

Fall 2005

## Clark Memorandum: Fall 2005

J. Reuben Clark Law Society

BYU Law School Alumni Association

J. Reuben Clark Law School

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A black and white photograph of a man in a dark suit, seen from behind, holding a large axe over his shoulder. He is standing in a forest of tall, slender birch trees with characteristic white bark and dark lenticels. The ground is covered in fallen leaves and forest debris. The lighting is soft, creating a contemplative atmosphere.

# cm

CLARK MEMORANDUM

J. Reuben Clark  
Law School  
Brigham Young  
University  
Fall » 2005

PREPARING FOR LIFE'S CHALLENGES

## Looking Ahead

## c o n t e n t s



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Looking Ahead: Preparing for Life's Challenges

*Scott M. Matbeson Jr.*

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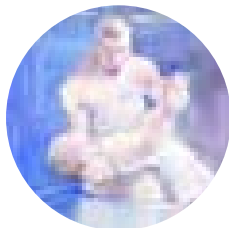
Three Assumptions Lawyers Must Never Make

*Brett G. Scharffs*

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The J. Reuben Clark Law Society draws on the philosophy and personal example of the Law School's namesake, J. Reuben Clark Jr., in fulfilling the following mission: We affirm the strength brought to the law by a lawyer's personal religious conviction. We strive through public service and professional excellence to promote fairness and virtue founded upon the rule of law.



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Religious Doctrine and the Language of the Law

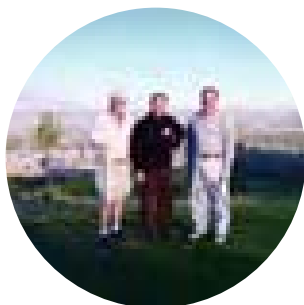
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LOOK

*by Scott M. Matheson Jr.*

ING + A

*PHOTOGRAPHY by Bradley Slade*

HEAD

PREPARING *for* LIFE'S CHALLENGES



THE FOLLOWING  
ADDRESS  
WAS PRESENTED  
AT THE J.  
REUBEN CLARK  
LAW SCHOOL  
CONVOCATION IN  
THE PROVO  
TABERNACLE ON  
APRIL 22, 2005.

resident Hinckley, President Samuelson, Dean Worthen, honored guests, faculty, family, friends, and members of the Class of 2005: It is a great honor and privilege to be here with you today and to be asked to serve as your commencement speaker.

The talent and the accomplishment in this room are truly extraordinary. Through years of hard work, discipline, and dedication; through the times when you wondered whether you would reach this day; through all the highs and lows of law school; you have finally made it. All of us here are deeply impressed and very proud of each and every one of you. But enough about the parents—I need to turn my attention to the graduates!

Speaking of the graduates, I want to thank one of you in particular for sending me an e-mail earlier this week with some tips on what I should say this afternoon. It was entitled “The top 10 things a ‘Utah man’ can do to tame a Cougar crowd.” I’m not making this up; this was a real e-mail. The first tip is: “Refrain from mentioning football.” The second tip is: “Don’t mention basketball either.” So, even though I quite enjoyed football and basketball this year, I won’t mention either. If we have time at the end, however, maybe we can talk about gymnastics.

This graduation is a special moment in time, your special moment, a joyful celebration of great achievement in a forum overflowing with pride and affection for a shared accomplishment. I find these circumstances humbling and daunting, because there is more meaning to this moment than a few remarks can possibly express. But that has rarely stopped a graduation speaker, especially when it comes to giving advice!

*YOU NEED TO MAINTAIN BALANCE IN YOUR LIVES . . .*

*BETWEEN TILLING THE LEGAL FIELD AND SMELLING*



*THE FLOWERS.*

Let's get the most practical advice out of the way. Floss your teeth, put on sunscreen, buckle your seat belt, don't smoke, eat vegetables, get more sleep, and exercise. If you do all of those things, you will be healthier and probably happier. You didn't need to go to law school for all of that, but it's still good advice.

Today's ceremony is important for many reasons, none more important than thanking the parents, spouses, family, friends, and, I suppose, other lending institutions, who have provided and will continue to provide enormous strength and support through the love, confidence, and faith they have placed in you.

For you and them, this day is the culmination of years of hope and dreams and the beginning of new hope and more dreams. It's so important to have hope. Martin Luther King Jr. said, "We must accept finite disappointment, but we must never lose infinite hope." We have infinite hope for all of you.

I would like to begin with a story. Seven years ago when I became dean of the law school up north, Dean H. Reese Hansen invited me to spend some time with him at the J. Reuben Clark Law School. We started in his office, and from there he took me to every nook and cranny of the building, including the spectacular new Howard W. Hunter Law Library. He introduced me to every person we encountered and shared his views about serving as dean of a law school.

That day marked the beginning of a wonderful personal friendship and professional association, leading to many consultations between us and from which I gained much benefit through the counsel and wisdom of Dean Hansen. What Dean Hansen did that day was actually a continuation of the strong working relationship he had established with my predecessor, Dean Lee Teitelbaum, and one that Dean Worthen and I are committed to continue.

This spirit of collaboration between the deans is reflective of the relationship between our law schools. Faculty are invited to participate in academic programs at both schools, students attend jointly sponsored job fairs, and administrators often consult each other on issues of mutual concern. Students from both schools attend the J. Reuben Clark Society firesides, and several members of your faculty have taught as visiting professors at my school. A few years ago I invited Dean Hansen to be our graduation speaker. Finally, Beth Hansen, director of your Career Services Office, is a reliable supplier of my favorite BYU confection: lemon bars from the BYU bakery!

Not only have I had the opportunity to work with your dean and many of your faculty, but I also have worked with many of your alumni in various legal circles. I have great respect for this fine law school and value highly my friendships and associations here. We are in this enterprise of legal education together, and because of that we are better law schools and better lawyers.

Today marks the end and the beginning: the end, to be sure, of your legal schooling, but the beginning as well, because your legal education has just begun and that journey will continue for your entire legal careers. As you take the next step on that journey, I wish to

pose two questions: (1) what makes you different as a lawyer? and (2) what should you do to meet the demands of that role? In the time we have, I can only offer a few observations, however incomplete, about these questions.

What makes you different as a lawyer? Consider the impact law school has had on you. After three years of classes, lectures, meetings, moot courts, exams, research papers, internships, and trying to balance all of this with family, work, and other demands, what has all of this done to you?

You have, no doubt, broadened your intellectual horizons, developed a variety of skills, and learned much about the law. But, as impressive as all of that sounds, each of you is fundamentally the same person who came to law school in the first place. Your law professors, as important as they have been to your education, are latecomers in your lives. Long before you had even heard of the Rules of Professional Conduct, your families had already taught you about morality and helped you develop your code of ethics. Your parents, family, religious leaders, teachers, life experiences, and faith had forged your strength of character. Learning the law did not change that. It is worth recalling what Elder Dallin Oaks said in a speech a few years ago at my law school: "There are innumerable examples of personal conduct in violation of our religious/moral foundations that is not prohibited by the professional codes regulating the conduct of lawyers." The fundamental character you brought to law school should remain at the core of your professional and personal lives.

Yes, you are fundamentally the same individuals who arrived at this law school three years ago, but you have added some dimensions. Receiving your diploma today is more than formal recognition of an educational accomplishment. It also signifies your entry into the legal profession, and with that you will have a certain power and responsibility that others do not.

When most of you were 16, you received a license to drive a car. You learned the rules of driving and hopefully took a driver education class. Most of you probably were not especially good drivers when you first received your licenses. You needed experience to develop skills and judgment. Nonetheless, you had your license, which permitted you to surround yourself in two tons of metal with a big engine and to move at high speeds.

## Lifetime Students of the Law and of People

*by Julie Stanger*

The following excerpts are taken from a talk given at the  
BYU Law School Convocation on April 22, 2005.

**A**lmost three years ago we sat together in room 205 for our first day of orientation. As you may recall, Dean Hansen explained that the law is similar to a foreign language and that our goal here would be to learn this language to the best of our ability. He reminded us that as with the learning of any language, fluency and competence in the law would take time and diligent study. During these three years of stumbling through a type of "language lab," we have learned words and phrases like "res ipsa locutor," "adverse possession," "consideration," "strict scrutiny," and even the infamous Erie doctrine's acronym ECISAJ, which stands for Essential Characteristic of the Independent Federal System in Administrating Justice.

But, as James Monroe once said, "The question to be asked at the end of an educational step is not 'What has the student learned' but 'What has the student become?'" One answer we have in common: Each of us has become a true learner. As true learners we are lifetime students of both the law and of people. As noted by many, the best lawyers are those who understand the intricacies of both the law and human interaction.

First, we are students of the law. Learning the law does not mean we are good at memorizing statutes or even our class outlines—we all wish it were that simple. The reality is that being a lawyer means being a perpetual learner. Almost every day of our career will present us with different challenges that may require new knowledge and a new set of skills. We can be confident that our legal education has prepared us to face those challenges. After three years of the Socratic method, we need not fear the unknown. Our basic skills acquired here have equipped us with the ability to embrace a lifetime of learning, and that is the essence of the practice of law.

Second, during our legal education we have become students of people. In his opening remarks to the recent first-year class, Dean Worthen explained:

*While learning to think like a lawyer is the core component of the study of law . . . the true study of law requires development of characteristics other than analytical and communicative skills. It requires an ability to understand and deeply care about the human condition. . . . Law matters in the real world.*

Law matters to real people. As lawyers we are vested with the obligation to remember the human element behind every transaction and interaction.

So, in response to Madison's question "What has the student become?" we are not mere speakers of legalese nor are we yet great attorneys. However, as we learn from those around us by treating each client, colleague, family member, and stranger with the respect, civility, and grace they deserve, we will become fluent in the true language of the law.

## Honor Their Trust Through a Life of Faith

*by Daniel H Walker, '05*

The following excerpts are taken from a talk given at the  
BYU Law School Convocation on April 22, 2005.

**I**t is estimated that BYU law graduates pay approximately one-third the amount of tuition that graduates of similarly ranked, private law schools pay. Behind the special funds used to provide this two-thirds subsidy are the faces and lives of not only the wealthy but also the desperate immigrant family working two or three jobs to keep food on the table, the disabled veteran trying to maintain hope, the five-year-old learning what 10 percent means, and many more. Their investment in us represents a sacred trust that cannot be neglected without important personal and institutional consequences.

In order to truly honor what is more than a monetary investment, we must maintain our faith. For aspiring practitioners of man's laws to live lives of faith, at least two key principles in relation to God's laws must be understood.

The first principle is this: Spiritual things are learned and understood according to spiritual laws.

We must recognize the limits of our newly acquired knowledge. When one uses man's limited wisdom to measure the infinite means and purposes of God, faith is destroyed and by and by truly good legal scholarship ceases. We will all be tested in this regard on some point or another, and we will be better off in time and eternity if we measure the doctrines and philosophies of men by standards of revealed truth and not the other way around.

The second principle is this: The Lord's valuation scale is different than the world's scale.

What we value must remain independent of worldly dictates—monetary gain over peace, career advancement over family development, and even reason over revelation.

The world is moving toward a belief in a form of equality that treats not only people but also conduct as equal, attempting to divorce all manner of conduct from personal and societal consequences. On the Lord's scale, all people are equal, but not all conduct is equal. Conduct and consequences are inseparably connected and will be forever. There must be recognition of what is right before God if we are to maintain our faith as individuals and as a society.

As graduates of BYU Law School, ours is a sacred trust. As we go into the world, we will meet many who have made an investment in us. We will be best equipped to bring peace to their lives and the lives of others through our knowledge of the law if our own lives have a foundation of faith.

My hope is that long after our one-third of the cost to attend BYU law school has been repaid we will be found living lives of faith. May we ever learn and understand spiritual things through the application of spiritual laws, and may we ever value all things according to the Lord's valuation scale.

The privilege to drive allowed you to transport yourself for long distances more quickly than with other forms of transportation. This privilege to drive, if exercised carelessly, also put you in a position to cause great damage, even death, to yourself and others.

With your graduation and admission to the bar, you are put in the driver's seat once again—this time on the highway of the law. When you receive the license and privilege of practicing law, just as with driving, you will need time and experience to develop your skills and judgment. You will be in a position to do both good and harm.

The dean will hand you more than a diploma today; he will give you the power that comes with being an attorney in American society. He knows that, and so does your faculty. This is one of the most important reasons why they work so hard and care so deeply about the time you spend with them at this law school.

Your faculty know what you may not yet fully comprehend and appreciate: when they stand before you in the classroom, they see a room full of law students, but they also see future judges, legislators, prosecutors, defense attorneys, law firm partners, corporate counsel, CEOs, entrepreneurs, and yes, even law professors.

You know from your learning and experience that power can be used for good or for evil, that unchecked power can produce human misery and destruction, and that properly channeled power can produce remarkable human achievement and progress. You also know that lawyers are keepers of a venerable constitutional tradition, one that self-consciously recognizes and checks power. Our constitutional design is the product of a debate over power—the relationship between the nation and the states, among the branches of government, and, most important, between the government and the individual.

Within that constitutional design, with all the checks and balances and review and oversight, we ultimately place much confidence and trust in people and institutions to use good judgment in the exercise of power. As attorneys you will make decisions and take actions that will have enormous impact on others. You have this power because centuries of legal tradition and generations of those who have developed and upheld it have made what you have possible. Almost every

LINCOLN SAID:

"IF I HAD EIGHT HOURS TO CHOP DOWN A TREE,

I WOULD SPEND SIX HOURS SHARPENING MY AXE."



lawyer every day, whether he or she is a prosecutor, public defender, law firm associate, legal services attorney, or general counsel, makes choices that will have impact. That attorney has power to make a difference, and that is exactly what you will have as you graduate from this law school.

With power comes responsibility. When confidence is placed in an attorney's hands, that attorney has assumed a position of trust. With trust comes the power to act, and with power comes responsibility. You will now become part of the American legal tradition, and that makes you a guardian of the rule of law. Wherever you work, whenever you act as a lawyer, you will be an important part of our system of justice. And that system and your calling is dedication to the rule of law.

That's why what you are about to do is so important. For the rule of law is secure only when steadfast lawyers and judges respect,

follow, and practice it every single day in everything they do. That's what lawyers do. We witness it in every courthouse in every community every day.

Yes, you are fundamentally the same individuals who started at this law school three years ago, but you leave with power and responsibility that you did not have before. You have the power to help people and make the world a better place, and you have the responsibility to safeguard the rule of law with fidelity to a legal tradition that makes this extraordinary opportunity available to you.

What should you do to meet the demands of this role? Each of you ultimately will have to find your own way. I wish to offer five modest suggestions.

First, "Stay close to your law school friends." You started law school a little over one thousand days ago. It was probably evident early on that the friends you would make in law school would also one day be your professional colleagues. Today I wish to stress the converse of that statement. That is, to remind you that your professional colleagues from law

school are also your friends. Through these three years, your classmates have become your soul mates, your brothers and sisters in law. In the years to come, they will become your law partners, opposing counsel, judges, bar association leaders, and legislators. They will be your professional colleagues.

You are entering an exciting and challenging profession that will bring its share of ups and downs. Through it all, your friendships will provide support and understanding. They will be one of the important constants, and I promise they will grow even more important over time. Your family is, of course, your core source of support and your primary responsibility, followed by your close personal friends. But your law school friends should be an important circle in your lives as well. Stay close to them.

