths, faith in the Church and faith in the law. In both of these important areas, may our faith continue to be strong; may we magnify our callings as representatives of the Church and as officers of the court in my prayer in the name of Jesus Christ, amen.

Stephen A. West is the senior vice president and general counsel of Marriott International, Inc.

Keeper

Elder F. Burton Howard

*This address
was given to the
San Diego
Chapter of the
J. Reuben Clark
Law Society on
October 12, 1993*

the

Flame

I acknowledge the gracious invitation to speak to this distinguished group and recognize that it has come primarily because of the fact that I was a lawyer before I became a General Authority. I thank you for honoring my office and take some comfort from the words of J. Reuben Clark, that "if I did not hold the office I hold, I would amount to little in the eyes of the people."

• It was suggested that I address the question of the right of privacy vs. the right to know. That is a wonderful subject about which I know very little. I am aware that in 1883, one year after he had been appointed to the Supreme Judicial Court of Massachusetts, Oliver Wendell Holmes gave what he

Photography by John Snyder



called "An After-Breakfast Talk." Present were civic leaders and members of the bar. There, lamenting the lack of privacy in his high office and the constant intrusions of the press, he said:

The interviewer is the product of over-civilization, who does for the living what the undertaker does for the dead, taking such liberties as he chooses with the subject of his mental and conversational manipulations, whom he is to arrange for public inspection. The interview system has its legitimate use—is often a convenience to politicians, and may even gratify the vanity and serve the interests of an author. In its abuse it is an infringement of the liberty of the private citizen, to be ranked with the edicts of the Star Chamber and the visits of the Inquisition. The interviewer, if excluded, becomes an enemy, and has the columns of a newspaper at his service, in which to avenge himself. If admitted, the interviewee is at the mercy of the interviewer's memory, if he is the best meaning of men; of his inaccuracy, if he is careless; of his malevolence if he is ill disposed; of his prejudices, if he has any; and of his sense of propriety, at any rate.

I have not done enough research to know who was present at that breakfast. I suspect that two fearsomely bright young Boston lawyers, Samuel Warren and Louis D. Brandeis may have been there. If not, they undoubtedly were influenced by the talk. In 1890, writing in the newly founded *Harvard Law Review*, they addressed the right of privacy versus the tactics of prying photographers and newspaper columnists and concluded with these words: "The question of whether our law will recognize and protect the right to privacy must soon come before the courts." Samuel Warren & Louis D. Brandeis, "The Right of Privacy," 4 *Harv. L. Rev.* 193 (1890).

That prophecy signaled an entirely new field of jurisprudence. Brandeis frequently lectured about freedom of the press and attracted a national audience. For example, writing in *Collier's Weekly*, in 1912, he said: "The function of the press is very high. It is almost holy. It ought to serve as a forum for the people, through which the people may know freely what is going on." But, he warned, "To misstate or suppress the news is a breach of trust."

Holmes was appointed to the U.S. Supreme Court in 1902. Brandeis followed his mentor there in 1916. His interest in the subject continued unabated. In a dissenting opinion in *Olmstead vs. U.S.* 227 U.S. 438 (1928), he gave eloquent expression to the right of privacy:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Let me cite two or three other voices from among the thousands who have written or spoken about this controversy:

Daniel Defoe, in "An Essay on the Regulation of the Press," London, January 7, 1704, wrote: "All Men pretend the Licentiousness of the Press to be a publick Grievance, but it is much easier to say it is so, than to prove it, or prescribe a proper Remedy; nor is it the easiest Grievance to Cure."

Two hundred years later, Clarence Darrow reputedly said: "Our independent American press, with its untrammelled freedom to twist and misrepresent the news, is one of the barriers in the way of the American people achieving their freedom."

Last week, the lead editorial in the *Wilson Quarterly*, Autumn, 1993, pp. 5–7 read: "We seem determined that the whole nation should have the privacy of a military barracks. Supreme Court decisions turn precariously on invocation of a constitutional right to privacy, and we want that right fiercely guarded. Yet we often behave in daily life as if nothing should be kept private anymore, and no one spared."

If I were required to adjudicate between these basic rights, I would construe the issue narrowly and prayerfully. However, if freedom is to be meaningful then it seems to me that the right to know must often give way to the right not to tell where individuals alone are involved.

But I did not accept the invitation to speak to you tonight to talk about the law. There are many more qualified than I who can do that. I really came because I am a keeper of the flame. I knew J. Reuben Clark. I knew Marion G. Romney. I knew those who founded the J. Reuben Clark Law School under the auspices of which we have met tonight. I know something of the expectations they had for you, and I know something of the perils of practicing law. Let me begin at the beginning.

One April evening, before the organization of the Law School, Marion G. Romney, Howard W. Hunter, and Ernest Wilkinson invited 80 University of Utah students to dinner at the Lion House in Salt Lake City. These students, all graduates of BYU, were enrolled in the University of Utah College of Law. The brethren asked a question. Three selected class spokesmen responded. The question was phrased like this: "How has your training at BYU contributed to your success or failure in law school?" We might paraphrase the question; how has your being a member of the Church contributed to your success or failure in law school? Marion Romney later commented:

To my surprise and disappointment, two of the three were notably critical of their training at BYU. They had not been, so they said, conditioned to think and find the answers for themselves; they complained that they had been taught as if they were children and the teachers already had all the answers. They felt that they had been restricted in self-expression. The so-called protective atmosphere at BYU had, so I understood them to feel, put them at a disadvantage at law school. Not one referred to the distinctive training BYU is maintained to give.

From no one of them did I obtain the slightest indication that they had left BYU morally fortified to deal with the toils of the law.

This dinner, and the responses of those students, led to a significant series of events. In June 1970, in a meeting with

Harold B. Lee and N Eldon Tanner, Brother Romney's counsel about the organization of the Church Educational System was requested. He recommended Neal Maxwell for commissioner of education and for the first time talked with the First Presidency about a BYU law school in honor of President Clark. Marion reported, "they seemed favorable; at least they did not say no."

The following day he had a discussion with President Ernest Wilkinson of the university. He told him that he intended to substitute a motion that the law school be established at BYU in honor of President Clark instead of an Institute on Human Dignity that had been proposed previously.

