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CLARK MEMORANDUM

J. Reuben Clark

Law School

Brigham Young

University

Spring » 2010



THE MOST IMPORTANT

THREE

THINGS IN THE WORLD



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Brett G. Scharffs

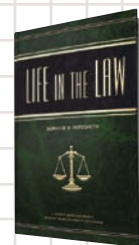


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J. Reuben Clark Law Society
draws on the philosophy and
personal example of the Law
School's namesake, J. Reuben
Clark Jr., in fulfilling the following
mission: We affirm the strength
brought to the law by a lawyer's
personal religious conviction.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

ALL OF
THIS
WAS A
MIRACLE
TO ME



THE MOST IMPORTANT

three things

IN THE WORLD

BY BRETT G. SCHARFFS¹

I wish to thank President Samuelson, Academic Vice President Tanner, and Advancement Vice President Worthen for the opportunity to speak today. I am grateful for these devotionals and the occasion they give us to explore what it means to be a community of faith as well as a community of reason. I want to

express my gratitude for the beautiful music and to Megan Grant and Suzanne Disparte for their prayers. They are two of my research assistants who prop me up on a daily basis; so it is entirely fitting that they do the same thing here. I want to also acknowledge my father and stepmother; my wife, Deirdre; and my three children, Elliot,

Sophelia, and Ella. They are missing school to be here, so I know I have a grateful audience of at least three.

As I prepared to speak with you today, I actually worked through three different topics, each more personal than the last, and I hope you will forgive me as I speak from the heart about some aspects of my own journey of faith.

This address was given at a devotional at Brigham Young University on May 12, 2009.



I traveled in my mind's eye back to my student days. At Oxford University I attended a series of lectures in which a famous and fashionable professor asserted confidently that the study of ancient Greek philosophy was one of the three best things in life. With a sly smile and an arched eyebrow, he did not tell us out loud what he thought the other two were.

But his assertion left me wondering: What are the most important three things in the world? Later, during my personal scripture study, I searched the Topical Guide for inspiration and was led to Paul's famous formulation in 1 Corinthians:

Though I speak with the tongues of men and of angels, and have not charity, I am become as sounding brass, or a tinkling cymbal.

And though I have the gift of prophecy, and understand all mysteries, and all knowledge; and though I have all faith, so that I could remove mountains, and have not charity, I am nothing. . . .

And now abideth faith, hope, charity, these three; but the greatest of these is charity.²

At the very end of the Book of Mormon, after completing his abridgement of the Jaredite record, the prophet Moroni is surprised to find that he is not dead yet.³ Fortunately, he catches a second wind and recounts a few of his father's teachings, including Mormon's powerful discourse on faith, hope, and charity.⁴ And then, in Moroni 10, the last chapter of the Book of Mormon, Moroni returns to this theme as he offers his final exhortations. (By my count, in that chapter alone he uses the words *exhortation* or *exhort* nine times.) Moroni says:

And I would exhort you, my beloved brethren, that ye remember that every good gift cometh of Christ. . . .

Wherefore, there must be faith; and if there must be faith there must also be hope; and if there must be hope there must also be charity.

And except ye have charity ye can in nowise be saved in the kingdom of God; neither can ye be saved in the kingdom of God if ye have not faith; neither can ye if ye have no hope.⁵

Today I would like to spend our time together talking about faith, hope, and charity.

These are not simply three good things on a list. In a certain sense, they are the most important three things in the world. They

are the foundational Christian virtues. Each is a trait of character to be cultivated and developed. Each is a set of attitudes and beliefs to guide thought and action. Each is a choice. Each is a gift from God.

Faith, hope, and charity may be likened to the three legs of a stool. As a boy visiting my grandmother's farm, I was impressed with the three-legged stool used for milking cows. Just as the stool's three legs enabled it to rest firmly on uneven ground, if we are grounded in faith, hope, and charity, we too will be on solid footing, even when the ground beneath us is rough or bumpy. Just as a one- or two-legged stool will teeter precariously, we too will be vulnerable to toppling over if we neglect any of these three virtues.

In my study of this topic, I've noticed several things. First, faith, hope, and charity are mutually reinforcing. An increase in one tends to result in an increase in the others. If we are feeling weak with respect to one, we can gather strength by focusing on the other two.

There is also a temporal dimension to the relationship. Faith is rooted in the past—in Christ's death and resurrection and in His Atonement for our sins. Hope is focused on the future—in the promise that through Christ's Atonement and by the covenants we make and keep, we can return to the presence of our Father in Heaven. And charity is enacted in the present—because it is only here and now that we can really love.