Second, "Treat your clients with dignity, courtesy, and respect." During my first week of law practice, an experienced member of my law firm came to me and offered the following advice: "Remember, there is no such thing as a small thing." At first I thought he was cautioning me not to take on too much work, because even the seemingly simple matter has subtle and unforeseen complexities. I learned that lesson the hard way when I agreed to work with another senior attorney for what was supposed to be one day and eventually logged over 300 hours on the case.

But the advice that there is no such thing as a small thing had an additional, more significant meaning than efficient time management. When you represent the interests of others, people are relying on you to help them with their problems, often at times of great stress. Whatever the legal matter may be, to your clients, it can be one of the most important things in their lives. Whether it's drafting a will, providing tax advice, working on an adoption, handling an immigration matter, or defending someone charged with a crime, your client is relying on you to do what you can within the rule of law to help. Your clients

need your legal knowledge and skills, your diligence, and your best judgment. Most important, they need and deserve your compassion, respect, and loyalty.

As President Faust said at a J. Reuben Clark Society fireside two years ago, "The compensation a lawyer receives ought not to be his primary interest. The interest of the client always has to be the first consideration. If you will follow that rule, you and your family will be taken care of." So remember, there is no such thing as a small thing, especially to your clients, who deserve your compassion and respect.

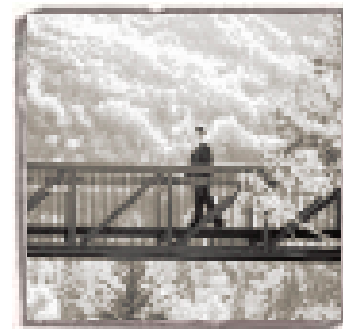
Third, "Achieve balance between and quality within your professional and personal lives." You need to maintain balance in your lives between work and family, between professional obligation and personal responsibility, between tilling the legal field and smelling the flowers. Many times I have heard speakers urge new law graduates to resist the pressures of total immersion in their legal careers, to make time for family and friends for those things that are important outside the law. I agree wholeheartedly, but in recognizing the importance of time outside your legal career, do not fail to give sufficient concern to the quality of time spent inside your legal career.

Life's best hours may not be billable ones, but the hours you spend working as a lawyer should include some of your better times. Think about how you want to spend that time, how you want to remember those moments that will mean the most. In looking ahead, what commitments are you prepared to make that will bring high purpose and satisfaction to your professional life? Those are personal decisions that all of you will have to make, and if you succeed in achieving quality time in your professional life, you should find it easier to achieve balance with your personal life as well. So seek balance between and quality within your professional and personal lives. And, I should add, be supportive of others who are trying to achieve this balance as well.

Fourth, "Do your homework." Most of you have been in school for about 20 years of your lives. You have completed your last day of school. But for those who think the days of homework are over, think again. A wise lawyer said the three keys to successful lawyering are preparation, preparation, and preparation. I had the privilege of working in the law firm of one of the great trial lawyers of the 20th century, Edward Bennett Williams. He was approaching the end of his career and said he was not sure he wanted to try anymore cases. He loved presenting a case in court, but it was the agony of trial preparation that gave him pause. He continued to try cases, and it was his painstakingly thorough preparation combined with his extraordinarily gifted advocacy skills that made him so effective as a trial lawyer. President Abraham Lincoln, one of our greatest constitutional lawyers, was adamant about preparation: "If I had eight hours to chop down a tree," he said, "I would spend six hours sharpening my axe."

Fifth, "Follow your heart, and don't let opportunities pass you by." You came to law school with dreams and aspirations. Never let go of them. If anything, add to them. You have embraced the message *carpe diem*, "seize the day." You obviously would not be here if you had not applied to law school. You just as clearly will not meet your goals and reach your full potential and contribute as much to your profession and your community if you do not pursue the opportunities presented to you.

I have been fortunate to use my legal training in a variety of interesting and satisfying ways, but I also stand before you as someone who, like most lawyers I know, has not received every job I have pursued. That has not prevented me from trying, and it should not prevent you from trying either. So if you want to become a law firm associate or a prosecutor or a public defender, apply for the job. If, after appropriate legal experience, you wish to become a judge, seek the appointment. If you want to be a school board member or a legislator or maybe even governor, run for the office. Sure, you may not make it, but you won't have a chance unless you try. Good things can happen when you do.



I've talked about the empowerment and responsibility you assume as you take this next step. I've suggested that you stay close to your friends; give respect and compassion to your clients; always prepare, prepare, prepare; achieve balance and quality in your personal and private lives; and pursue your dreams.

Finally, as important as your chosen profession may be, never let it stand in the way of being a good parent, spouse, or caregiver; never compromise your core principles.

This law school has served as the bridge that leads to the potential for tremendous personal growth and public service, to assumption of responsibility for the best that the American legal tradition has to offer, and to a vast array of professional callings that will enlist you to exercise power in the interests of justice.

As you embark on this wonderful adventure, remember your values, those values that brought you here and will take you through life's challenges. Remember that all anyone can ever ask of you is that you do your best.

I started off talking about hope. You truly are our hope, and we hope all of you will dedicate yourselves to making an imperfect world better and more just. Remember, you have the power to do just that. And you will.

I wish you all the best and my most heartfelt congratulations.

Scott M. Matheson Jr. is dean of the University of Utah S.J. Quinney College of Law.





# assumptions

LAWYERS

MUST

*never*

MAKE

d d d

BY BRETT G. SCHARFFS<sup>1</sup>

“You did what!?” my Uncle bellowed.

“I assumed you saw me pass you,” I said defensively.

My Uncle Dick, no children of his own, had brought 13-year-old me along on one of his epic bicycle treks down the California coast near Carmel. Inevitably he ended up waiting for me to catch up, and when I finally did, he was ready to hop back on his bicycle and begin peddling again. For once, when I caught up, he was deep in conversation with another cyclist on the side of the road. I waved and hurried on, savoring the prospect of choosing my spot to rest and wait for him for a change. Finally, I stopped and rested. So this is what it feels like to be out front, I thought.

But when 30 minutes passed, I got nervous enough to climb on my bike and pedal back. When I got to the spot where I had passed my uncle, he was no longer there. Now I was concerned, and I decided I had better continue retracing my trail, although I couldn't be sure that he hadn't passed me at some point during my rest. By the time I met up with him, he must have been pretty worried, but all I saw was anger.

“You what?” he repeated.

“I assumed you . . .”

“You assumed?” he said sarcastically. “Spell it.”

I meekly complied. “A-s-s . . .”

“Stop. What does that spell?”

“Ass?” I answered doubtfully.

“Continue,” he ordered.

“ . . . u-m-e.”

“What does that spell?” he demanded.

I hesitated. “u . . . m-e?”

“That's what assuming does,” he declared. “Makes an ‘ass’ out of ‘you’ and ‘me.’”

“Don't ever assume,” he ordered, and to his credit my Uncle Dick communicated the message with a directness and clarity that makes the experience as vivid today as it was over 25 years ago.

## II | ASSUMPTIONS AND PRESUMPTIONS

Lawyers make assumptions many times every day. We may wish to think that we are all about evidence and proof—Just the facts, ma'am—but in reality, making assumptions is the bread and butter of our professional lives. An assumption involves believing something to be true without sufficient grounds for knowing it to be true. When we assume, we take something for granted without proof.<sup>2</sup> As lawyers we routinely make assumptions, sometimes formally,<sup>3</sup> as when we write an opinion letter,<sup>4</sup> sometimes informally,<sup>5</sup> as when we engage in stereotyping or attempt to exploit the suspected prejudices of others.<sup>6</sup>

Closely related to assumptions are presumptions. A presumption relieves a party in whose favor the presumption runs of the burden of proof. “Legal presumptions . . . are not a ‘means of proof’ . . . [but rather] a dispensation of the need to furnish proof.”<sup>7</sup> For example, we presume that someone is “legally dead” when they have been absent for a given length of time without evidence that they have been seen or heard.<sup>8</sup> The most famous presumption in the law is the presumption of innocence,<sup>9</sup> but our criminal system is based upon even deeper assumptions about individual responsibility for one’s actions.<sup>10</sup> Some presumptions are rebuttable, such as when we presume that a child of a certain age is not capable of committing a crime.<sup>11</sup>

As lawyers we often have to make snap judgments, sometimes in rapid-fire succession, which often are built on an undergirding of assumptions. We also make assumptions when we form a hypothesis and develop evidence to prove our “theory of the case.” But while making assumptions is a necessary and natural part of our professional lives, making assumptions can also get us into trouble. Making assumptions may reflect laziness or pride: laziness when we trust our impressions without doing the hard work of verification, and pride when we close our eyes to evidence contrary to our favored presuppositions. I want to suggest that lawyers are particularly prone to mistakes that arise from making assumptions. Let me explain.

## III | THREE PERILOUS ASSUMPTIONS

While it would be quite easy to compile a long list of assumptions that lawyers are

prone to make and that routinely cause lawyers grief,<sup>12</sup> there are three assumptions that pose particular peril to lawyers. It would hardly be an exaggeration to say that these are three assumptions that a lawyer must never make.

- ① First, don’t assume you are the good guy.<sup>13</sup> You probably are not.
- ② Second, don’t assume you understand the other guy. You almost certainly do not.
- ③ Third, don’t assume you are right. You are most likely wrong.

Now, please do not misunderstand me. It is as important for me to avoid making these assumptions as it is for you. And, while you are probably not the good guy, you might well not be the bad guy either. You very well may understand the other guy, in a partial and limited way. And you are probably not entirely wrong. Although your spouse and I are certain that you are not entirely right.

Unfortunately, avoiding these assumptions requires a large dose of self-doubt, empathy, and humility, and there is precious little in our professional education or practice that helps us cultivate this particular set of habits or traits of character. Indeed, our professional lives are organized and structured in a way that almost compels us to make these particular assumptions.

## IV | THE ORGANIZATION AND STRUCTURE OF OUR PROFESSIONAL LIVES

What is it about the professional lives of lawyers that makes us particularly prone to assuming that we are the good guy, that we understand the other guy, and that we are right? Three features of the legal profession are of particular significance, each of which is closely related to one of these three assumptions.

### Ⓐ THE ADVERSARIAL SYSTEM

First and most obviously, ours is an adversarial profession, and this means we take sides. There are two important implications of this rather pedestrian observation. First, we tend to identify with the side we are on. As we identify with our cause, we tend increasingly to think of it as being good, or right, or just. Naturally, we come to think of ourselves as the good guys. Second, we tend to caricature, villainize, or in extreme cases even dehumanize our opponents. This tendency is a

well-documented feature of rivalries, feuds, and war.<sup>14</sup> While this tendency is hopefully less severe in the law than when facing a mortal enemy, there is still a strong propensity to think of the other side as the bad guys. The reality, of course, is likely much more complex, and in most situations there will be good and bad, right and wrong, as well as the potential for abuse on both sides. As Isaiah Berlin said, quoting Immanuel Kant, “Out of timber so crooked as that from which man is made nothing entirely straight can be built.”<sup>15</sup>

This risk of assuming you are the good guy is particularly acute for prosecutors, who quite naturally view themselves as being on the side of truth and justice. But prosecutors are in a uniquely powerful position and face a particular proclivity to abuse the weapons at their disposal. For example, I have an acquaintance who was indicted nine years ago for securities fraud. For nearly a decade he was bullied and hounded by prosecutors who never quite got around to pursuing or resolving his case. From time to time he was threatened with a lengthy prison sentence, and the government attorneys tried to cajole him into being a witness against his father, who had been in business with him. Over this period of almost 10 years, he spent more than a hundred thousand dollars on lawyers’ bills. Finally, on the eve of trial, the government offered him a deal. He pled guilty to one misdemeanor. The negotiated description of his alleged misconduct was so technical that even as a professor who teaches securities law it was difficult to discern exactly what he had done wrong. Nevertheless, this criminal indictment hung over his head for nearly 10 years, caused many sleepless nights, and took a toll on his marriage, not to mention his relationship with his father, which has been all but destroyed.

I suspect the prosecutors in this case have little or no idea the ordeal they put this man through. Indeed, they probably think they showed statesmanship and restraint in allowing him to plead to a lesser offense and avoid prison. They probably assume they were the good guys and that they let him off easy.

### Ⓑ STEREOTYPING

A second reason we make unwarranted assumptions relates to the ways in which we rely upon stereotypes. As lawyers we are in the business of making quick assessments.

We often deal with people or situations that seem quite familiar, and we become adept at noting patterns and similarities. After years of practice we lawyers may come to believe that there is nothing we haven't seen before.

One of my mentors, Dean Anthony Kronman, has argued that legal training, especially the case method, cultivates in students an attitude of "moral cosmopolitanism that is best expressed, perhaps, by the old Roman motto *nihil humanorum alienum meum est*, 'nothing human is foreign to me.'"<sup>16</sup> Lawyers are less likely to be gullible than they were before beginning their legal training, but they are also less likely to be trusting, and are unlikely to be surprised by human selfishness and perfidiousness. Having seen so much so many times, it becomes easy for lawyers to mistakenly think they know exactly what is going on when they encounter a situation that looks very familiar.

We assume we understand the other guy because we have become expert in assessing situations and people. This can lead us to making confident, and often inaccurate, assumptions about people or situations based upon a paucity of real evidence. Thus, one of the most common quips about lawyers is "Often wrong, never in doubt." We may jump to conclusions too quickly. For example, we are all familiar with how biases and prejudices of various types tend to become more hardened and extreme as we grow older.

#### © PASSING JUDGMENT

Closely related to assumptions made when stereotyping are assumptions made when passing judgment. As lawyers we are constantly passing judgment on others: Are they telling the truth? Can they be trusted? Are they virtuous or vicious? Over time we get better at making snap judgments. The tendency to pass judgment emphatically and confidently grows stronger as we gain experience and expertise—indeed, simply as a facet of growing older. As we age, our mode of problem solving gradually changes from one based upon analysis and calculation to one based upon pattern recognition. In his book *The Wisdom Paradox*, neuroscientist Elkhonon Goldberg describes this process:

*Frequently, when I am faced with what would appear from the outside to be a challenging problem, the grinding mental computation is somehow circum-*

*vented, rendered, as if by magic, unnecessary. The solution comes effortlessly, seamlessly, seemingly by itself. What I have lost with age in my capacity for hard mental work, I seem to have gained in my capacity for instantaneous, almost unfairly easy insight.*<sup>17</sup>

Today some people urge us to believe that the immediate judgments we make in a blink of an eye are more accurate and reliable than the decisions we make when we engage in a lengthy process of investigation, thought, and deliberation. For example, in his book *Blink*, Malcolm Gladwell describes an experiment involving student evaluations of teachers. A psychologist gave students "three ten-second videotapes of a teacher—with the sound turned off—and found they had no difficulty at all coming up with a rating of the teacher's effectiveness."<sup>18</sup> When the clips were cut back to five seconds, "the ratings were the same." These ratings were "remarkably consistent even when she showed the students just two seconds of videotape." When these snap judgments were compared with evaluations made by students after a full semester in a professor's class, the outcomes were essentially the same. "A person watching a silent two-second video clip of a teacher he or she has never met will reach conclusions about how good that teacher is that are very similar to those of a student who has sat in the teacher's class for an entire semester. That's the power of our adaptive unconscious."<sup>19</sup>

But our instantaneous judgments and snap assessments are almost certainly incomplete and quite probably wrong. Why?