On December 1, 1970, Marion met with Neal A. Maxwell and Ernest L. Wilkinson about a proposal for a law school at BYU. Later in the day he met with the executive committee of the BYU Board of Trustees when a recommendation was passed to be presented to the board the following day recommending the establishment of a law school. After the meeting, Elder Romney called Brother Maxwell, who was by then commissioner of education, aside and told him, "I want to build a law school at BYU in honor of J. Reuben Clark, and I want you to help me."

President Romney's journal, a month later, records the following: "In the meeting of the Board of Education, Board of Trustees—the most interesting decision made was the decision to go forward with the establishment of the J. Reuben Clark Law School at Brigham Young University."

Later in that year, he was assigned to be chairman of a search committee to recommend administrators for employment in the Church Education System. Speaking of this assignment, he once said:

I want to testify to you that in the Search Committee, which has nominated five school administrators, all of whom have been appointed, the Lord has been with us. We have sought them out through faith and study. If you could see the stack of materials we have gone through you would know that we worked hard. When we began our deliberations, we were miles apart. We didn't use that word "liberal," but we had on the committee the two ends of the spectrum. As we sat around the desk in my office, we were at times as far apart as we could get. Sometimes I wondered how we would ever get together. But when we had finished and had taken test ballots, we got down on our knees and asked the Lord to help us find the man. We found those men just like you find stake presidents: Neal Maxwell for commissioner of education, Dallin Oaks for president of BYU, Henry B. Eyring at Ricks; Steven Brower out in Hawaii; and Rex Lee for dean of the J. Reuben Clark Law School. These men were chosen by inspiration just as our stake presidents. I know the power of the Spirit is with us in our work.

Four and one-half years later at the dedication of the J. Reuben Clark Law School building on September 15, 1975, President Romney, then himself a member of the First Presidency, stated:

It has been suggested that I might comment on the reasons for the establishment of the J. Reuben Clark Law School. I cannot say with certainty what was in the minds of those who made the final decision to establish the school. I can, however, tell you why I used such influence as I had to get it established. To begin with, I have long felt and now feel that no branch of learning is of more importance to an individual or to society than the subject of law. I likewise felt that the atmosphere of honor, integrity, patriotism, and benevolence prevailing in Brigham Young University would be a good influence upon a law school and the members of its student body.

**I really came because I am a
keeper of the flame.**

I knew J. Reuben Clark.

I knew Marion G. Romney.

In the privacy of his journal, Marion added another thought:

Law students must be taught and inspired to obtain for themselves a motivating conviction that the revelations do, in fact, prescribe a solution to the problems of our day. A mere mental concept is not enough. Students must be so familiar with the scriptures themselves that they not only recognize in them the solutions but also understand them and apply them to current questions and problems.

Well, so much for the hopes and expectations of the founding brethren. For better or for worse, you are the result. By virtue of your training and education, whether obtained from BYU or not makes no difference, you will be thrust into leadership positions in the Church and into decision-making roles across the length and breadth of this land. Your careers will epitomize the teaching of Alma, who when counseling those who wanted to accept the covenant of baptism, reminded them that they had agreed to "bear one another's burdens, that they may be light." This is the principal business of a lawyer, to bear the burdens of another.

But we must not forget that the covenant further requires those desirous of coming into the Church "to stand as witnesses of God at all times and in all things and in all places, even until death" (Mosiah 18:8–9). I have always liked the statement by Whittaker Chambers, who after having his testimony in the Alger Hiss case questioned by lawyers and politicians throughout the country, wrote in his autobiography:

A man is not primarily a witness against something. That is only incidental to the fact that he is a witness for something. A witness in the sense that I am using the word, is a man whose life and faith are so completely one that when the challenge comes to step out and testify for his faith, he does so, disregarding all risks, accepting all consequences.

And so with you, whether you know it or not, or whether you intend to honor the covenant or not, each of you has covenanted to stand as witnesses for God, not only in fast and testimony meeting, but in cloakrooms and courthouses, in halls of power and law offices, with clients and judges, and with wives and families. More than most men and women, you will have the opportunity to stand as witnesses of God at all times and in all things and in all places. Your lives and your faith must become one so that when the challenge comes, as it most certainly will, you can step out and be witnesses for your faith as well.

At the funeral of former Dean and Judge Samuel R. Thurman on July 17, 1941, Marion Romney was a pallbearer. J. Reuben Clark was asked to speak. To the surprise of all present, he did not speak about the law. Marion Romney noted: "He gave a ringing testimony on the necessity of a knowledge of God and faith in the atonement. It was thrilling, even more so in view of the audience of hardened lawyers."

Several years ago I visited the Utah Supreme Court. I had clerked there after leaving law school. I had made friends with the personnel and the justices. In particular, I admired and respected Judge J. Allan Crockett. He had been extremely helpful to me when establishing my first law office. I went to see him on a sleepy summer afternoon. We began to reminisce. He told me he was thinking about retiring from the court and asked me what I thought about that. I couldn't imagine the Supreme Court without him, and I blurted out the first inane thought that came to mind, "Oh, don't do that, judge." I said, "It's comforting to know that there is someone on this bench who always tries to do what's right."

I spoke out of frustration and a practitioner's feeling that not everyone on the bench shared that policy. I assumed he would understand what I meant. His indignation, however, surprised me. He thundered a response that perhaps only a lawyer can understand, and only a lawyer who is a member of the Church can fully appreciate:

"Do what's right," he snorted. "Heavens, Burt, any fool can do what's right. It's knowing what's right that's hard."

Now, by electing to go into the law, you have assumed the burden of counseling clients, advising governments, and making decisions regarding what the law is and what is right. The formulation of this counsel is without any doubt the most critical and creative event in the life of any lawyer. And while most lawyers are taught not to concern themselves with the rightness or wrongness of a client's cause, the LDS lawyer cannot wholly avoid concerning himself with what is right.

It is said that when Samuel Johnson entered into the study of the law in 1765, he formulated this prayer:

Almighty God, the Giver of wisdom, without whose help resolutions are vain, without whose blessings study is ineffectual, enable me, if it be Thy will, to attain such knowledge as may qualify me to direct the doubtful and instruct the ignorant: to prevent wrong and terminate contentions; and grant that I may use that knowledge which I shall attain to Thy glory and my own salvation; for Jesus Christ's sake. Amen

Such a pronouncement would not be made anywhere in the United States of America today by a lawyer unless it were made by one such as you.