There is also a dimension of progression and culmination: faith and hope lead to charity, and it is charity—Christ's love for us—that never fails.⁶ If we desire to develop and be endowed with this Christlike love, it will be by traveling the road of faith and hope.

I - FAITH

First, a few words about faith.

As a freshman at Georgetown University, I took a required course, The Problem of God, from a wonderful professor, Dr. John F. Haught. This Catholic theologian became one of my most influential teachers and mentors.

One day toward the end of fall semester, Dr. Haught introduced theologian Paul Ricoeur's concept of the three stages of religious faith.⁷

The first stage, childlike faith, may be likened to the clear, unimpeded view that one enjoys standing atop a tall mountain.⁸ As children, our faith is simple and uncritical,

and we can see clearly in every direction. There is something quite beautiful about this stage of faith. To me it is exemplified by hearing a chorus of Primary children sing "I Know My Father Lives."⁹

The second stage Ricoeur calls the desert of criticism. At some point, often during adolescence, we descend from the mountain of childlike faith and enter the critical world. We might label this world "high school" or, better yet, "college." Here we find that others do not share our faith. In fact, some openly disparage what we hold dear. We learn that the very idea of faith is thought by many to be childish or delusional. We may become skeptical, perhaps even cynical.

The desert of criticism is akin to being in the midst of a blinding sandstorm, where you are forced to lean into the wind and take one step at a time without a clear view of where you are going. Walking by faith becomes difficult. Some of our former beliefs cannot survive the desert of criticism.

Ricoeur did not malign the desert of criticism, for some childish beliefs are incorrect and should be abandoned. As the Apostle Paul says in his discourse on faith, hope, and charity, "When I was a child, I spake as a child, I understood as a child, I thought as a child: but when I became a man, I put away childish things."¹⁰

Furthermore, it is only in coming down from the mountain that we are able to enter into the world and engage others who are different from us. To a great extent this is where life is lived and where we can make a difference in the world. Some people never leave the desert of criticism, and in time the memory of their childlike faith may dim. After prolonged exposure to the desert of criticism, some even lose their faith altogether. Ricoeur maintained that once one has entered the desert of criticism, it is not possible to return to the mountain of childlike faith. It is a little like leaving Eden. Something has been lost; life and faith can never be quite so simple again.¹¹

But he held out the possibility of a third stage of religious faith. On the other side of the desert of criticism lies another mountain, not as tall as the mountain of childlike faith, with views that are not quite as clear and unobstructed. But we can, as Dr. Haught explained it, remove ourselves periodically from the desert of criticism and ascend this



MORE IMPRESSIVE THAN THE FACT THAT GOD
COULD SAVE SHADRACH, MESHACH, AND ABED-NEGO
WAS THAT THEY COULD TRUST GOD.

somewhat less majestic mountain. Ricoeur calls this possibility of a second faith “post-critical naïveté” or a “second naïveté.”¹²

Here the truths and realities of our childlike faith can be reaffirmed or revised. Although the view is not completely unimpeded, and the storms of the desert of criticism remain in view, and some of our childish beliefs may be left behind, we can emerge from the storm and reaffirm our faith. Our faith will not be as simple as it once was, but it need not be lost. In fact, I believe our faith may become more powerful than before, for it will have weathered and survived the assaults of the desert of criticism.

To me, postcritical naïveté is a state in which both our hearts and our minds are open and we remain willing to experience childlike spiritual wonder; it is a place where we remain open to the promptings of the Holy Spirit.

As Paul puts it, “Brethren, be not children in understanding: howbeit in malice be ye children, but in understanding be men.”¹³

My father told me about an experience he had when he was roughly the age of most of you. As a young adult he was, in a sense, in the desert of criticism and found himself questioning his faith and the Church. One day he took out a pad of paper and made a list of his criticisms and doubts. He put the list in a drawer and forgot about it. Years later he found it again, and he was surprised that nearly every concern had been answered in his mind and in his heart. He reflected upon how different his life, and the lives of his posterity, would have been if he had followed his questions and concerns out of the Church.