For one thing, our stereotypes and judgments often rest upon prejudices that we don't even suspect we possess. For example, in the past 30 years since putting up screens between musicians auditioning for orchestra jobs and the committees evaluating them has become commonplace, "the number of women in the top U.S. orchestras has increased fivefold."<sup>20</sup>

Another cause of our proclivity to judge imperfectly is the human capacity for self-deception, which is surely one of our most highly developed capacities. Consider the hypocrite who beheld the mote (a small particle or speck of dust) in his brother's eye, but failed to consider the beam (a large piece of timber or metal that is long in proportion to its thickness) that was in his own eye.<sup>21</sup> Why is it that we have such a keen eye for spotting self-deception in others, but a big blind spot

for recognizing it in ourselves? Part of the reason, I suspect, is that we tend to judge ourselves based upon our intentions, whereas we judge other based upon their actions.

#### V | CORRECTIVE ACTIONS

I would like to suggest several concrete steps we can take to counteract the tendency to make unwarranted assumptions, including the assumption that we are the good guy, the assumption that we understand the other guy, and the assumption that we are right.

##### Ⓐ KEEP AN OPEN MIND

First, when trying to counter these powerful assumptions, it is important to keep our minds open to contrary evidence. Myson of Chen, one of the Seven Sages, advised, "We should not investigate facts by the light of arguments, but arguments by the light of facts."<sup>22</sup>

Judge Learned Hand is often considered the most influential American judge who was never on the Supreme Court. Judge Hand was famous for the painstaking and evenhanded approach he took to the law. Justice Felix Frankfurter occasionally referred to Hand as the "modern Hamlet," and Hand's biographer, Gerald Gunther, noted that Hand "was uncertain about the proper result in most cases, even after decades of judicial experience."<sup>23</sup> Hand believed that every judge should first and foremost entertain the possibility that he or she might be mistaken. Hand said:

*Of those qualities on which civilization depends, next after courage, it seems to me, comes an open mind, and, indeed, the biggest courage is, as Holmes used to say, to stake your all upon a conclusion which you are aware tomorrow may prove false.*<sup>24</sup>

The truth is we may not be the good guy and we almost certainly do not understand the other guy. This is not only because we have not walked the proverbial mile in his moccasins, we often lack the imagination and empathy to even consider what such a journey might look and feel like. A few years ago I wanted to learn more about the word "empathy," so I looked it up in my 13-volume *Oxford English Dictionary*. Imagine my surprise when the word "empathy" was nowhere to be found.<sup>25</sup> Upon reflecting on my treatment at the hands of my tutors as a student at



One of the most common quips about lawyers is

“Often **WRONG**, never in **DOUBT**.”



Oxford, it seemed to me quite fitting that this was a concept that was not even a linguistic possibility at Oxford.<sup>26</sup>

One reason why we sometimes trust our assumptions more than we should is that we mistake having our assumptions *vindicated* with having them *justified*. Consider prejudice and stereotyping. Perhaps I believe that Mormon men are narrow-minded and sexist, even though I haven't really ever known any Mormon men. I have heard this about

Mormons and have no reason to doubt that it is true. I meet a Mormon man and he behaves in a way that I view as being narrow-minded and sexist. My assumption about Mormon men has been vindicated. I saw what I was expecting to see. I can say emphatically that every Mormon man I have met is narrow-minded and sexist. With this firsthand experience, my assumption about Mormon men will likely become even stronger, and my sense that my assumption is valid will be

stronger, too. Indeed, after a few more verifying experiences, I probably won't even view this as an assumption, but rather a fact.

But the fact that one of our assumptions has been vindicated does not mean that it is or was justified. Justification involves having a sufficient basis in reason for believing something to be true. A belief that Mormon men are narrow-minded and sexist is only justified if, based upon a broad array of evidence and proof, a general rule can be inferred from a



As we identify with our cause . . . we tend to **CARICATURIZE**,

large number of cases. Even then, a justified belief will probably be qualified by a variety of caveats and limitations that have emerged from our observation of numerous examples of the phenomena in question to account for exceptions and variations.

It is easy to mistake vindication as justification, especially given our tendency to give more weight to evidence that confirms our presuppositions and to discount evidence that calls our assumptions into doubt. Perhaps this explains why many members of minority groups are so sensitive to portrayals of members of their groups that reflect stereotypes. The American writer Jessamyn West once observed, “We want the facts to fit the preconceptions. When they don’t, it is easier to ignore the facts than to change the preconceptions.”<sup>27</sup> This tendency to ignore facts that do not fit our preconceptions, while problematic for everyone, can be even

more problematic for the lawyer. As La Rochefoucauld memorably said, “There is nothing more horrible than the murder of a beautiful theory by a brutal gang of facts.”<sup>28</sup> Many a courtroom lawyer has witnessed the massacre of their beautiful theories.

#### ® BE A SKEPTIC, NOT A CYNIC

A second protective measure against making unwarranted assumptions lies in the distinction between being a skeptic and a cynic. When I was a student, Dean Guido Calabresi repeated like a mantra, “For a lawyer skepticism is necessary, cynicism devastating.” What is the difference between being skeptical and being cynical, and why is it important that a lawyer be one, but dangerous if he or she is the other? I had thought of the two terms as more or less synonymous. In time, however, I began to understand what Dean Calabresi may have meant by this distinction.

A lawyer must be skeptical. We see people acting at their self-interested worst. Clients do not always tell the truth, even to their lawyers. Memories tend to be selective and self-serving. Opposing counsel often engage in grandstanding and gamesmanship. A lawyer cannot afford to take things at face value; the unexpected and improbable must be foreseen and planned for. How things will look in litigation must be anticipated at a time when partners seem to see eye to eye. Lawyers encounter human beings treating each other with almost inconceivable indifference and brutality. Lawyers know too much to be completely trusting.

But a lawyer must not be cynical. The *Oxford English Dictionary* defines a cynic as “one who shows a disposition to disbelieve in the sincerity or goodness of human motives and actions, and is wont to express this by sneers and sarcasms.”<sup>29</sup> The cynic exhibits

## VILLAINIZE, or in extreme cases even DEHUMANIZE our opponents.



contempt rather than compassion. Believing the worst of others serves as grounds for treating them with disregard.

To be skeptical is to doubt whether someone is telling the truth; to be cynical is to doubt whether there is such a thing as truth, or whether being truthful matters at all. To be skeptical is to be unsurprised by human selfishness; to be cynical is to maintain that there is no such thing as selflessness. To be skeptical is to realize that people sometimes behave in ways that are insincere or deliberately hurtful; to be cynical is to disbelieve in the human capacity for sincerity or goodness. To be skeptical is to recognize that we are each capable of evil; to be cynical is to believe only the worst about each other. To be skeptical is to recognize that matching means to ends can be difficult and controversial; to be cynical is to believe that one's ends always justify one's means. One can be doubtful, wary, and watchful without being contemptuous, sneering, and sarcastic.

A skillful, cynical legal technician is dangerous, the more dangerous for being the more skilled. In your practice as lawyers, there will be times when it will prove more difficult than you can possibly imagine to keep your skepticism from degenerating into cynicism. Especially at moments of extremity, it is useful to ask ourselves whether we have crossed the line from skepticism to cynicism. If we have, or if we cannot say for certain that we have not, we should be

alarmed—not only out of concern for the damage we may work but also out of concern for the welfare of our own souls.

### © DOUBT THYSELF

A third way in which we can avoid some of the pitfalls of unwarranted assumptions lies in having a measured tentativeness about our own opinions, even those we hold strongly. In 1958, at age 87, Judge Hand delivered the Oliver Wendell Holmes Lectures at Harvard Law School. To the dismay of many in the audience, he expressed doubt about the correctness of the recent school desegregation cases. But, quoting Benjamin Franklin, Hand acknowledged his doubts about his own conclusions:

*Having lived long, I have experienced many instances of being obliged by better information or fuller consideration to change opinions even on important subjects, which I once thought right, but found to be otherwise. It is therefore that the older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others.<sup>30</sup>*

Unfortunately, this attitude does not seem to be characteristic of most of us as we grow older. The more common tendency is to become more set in our ways, more committed to our previous viewpoints, and more unwilling to reassess honestly our prior conclusions. Charles Alan Wright suggests that “[i]n spite of being a modern Hamlet—or,

more likely, because of it—Learned Hand is firmly enshrined in the small group of judges who universally are regarded as great.”<sup>31</sup> Simply being unsure or indecisive is not what made Hand great; rather, it was his open mind, his willingness to entertain opposing possibilities and to characterize each in its best possible light, and his capacity to understand and feel the independent force exerted by each side of an argument.

In cautioning us about the perils of passing judgment, I am not making a postmodernist observation about the impossibility of differentiating between good and evil. There is a difference between right and wrong, good and bad, light and dark, and we can know it.<sup>32</sup> But most truths are partial, and all human perceptions are imperfect. Too often we draw a stark dichotomy between objectivity and subjectivity, when in reality our perceptions are objective, subjective, and relative—objective due to the character and traits of the thing being perceived, subjective due to the character and traits of the person doing the perceiving, and relative due to outside factors such as the color and frequency of light. For example, when I conclude that you acted courageously, it is partly based upon something you did, partly based upon my own values and perceptions, and partly based upon the contingencies of the situation.

## VI | CONCLUSION

My purpose has not been to denounce all assumptions. To the contrary, I have suggested that our work as lawyers requires us to make assumptions. Rather, my purpose has been to highlight certain assumptions that pose particular peril for lawyers, not only because they can lead us astray, but because they engender a kind of professional arrogance and hubris for which lawyers are all too famous.

Whereas the adversarial system drives us to think of ourselves as the good guy, if we try to keep an open mind and strive to develop empathy, if we remain willing to alter our preconceptions when facts are contrary to our suppositions, then we will be more open to the possibility that we may not be completely in the right. Whereas the necessity of making snap judgments and our increasing capacity to recognize patterns creates a strong tendency for us to assume

that we understand the other guy, if we subject our stereotypes to verification, if we temper our skepticism before it degenerates into cynicism, if we genuinely strive to develop empathy, then we may retain the capacity for reassessment and correction. And whereas we may get better at exercising judgment as we grow in expertise and even wisdom over years of deliberate practice, if, like 87-year-old Judge Learned Hand, we can retain a healthy measure of self-doubt, then our judgments may be tempered by a measure of humility and open-mindedness that may enable us to transcend our natural inclinations and limitations, in life as well as in the law.

Especially at moments of **EXTREMITY**,  
it is useful to ask ourselves whether we have



## CROSSED THE LINE

from skepticism to cynicism.

### NOTES

- ① Professor of Law, J. Reuben Clark Law School, Brigham Young University. BSBA, MA Georgetown University; BPhil Oxford University; JD Yale Law School. I am grateful to Danny Walker and the Spirit of the Law Board for the invitation to speak today. I wish to thank Marjorie Fannesbeck Layne for her kind and capable research assistance. This article is dedicated to the richly wrathful Richard Wrathall, my wonderful Uncle Dick. I love you. Copyright © 2005 Brett G. Scharffs.
- ② There are numerous related definitions of the term “assumption” that illustrate additional dimensions of the phenomena, including pretending to possess, as to “assume a virtue, if you have it not”; or taking something as one’s own, to appropriate, or usurp, as in to “assume an honor.” Synonyms include, to “put on, counterfeit, sham, affect, pretend, simulate, feign.” Making assumptions is more related to appearance than to reality. See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 70 (10th ed. 1994).
- ③ An example of a formal assumption in the law is the policy of inferring that someone who is engaged in obfuscation is trying to hide something. For example, the law assumes that someone who pays child support is hiding something when he resists discovery of detailed financial information. See Philip G. Seastrom & Michelle L. Kusmider, *Family Law Corner: Child Support and the High Income Earner*, 41 ORANGE COUNTY LAWYER 40, 41 (1999).
- ④ I once heard a lawyer brag that when he gave a validity opinion in connection with a securities offering, it was so filled with qualifications and disclaimers that a careful reading would reveal that he had actually said nothing that was not either based upon a stated assumption or a declaration in an officers certificate upon which he explicitly relied.
- ⑤ One of the most problematic examples of informal assumptions in the law is racial profiling. See Frank Rudy



Cooper, *The Un-balanced Fourth Amendment: Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851 (2002). Cooper explains:

Racial profiling does not provide information; it collapses all potential information around the assumption about behavior derived from the stereotype about one characteristic. Whereas a description of a suspect simplifies merely for purposes of proper identification, a racial profile takes very broadly defined characteristics and associates any individual owning those characteristics with bad behavior.

*Id.* at 872.

- ⑥ To gain advantages for their clients, attorneys often exploit the suspected prejudices of jury members. In an attempt to combat the effect of jury prejudice in a case involving an altercation between a black student and a white student in Anchorage, Alaska, the defense lawyers for the black student proposed a jury instruction that required the jury to engage in a “race-switching exercise” to assure they were not relying on racial-stereotype thinking. See James McComas & Cynthia Strout, *Combating the Effects of Racial Stereotyping in Criminal Cases*, 23 CHAMPION 22 (1999). A portion of the proposed jury instructions describing the “race-switching exercise” is as follows:

To ensure that you have not made any unfair assessments based on racial stereotypes, you should apply a race-switching exercise to test whether stereotypes have affected your evaluation of the case. “Race-switching” involves imagining the same events, the same circumstances, the same people, but switching the races of the parties and witnesses. For example, if the accused is African American and the accuser is white, you should imagine a white accused and an African-American accuser. If your evaluation of the case is different after engaging in race-switching, this suggests a subconscious reliance on stereotypes. You must then re-evaluate the case from a neutral, unbiased perspective.

*Id.* at 24.

- ⑦ Geoffrey J. Orr, *Toward a Workable Civil Presumptions Rule in Louisiana*, 53 LA. L. REV. 1625, 1629 (1993).
- ⑧ The Uniform Probate Code provides that an individual is presumed dead if he or she is “absent for a continuous period of 5 years, during which he (or she) has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry.” U.P.C. § 1-107(5) (1990).
- ⑨ See Cathy Lynne Bosworth, *Pretrial Detainment: The Fruitless Search for the Presumption of Innocence*, 47 OHIO ST. L.J. 277 (1986) (documenting the history of the presumption of innocence and how the presumption has evolved in recent times).
- ⑩ See Matthew Jones, *Overcoming the Myth of Free Will in Criminal Law: The True Impact of the Genetic Revolution*, 52 DUKE L.J. 1031 (2003). Jones asserts that the theoretical justification for criminal punishment in the American criminal justice system is based on the idea that “offenders have made a voluntary choice to break the law, thus validating the imposition of a societal sanction.” *Id.* at 1031.

- ⑪ See Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503 (1984). Walkover explains:

The common law’s resolution of this basic tension between culpability and juvenile status was lodged in the infancy defense. This defense constituted a series of presumptions that embodied largely intuitive judgments concerning a child’s capacity to take responsibility for individual acts. These presumptions had the effect of screening out the non-culpable from treatment as adult offenders. Children under the age of seven were conclusively presumed to be incapable of taking responsibility for their acts and thus were precluded from criminal adjudication. Children over the age of fourteen were regarded as adults and thus were presumed capable of committing crimes. Between these two ages the common law created a rebuttable presumption of incapacity.