Bless me to use the knowledge I gain "to prevent wrong and [to] terminate contentions to Thy glory and my own salvation." I commend these concepts to you. May you use the knowledge you attain here to the glory of God and to your own salvation. I should note that it will be a constant challenge.

Several years ago I read this little poem in the American Bar Journal. I have taken a liberty or two with it, but you will be interested just the same.

A lawyer at the pearly gate
Protested, "Make the record straight, St. Peter
I'm too young to die."
The old Saint raised a kindly eye
And sighed and put his [Postum] down.
Reviewed his books with puzzled frown,
Then smiled: "There's no mistake," said he
"My ledger shows you're eighty-three."
"How can that be?" in outraged tone,
The lawyer cried "I'm fifty-one."
The good Saint shrugged and sipped his cup,
"We added all your time sheets up."
[Allan J. Parker, "Time in Eternity"]

This is perhaps what President Kimball had in mind when at the dedication of the J. Reuben Clark Law School he said: "Here at this college of law we hope to develop an institution where those who attend will become superior in the legal aspects for which they come, and also in the ethical part which is so greatly needed in our land."

The founders of the BYU Law School were examples of ethical excellence. Even in the privacy of his heart, Marion G. Romney lived this principle.

Again, returning to his journal to an entry dated July 10, 1941, he wrote: "During the evening I was at a meeting at President Clark's where he talked to Harold B. Lee and me for about three hours. I greatly appreciated his confidence and shall respect it by not writing down here what was said."

Ethics, as you know, is the study and philosophy of human conduct with emphasis on determining right and wrong. Most modern thought blurs or eliminates this distinction. You, however, have been instructed sufficiently that you know good from evil (see 2 Nephi 2:5). That instruction must be added to all the rest. As you reason, make fine distinctions and find exceptions to rules.

Conventional wisdom teaches that there is no rightness or wrongness to your client's cause as long as intellectual tools are sharp and our presentation professional. There is an alarming tendency to judge the morality of any issue by the legality of that issue. You, of all people, must determine these issues by God's standard as well as man's.

A few years ago, Harold Williams, a former chair of the Securities and Exchange Commission, gave a speech to the American Bar Association. He said,

Increasingly we as a society, look to the law to define right and wrong, moral and immoral: the notion that the law sets the floor rather than the ceiling receives little currency. By the same token, the tendency to focus on the law leads to a withering of interest and concern for the ethical. The implicit assumption increasingly becomes that if [the Law] has not forbidden it, it must be [morally] acceptable. This results in increased dependence on legal process to define the limits, and the game becomes one, as it has in tax law—of avoidance and loophole closing. The result is a fundamental change in the mores of the society.

As Latter-day Saints we must, it seems to me, be concerned with the morality of what we do. We cannot afford to confine our gospel observance to the meeting house and practice law according to the manner of the world. This perhaps is our greatest challenge and our most significant opportunity.

And to those who say to you that you should not concern yourselves with the rightness or wrongness of a client's cause, I say nonsense. Only a prostitute does not concern himself with the morality of his actions. Only a mercenary sells his services to a cause without concern for the consequences. You must become involved in these issues or risk your salvation.

Here arises the great ethical dilemma that all of us must face. Which is the greatest commandment—my client's wishes or my own integrity? Do I serve the end or do I serve the means? Unfortunately, a lawyer must confront this question more than once and the battle is never ending. As comfort and assistance in the struggle, I offer the words of the psalmist, who summing up his own life to the great Judge of all said:

Judge me, O Lord; for I have walked in mine integrity: I have trusted also in the Lord: therefore I shall not slide

Examine me, O Lord, and prove me; try my reins and my heart.

For thy loving kindness is before mine eyes: and I have walked in thy truth

I have not sat with vain persons, either will I go in with dissemblers.

I have hated the congregation of evil doers; and will not sit with the wicked.

I will wash mine hands in innocency; so will I compass thine altar, O Lord:

That I may publish with the voice of thanksgiving, and tell of all thy wondrous works.

Lord, I have loved the habitation of thy house, and the place where thine honour dwelleth. [Psalms 26:1–8]

You will recall that shortly before the Israelites entered the promised land, Moses counseled his people. He knew them and knew that he had not been permitted to go with them. He feared for their spiritual survival under a lesser law. Allow me to repeat his words.

Behold, I have taught you statutes and judgments, even as the Lord my God commanded me, that ye should do so in the land whither ye go to possess it.

Keep therefore and do them; for this is your wisdom and your understanding in the sight of the nations, which shall hear all these statutes, and say, Surely this great nation is a wise and understanding people

Only take heed to thyself, and keep thy soul diligently, lest thou forget the things which thine eyes have seen, and lest they depart from thy heart all the days of thy life: but teach them thy sons, and thy sons' sons. [Deuteronomy 4:5–6, 9]



For all of us it seems that there is danger that "what our eyes have seen" will depart from our hearts. Moses knew that constant contact with a lesser law can make us forget spiritual principles we once knew. Parenthetically, I would add that the controversy and contention and the competitive will to win, so associated with our profession, are inimical to celestial law. And the corrupting influences that sometimes accompany the practice of criminal law—or the burning ambition and exalted ego that often follows us into the political arena—none of this can be

considered a higher law. These things will not argue well for us when we meet the Holy One of Israel.

My son, Michael, graduated from BYU in August. Many years ago after a hectic day that same son met me at the door with news that his first grade class had voted to have fathers' day at school. Several students had volunteered to have their fathers come and explain to the class exactly what it was they did for a living. My son told me that none of the other kids had a lawyer for a father. He had assured his teacher that I would not mind coming.

While accepting his invitation, I grumbled a little, "Son, it's kind of hard to explain to first graders exactly what a lawyer does. I don't think that even you know, do you?"

He assured me that he did. To test him I said, "All right, tell me what does a lawyer do?"

He looked me in the eye and said, just like he had known it all the time, "A lawyer is a man who makes things better."