One of my favorite stories that illustrates what faith and trust mean is the account of Shadrach, Meshach, and Abed-nego. You recall

the story.¹⁴ King Nebuchadnezzar commanded all his subjects to worship a golden image, and these three young men boldly refused. They were condemned to death by fire. The furnace was heated to seven times its normal strength¹⁵ and was so hot that the guards around it were consumed by the flames.¹⁶ As the three young men walked out of the fiery furnace, not a hair of their heads was singed, their coats were not burned, and they didn’t even smell like smoke.¹⁷ That’s impressive.

But to me there is another aspect to the story that is even more impressive. When Shadrach, Meshach, and Abed-nego addressed King Nebuchadnezzar before being thrown into the fire, they declared:

Our God whom we serve is able to deliver us from the burning fiery furnace, and he will deliver us out of thine hand, O king.

But if not, *be it known unto thee, O king, that we will not serve thy gods, nor worship the golden image which thou hast set up.*¹⁸

The words that impress me are “but if not.” I understand Shadrach, Meshach, and Abed-nego to be saying that even if God, for His own reasons, does not intervene to save them, they will not question or doubt His power and goodness. Their trust in God is unequivocal.¹⁹

Trust like that is not easy. Faith is not the power to bend God’s will to ours, but rather the power to align our will with that of Heavenly Father.

God is mighty to save, but sometimes He does not intervene in the affairs of men. He allows mind-boggling evil and suffering in the world. He allows us to hurt each other in unimaginable ways. To me, more impressive than the fact that God could save Shadrach, Meshach, and Abed-nego was that they could trust God, whatever the physical outcome of their being thrown into the fire.²⁰

In my experience, sometimes God gives us direction that is unmistakable and clear. But the answers to our prayers do not always come in the time frame and way we expect.

Perhaps you will indulge me another personal story. I had the dream of becoming a law professor even before I went to law school. In an abundance of caution, I applied to 10 schools and found myself in a fortunate situation, like you have, with a number of good choices.

I knew where I wanted to attend, but I decided to ask Heavenly Father. I prayed and pondered without receiving an answer. As the days turned to weeks, I’m sorry to say I grew impatient, annoyed, and perhaps even angry. “If I’m willing to do your will,” I complained, “you could at least have the common courtesy to tell me what your will is.”

After weeks had passed, I decided to make a more serious attempt. I climbed on my bicycle and rode to a quiet place beside a small river a few miles out of town. I spent the day on my knees with my scriptures and a notebook. Finally, as the shadows grew long, I gave up in frustration. I was pounding the pedals on my bicycle as I rode home. Gradually I calmed, and my cadence slowed. A thought entered my mind, at first faint, and then increasingly distinct: “Honor your priesthood and remember your covenants.” I

repeated this in my mind with the revolution of the bicycle pedals: “Honor your priesthood, remember your covenants. Honor your priesthood, remember your covenants.”

I stopped my bike, looked up to heaven, and exclaimed, perhaps audibly, “You don’t care where I go to law school! You want me to honor my priesthood and keep my covenants.” As I spoke these words, I was flooded with the classic confirmation of the Holy Spirit, a combination of a shiver down my spine and a burning in my chest that was so strong I could hardly stand it.

So I went to the law school of my choice. During my years there, when I was tempted to think too much of myself or to be too caught up in the cares and preoccupations with which I was surrounded, I thought often, “Brett, honor your priesthood and remember your covenants.” It was precisely the message I needed to keep me on track during those three years of law school. My prayers had been answered in a deeply meaningful—but entirely unexpected—way.

I have had the opposite experience as well, in which I was directed to a particular place. On those occasions, too, the answer was sometimes quite different than I expected.

II - HOPE

A few words about hope. Hope is not just a positive attitude, a sunny disposition, or looking on the bright side of life. Hope is rooted in Jesus Christ and the prospect of being with Him back in the presence of God. Deep down, it is a surrender and a trust in God and His promises—that He, and they, are real. Shadrach, Meshach, and Abed-nego had hope, but not just that they would survive the fiery furnace. They also had confidence in God’s plan.

Hope is neither ethereal nor wispy; it is an anchor for the soul. Hope is focused on the future and gives us the disciple’s perspective that the current state of affairs will not last. Hope is not simply the truism “This too shall pass,” helpful though that truism is.²¹ Rather, hope is a quiet confidence about what shall come to pass—that Christ is mighty to save and that His grace is sufficient for us.

Perhaps the reason I am so drawn to the concepts of faith, hope, and charity is that even though I work hard and am reasonably diligent, sometimes I get discouraged or frustrated with my own limitations. For me

there is comfort in the concept of hope, understood as a quiet confidence and belief that my best will be good enough and that Jesus Christ is there to carry me the rest of the way.