*Id.* at 511. The U.S. Supreme Court created a strong presumption when it recently held in *Roper v. Simmons*, decided March 1, 2005, that it is cruel and unusual punishment to execute an individual who was under the age of 18 at the time he committed the crime.

- ⑫ Consider the following classics: “It doesn’t matter.” “No one will find out.” “No one will be hurt.” “I’m sure this case is still good law.” “These partners will be friends forever.” “I can handle this matter.” “I’ve still got time.” The list is virtually endless.

- ⑬ No gender implication is intended by the use of the informal term “guy,” and hopefully none will be inferred.

- ⑭ See John M. Kang, *Deconstructing the Ideology of White Aesthetics*, 2 MICH. J. RACE & L. 283 (1997). Kang reports that during World War II, when American sentiment toward the Japanese was strongly negative, the *Los Angeles Times* published the following: “A viper is nonetheless a viper wherever the egg is hatched—so a Japanese American, born of Japanese parents—grows up to be Japanese, not an American.” *Id.* at 329. In addition, U.S. World War II propaganda often depicted Japanese soldiers with “buck teeth, slanted eyes and with thick glasses.” *Id.*

- ⑮ ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY* xi (Henry Hardy ed., 1991) (quoting Immanuel Kant, *Idee zu Einer Allgemeinen Geschichte in Weltbürgerlicher Absicht* [1784]).

- ⑯ ANTHONY T. KRONMAN, *THE LOST LAWYER* 159 (1993).

- ⑰ ELKHONON GOLDBERG, *THE WISDOM PARADOX: HOW YOUR MIND CAN GROW STRONGER AS YOUR BRAIN GROWS OLDER* 9 (2005). Dr. Goldberg observes, “With age, the number of real-life cognitive tasks requiring a painfully effortful, deliberate creation of new mental constructs seems to be diminishing. Instead, problem-solving (in the broadest sense) takes increasingly the form of pattern recognition.” *Id.* at 20.

- ⑱ See, e.g., MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 12 (2005).

- ⑲ *Id.* at 12–13.

- ⑳ *Id.* at 250. Gladwell adds, “What the classical musical world realized was that what they had thought

was a pure and powerful first impression—listening to someone play—was in fact hopelessly corrupted.” *Id.* at 250–51.

- ㉑ “Or how wilt thou say to thy brother, Let me pull out the mote out of thine eye; and, behold, a beam is in thine own eye? Thou hypocrite, first cast out the beam out of thine own eye; and then shalt thou see clearly to cast out the mote out of thy brother’s eye.” Matthew 7:4–5 (King James Version).

- ㉒ QUOTED IN BURTON STEVENSON, *HOME BOOK OF PROVERBS, MAXIMS AND FAMILIAR PHRASES* (1948).

- ㉓ Justice Frankfurter’s characterization of Judge Hand as the “modern Hamlet” can be found in a letter from Felix Frankfurter to Charles C. Burlington (Jan. 1933) (Burlington Papers, Harvard Law School). Gunther’s observation that Hand was uncertain about the proper result in most cases can be found in GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 136, 289 (1994).

- ㉔ Learned Hand, *The Bill of Rights*, in *THE OLIVER WENDELL HOLMES LECTURES* 1958, 75 (1962).

- ㉕ In volume III (D–E) of the 1933 edition of the *Oxford English Dictionary*, the word “empasma” is followed by the word “empatron.” 3E THE OXFORD ENGLISH DICTIONARY 125 (1st ed. 1933).

- ㉖ You will be relieved to learn that the 1978 supplement to the 1933 edition of the OED includes the following definition of “empathy”: “The power of entering into the experience of or understanding objects or emotions outside ourselves.” THE OXFORD ENGLISH DICTIONARY 329 (1st ed. Supp. 1978).

- ㉗ JESSAMYN WEST, *THE QUAKER READER* 2 (The Viking Press ed. 1962).

- ㉘ FRANCOIS DUC DE LA ROCHEFOUCAULD, *REFLECTIONS, OR SENTENCES AND MORAL MAXIMS* (1678).

- ㉙ THE OXFORD ENGLISH DICTIONARY 1304 (1st ed. 1933).

- ㉚ Learned Hand, *The Bill of Rights*, in *THE OLIVER WENDELL HOLMES LECTURES* 1958, 75 (1962).

- ㉛ Charles Alan Wright, *A Modern Hamlet in the Judicial Pantheon*, 93 MICH. L. REV. 1841, 1841 (1995).

- ㉜ And so can the postmodernist, as is evidenced all too frequently by her passionate devotion to the correctness of her own point of view. As a theoretical matter, it may be the case that all truth is relative and that objectivity is impossible, but one cannot coherently assert these propositions, since doing so involves what philosophers have called operational self-refutation—the making of the assertion belies one’s belief in its truth.

#### ART CREDITS

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# Religious DOCTRINE AND THE LANGUAGE of the Law

BY DEREK P. PULLAN

WHILE WORKING AS AN ATTORNEY IN SOUTH AFRICA, MAHATMA (MOHANDAS K.) GANDHI BEGAN TO STUDY THE BHAGAVAD GITA (THE GITA). AS HE PONDERED UPON THE MEANING OF

the Gita's term *samabbava*, or "equability," his "study of English law came to [his] help." He wrote: "I understood more clearly in light of the Gita teaching the implication of the word *trustee*. My regard for jurisprudence increased, *I discovered in it religion*."<sup>1</sup> ✿ This observation opened my eyes to the frequent use of legal language in scripture. At these coordinates—where religion and the language of the law intersect—legal training can provide deeper spiritual understanding. ✿ How these doctrinal-legal coordinates came to exist is a question for etymologists. The human family may have imported into its legal institutions the terminology of a divine justice system. It is equally plausible that God and His prophets chose the language of extant legal institutions to teach religious truths. Whatever the explanation, the result is the same—a scriptural text brimming with legal metaphor.





## THE TRIAL OF THE SINNER

**T**he scriptures use the language of criminal trial procedure to describe final judgment.<sup>2</sup> As the accused, each of us will stand trial before the “bar of the great Jehovah, the Eternal Judge of both quick and dead.”<sup>3</sup> There we are “arraigned . . . to be judged according to [our] works.”<sup>4</sup> The final determination is either “guilty” or “guiltless.”<sup>5</sup>

The charge is violating God’s laws, the breach of which is sin. Only those who keep all of the commandments merit salvation, “for the Lord cannot look upon sin with the least degree of allowance.”<sup>6</sup> Those who do not keep the commandments merit punishment. The evidence against us is overwhelming—“for our words will condemn us, yea, all our works will condemn us; . . . and our thoughts will also condemn us.”<sup>7</sup> Paul succinctly described our desperate circumstances: “By the . . . law there shall no flesh be justified. . . . For all have sinned, and come short of the glory of God.”<sup>8</sup>

For Book of Mormon prophets, judgment has been entered against fallen men and women. However, God mercifully stayed execution of that judgment and placed us in “a state of probation”<sup>9</sup> during which we might repent. The dilemma is that in varying degrees we have all “waste[d] the days of [our] probation”<sup>10</sup> in sin.

The good news is that we need not appear “before the tribunal of God”<sup>11</sup> without

counsel. Jesus Christ “appear[s] in the presence of God”<sup>12</sup> for the penitent. More than 2,500 years ago Isaiah confidently prophesied, “For God is near, and he will prove me innocent. . . . The Sovereign Lord himself defends me—who, then, can prove me guilty?”<sup>13</sup> In the first century John confirmed the Lord’s role as defense counsel for the penitent: “And if any man sin [and repent], we have an advocate with the Father, Jesus Christ the righteous.”<sup>14</sup> In the *New International Version of the Bible* (NIV), this verse reads: “But if anybody does sin, we have one who speaks to the Father in our defense.”<sup>15</sup>

In this dispensation the Lord repeatedly calls himself the Advocate.<sup>16</sup> In that capacity He “knoweth the weakness of man and how to succor them who are tempted.”<sup>17</sup> But if all have sinned and come short of salvation, what defense can be plead? Consider this excerpt from the trial transcript:

*Listen to him who is the advocate with the Father, who is pleading your cause before him—*

*Saying: Father, behold the sufferings and death of him who did no sin, in whom thou wast well pleased; behold the blood of thy Son which was shed, the blood of him whom thou gavest that thyself might be glorified;*

*Wherefore, Father, spare these my brethren that believe on my name, that they may come unto me and have everlasting life.*<sup>18</sup>

Our sinless Advocate—who retained the wounds of crucifixion as physical evidence—suffered punishment for sin in our place.<sup>19</sup> Like the Fifth Amendment, divine law prohibits punishment being imposed twice for the same offense.<sup>20</sup> Thus, in our defense, the Lord pleads double jeopardy. His vicarious suffering is a complete affirmative defense. When proffered, it exonerates the penitent sinner, who is found “guiltless before [the] Father at that day when [He] shall stand to judge the world.”<sup>21</sup>

In his 38th Meditation, the Puritan Minister Edward Taylor (c. 1642–1729) poignantly described our need and resultant gratitude for the Lord’s representation:

*My case is bad. Lord, be my advocate.  
My sin is red. I’m under God’s arrest.  
Thou has the hint of pleading; plead my state.  
Although its bad Thy plea will make it best.  
If Thou wilt plead my case before the King:  
I’ll wagonloads of love and glory bring.”*<sup>22</sup>

#### FORECLOSURE AND REDEMPTION

The scriptures also teach that the sinner is party to a civil foreclosure action. When a person violates God’s laws, he mortgages his soul in return for the “pleasures of sin for a season.”<sup>23</sup> Isaiah wrote: “Behold, for your iniquities have ye sold yourselves.”<sup>24</sup> Nephi concurred, writing that the proud and the foolish “sell themselves for naught.”<sup>25</sup>

On Judgment Day the note falls due. Justice demands that the debt be paid or that the soul of the debtor be foreclosed upon. Satan—who actively persuaded the sinner to incur the debt in the first place—is the only purchaser at the foreclosure sale. There he “obtain[s]” the sinner who falls “prey to his awful misery.”<sup>26</sup>

The good news is that Jesus Christ can redeem the encumbered soul. *Black’s Law Dictionary* defines redemption as “the act . . . of reclaiming or regaining possession by paying a specific price.”<sup>27</sup> Through His suffering Jesus Christ paid the price of sin for the penitent.<sup>28</sup> On condition of repentance, He “reclaims” them and thereby “appeases the demands of justice.”<sup>29</sup> Those who sold themselves for nothing are “redeemed without money.”<sup>30</sup>

Redeemed sinners answer to a new Creditor whose “yoke is easy” and whose “burden is light.”<sup>31</sup> Still, the demands of this

new arrangement are real. “Grace is not cheap,” taught Elder Bruce C. Hafen. “It is very expensive, even very dear. How much does grace cost? . . . If we desire ‘all that the Father hath,’ God asks all that we have.”<sup>32</sup>

Finally, the Lord’s redemption is in part unconditional. Through His own death and resurrection, all of God’s children are reclaimed from temporal death.<sup>33</sup> Having paid this debt too, Christ becomes the rightful owner of our physical bodies. The Apostle Paul taught this doctrine. Counseling the Saints at Corinth to refrain from sexual sin, he wrote: “For ye are bought with a price: therefore glorify God in your body, and in your spirit, which are God’s.”<sup>34</sup>

By the intercession of Jesus Christ, the action to foreclose upon our mortgaged bodies and spirits is dismissed. He reclaims the body unconditionally and the spirit on condition of repentance—hence, the sacred and deserved title “Redeemer.”

#### FINAL JUDGMENT IN A COURT OF EQUITY

Final judgment will occur in a court of equity. The Psalmist wrote: “With righteousness shall he judge the world, and the people with equity.”<sup>35</sup> Isaiah taught that God “shall not judge after the sight of his eyes, neither reprove after the hearing of his ears: But with righteousness shall he judge the poor, and reprove with equity for the meek of the earth.”<sup>36</sup>

Certainly, equity in this context means that the Lord will not play favorites. However, the nature of equitable remedies suggests something more. The Utah Supreme Court recently explained that equitable remedies are “distinguishable by their . . . adaptability to circumstances.”<sup>37</sup> The Court wrote:

*“The court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties.”*<sup>38</sup> *Each case presents unique facts and circumstances. What is relevant or persuasive in one equity decision may be meaningless in another context.*<sup>39</sup> *“As in much else that pertains to equitable jurisdiction, individualization in the exercise of discretionary power will alone retain equity as a living system and save it from sterility.”*<sup>40</sup>

The commandments of God do not change with the changing circumstances

of every case. Otherwise, divine law would be reduced to what Pope John Paul called “the widespread spirit of . . . relativism.” This spirit, stated the Pope, “has cast doubt on reason’s ability to know the truth, which alone satisfies the human heart’s restless quest for meaning.”<sup>41</sup> A just God will not permit equity to excuse willful disobedience.

In the breach of divine law, however, each person is unique. While not controlling, a person’s capacity, experience, perception, understanding, knowledge, intent, and motive combine to influence his decisions for good or evil. In the criminal justice system, efforts are made to understand these factors. But in a temporal world, they can never be fully known or understood.<sup>42</sup>

As the only omniscient judge, the Lord is unhindered by these limitations. He comprehends all of the factors influencing our obedience and disobedience, including the thoughts and intents of our hearts. Thus final judgment will be perfectly fair and individualized—equitable.

The Lord’s knowledge of the human condition is not secondhand. Paul taught: “For we have not an high priest which cannot be touched with the feeling of our infirmities.”<sup>43</sup> An alternate translation from the Greek is: “For we have not an high priest unable to sympathize with our frailties [and] imperfections.”<sup>44</sup> In atoning for sin, Jesus Christ also suffered “temptations, and pain of body, hunger, thirst, and fatigue, even more than man can suffer, except it be unto death.”<sup>45</sup> That suffering included experiencing our infirmities and sicknesses.<sup>46</sup>

Thus the Lord’s judgment will be equitable—not because the commandments change with changing circumstances but because the Judge Himself has infinite knowledge and infinite empathy. This is what is meant by the scriptural teaching that Jesus Christ is “full of grace, equity, and truth, full of patience, mercy, and long-suffering.”<sup>47</sup>

#### PRINCIPAL AND AGENTS

In a revelation to the Prophet Joseph Smith, the Lord declared: “Wherefore, as ye are agents, ye are on the Lord’s errand; and whatever ye do according to the will of the Lord is the Lord’s business.”<sup>48</sup> The legal rules defining the relationship between principal and agent shed light on the meaning of this passage.





AS PRINCIPAL, THE LORD . . .  
CALLS AND AUTHORIZES AGENTS  
TO ASSIST IN HIS WORK.

Agency is “a fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions.”<sup>49</sup> Agency enables “a person, through the services of another, to broaden the scope of his activities and receive the product of another’s efforts, paying such other for what he does but retaining for himself any net benefit resulting from the work performed.”<sup>50</sup>

As Principal, the Lord’s work is to bring to pass “the immortality and eternal life” of His children.<sup>51</sup> He calls and authorizes agents to assist in His work. The agency relationship is established by the covenant of baptism, as well as by the oath and covenant of the priesthood. Those who receive baptism take upon themselves the name of the Principal, Jesus Christ, “having a determination to serve him to the end.”<sup>52</sup> Similarly, those who receive the priesthood promise to “live by every word that proceedeth forth from the mouth of God.”<sup>53</sup> By His agents the Lord “broaden[s] the scope of [H]is activities” on the earth. Saved souls—the net benefit derived from the work performed—belong to Him alone.