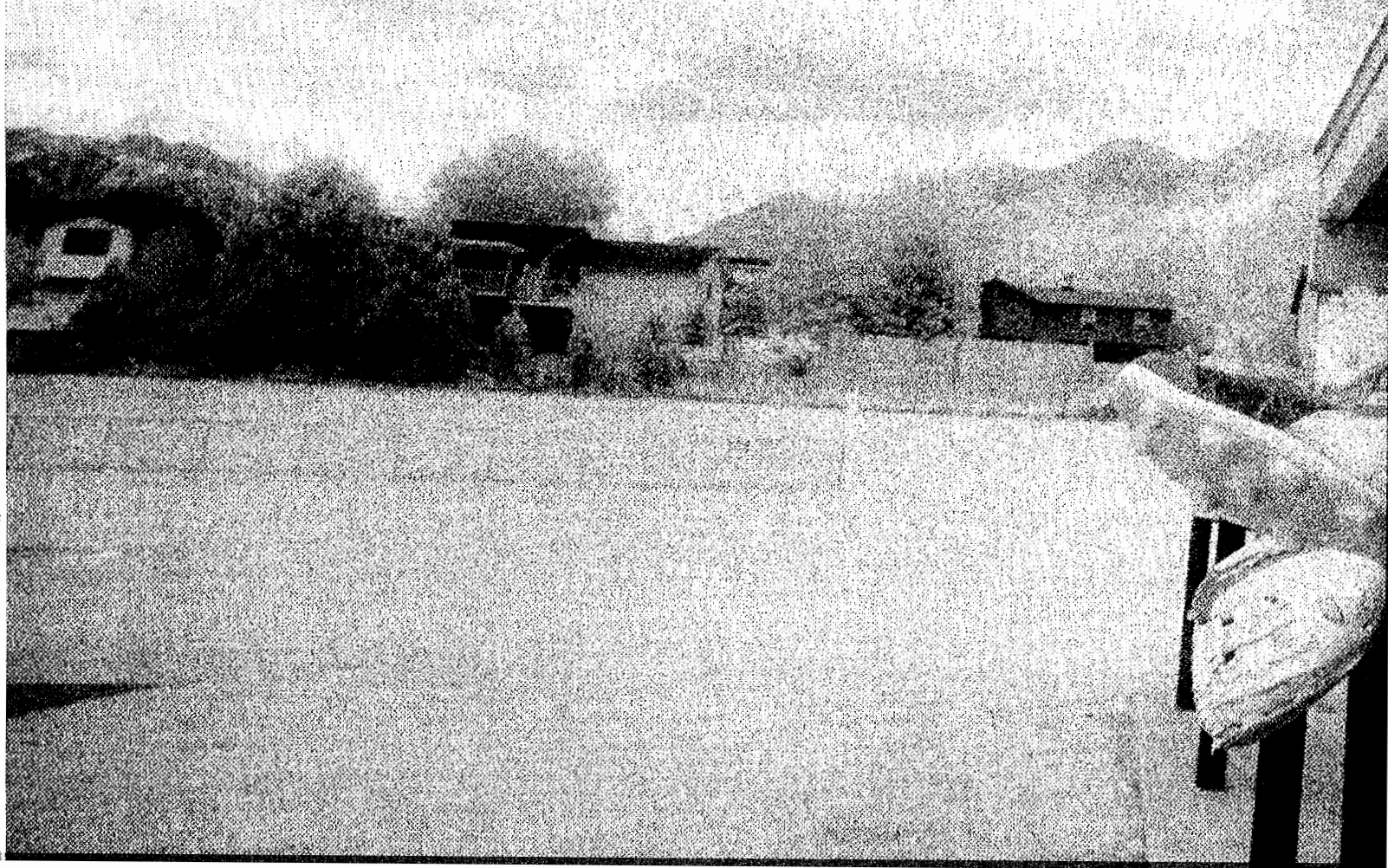
May this be your lot, I pray in the name of Jesus Christ, amen.

Elder F. Burton Howard is a member of the First Quorum of Seventy of The Church of Jesus Christ of Latter-day Saints.

A SAFE RETURN

Michael Goldsmith

APRIL 15, 1983, seemed like a rather routine day for me. I had just returned from Knoxville, Tennessee, where I had given a lecture on asset forfeiture to the local U.S. Attorney's Office. In recent years, I have enjoyed giving many such lectures as part of a program sponsored by the Department of Justice. This trip, however, had been especially memorable because I began my teaching career at Vanderbilt Law School in Nashville, Tennessee, and so the occasion provided me a chance to visit some former students. I had also taken the opportunity to drive through the mountainous countryside of eastern Tennessee and to reminisce about my early years. PHOTOGRAPHY BY JOHN SNYDER





"Oy vey, go to the doctor. Vat do you know about taking

Perhaps I should have spent even more time reminiscing. My return to Salt Lake City would be more momentous than anything I could have imagined. I arrived safely in Salt Lake City and went home to complete my tax return. The last thing I remember happening is a phone call that I received from my accountant, who explained my tax bill to me.

Like thousands of other Americans, shortly afterwards, I passed out. I had been struck, however, by more than an adverse tax bill. An aneurysm had ruptured deep inside my brain, and my chances of surviving to pay my tax bill in person had immediately been reduced to only 50/50.

Of course, I am not a doctor (lawyers, after all, are simply graduate students who are not able to get into medical school), and so, at first, I didn't know what was wrong with me. I had heard a strange popping sound inside my head, and although some of my college friends from the 60s routinely hear such noises, this experience was a new one for me.

But I didn't need a medical degree to know that something was terribly wrong. I felt very dizzy, the way you might feel after having stayed too long in a jacuzzi. Also, I happened to glance at a mirror, and what I saw was even less appealing than usual. Within a few minutes, I had become drenched in perspiration.

Even so, the macho side of my personality told me that everything was all right, that I should tough it out and that all I needed was a good nap. Fortunately, my macho side is about the size of an earthworm, and soon my Jewish side and years of training from my Jewish mother prevailed. I heard a voice inside my head (this really happened) say "Michael, if you take a nap, you'll wake up dead. You've never been macho before, and this is not the time to start." Then I heard my mother's voice say to me: "Oy vey, you have a headache, go to the doctor. Vat do you know about taking care of yourself? You couldn't even get into medical school. Now the doctor for you."