Agents of the Lord are well compensated. On the effective date of the contract, they receive the gift of the Holy Ghost. Their ultimate reward for faithful service is eternal life.<sup>54</sup> Speaking to “servants” of God, Paul taught: “For the wages of sin is death; but the gift of God is eternal life through Jesus Christ our Lord.”<sup>55</sup>

Paul knew well another principal of spiritual agency. It is not a question of whether you will be employed and compensated but by whom.<sup>56</sup> Writing to the Romans, Paul taught that “to whom ye yield yourselves servants to obey, his servants ye are . . . whether of sin unto death, or of obedience unto righteousness.”<sup>57</sup> How important it is for us to work for and receive wages from the Lord!

Mercifully, the Principal is not so concerned with when agents begin work but that they come when called. The Lord taught this truth in the parable of the laborers in the vineyard.<sup>58</sup> There he likened the kingdom of heaven to “a man that is an householder” who goes into the marketplace “early in the morning to hire lab[or]ers into his vineyard.”<sup>59</sup> The laborers are hired for “a penny a day.”<sup>60</sup> At the third, sixth, and ninth hours of the day, the householder returns to the marketplace, each

time hiring more laborers. To these he promises to pay “whatsoever is right.”<sup>61</sup> Finally, at the 11th hour, the householder hires more laborers, again promising “whatsoever is right, that shall ye receive.”<sup>62</sup>

When the day is spent, the Lord calls the laborers together to be paid, beginning from the last unto the first. He pays those hired at the 11th hour a penny. Seeing this generosity, the laborers hired first “supposed that they should have received more,” but “they likewise received every man a penny.”<sup>63</sup> Outraged by this seeming injustice, they complain: “These last have wrought but one hour, and thou hast made them equal unto us, which have borne the burden and heat of the day.”<sup>64</sup> The Lord responds: “Friend, I do thee no wrong: didst not thou agree with me for a penny? . . . Is it not lawful for me to do what I will with mine own? Is thine eye evil, because I am good?”<sup>65</sup>

So it is in the kingdom of heaven. Time in the vineyard is not so important as coming when called. Agents of the Lord are not hourly employees. Each is salaried to receive the Principal’s precious “penny.” That penny is “all that [the] Father hath.”<sup>66</sup> There simply is no more to give.

#### ADOPTION AND INHERITANCE

To be saved we must become “sons and daughters” of God. The scriptures describe this process as an adoption.

In civil law, adoption is the “judicial act which creates the relationship of parent and child where it did not previously exist and which permanently deprives a birth parent of his parental rights.”<sup>67</sup> When a final decree of adoption enters, “a child may take the family name of the adoptive parent or parents.”<sup>68</sup> Thereafter the adoptive parents and the child “sustain the legal relationship of parent and child, and have all the rights and [are] subject to all the duties of that relationship.”<sup>69</sup> The rights of an adopted child include the right of inheritance.

Spiritual adoption is remarkably similar. In our fallen state we are “carnal, sensual, devilish.”<sup>70</sup> Alma described this condition in familial terms. He wrote: “Whosoever bringeth forth evil works, the same becometh a child of the devil.”<sup>71</sup> As parent, the devil thwarts the best interests of his children and is consistently guilty of nonsupport.<sup>72</sup> Mercifully, God provided a means of spiritual adoption.

By repentance and obedience to the gospel, we become “candidates for the fulness of salvation” and are “accounted as sons and daughters of Jesus Christ.”<sup>73</sup> In contrast, His children are “supported in their trials, and their troubles, and their afflictions, and shall be lifted up at the last day.”<sup>74</sup>

This process is best illustrated by the experience of King Benjamin’s people. After hearing the sermon of their prophet-king, they repented and promised lifetime obedience to God. Seeing this, King Benjamin declared:

*And now, because of the covenant which ye have made ye shall be called the children of Christ, his sons, and his daughters; for behold, this day he hath spiritually begotten you; for ye say that your hearts are changed through faith on his name; therefore, ye are born of him and have become his sons and his daughters.”<sup>75</sup>*

The people then took upon themselves the name of Christ, their adoptive Father.<sup>76</sup>

Spiritual adoption differs from civil adoption in important ways. First, while the goodness of God “actually draws us to him,” only the child can initiate spiritual adoption.<sup>77</sup> Isaiah explained: “When thou shalt make his soul an offering for sin, he shall see his seed.”<sup>78</sup>

Second, all children are born to one set of biological parents. While civil adoption may create a new parent-child relationship by operation of law, it is powerless to effect a rebirth. In contrast, spiritual adoption effects a change in our very nature—a change that is so comprehensive that it is called being “born again.”

What a gift to know that we can literally be “changed from [our] carnal and fallen state, to a state of righteousness.”<sup>79</sup> All sin and weakness to which natural men and women are inclined—pride, envy, greed, lust, cruelty, fear, addiction—can be changed to a state of righteousness wherein we have “no more disposition to do evil, but to do good continually.”<sup>80</sup>

The only prerequisite for spiritual adoption—the filing fee, if you will—is full submission to God. Surrender of self is the paramount duty of the new parent-child relationship. “As you submit your wills to God,” taught Elder Neal A. Maxwell, “you are giving him the *only* thing you *can* actually give Him that is really yours to give.”<sup>81</sup>

Like children adopted under law, adopted sons and daughters of God enjoy the right of inheritance.<sup>82</sup> As Paul taught: “The Spirit itself beareth witness with our spirit, that we are the children of God: And if children, then heirs; heirs of God, and joint-heirs with Christ.”<sup>83</sup> No wonder the scriptures consistently teach that the spiritually begotten inherit the kingdom of heaven.<sup>84</sup>

#### NOTES

① *Gandbi: An Autobiography: The Story of My Experiments with Truth* (Boston: Beacon Press, 1993), p. 265.

② While this divine decree will certainly adjudicate all liabilities between the parties, it is not appealable. See, Utah R. Civ. P. 54(b); Utah R. App. P. 3(a).

③ Moroni 10:34.

④ Alma 11:44.

⑤ Mosiah 2:38; 3 Nephi 27:16.

⑥ Alma 45:16.

⑦ Alma 12:14.

⑧ Romans 3:20, 23.

⑨ 2 Nephi 2:21.

⑩ 2 Nephi 9:27. For other references to life being a state of probation, see, 2 Nephi 2:30; Alma 42:10–13; Helaman 13:38.

⑪ Alma 5:18.

⑫ Hebrews 9:24.

⑬ Ludlow, V. L., *Isaiah: Prophet, Seer, Poet* (Salt Lake City: Deseret Book, 1982), pp. 421–22, quoting, *Today’s English Version of the Bible*, Isaiah 50:8–9.

⑭ 1 John 2:1. The Holy Ghost also bears the title Advocate. While not appearing in the King James Version of the Bible, the Greek term *parakletos* was used by the Lord in reference to the Holy Ghost. See, Bible Dictionary, “Paraclete,” citing, John 14:16, 26; 15:26; 16:7. The term may be translated “comforter,” “advocate,” or “helper.” The *New International Version Study Bible* (hereinafter “NIV”) uses the term *counselor* in these verses, noting that “it is a legal term, but with a broader meaning than counsel for the defense. . . . It referred to any person who helped someone in trouble with the law.” NIV, John 14:16, note 5, (Grand Rapids, Michigan: Zondervan Publishing, 1985). However, *advocate* “is probably the English word that most nearly represents the meaning of the Greek.” *Id.* This doctrine is reiterated in the hymn “Prayer Is the Soul’s Sincere Desire” (*Hymns* [Salt Lake City: The Church of Jesus Christ of Latter-day Saints, 1985], no. 145). Verse seven reads: “Nor prayer is made on earth alone: The Holy Spirit pleads, And Jesus at the Father’s throne, For sinners intercedes.”

⑮ NIV, 1 John 2:1

⑯ See, D&C 29:3; 32:3; 45:3; 62:1; 110:4.

⑰ D&C 62:1. Elder Jeffrey R. Holland recently noted, “*To succor* means ‘to run to.’” Holland, Jeffrey R., “Teaching, Preaching, Healing,” *Ensign*, January 2003, p. 42.

- ⑩ D&C 45:3–5.
- ⑪ Isaiah 49:15–16 reads: “Can a woman forget her sucking child, that she should not have compassion on the son of her womb? yea, they may forget, yet will I not forget thee. Behold, I have graven thee upon the palms of my hands.” Concerning the wounds retained by the Lord, Elder Jeffrey R. Holland wrote: “However dim our days may seem, they have been a lot darker for the Savior of the world. As a reminder of those days, Jesus has chosen, even in a resurrected, otherwise perfected body, to retain for the benefit of His disciples the wounds in His hands and in His feet and in His side. . . . Remind others that it is the wounded Christ who is the Captain of our souls, He who yet bears the scars of our forgiveness, the lesions of His love and humility, the torn flesh of obedience and sacrifice.” Holland, Jeffrey R., “Teaching, Preaching, Healing,” *Ensign*, January 2003, p. 42.
- ⑫ U.S. Const., Amend. V (“nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb”). Utah Const., Art. I, Sec. 12. *State v. Miller*, 747 P.2d 440 (Utah App. 1987) (“Constitutional guarantee against double jeopardy affords a criminal defendant three separate protections by prohibiting (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense”), *quoting*, *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656 (1969).
- ⑬ 3 Nephi 27:16.
- ⑭ *Supra*, note 29, pp. 57–58. *Meditation* 38 consists of seven stanzas. Stanzas 1, 4, 5, 6, and 7 are quoted here.
- ⑮ Hebrews 11:25.
- ⑯ Isaiah 50:1.
- ⑰ 2 Nephi 26:10.
- ⑱ 2 Nephi 9:46.
- ⑲ *Black’s Law Dictionary*, 7th edition, p. 1282.
- ⑳ See, Isaiah 53:5 (“But he was wounded for our transgressions, he was bruised for our iniquities: the chastisement of our peace was upon him; and with his stripes we are healed”).
- ㉑ Alma 42:11–15. See, Alma 34:16 (“And thus mercy can satisfy the demands of justice, and encircles them in the arms of safety, while he that exercises no faith unto repentance is exposed to the whole law of the demands of justice; therefore only unto him that has faith unto repentance is brought about the great and eternal plan of redemption”).
- ㉒ Isaiah 52:3.
- ㉓ Matthew 11:30.
- ㉔ Hafen, Bruce C., “The Atonement: All for All,” *Ensign*, May 2004, p. 98.
- ㉕ Alma 11:42, 44.
- ㉖ 1 Corinthians 6:14, 18, 20.
- ㉗ Psalms 98:9.
- ㉘ Isaiah 11:3–4.
- ㉙ *Hughes v. Cafferty*, 2004 UT 22 (filed March 12, 2004), *quoting*, 1 Spencer W. Symons, *Pomeroy’s Equity Jurisprudence* § 109 (5th ed. 1941).
- ㉚ *Id.*
- ㉛ *Hughes*, 2004 UT 22.
- ㉜ *Hughes*, 2004 UT 22, *quoting*, *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161, 167 (1939).
- ㉝ “Pope Worries About ‘Soulless’ Life in America,” Vatican City (AP), *Deseret Morning News*, A-2 (May 29, 2004).
- ㉞ This limitation inherent in the human condition does not render the imposition of punishment unjust. Society has the right and duty to hold a criminal offender accountable for his wrongful acts.
- ㉟ Hebrews 4:15.
- ㊱ *Supra*, note 49, explanatory note 15a.
- ㊲ Mosiah 3:7.
- ㊳ Alma 7:12.
- ㊴ Alma 9:26.
- ㊵ D&C 64:29.
- ㊶ *Black’s Law Dictionary*, 7th edition, p. 62.
- ㊷ *Supra*, note 56, *quoting*, Reuschlein, H.G. & Gregory, W.A., *The Law of Agency and Partnership* § 1, at 3 (2d ed. 1990).
- ㊸ Moses 1:39.
- ㊹ D&C 20:37.
- ㊺ D&C 84:44.
- ㊻ D&C 14:7.
- ㊼ Romans 6:22–23.
- ㊽ Elder Neal A. Maxwell stated: “Ironically, if the Master is a stranger to us, then we will merely end up serving other masters. The sovereignty of these other masters is real, even if it is sometimes subtle. They do call their cadence, for ‘we are all enlisted,’ if only in the ranks of the indifferent. To the extent that we are not willing to be led by the Lord, we will, instead, be driven by our appetites and be preoccupied with the lesser things and the pressing cares of the day.” Maxwell, Neal A., “King Benjamin’s Sermon: A Manual for Discipleship,” *King Benjamin’s Speech Made Simple* (Provo: Foundation for Ancient Research and Mormon Studies, 1999) p. 12.
- ㊾ Romans 6:16.
- ㊿ See, Matthew 20:1–16 for the parable in its entirety.
- ① Matthew 20:1–2.
- ② *Supra*, note 66.
- ③ Matthew 20:4.
- ④ Matthew 20:7.
- ⑤ *Supra*, note 70.
- ⑥ Matthew 20:12.
- ⑦ Matthew 20:13, 15.
- ⑧ D&C 84:38.
- ⑨ Utah Code Ann. § 78-30-16(i)(b).
- ⑩ Utah Code Ann. § 78-30-10.
- ⑪ *Supra*, note 77.
- ⑫ Mosiah 16:3–5.
- ⑬ Alma 5:41.
- ⑭ Alma 30:60 (“And thus we see that the devil will not support his children at the last day, but doth speedily drag them down to hell”).
- ⑮ *Bible Dictionary*, “Adoption.” See, Romans 8:14–27; Galatians 4:1–7.
- ⑯ Alma 36:3.
- ⑰ Mosiah 5:7.
- ⑱ Mosiah 5:9–12.
- ⑲ Elder Neal A. Maxwell wrote: “It is true, as you know, that God’s goodness actually draws us to him and thus leads us to repentance. Paul confirmed this (see, Romans 2:4). God’s gravitational pull is real. This was well-expressed by Jeremiah.” Maxwell, Neal A., “King Benjamin’s Sermon: A Manual for Discipleship,” *King Benjamin’s Speech Made Simple*, p. 13, *citing*, Jeremiah 31:3 (“therefore, with lovingkindness have I drawn thee”); Romans 2:4 (“the goodness of God leadeth thee to repentance”).
- ⑳ Isaiah 53:10.
- ㉑ Mosiah 27:24–25
- ㉒ Mosiah 5:2.
- ㉓ Maxwell, Neal A., “Remember How Merciful the Lord Hath Been,” *Ensign*, May 2004, p. 46.
- ㉔ Elder Bruce C. Hafen said: “To qualify for such exquisite treasure [all that the Father hath], in whatever way is ours, we must give the way Christ gave—every drop He had: ‘How exquisite you know not, yea, how hard to bear you know not.’ Paul said, ‘If so be that we suffer with him,’ we are joint-heirs with Christ.” Hafen, Bruce C., “The Atonement: All for All,” *Ensign*, May 2004, p. 98.
- ㉕ Romans 8:16–17. See, Mosiah 15:11–12 (the “seed” of Jesus Christ are “the heirs of the kingdom of God”).
- ㉖ See, Matthew 25:34 (inherit the kingdom prepared for you); 1 Corinthians 6:9–10 (unrighteous shall not inherit the kingdom of God); Galatians 5:19–21 (those who commit the works of the flesh shall not inherit the kingdom of God); Revelations 21:7 (“He that overcometh shall inherit all things; and I will be his God, and he shall be my son”); 2 Nephi 9:18 (those who believe and endure the crosses of the world shall inherit the kingdom of God); Mosiah 27:26 (without being born again, one cannot inherit eternal life); Alma 9:12 (without repentance, one cannot inherit the kingdom of God); D&C 6:37 (the faithful will inherit the kingdom of heaven); 3 Nephi 11:32–33 (those who repent, believe in Christ, and are baptized shall inherit the kingdom of God); D&C 50:5 (those who are faithful and who endure shall inherit eternal life).

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# SACRIFICE

*This talk was given at the Women's Conference at Brigham Young University on April 29, 2005.*

BY CONSTANCE K. LUNDBERG ❁ WHEN I HEAR THE WORD *SACRIFICE*, I OFTEN THINK OF THE TERRIBLE trials of the martyrs: from Abel to Isaiah to Peter and Paul; to Joseph and Hyrum to the victims—including my own relatives—of Haun's Mill. Brother Turley will give us dramatic examples of the sacrifices made by the Prophet Joseph and others to bring us the blessings of modern-day scriptures. Their lives are dramatic, their suffering a profound testimony of their faith. I do not doubt they returned to our Father clothed in glory, welcomed into the peace and love of His rest. ❁ On the other hand, in modern language, *sacrifice* often suggests deprivation, giving up a great, or not so great, thing. The word is often used casually: "Oh! The sacrifices I make for you!" ❁ Today I want to talk about our own sacrifices, less dramatic than those of the great martyrs and not as silly as those in common language, but frequent and holy in their own right. I also want to talk about the blessings our Father gives us for those offerings. ❁ Let us start with the meaning of the word *sacrifice*. The Latin and Old French roots of the word *sacrifice* are *sacred* and *work*. *Sacrifice* is similar to *offering*. *Offering* comes from an Old German word meaning "to do zealously, to serve God." So historically, sacrifice is doing a sacred work or zealously serving God. The history of these words brings them nearer to my own feeling about them than the casual modern usage. ❁ One of my favorite poems about sacred offering is a Christmas hymn by Christina Rossetti, "In the Bleak Mid-winter":

*In the bleak mid-winter frosty wind made moan,  
Earth stood hard as iron, water like a stone;  
Snow had fallen, snow on snow,  
In the bleak mid-winter, long ago.*

*Our God, heav'n cannot hold him nor earth sustain;  
Heav'n and earth shall flee away when he comes to reign;  
In the bleak mid-winter a stable-place sufficed  
The Lord God Almighty Jesus Christ.*

*Enough for him, whom cherubim worship night and day,  
A breastful of milk and a mangerful of hay;  
Enough for him, whom angels fall down before,  
The ox and ass and camel which adore.*

*Angels and archangels may have gathered there,  
Cherubim and seraphim thronged the air:  
But only his mother in her maiden bliss  
Worshipped the Beloved with a kiss.*

*What can I give him, poor as I am?  
If I were a shepherd I would bring a lamb;  
If I were a wise man I would do my part;  
Yet what I can I give him—*

*give my heart.*

The idea that we offer our love to the Savior and the Father is the beginning of our path to eternal life and salvation, but what does love mean? Is it an unquestioning and unexamined declaration of love? I think not. In his epistle, found in the New Testament, James, the brother of Jesus, reminds us: “But wilt thou know, O vain man, that faith without works is dead?” (James 2:20). Later in the same epistle he says, “For as the body without the spirit is dead, so faith without works is dead also” (James 2:26).

I think the scripture applies equally to love. If we have love, we bring it to life through works. If we have love, it is embodied in what we do. The idea that love is embodied in service is at the core of every mother's heart. It is found in other places too; for instance, in one of my favorite movies, *The Princess Bride*. Remember the opening scene—the grandfather is going to read to his ill grandson, who isn't sure he wants to be read to but grudgingly agrees.

*Grandfather:* Oh. Well, thank you very much. It's very nice of you. Your vote of confidence is overwhelming. All right. [Book open now, he begins to read.] *The Princess Bride*, by S. Morgenstern. Chapter one: “Buttercup was raised on a small farm in the country of Florin. Her favorite pastimes were riding her horse and tormenting the farm boy that worked there. His name was Westley, but she never called him that.”

[To the kid] Isn't that a wonderful beginning?

*The kid:* Yeah. It's really good.

*Grandfather:* “Nothing gave Buttercup as much pleasure as ordering Westley around.”

[*Buttercup*]: “Farm boy. Polish my horse's saddle. I want to see my face shining in it by morning.”

[*Westley*]: “As you wish.”

“As you wish” was all he ever said to her.

[*Buttercup*]: “Farm boy. Fill these with water—please.”

[*Westley*]: “As you wish.”

“That day, she was amazed to discover that when he was saying, ‘As you wish,’ what he meant was, ‘I love you.’ And even more amazing was the day she realized she truly loved him back.”

We are something like Westley. As I talk about sacrifice today, I will be talking about our love, sacred gifts, and offerings to God.

President Benson wrote: "This is a day of sacrifice, and the opportunities are ever present" (Ezra Taft Benson, "This Is a Day of Sacrifice," *Ensign*, May 1979, 32). He considered sacrifice an opportunity, not a burden. The four sacrifices he suggested we make were: deny yourself ungodliness, be willing to serve a mission, solemnize your marriage in the house of the Lord, and serve with your time and means to build the kingdom of God on earth. These four sacrifices are a good outline for each of us. Let's consider them and think how these four sacrifices bring us closer to eternal life and salvation.

#### 1 DENY YOURSELF OF UNGODLINESS

Most of us can avoid the major sins—theft, murder, adultery. Our downfalls are the little things. Do you have a little sin that you treasure, holding it close, perhaps covertly, cherishing it like a guilty secret? Most of us have at least one. In our hearts we know we must give them up sometime. In the meantime, we rationalize them, nurture them, and enjoy them with a sometimes guilty pleasure. Let me tell you a few I have seen. I won't tell you which is mine.

- d Watching violent or overtly sexual films or television shows
- d Lying about our achievements to make ourselves look better to others or to feel better in our own eyes
- d Undermining the reputation of others through malicious gossip
- d Criticizing the bishop, the stake president, the Relief Society president, or an officer or General Authority of the Church
- d Emotionally or physically abusing someone in our family
- d Missing meetings or Church obligations to indulge in a personal amusement, from spending the day in bed reading a book to going camping
- d Stopping in Las Vegas on the way to Disneyland for a little harmless gambling ("I never go over my \$5 [\$10, \$50] limit, so it isn't really gambling.")

These little sins remind me of my teenaged son, who was supposed to be doing homework. He would start out right, but the temptation of the computer game mounted on the hard drive would overcome him. When I walked in, he would hit Alt+Tab and return to his work as fast as possible. If it was not possible, he would say, "I was just taking a little break," and plunge back to work. The scary part is that I do the same thing. I take a

break from work, particularly writing, and the break begins to consume my work time. I have no one to hide from—the dogs don't care. I am hiding from myself.

My too-long breaks, or my son's, are not sins; they're just foolish and time wasting. But I think we do the same thing sometimes with our secret sins. Who do we think we are fooling with those? Like my playing "Noah's Ark," we are only deluding ourselves.

Can we go to Father with a clean conscience if we continue to nourish our secret sins? As part of a regular review of our lives, I suggest we all look for those secret sins and resolve to weed them out.

## 2

SELF-JUSTIFICATION . . .

IS A MODEL OF THE SLIPPERY

SLOPE WE FIND AS WE

PUT OURSELVES FIRST, OUR

FATHER AND OUR

OBLIGATIONS TO OTHERS LAST.

## 4

BELOW: John Dashwood reconsiders his generosity.



### 3 BE WILLING TO SERVE A MISSION

President McKay said every member is a missionary. President Benson repeated the message, although, from the context of his talk, I think he was thinking of full-time missions for youth and senior adults. But we are all representatives of The Church of Jesus Christ of Latter-day Saints. We do not need to wear a black-and-white name tag, give a talk in sacrament meeting before we leave, or even spend time in the MTC.

How can we serve as missionaries? Let me give you an example. I had a client with a major national corporation. He was located in Provo for several years by his company. During those years, and in that Provo neighborhood, he, his wife, and their children were welcomed by their neighbors. They were befriended. They were not abandoned when they showed no interest in being members of the Church. They continued to be accepted as part of the neighborhood; their children were welcomed in their schools. They never returned to Utah again, but they told everyone they worked with that the Mormons in Utah were great friends, great neighbors, and the finest people in the world.

We know of such cases. We also know of neighbors who are ignored once it is clear that they do not want to take the discussions or join the Church. Our missionary effort includes helping people understand the gospel in word and action. We are all that most people see of the Church. If we exemplify charity, love, and understanding, we deliver the message of Christ. If we are closed and uninterested, ignoring our neighbors, that is the picture of the Church others see.

How is being a good neighbor sacrificing? We sacrifice a self-centered life for one of outreach. We give ourselves the challenge to see the good in others, rather than shun the new, the different, the unfamiliar. We put ours egos at risk by valuing other people, cultures, and attitudes. But if we do so, we exemplify the love of our Savior.

I am blessed to be corresponding with about a dozen full-time missionaries right now, including my son Phil, who wrote to me shortly after he arrived in Germany. He said he had come to realize that being set apart as a missionary is a literal thing. He is set apart from the world. Everything he does, thinks, and takes on is to further the work of the Lord. But as his ward helps—in fact, takes the lead in

the missionary effort—things become so much better. A few weeks ago, I got this letter:

*I'm really, really excited for this coming period of time. All the members are starting to actively participate more and more in the work, and you can tell. When the members are involved, it goes 10 billion times better. The other day I was sitting in the kitchen and I almost blew up, I was so happy with everything that was going on. I had just gotten off the phone with Frau Orth and Schwester David about our next appointment, and I just started thinking about the people we're meeting with and the experiences we've been having lately, and everything just built up all of a sudden and I tensed up for a second, then my legs and arms shot out straight, my body got completely extended, I got a huge smile on my face, and I yelled, "I love being here!!"*

*Elder Darais, who at the time was searching for something in the refrigerator, kinda jumped, and when I finally looked over at him, he was standing/buddling in the corner of the kitchen, kind of in a position to cover himself from my body parts in case I were to explode. What a cool guy!*

I think we should all feel like my dear Elder Phil. We do not leave our families and go to another country, but aren't we also set apart by our faith and the covenants we have made? Our sacred offering should be made with joy in the Lord.

### 3 SOLEMNIZE YOUR MARRIAGE IN THE HOUSE OF THE LORD.

Would you enter a battle with no weapons, no armor, and no training? Would you send your sons and daughters to the same battle equally unprepared? Would you send them out knowing they would never return?

We think of the eternal ordinances of the temple as being our pathway to return to Father, and it is. But it is a source of peace, healing, contemplation, meditation, and answers. In the year after the death of my husband, I got in the habit of keeping my temple clothes in my car. Whenever life became more than I was ready to bear, I would head for my car—and the temple. Once equilibrium was reestablished, I could return to work or home. In the best sense, the time spent at the temple could be called a sacrifice.

My father was not LDS. Although my parents were married for almost 60 years, my mother refused to go the temple without Dad. For a good part of that time, Church

C. S. LEWIS

IMAGINES THE LAST DAY

AS ONE WHERE

WE DETERMINE WHETHER

TO RETURN TO

FATHER BY OUR CHOICE

OF ATTITUDE.

policy would have allowed it. Finally, in the late stages of his leukemia, she went. It was a wonderful day for her and for the family who were present. At the time, I rejoiced for her, as I do to this day. But after years of going to the temple for comfort, solace, inspiration, and all the other blessings of temple attendance, I grieved for her as well. If she could have sacrificed her pride or her need to determine *his* life choices and gone to the temple alone, what blessings might she have received for herself and for the family?

People all around the world have to sacrifice tremendous time and scarce income to attend the temple even once. We need to heed the counsel of the prophet and sacrifice our time and perhaps our pride to receive those great blessings.

Furthermore, we must live faithful to the covenants we make in the temple. President Benson surely understood how many people find the covenants of the temple a constraint on the lifestyle they expect. He knew that, for some, keeping the covenants is a challenge. For instance, we must help our daughters understand that wearing sleeved tops and dresses and skirts below the knee is not a hardship. Our young men should be helped to understand that shorts and tank tops are not central to life. Modesty is a life choice



calculated to bless and protect us. The blessings of the temple are a shield and a protector. To receive these blessings we must eschew those things from which we wish to be protected. Understanding the balance brings us closer to eternal life.

④ SERVE WITH YOUR TIME AND MEANS TO BUILD THE KINGDOM OF GOD ON EARTH.

Now we come to the great border, where sacrifice blends into consecration. We are asked to accept callings and to pay tithes and offerings. It is in our hearts and souls to determine the amount of offerings. It is here where our sacred gifts help us draw most closely to Father.

President Marion G. Romney asked, “What prohibits us from giving as much in fast offerings as we would have given in surpluses under the United Order? Nothing but our own limitations” (In Conference Report, April 1966, 100; or *Improvement Era*, June 1966, 537).

President Romney is telling us that we have no limits on our contribution to building the kingdom except the limits we place upon ourselves.

I constantly admire our law students, with the great burdens school imposes upon their time, serving as teachers, members of Relief Society or priesthood quorums, and members of priesthood, Relief Society, or Primary presi-

dencies or of bishoprics. They have learned what we all must learn. It is not enough to provide a *little* time or means. Surely we must make our families our central care. That is a core part of our stewardship. But beyond that, our job is to build the kingdom of God.

Elder Neal A. Maxwell counsels us that we must serve the Lord with all our hearts, might, minds, and strength and not keep back part. How do we keep back part? Do we miss meetings for television shows? Do we get so involved in social events or community activities that we lose time for family home evening, preparing our lesson for Sunday, or doing our visiting or home teaching?

Do you remember the story of Jane Austen’s novel *Sense and Sensibility*? Henry Dashwood died, leaving a widow, a married son, John; and three unmarried daughters. John sincerely promised his dying father that he would do everything in his power to make his stepmother and his sisters comfortable. He thought he could give each sister a thousand pounds each year. “He thought about it all day long, and for many days successively, and he did not repent.” John’s wife, on the other hand, could not bear the idea of sharing. She argued and reasoned with him until he concluded that they would be better served with no yearly allowance, but only occasional “kind

neighborly gifts.” With that he essentially threw them out of the home, giving them not so much as dishes and silverware to start a new home. That self-justification—taking all of chapter two—is a model of the slippery slope we find as we put ourselves first, our Father and our obligations to others last. When we keep back part, that part grows. Our gift shrinks to a niggardly sum.