In the past, I've almost never paid much attention to my mother. (I can still recall telling her: "Mom, I'm 13 years old. I know what I'm doing.") However, I had learned the error of my ways. This time I said to myself: "She's right. I couldn't get into medical school, but at least I've got medical insurance (even if it is DMBA) and I'm a taxpayer. I'm calling an ambulance." So, I did.

Well, I'm a Cougar fan, but this was not time to become a zealot. So, I hitched another ambulance ride, this time to the University of Utah. That's the last thing I remember about this world. I didn't wake up again until May 4, 1993.

However, I do remember a lot about the mystical world that my mind and soul inhabited for that three-week period. I remember snow-covered moun-



In retrospect, I might have panicked from fear that the ambulances would be busy with thousands of other taxpayers who had also received bad news from their accountants. Fortunately, the rest of the populace seemed to be enjoying good health; the ambulance arrived within minutes, and again I passed out.

The ambulance took me to LDS Hospital, where the emergency docs diagnosed my aneurysm, and judged my chances of surviving the night at 50 percent. And that was the *good* news. The bad news was that, given the depth and location of my aneurysm, none of their surgeons felt comfortable performing surgery on me (and these were the guys who had gotten into medical school?) They recommended that I go elsewhere. You might want to keep this quiet because elsewhere happened to be the University of Utah Medical Center.

tain peaks, and beautiful snowy days with perfect blue skies. (I realize, of course, that snowy days usually are not accompanied by clear-blue skies, but that's what I remember, and I'm sticking with my story.) Apparently, I took advantage of the opportunity to ski because, on at least one occasion, I sat up and told everyone around me to "go in for lunch without me because I want to keep skiing." And so I skied.

I also spent considerable time and energy discoursing about the law. Once, I am told, I mistakenly thought that I had been requested by the medical staff to solve an unusually complex legal problem, and so I called in all the doctors and nurses and gave them a lecture about legal ethics (this must have been one of my shorter lectures). Upon concluding my remarks, I said: "So what's the legal problem that you want me to solve? I'm a 'can-do' kind of guy. Let me at it"—at which point they told me

care of yourself. You couldn't even get into medical school."

that there was no legal problem, that they had not called upon me for help, that I had sustained a ruptured cerebral aneurysm, and that I probably needed my rest

And that was good advice I would need my rest, especially since I also recall having been elected to Congress and, presumably, would soon need to deal with the rigors of political life. So a good rest, no doubt, would be helpful. Actually, I knew that there had been no election; I believed my political ascendancy had occurred by acclamation. (When I announced this remarkable development to the collected medical staff, they told me that this was good news because it showed that my "ego [was] still intact." This meant that, whatever the extent of my brain impairment, at least I would still think a lot of myself. The analogy to many practicing attorneys seems obvious even to me.)

Putting skiing and politics aside, I remember spending most of that precious time with my kids. In my mind's eye, they were by my side at every moment. We skied, we biked, we hiked, and we even bought a new place to live. Even now, when I visit certain places, I recall having been there with my kids during my aneurysm, and I can't believe that those experiences never happened (because in my heart they really *did* happen).

Also, for those of you who are into NDEs (near-death experiences), I did see a Light. It was a constant presence, very bright and it shined through a blue veil. I kept noticing it and wondering about it, but, in typical Goldsmith fashion, I remember being too busy to check it out. After all, blue-sky powder days are rare even in Utah, and that Light was always there. So, I assumed there would be plenty of time to check it out later. (I surely hope that's true.)

I often wonder if things might have worked out differently if I had been more curious about the Light. I don't think that I met Jesus, Mohammed, or Moses. But, maybe I would have met them, if I had decided to pursue the Light. One day I hope to find out—but not too soon.

Is there a metaphysical aspect to death? If that Light did reflect the breach between life and death, could medical science still have saved me had I decided to venture across the divide? God only knows.

During my period of unconsciousness, I felt content and placid. This other world posed no problems for me, at least compared to my reality. However, my real world counterparts—family and close friends—suffered greatly. Jeff Nelson, a private investigator and wonderful friend, was in the waiting room when they wheeled me out of surgery. Jeff later told me that I looked far worse after the surgery than I had looked going into it. My head had been shaved; my eyes were blackened and swollen, and a scar in the form of a giant question mark was etched on top of my scalp. Jeff said that, if he had had a camera, he would have taken a picture and sent it to me as a postcard with the caption: "Michael, you've got to slow down."

The doctors told Jeff and my other supporters that I would be in critical condition for 14 days and that, during that period, I would be greatly at risk of death or grievous bodily injury from compression seizures. So, while I skied and contemplated the Light, my friends and family counted each passing day and prayed for the safe passage of two weeks.

To keep me from slipping into a coma, the medical staff woke me every hour. They did this to keep me from falling into a deep sleep that could produce a coma. Notwithstanding their good intentions, these hourly wake-ups made me somewhat grumpy, but they worked.

I am told that, whenever the staff awoke me, they asked me if I knew my name and where I was. "Who wants to know?" I replied and "what about my constitutional rights?"

Actually, I answered their questions as best I could, although apparently I never could state my location correctly. Because I believed myself to be in Philadelphia with my kids, I paraphrased WC. Fields and said "On the

whole, I must be in Philadelphia." (When I awoke, I remained steadfast in this belief until we later checked my Frequent Flyer records at Delta Airlines, which to my surprise confirmed that there had been no activity on my account since April 15, 1993.)

During this time, my colleagues and friends at BYU really came through for me. Dean Reese Hansen visited the hospital and provided great comfort to my mother. Professor Doug Parker was there, too, and spent considerable time consoling my sisters. Many others also visited or made their feelings clear to my family. I will always be grateful to Reese, Doug, and to all of you who stayed so close to the situation and showed such strength and compassion for my family.

When 14 days had finally passed without incident, the doctors began to express great optimism for my recovery. And slowly I began to awaken. As I reflect upon that time, it seemed like a rebirth. I felt warm and snugly, and very well protected. Everything seemed new and fresh.