The answer is to remember who we are—children of Heavenly Father. We love Him, wish to serve Him, and long to return to Him. Elder Maxwell counseled us:

*The submission of one’s will is really the only uniquely personal thing we have to place on God’s altar. The many other things we “give” . . . are actually the things He has already given or loaned to us. However, when you and I finally submit ourselves, by letting our individual wills be swallowed up in God’s will, then we are really giving something to Him! It is the only possession which is truly ours to give! [In Conference Report, October 1995, 30; or *Ensign*, November 1995, 24]*

In the end, we draw near to Father, eternal life, and salvation, if and only if we become the people who would live comfortably in that life and in the presence of Father.

In *The Great Divorce*, C. S. Lewis imagines the Last Day as one where we determine whether to return to Father by our choice of attitude. Are we able to give up hate, contention, recrimination, and greed? If not, we do not return to Father even though the door is open. We turn away and choose to spend eternity in the mire of selfishness and anger.

Like Westley in *The Princess Bride*, we must serve and give, and in doing so we say to Father, “I love you.” And we know, as surely as we breathe, that in accepting our service—our sacred offering, our sacrifice—He loves us too.

I pray we may all understand that sacred works and offerings are a joyful service to our Father that will bring us closer to eternal life and salvation, in the name of Jesus Christ, amen.

ART CREDITS

Page 31: Illustration by C.E. and H.M. Brock, in *The Novels and Letters of Jane Austen*, vol. 1 (New York: F. S. Holby, 1906) 8–9. Photograph by Bradley Slade. Page 33: C. S. Lewis at Magdalen College, © Norman Parkinson Limited/Fiona Cowan/CORBIS.

*Constance Lundberg  
reminisces with  
law school colleague  
Lovisa Lyman.*

**C**onstance Lundberg, BYU professor of law for 23 years, returned to full-time practice August 2005. While at the Law School, she served as associate dean for 16 years and law library director for 15 years. Lundberg calls her recent move “a progression rather than a rejection.” She says, “I didn’t reject law practice when I came to the Law School. I didn’t reject full-time teaching when I moved into the directorship of the library, and now I am not rejecting either teaching or the library by going to Jones Waldo Holbrook & McDonough.”

Like much of her career, this move was not planned—at least not at this time. “I had always intended to return to practice at some point,” she explains, “but not until two or three years down the road.” And she had always assumed she would return to Parsons Behle & Latimer, the firm that hired her fresh out of the University of Utah law school when no other firm in Utah seemed interested in hiring a woman. When she graduated in 1972, only five of the graduates were women. “That was the most women the law school had taught at one time up to that point.” Parsons not only hired her but also expressed their confidence by entrusting her with their environmental clients. “Environmental law was new. We were making it up as we

went along.” When she had been at Parsons for only 18 months, Lundberg was invited to address the Utah Bar on the subject of “takings,” because she had already become one of the local authorities on the subject.

During her eight years of practice, Lundberg discovered something for which law school had not prepared her: “No one had ever told me law practice would be fun. The faculty at the University of Utah cared about policy, law, and being a good lawyer, but some hated practice and could hardly wait to get out of it and teach. How sad to prepare students for something you hate!”

What Lundberg liked most about practice was tackling the unknown, including meeting new people, helping them discover solutions to their problems, and learning how to represent them well. “Maybe I just have a short attention span,” she jokes, “but as a lawyer you get paid to learn new things.” She went wherever she needed to go to learn what she needed to know. She enjoyed several stints at Utah State University learning about different aspects of natural resources: “For instance, I learned about the impact of fluoride on cattle and the effect of sugar-beet seed propagation and sale on economics, and I monitored lichen to see if they were taking up pollution.” Her practice was com-



## Blessed Shalt Thou Be

— DEUTERONOMY 28:6

plicated and fact-specific, just the sort she enjoys most.

After several years of practice, she was asked to work for President Gerald Ford’s Council on Environmental Quality, and she was granted a leave from Parsons with the understanding that she would be returning. She spent two years in Washington writing policy, something she found fascinating and rewarding. One particularly challenging project was funded by the Ford Foundation: environmental mediation. Ultimately, it was deemed a good idea whose time had not yet come.

Soon after Lundberg returned to Utah from Washington, she renewed a



professional acquaintance with Boyd Erickson, a widower with five sons, the oldest a year older than Lundberg. Once the couple married, Lundberg’s weekly trips to Alaska and frequent trips to Denver, Philadelphia, and Washington lost their charm as she did her best to bond the new family together. “If you care about

family," she quickly learned, "you have to devote time to it."

At this point, longtime friend Reese Hansen asked if she would consider teaching. Although the demands of a new family might have encouraged her to consider such a career change, initially the timing did not seem right. When she and Boyd parted the morning of her BYU interview, she told him she couldn't imagine any circumstance that would convince her to leave practice to become full-time faculty. True, before enter-



One of the most joyous events of her life occurred after she came to BYU—her son, Philip, was born. Faculty member Mary Anne Wood hosted a couples



shower, and many contributed to purchase a playpen for Lundberg's office, a subtle way to let her know they supported her being a mother as well as a professor. Mothering her son, her stepsons, their wives, her grandchildren, and many law students over the years turned out to be one of the greatest perks associated with the regular schedule of academia.

library school director to find out if she could take the courses part-time. The director was happy to approve her proposal, since, he confessed, he had been racking his brain from the moment she called trying to figure out why she wanted to sue him. She ably completed the course work while working full-time.

Initially, her understanding was that she would be director until the library was remodeled. "I didn't realize it was a one-way street. But, I'm Tigger. I just went bouncing." As library director, Lundberg expanded services, established consortial arrangements, and oversaw the design and construction of the expanded library—ahead of schedule and under budget. Her most recent library innovation, and something she will continue to be involved in even after she assumes her new position at Jones Waldo, is the Greater Western Library Alliance. GWLA consists of 31 major research libraries in the West committed to digitally preserving foundational 19th- and 20th-century water documents. Original documents held in paper by one or more of the participating libraries or in private and government files throughout the West are on the shelves and burning up with sulfuric acid, and an important segment of environmental legal history is in danger of being lost. "I've been doing triage—finding the things we desperately need and finding someone to preserve them." Her involvement with GWLA and some teaching will keep her officially linked to BYU for up to the next five years.

Lundberg's ties with Parsons have remained warm and collegial since she left to become full-time faculty, and her philosophy has always been that "you don't just go somewhere else because you can." How then did Jones

Waldo win her over? "They made me laugh," she confesses. Lundberg has been alone for the past several years. Two years ago her husband of nearly 22 years succumbed to lung cancer. Last year her son, Philip, left for a mission in Frankfurt, Germany. Lundberg immersed herself in work to head off grief and loneliness. The invitation and subsequent interview at Jones Waldo opened the vista of a vigorous, new direction for her energies. The interviews and subsequent meetings revealed a team that worked hard but passed up on certain obligations that might take employees away from family more than they wished. Included in their organization is a women's group that does such things as sponsor visiting children's authors, foster the arts, and even build a house for Habitat for Humanity. In summary, says Lundberg, "I knew I would be happy there with witty and complete people."

At Jones Waldo, Lundberg has joined the resource group where, she says, she will do whatever comes in. Surely she will be involved in environmental policy and writing. She hopes that mediation, a concept that has finally come into its own in environmental law, will be part of her job. "Explaining what each side wants and needs is at the heart of mediation," she affirms, and this concept has many applications in resource practice.

BYU will miss Constance Lundberg—professor, dean, library director, and dear friend. Dean Kevin Worthen expresses the feelings of all her associates at the Law School when he says, "We will miss our daily association with Constance. We thank her for her many significant contributions to the Law School and to us personally. We wish her well in her new endeavors."

# When Thou Goest Out

BY LOVISA LYMAN

ing law school she had fully intended to become an academic, and she had enjoyed teaching part-time at the University of Utah and Utah State, but practice had become too rewarding to give up.

She changed her mind when she met the BYU faculty. "They were fun and enjoyed an easy camaraderie—a team working shoulder to shoulder. I liked being with them." Even then the faculty included a cadre of strong women committed to family as well as to law. She began her faculty tenure in August of 1982. The icing on the cake was that she didn't have to give up practice but continued of counsel for Parsons until she became an associate dean.

Lundberg taught a wide variety of courses at the Law School, including environmental law, public land law, conservation law, energy law (mining, oil and gas), federal courts, real property, interviewing and counseling, poverty law, civil rights law, legal research, legal writing, legal history, and law library management. She proposed and helped design some of the courses.

Soon after she became an associate dean, Dean Hansen asked her to become the library director as well. When she discovered she needed a master of library information science to comply with accreditation team regulations, she made an appointment with the BYU

# Law School Grads Lead Institutions of Higher Education

## MARK BRYCE

President, Eastern Arizona College

Love of education is an evident characteristic of Mark Bryce, '81, president of Eastern Arizona College. As an undergraduate at BYU, he earned his accounting degree after only three years. The Monday following graduation he began his studies at the J. Reuben Clark Law School.

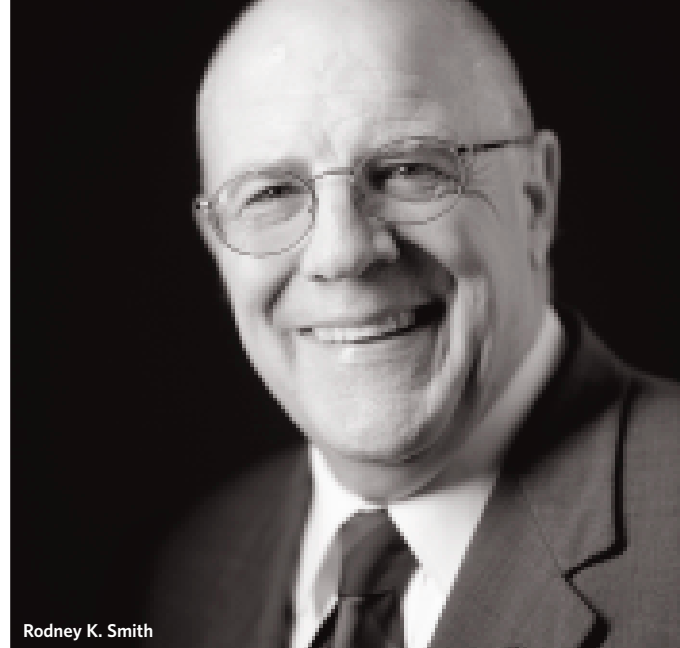
President Bryce speaks highly of his experience at BYU:

*When we took a course to prepare for the bar examination, it was obvious that our education was more thorough than that of students from major, prestigious universities. Later, I was selected as one of 40 new presidents for presidential training at Harvard. It was there that I really learned just how good BYU is. My BYU background never failed or faltered, and I felt confident alongside the best in the world.*

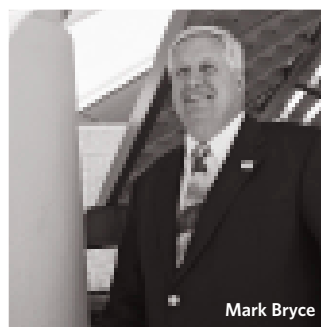
President Bryce explains that his legal background has strengthened his ability to handle his presidential responsibilities:

*From the very first day, my legal background has been invaluable. Legal training develops decision-making skills. As in legal matters, many presidential decisions must be made now, even though all the facts are not available. The buck stops with the attorney, and the buck stops with the president. Legal training also develops communication skills and the toughness to stand by a decision. As an attorney and a president, I am open to bearing new ideas and approaches; I have no fear of examining all sides of an issue, making the decision, and taking action.*

Eastern Arizona College has long been a tradition in President Bryce's family. As he recalls, "EAC was founded in 1888 by the LDS Church. My great-great-grandfather helped make the wooden benches



Rodney K. Smith



Mark Bryce

upon which my great-grandfather sat in the very first class. My family has attended the institution ever since."

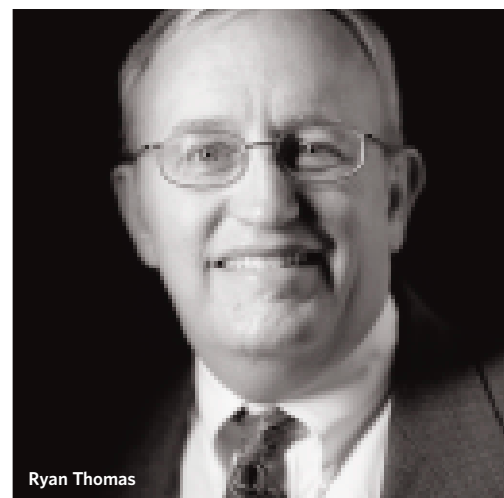
Formerly a practicing lawyer in Arizona's Gila Valley, President Bryce began his duties at EAC on February 2, 2002. Since that time the college has experienced a growth of 6 to 7 percent a year and recently began serving another county with two new campuses. His interest in university administration began when, as a volunteer, he taught LDS institute classes and discovered his love for teaching and working with students.

President Bryce and his wife, Cindy (Nielsen), are the parents of seven children.

## LEE G. CALDWELL

President, Dixie State College

On August 15, 2005, Lee Caldwell, '78, became the 16th



Ryan Thomas



Lee G. Caldwell

president of Dixie State College. Besides his law degree, Caldwell has a BA in business from Utah State University and a PhD in strategic management from Texas A&M University. Of law school he says, "The rigor and work ethic prepared me well for my subsequent academic endeavors."

Caldwell's experience in both business and education is

extensive. He has worked at many educational institutions: Sam Houston State University, the University of Utah, Indiana University, Georgia Tech, and Dixie State College. His business dealings include work in corporate legal and real estate departments, and executive positions at Novell and IBM.

He has found his business experience necessary in aiding the development of both students and educational institutions. "I have been fortunate to work in areas of business where I could also maintain strong academic ties," Caldwell explains, "particularly through joint research programs and in the development of the Internet." He admits, "Education has been my first love."

Caldwell now finds himself president of a college of approximately 8,700 students. Dixie State College offers five bachelor degrees: nursing, elementary education, computer and information technology, business, and communications. He identifies some significant challenges he faces in leading the college:

*Dixie State College has a long tradition of smaller classes and dedicated faculty. As the institution continues to grow and add more bachelor's degrees, there are significant financial and faculty and staff recruiting challenges to maintain this tradition and commitment to quality of education.*

*We need to do more to develop Utah's economy to produce higher paying college-level jobs. Utah has lost more than 50,000 high-tech jobs over the last four years. I believe that the colleges and universities can and should do far more to develop the high-tech sectors of the economy.*

Caldwell identified three points that are important both "for the future of the College and of improving human endeavor":

commitment to truth, commitment to people, and commitment to principle.

Lee and his wife, Bonnie (Allphin), have two children, who are married.

**RODNEY K. SMITH**  
President, Southern Virginia University

Rodney K. Smith, '77, is the president of Southern Virginia University, a four-year liberal arts college with a student body of almost 600. President Smith attended and earned a bachelor's degree at a small college himself. After graduating from the BYU Law School, he continued his studies at the University of Pennsylvania, where he earned LLM and SJD degrees. He spent over 20 years as either a university professor or an administrator prior to his position as SVU president.

President Smith began his current position in June 2004. He holds the school in high esteem, finding strength in the university's size and the low student-to-faculty ratio. He explains:

*Students at SVU do not get lost in large classrooms but are given an opportunity to shine in small and rigorous classes that require students to be prepared, to participate, and to develop critical thinking and writing skills. It is not surprising that so many liberal arts graduates go on to succeed in business, the fine arts, and the professions.*

SVU is located in Buena Vista, Virginia. Though not owned by the Church, it has been the only liberal arts university that supports and encourages LDS beliefs and standards since it adopted such a mission statement in May 1996. At that time the university also selected an LDS board of trustees and president. SVU is accredited by the American Academy for Liberal

Education. Smith describes the purpose of the university:

*Our mission is to prepare leaderservants in the home, the Church, and the world. As a residential liberal arts university committed to providing an excellent and broad-based education in an environment fully supportive of the values and teachings of The Church of Jesus Christ of Latter-day Saints, I firmly believe that we are ideally suited to help develop leaderservants. Our students take our motto, Learn That Life Is Service, seriously and contribute thousands of hours of service on an annual basis. They are also leaders in music, the arts, athletics, and academics.*

President Smith is married to the former Danielle Reget. They are the parents of eight children.

**RYAN THOMAS**  
President, College of Eastern Utah

Ryan Thomas, '79, is currently in his fourth year as president of the College of Eastern Utah. CEU is a junior college with the lowest student-to-faculty ratio of Utah's two-year colleges. The school is an integral part of Price, a town of 17,000.

President Thomas speaks highly of his experience in Price. "In a community this size you feel you know everyone, and you are supported and embraced by the community spirit." His children are also enjoying the advantages that come from living in a small town. "My children, much to their surprise, have loved the community. Two of my children met their spouses here."

President Thomas has familial ties to the area and a commitment to the students there. He says,

*My father was born in a small coal camp a few miles from Price. Education made all of the difference in*

*his ability to make important choices in his life. At the time I was recruited to CEU, the college was experiencing a number of challenges. I felt that I had some obligation to ensure that the young people in this area had the chance to have the same kind of opportunities that post-secondary education had provided for my father, so I came to the college hoping to try to resolve some of the problems it was facing.*

As CEU president he has done just that—and then some. When asked about his responsibilities at the college, President Thomas explains,

*At a small college the president does just about everything. I teach at least one course each semester, I am the chief fund-raiser, I do most of the legal work for our development office, I spend most of February and early March working with the state legislature, and I attend to the myriad administrative details that seem to be associated with running a small college.*

It has been rewarding for President Thomas to witness the contribution of others to CEU, particularly those of the community. He recalls,

*Shortly after I arrived at the college, I attended a dinner honoring the miners who were on the rescue team at the time of the Willow Creek mine fire. The company that had operated the mine had offered to give the team a significant sum of money to recognize their heroism. Although several were out of work [because] the mine did not reopen after the fire, the men chose to give the sum to the college to sponsor scholarships. I was sobered then, and have been frequently impressed since, at the sacrifices that people have been willing to make to ensure educational opportunities for others.*

President Thomas and his wife, Ann (Morrell), are the parents of six children.

# Learning the Language

## INTERNATIONAL EXTERNSHIPS

Looking out across London's Trafalgar Square, his back to the National Gallery, J. Reuben Clark law student Todd H. Goodsell quotes

Winston Churchill: "We are two nations divided by a common language." Churchill said this 67 years ago about the differences between the United Kingdom and the United States. A law extern with Devonshire Solicitors in London, Goodsell is finding out just how true Churchill's statement is.

"A lot of legal skills are universal," he explains, "just with different laws; different parties have different responsibilities. But it's a whole different English language that I have to learn and apply."

This is not Goodsell's first experience in London. As an undergraduate, Goodsell participated in Study Abroad programs that brought him to London, first in 2002 and again in 2003. "I've already done the tourist thing and the student thing," he says with a smile, "now I get to see the business side of things. I'm just grateful the Law School allows students to do this and has the connections to make it happen."

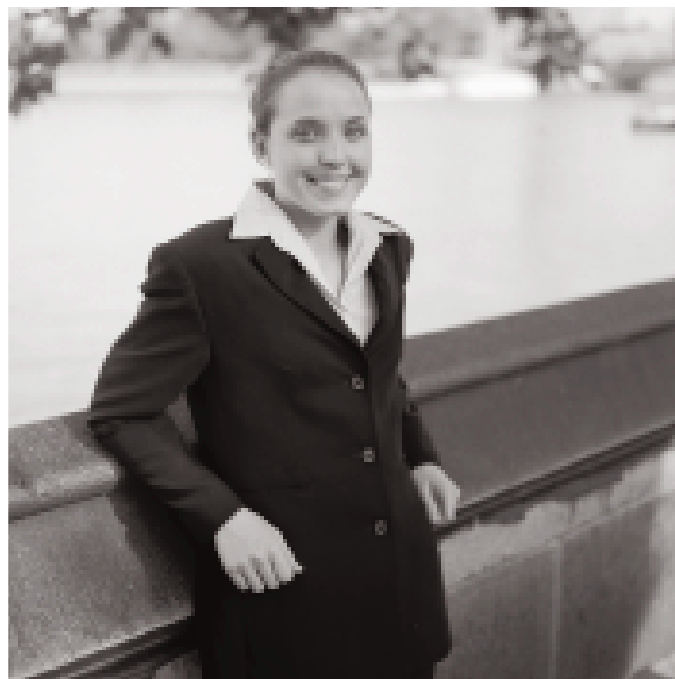
Goodsell is only one of hundreds of JRCLS students who have completed an externship after their first year of law school. According to James H. Backman, associate professor of law and externship program director, each year approximately 165 students complete an externship, and between 20 and 30 of those are international. "An externship gives the students a taste of real-life lawyer work.

It's a marvelous way of rekindling a student's interest and enthusiasm for the law after their first year of class work," says Backman.

Students interested in an international externship submit an application detailing their interest in international law and their experience with the country and language in which they hope to work. "Each of the Church's legal offices takes students each summer, but that would be only seven or eight positions," explains Backman. "They help [us] identify law firms that they work with in the various countries that they serve, and they inquire if they would be willing to take a student for credit. All of our students do [an externship] for credit, rather than pay—that's one of our requirements.

"An externship is a different experience from a paid clerkship. The students create a learning plan right from the beginning; they are encouraged constantly to look for new opportunities and new learning experiences, to be proactive and ask their employers for those, to seek them out. And the employer is very willing to give them a good range of learning opportunities. A paid clerk, on the other hand, is concerned with watching the clock and billing the client, so they are more often used in simple backroom tasks."

At Devonshires, Goodsell thought he would be making copies and coffee, but instead, he says, "I've been handed files of clients and told to figure out what comes next. Daniel Clifford, the Devonshires partner who works with BYU



interns, likes to give his interns 'real work.'"

Stephanie Davis, a JRCLS extern with Devonshires in 2004, echoes Goodsell's experience. "I knew that at Devonshires I would be working closely with a partner from the firm, which a lot of externships don't let you do. I was right in the office with Daniel Clifford and his assistant, seeing what they did on a daily basis."

Many of the cases Davis worked on involved the Church. "It was really rewarding doing research on those cases," recalls Davis, "because I was researching things that I already knew about the Church, but I was getting it from a different perspective. For example, I'd be writing memos and notes about the priesthood, explaining the priesthood to someone who wasn't LDS. It was interesting to figure out how to explain it, how to explain which members were called 'deacons' and which were called 'priests.' It was interesting to look at it from another point of view.

*Law extern Stephanie Davis gained hands-on experience at Devonshire Solicitors in London.*

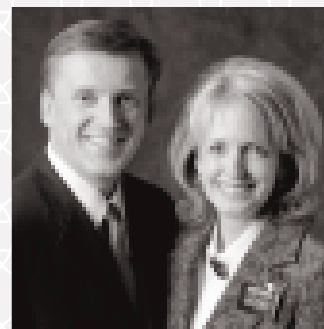
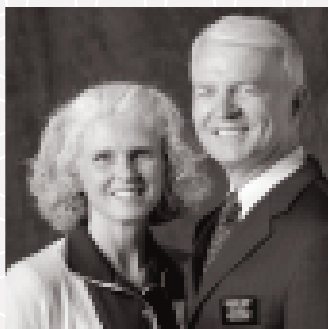
Jason Burt, a 2004 extern with a private firm in Brisbane, Australia, regarded his externship as a necessary step between law school and law firm. "It's helped me to understand how you bridge what you learn in the classroom to what you learn in the firm," Burt says, "to understand how those things carry over a little more. It's not like I learned substantive things in Australia that I didn't know before. What I learned is how I can take my studies and transfer them to a practice. That was very helpful." That bridge can, of course, be built in the U.S., but, as Burt points out, "I was exposed to the whole international legal environment and how that works. I'm interested in doing some of that, so now I have some good contacts in Australia that otherwise I wouldn't have had. I would say the international setting, for me, was nothing but a plus."

For Burt, Goodsell, Davis, and others who complete externships in English-speaking countries, the biggest difference they see between practicing American law and British or Australian law is the division of roles. "It's set up with barristers and solicitors, where we just have attorneys," explains Burt. "Solicitors don't go to court, usually. They prepare the cases and work with the clients; then the barristers go and argue before a court."

"Stepping into a British courtroom is like stepping into a different world. It's exactly as it was in the 18th century," comments Goodsell. "Daniel Clifford hands a copy of Dickens' *The Pickwick Papers* to his externs to read while we're here, because much is still the same in today's legal world."

Other externs find themselves literally stepping into a different world when they leave Provo for their externships. In 2004, Ryan Borneman worked for the Church legal office in Accra, Ghana. "Ghana was actually my second choice," Borneman says, "but those who interviewed felt that they needed some French experience in Ghana, because a lot of Africa is French-speaking. It was their first choice for me." Borneman's "French experience" proved important to the Ghana office. "For one week I traveled with the attorney to other African nations that were French-speaking, because he had not yet visited some of these nations because he didn't speak French."

"It was an excellent opportunity for a first-year law student, because after the second year you can always do an American experience. But what a way to spend a first summer!" Borneman adds.



### THREE FOR THREE: LAW ALUMNI CALLED AS MISSION PRESIDENTS

Douglas F. Higham, '78; D. Brent Rose, '79; and Kevin R. Duncan, '91, began three-year callings as mission presidents in July 2005.

President Higham and his wife, Colleen, serve the Arizona Tucson Mission, joined by four of their 12 children: Deborah, 17; Rebecca, 13; Elizabeth, 11; and Michael, 9. Six of their children are married; one recently returned from a mission, and one is currently serving a mission.

President Higham relates a highlight of reading their mission call:

*As we awaited our mission assignment, our family and friends would peruse the globe, picking out missions they thought would be great for us. . . . When expectations of exotic locales would get too high, I would yank everyone back by jokingly saying, "Or what about Tucson, Arizona?" When the assignment letter came, . . . no one believed me when I read that we would preside "over the Arizona Tucson Mission"!*

An attorney and partner at Higham, McConnell & Dunning in Mission Viejo, California, Doug is also a CPA with an accounting degree from BYU. He started out in practice as an associate with Rutan & Tucker, the largest law firm in Orange County. He then migrated to the 12-attorney firm of Stradling, Yocca, Carlson & Rauth, helping to build it to a team of about 80 attorneys.

D. Brent Rose and his wife, Dianne, leave Salt Lake City to serve in the Texas Lubbock Mission. President Rose also steps away from his job as an attorney at Clyde Snow Sessions & Swenson. He sees his current calling as only a shift in service.

"The way I view my professional life is no different than the way I view my life as a mission president, or anything else for that matter," he says, "for it is written, 'When ye are in the service of your fellow beings ye are only in the service of your God' (Mosiah 2:17). I truly believe that."

President Rose adds, "My legal education and the privilege of serving as a practicing water attorney has blessed my life with continuous opportunities to significantly serve my fellow beings and in every way has prepared me for this new and different opportunity to serve."

The Roses have four children, all of whom are married.

Kevin R. Duncan and his wife, Nancy, take four of their five children with them as they preside over the Chile Santiago North Mission. Steve, 17; Kelly, 11; and twins Lindsey and Lacey, 8, accompany their parents. Their oldest child, Aubrey, married and graduated from BYU this past summer.

Besides a law degree Kevin earned a bachelor's degree in accounting and a master's degree in taxation from BYU. In 1991 he and his family moved to Seattle, where he practiced law for two years before starting a business, CaseData Corporation, one of the largest forensics and electronic discovery companies in the United States.

President Duncan is excited to serve in Chile. Two years ago he accepted a call as a voluntary service missionary for the Church's Office of General Counsel. As associate international legal counsel in Chile, Peru, and Bolivia, he and his family lived in Chile. Furthermore, as a young missionary, he served in the Chile Santiago South Mission. He says, "A real joy for me is that our mission home during my first mission and where I lived for nine months is now the Santiago North Mission home and where we will live as we preside over the Chile Santiago North Mission."

# New General Authority

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David F. Evans, '79, was called to the First Quorum of the Seventy in the April 2005 general conference of the Church. He will serve as first counselor in the Asia North Presidency, making Tokyo, Japan, his home.

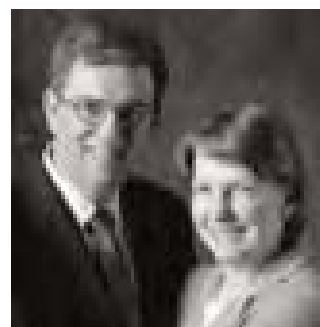
This will be the third time Elder Evans will have lived in Japan. He first served there as a young missionary and then returned with his wife, Mary, and four of their eight children in 1998 through 2001 while presiding over the Japan Nagoya Mission. This time only sons Michael, 16, and Jeff, 14, will accompany Elder and Sister Evans. Having attended Japanese elementary school previously, both boys are fluent in Japanese,

understand the culture, and have many friends there.

Elder Evans came to the J. Reuben Clark Law School as a first-year law student in 1976, the year of its first graduating class. "I had a very strong spiritual impression to attend here. I look back now and see what a correct decision it was. I learned that one could be a brilliantly effective litigator and still maintain Christian values, like Carl Hawkins. It was a critical point for my learning to watch Rex Lee as he both enjoyed and ennobled the practice of law. I learned that there could be joy in the practice of law while giving real service to someone who needed the skills of a lawyer and

that there was no conflict in loving the law, being an effective advocate, and being a good member of the Church."

When asked what would fundamentally change from his work with securities, corporate law, and investment banking to his new Church assignment, he replied, "Nothing, or very little. Consistent values and joy don't change as you work for good in any venue. The greatest happiness and joy come from service and seeing others engaged in service. I recently spoke with someone who had been in my MTC group years ago when we were sent to Hawaii preparatory to our service in Japan. We have talked maybe once in all those years, but we have both raised families in the Church and been active and faithful in our callings. As we talked and caught up on the past



decades, I felt like Alma must have felt when he met the sons of Mosiah after their years of separation: he "did rejoice exceedingly to see his brethren; and what added more to his joy, they were still his brethren in the Lord" (Alma 17:2). Whatever we find ourselves doing—whether in or out of the law—when we are reunited with our former friends and colleagues and find that we are still faithful brothers and sisters in the Lord, our joy will be its greatest."



## Law Alumni Weekend

Alumni and friends of the

J. Reuben Clark Law School will gather together Homecoming weekend, October 14 and 15, for recreation and reunions, good food and fun.



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For more information, visit <http://www.byulaw.org/> To register, go to <http://www.byulaw.org/Registration2005.pdf>.

**Clark Memorandum**

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