At first, there was concern about partial paralysis, as I had difficulty opening my right eye and moving on my right side. But these difficulties quickly resolved. Others, however, required more time to alleviate: double vision, for example, and a tendency to experience word processing difficulties while speaking. (Fortunately, as a law professor, I neither need to read nor speak for a living. Instead, my secretary could read old class outlines to my students. Some students might even prefer it this way. So these initial deficits did not cause me to panic.)

After a few days of semiconsciousness, I was transferred to a "rehab" ward, where I spent almost a month undergoing a variety of speech, occupational, and physical therapies. Slowly but steadily I made progress. I also learned the importance of developing patience, and that when your patience has seemingly been exhausted, yet another reservoir of inner patience can be located and tapped. Never run out of patience. It's crucial

I'm alive and in the game—even if I can't hit a curve ball.

to sustaining long recoveries and to getting on with life

Meanwhile, I wanted to get on with my life and leave the hospital as soon as possible (In retrospect, I guess that I had not yet fully developed the quality of patience. However, this quality is especially difficult to attain on a diet of hospital food.) The main hitch to my release was my lack of "pathfinding skills." In short, I got lost a lot. The doctors were concerned that, due to this deficit, I couldn't function safely. I told the docs to relax because this "deficit" really meant that I was returning to normal—I've always gotten lost a lot. (That's why I commute to BYU with Professor Burns, and she almost never lets me drive.) I told them that, years ago, I had been forced to abandon my efforts to obtain a pilot's license because of this problem. I could take off and land the plane without difficulty, but I could never find the airport. This story is true, but the docs didn't believe me. So I stayed in the hospital a bit longer to hone up on my pathfinding skills. When I continued to have trouble (making my way from my bed to my bathroom), I argued that, under the rigorous "pathfinding" standards being applied to me, I would have been institutionalized before my ruptured aneurysm. "Just give me a bedpan, and I'll be fine," I told them.

At times I felt like a rat in a maze, but eventually my pathfinding skills improved to the extent that I could usually find the bathroom two out of three times. This apparently was good enough because they released me.

Now I was really cruisin'! Except that my driver's license had been suspended for medical reasons. No problem, I remember thinking. At least the road test won't require me to prove proficiency at "pathfinding." With a little effort and concentration, I'd pass the road test the first time—provided, of course, that I could remember where I had last parked my car (or even the make and model number of the car).

Eventually, my mother found my car (just like she always found my toys for

me when I was a child). However, she refused to take my road test (just as she had always refused to do my homework). So I was on my own.

Well, I passed the road test, but I honestly don't remember my score. However, I have finally recognized the wisdom in a statement made to me long ago by a former student: "What's the difference? A pass is a pass, right?"

Right, and so now I could drive. But, could I find my way?

With a lot of help, eventually I would. I spent the summer of '93 and much of that fall resting and trying to relearn old skills. For example, I often felt quite uncomfortable in ordinary speaking situations. My speech therapists characterized the difficulty as a word processing problem. As I tried to speak, my brain would struggle to find the right word for whatever sentence I was attempting to construct. With concentration and effort, I could usually find the proper word, but the effort often left me physically drained.

This problem scared me. We all mumble and stumble on occasion, but I did not want stumbling and mumbling in class to become my trademark. Over time, however, my therapists showed me how to control my speech to minimize this difficulty. Today, fatigue from this process is still a factor, but now when I mumble and stumble in class what you're seeing is really a *preexisting* deficit that I can blame on the aneurysm. (In fact, if I am not dealing with someone who knew me before April 15, 1993, I can blame all of my preexisting deficits on the aneurysm. So, in a sense, I'm better off.)

Even with the benefits of speech therapy, I felt apprehensive about returning to the classroom. I didn't know if I could sustain the concentration required for a full lecture period. (Yes, although it might not be apparent from some of my previous classes, I do try to think while lecturing.) And I didn't want students to believe that occasional speech impediments reflected a lack of cognitive abilities.

Ironically, during this period of self-

doubt, I received an offer to be a visiting professor at Cornell Law School. I have always wanted to teach at Cornell, my alma mater, but I had let previous opportunities pass and their interest in me had apparently subsided. Perfect, I thought, now that I've had a brain injury I'm finally good enough for the Ivy League. They really want me this time.

I mulled over the Cornell offer with my medical support team. The docs and therapists unanimously advised that, under the circumstances, a visit to Cornell would not be a good idea. They felt that returning to teaching would be tough enough without the added pressures of a transition to a new school and place. They also felt that the supportive atmosphere of BYU would be especially conducive to a good recovery. They were right. I decided to return to BYU for winter semester and, although I did have difficulty finding the right classroom on the first day of the semester, I have never regretted that decision.

As I expected, my students at BYU offered me hope and encouragement for a full recovery. And they tolerated my occasional lapses with grace and good humor. I will always be grateful for this support.

Meanwhile, I have attempted to go on with my life. I continue to spend as much time as possible with my children, and I have begun to return to a variety of research interests. I'm also much more interested in playing just for the sake of playing. Recently, for instance, I joined an adult fast-pitch baseball league. We play weekends, and roaming the outfield grass has brought back many wonderful memories. I've found that the ruptured aneurysm did not affect my ability to hit a curve ball. I never could before, and I still can't now. So, everything's different, but nothing has changed.

Today, my recovery continues. I still experience problems with fatigue and sometimes with my speech pattern. But, I'm alive and still in the game—even if I can't hit a curve ball. And I never lose sight of my good fortune.

YOUNG MISSION PRESIDENTS

The founders of the J. Reuben Clark Law School hoped to train leaders as well as good lawyers. They hoped that families, communities, and individuals throughout the world would benefit from the service of graduates. One way this hope is being realized is through BYU Law graduates' service as mission presidents for The Church of Jesus Christ of Latter-day Saints. This significant service opportunity is often left to men more senior in their careers, but for six law school graduates these callings have come at a young age.

Rulon Munns '76 was the first graduate to serve as a mission president. Called at age 35, he served as president of the Japan Sapporo Mission from 1985 to 1988. He left his practice in Florida for three years and then returned and reestablished himself. Mark Zobrist '76 has spent the last three years as president of the Mexico City South Mission. He and his wife Linda returned to Salt Lake City in July. Von Packard '77 has completed his first year of service as president of the Monterrey Mexico Mission. This June three graduates started their service as presidents of missions within the United States: James Hamula '85, Washington, D.C. South Mission; Steve Snow '77, California San Fernando/Newhall Mission;

and Monte Stewart '76, Georgia Atlanta Mission.

The three new presidents and their wives have much in common: (1) they will take school age or preschool age children with them into the mission field; (2) they will preside over missions in the United States but have some missionaries who teach the gospel in languages other than English; (3) they all remember the exact day and even the hour of the day they received their mission calls from an apostle; (4) they have all been questioned by friends and associates about the wisdom of interrupting their careers at a crucial time; (5) they all responded affirmatively to the call without thought of their career.

Although acceptance of the calls may have been a "leap of faith," it appears that the way was made clear for each of them, Snow and Hamula with the help of their partners. Hamula practiced with Kimball & Curry, a Phoenix firm representing clients in environ-



President Steve Snow '77 and his wife, Phyllis. California San Fernando/Newhall Mission

mental law. His partners, both members of the LDS Church, and those of other faiths, encouraged him to accept the call. President Hamula said, "I'm grateful that the firm was so good to me to allow us to go—and promise that we'll have a place when we come back."

Steve Snow received similar encouragement from his firm, where all six partners are graduates of the BYU Law School. President Snow felt the example was set for

his firm by the original faculty at the Law School. He cited the example of Dean Lee's appointment as assistant attorney general in the Civil Division and the support he received from his colleagues.

Monte Stewart said that he and his wife, Ann, had felt that he should begin to scale down his successful civil practice in Las Vegas in 1991. This decision enabled him to work as U.S. attorney and also prepared him for his present calling.

Public and church service is not new to the three new mission presidents. Monte Stewart served as U.S. attorney in Nevada for 18 months. James Hamula served as stake president of two Arizona stakes for more than five years. Steve Snow had served for 11 years on the Utah Board of Regents, the governing Board for Higher Education—serving twice as chair in 1986 and



President James Hamula '85 and his wife, Joyce. Washington, D.C., South Mission



President Monte Stewart '76 and his wife, Anne Georgia Atlanta Mission.

again in 1993–94—and for 1987–93 as vice-chair between his two terms as chair. He also served as president of the Dixie College student stake

THE CALL TO SERVE

by Mark Zobrist '76

Editor's Note: In an interview with Mark Zobrist, recently returned mission president, the **Clark**

Memorandum asked him to review his three-year experience and explain how his legal training helped him to successfully complete his assignment

In December 1989 our family took a vacation to Mexico City to visit friends. Little did I realize that in less than two years our family would be living there. Approximately one year later, I received a telephone call that changed my life. Elder Boyd K. Packer called and asked if my wife and I could come to his office for an interview. After an additional interview with

President Hinckley on January 23, 1991, I received a call from the First Presidency to preside as mission president over a Spanish-speaking mission. We frantically began to make all the needed arrangements with my businesses, schooling for the children, renting our home, etc. In March I was assigned to the Mexico City South Mission with my three years of service to begin around July 1, 1991. I was set apart by Elder Boyd K. Packer on June 11, and later in June my wife and I attended a special mission president training seminar at the MTC. By July 1 I was in the mission field with Linda and our five children.

When I arrived, I was overwhelmed by the task. The mission boundaries are much larger than the name indicates. While the mission is based in Mexico City, it extends south to the coast and includes the states of Morrelos and Guerrero with the southernmost point of Acapulco. There were ten stakes and four large mis-

sion districts that I supervised. The farthest branch was 14 hours by bus from the mission home and over half of our 130 missionaries worked outside of Mexico City itself.

As I reflect back on those first few months, I realized that the Lord guided my every step. Sometimes he did so rather directly through very personal inspiration. But just as often, he permitted me to draw upon my past experiences to formulate the best solution to a particular problem. I found that my training from law school was a valuable part of that process. The practice of law is not quantitative. The solutions to particular problems clients may have are not taught in law school. Instead, methods of analyzing the facts, gathering support, formulating and evaluating possible alternative solutions and then presenting a particular point of view are taught. I found that this methodology had a much wider application for me. Such a process, when the result was confirmed by the Spirit, allowed me to more effectively solve a variety of problems I faced daily. Often I did not realize that I was using something I had learned in law school and perfected in practice. I now know that my training as a law student and my experiences as an attorney were part of my preparation to be a better mission president.

Service is an interesting concept in the gospel of Jesus Christ. When we

received our call, many of our friends and associates were surprised that we were willing to leave our work, our friends, and our new home. Yet shortly after we arrived in the mission field, we knew we were supposed to be in Mexico. The Lord truly qualifies his servants for their assignments. He also prepares the field, we knew we were supposed to be in Mexico. I believe that I was prepared in many ways and also that the Mexico City South Mission was prepared beforehand to use my particular talents. Many events have reaffirmed this for me, but none more than the missionaries assigned to us and the growth and reorganization of the Church in Mexico while I was there.

Of the more than 360 missionaries assigned to us during our tenure, over 300 were Mexican nationals. The country is truly becoming self-sufficient in supporting the missionary work in Mexico and is sending hundreds of its young men and women into missionary service every year. Yet more can be done. While serving in Mexico, I came to appreciate the sacrifices that many faithful saints at home make when they voluntarily contribute to the general missionary or Book of Mormon funds. Such donations helped dozens of young men from our districts to serve full-time missions and return as future leaders in their home districts.

With respect to growth and restructuring of the Church during our mission, we enjoyed over 6,000 new converts. We also witnessed the creation of two new stakes, the formation of a

new mission district and a pending proposal to form two additional stakes in the southern part of Mexico City—all in three years

Our mission coincided with a historical event for the Church and its legal status in Mexico. In late 1992 Mexico amended its constitution to legally recognize churches. Until that time, churches used various societies or corporations to conduct their activities. To put the name of the Church on any building, the Church had to first donate that building to the government (which the Church did

efforts to characterize us as a sect. Again, because righteous men who had been prepared for many years were serving as local leaders, the adversary was overcome and the Church was officially recognized.

I remember well the evening of that historical day. The acceptance of the Church's application had been delayed for several weeks, because the ministro de gobernacion himself wanted to receive the application. As the deadline neared, the area president, F. Burton Howard, and Agricol Lozano, the

ny of the restoration of the gospel. To have the Church's application accepted personally by the minister of government was an honor and privilege unique to our application. Some of us had been invited to have dinner at Elder Howard's home that evening. When he arrived he was in a state of awe and wonder. He shared with us some of the details of how the events had unfolded that day. He repeated that he could not believe what he had seen nor how well the Church had been treated. To me, it was yet another confirmation that the Lord directs the affairs of his church and that he does so by those he qualifies and prepares. To many of us, it was a modern-day miracle.

I am sure that many of my classmates and other members of the legal profession are being chastened, qualified, and prepared for similar service in the kingdom, and I'm sure the Lord will bless each of you individually as you heed the call to serve.

An Interview with
Mary Hales Hoagland,
New Career Services Director

What comes to mind first when I ask you to describe yourself personally and professionally?

Since returning to graduate school, my life has been an exciting, constant balancing act, and I've learned much about setting priorities. My family has always come first. My husband, Dennis, and I have raised three sons: Jason, who was recently married and begins medical school at the University of

Utah in September; John who has spent the last year serving a mission in Porto Alegre, Brazil; and David who is a junior at Orem High School. Because I've always enjoyed the challenge of multiple tracks, I've chosen to mix work, education, and family. I would hope that this places me in a position to understand the students, who are trying to keep their lives in balance.



How have you meshed your family life and education?

My family has always had a strong educational undercurrent. My parents and their brothers and sisters were all college educated. My father and grandfather Hales were both professors at BYU. My father and his three brothers all had medical degrees or PhDs, and their mother graduated from college at the same time as one of her children.

I had completed two years at BYU when I married Dennis. Our son Jason came as we celebrated our first anniversary. We arranged our schedules so I could continue my education and receive my BA in English from BYU while Dennis worked and attended law school.



President Mark Zobrist '76 and his wife, Linda. Mexico City South Mission

frequently). With these changes to the constitution, any "religion" could submit its application for official recognition by a certain deadline. A serious effort was made to classify the Mormons as a "sect" and not as a "religion." Members worried and non-members continued their

church's attorney and next temple president, worked night and day to prepare a multivolume application. Finally they were scheduled to present the package to the government's minister himself. To their amazement, the press, radio and television stations had also been invited. Elder Howard and President Lozano were given ample opportunity to explain Church doctrine, including the Book of Mormon, and bear testimo-

After completing your bachelor's degree, at what point did you decide to attend graduate school?

I took a part-time teaching job with the community college system, helping to oversee a multimedia library/resource center. I designed curriculum and provided individualized instruction and tutoring. Before long, I decided to pursue a master's degree in education technology and librarianship at San Diego State as work-related professional development.

What motivated you to go to law school?

Dennis went to law school while we were in San Diego. It took me eight years to recover enough to consider attending law school myself! I had always enjoyed the adversary system, from the time I debated in high school, so when I learned there was a law school in Fresno, I applied to San Joaquin College of Law.

How did you manage to balance your academic and domestic lives?

I chose a four-year evening program so I could be home during the day, and Dennis simplified his life to support me. I did a great deal of reading and studying at home, and my cooking suffered tremendously. My children still refuse to eat Hamburger Helper because I abused it during those years.

Did you have a good experience in law school?

Definitely. My classmates, without exception, had full-time jobs besides their night

school. They were high school principals, engineers, paralegals—extremely bright people. They were each focused on the goal of becoming attorneys and enjoyed the camaraderie that springs from a common challenge. I knew I wanted something that would give me professional fulfillment and open doors, and law school does train people for a variety of career options: teaching, researching, practicing, etc.

And after those four years, which path did you choose?

I began clerking for my real property professor while I was still in law school and continued after taking the bar. The work experience before graduation built my self-confidence and skills. In 1986 I had the opportunity to clerk for Bankruptcy Judge Eckhart A. Thompson of the Eastern District of California.

Put on your Career Services "hat" for a moment and share your thoughts about your judicial clerkship.

I think a clerking experience is invaluable, especially if you work in the area you are considering. Daily you see the inner workings of the courtroom and how the judge perceives the written and oral presentations. Whether it's a judicial externship during the school year or a clerkship after graduation, the insights gained are exceptional. It's an opportunity to hone research and writing skills without the pressure of billable hours and client needs. It's a wonderful transition from law school to practice.

After your clerkship, what opportunities did you seek?

While clerking, I evaluated the many attorneys who appeared in court as potential employers. I was fortunate to have several offers from local firms and chose to practice with Baker, Mannock & Jensen, for three years.

How did you come to accept the position as Career Services director at the Law School?

After moving to Utah, I decided to get the family settled and take the Utah Bar Examination before reentering the work force. Then, after sitting for the 1994 February bar, my interest in returning to law-related employment coincided with the opening in the Career Services Office.

After having time this summer to evaluate existing programs and assess the legal employment market, what will be your plan in working with students?

As most of us know by now, the 1990s present different challenges in the market than the 1980s. The downsizing and cautious hiring approach of most employers should lead students to be open-minded about what they want to do when they graduate. They must, I think, become excellent networkers, looking for every opportunity to gather information and make contacts, giving them exposure to many professionals so they can evaluate what would be a good match for them.

Also, students need to use their summers and part-

time employment during the school year to either confirm or reject various legal employment options. This year we're beginning a "Fundamentals of Legal Career Planning" course for students in their first semester. It's designed to help them assess early what might best suit them professionally and teach them the skills to pursue such opportunities. (This fundamentals class is also available to second- and third-year students.) I think they must plan a systematic approach to looking for employment. They should schedule time for their job search in the same way they schedule classes and studying.

We're also working to compile an international directory of contacts about employment and externship opportunities abroad. The International & Comparative Law Society has spearheaded much of this effort. Students interested in foreign job placement will now have more information to consider.

I know a most frightening time for inexperienced attorneys is that moment when they are entirely on their own to make decisions in practice. I want to help connect our students and graduates with those who can help. Mentoring by seasoned attorneys is essential, even with smaller employers. Thus, a network not only for locating job opportunities but for sustaining new attorneys is important.

Students need to craft and execute their own job search and their entry into the profession. My staff and I are here to provide every resource available to help them.

J. Reuben Clark Law Society
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