Maybe because I am a lawyer, one of my favorite descriptions of the Savior is that He is our Advocate. Both John and Mormon describe Jesus Christ as our Advocate with the Father.²² And in the Doctrine and Covenants we read:

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. . . .

*Wherefore, Father, spare these my brethren that believe on my name, that they may come unto me and have everlasting life.*²³

Perhaps less familiar is the description of Satan, who is not our advocate but is rather our accuser. Revelations 12:10 says:

And I heard a loud voice saying in heaven, Now is come salvation, and strength, and the kingdom of our God, and the power of his Christ: for the accuser of our brethren is cast down, which accused them before our God day and night.

Isn’t this description of Satan interesting? He accuses us before God both night and day. Lucifer is relentless in his desire to accuse and convict us before God.²⁴

In our own lives we often hear voices that tell us that we are not good enough and that we are unworthy or even unredeemable. Sometimes, and most dangerously, these voices come from within our own heads and hearts. I believe that these voices, external and internal, are often tools and messages of the adversary. If he can convince us that we are failures, or if he can persuade us that we are good for nothing, unloved, or unlovable, then he is succeeding in accomplishing his work and his glory, to bring to pass the death and eternal damnation of mankind.²⁵

Which voice will we heed—that of the Savior, whose message is that even when we stray or fail, His hand is outstretched still,²⁶ or that of Satan, whose aim is to make us miserable like unto himself?²⁷

Not only is the Savior our Advocate with the Father, pleading *for us*, but Jesus also

pleads *with us* to keep His commandments so that we may enjoy the complete blessings of His Atonement:

Hearken, O ye people of my church, to whom the kingdom has been given; hearken ye and give ear ...

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

*Hearken, O ye people of my church, and ye elders listen together, and bear my voice while it is called today, and harden not your hearts.*²⁸

For example, the passage in D&C 45 we just read, about Christ being our Advocate pleading *for us*, is bookended by Jesus pleading *with us* to hearken, give ear, hear His voice, and harden not our hearts.²⁹

III - CHARITY

Finally, charity. The importance of charity can scarcely be overstated. The Apostle Paul calls charity the greatest of all things³⁰ and says that without it we are nothing.³¹ Mormon urges us to “cleave unto charity,”³² and the Doctrine and Covenants instructs us to clothe ourselves in it.³³ Paul mentions charity 75 times and calls it “the end of the commandment,”³⁴ and John mentions it 30 times.³⁵ Amulek puts it starkly: “If ye do not remember to be charitable, ye are as dross, which the refiners do cast out, (it being of no worth) and is trodden under foot of men.”³⁶

Perhaps picking up on the concept of the three degrees of glory, I like to think of three degrees of charity. The first involves how we listen, the second how we give, and the third how we love.

Charity in Listening

The first degree of charity involves the way we listen to and seek to understand others. Charity in this sense is often associated with being fair-minded and giving others the benefit of the doubt.³⁷

This sense of charity is captured in *The Oxford English Dictionary*’s definition of *charitable* as “inclined to think no evil of others, to put the most favourable construction on their actions.”³⁸ This definition echoes Paul, who declares that charity “thinketh no evil.”³⁹

The philosopher Eugene Garver has written thoughtfully about what it means to listen and understand with charity:



THOUGH
I HAVE ALL
FAITH,
SO THAT I
COULD
REMOVE
MOUNTAINS,
AND HAVE
NOT
CHARITY,
I AM
NOTHING.

*Discourse is always incomplete and always requires interpretation, filling in missing premises, understanding ambiguities, etc. Our rational reconstructions depend on charity because we are inevitably making choices in understanding another.*⁴⁰

In striving to become charitable listeners, we may gain an increased appreciation for Mormon’s observation that an essential component of charity is being “meek and lowly in heart.”⁴¹ It takes a certain measure of humility to strive to understand others rather than to construe them in a way that serves our purposes.

Consider Mormon’s description of charity while focusing specifically on seeking to become a charitable listener:

*And charity suffereth long, and is kind, and envieth not, and is not puffed up, seeketh not her own, is not easily provoked, thinketh no evil, and rejoiceth not in iniquity but rejoiceth in the truth.*⁴²

This is an impressive road map of how we should listen to one another.

Charity in Giving

The second degree of charity involves the way we give to and seek to serve others. Charity in this sense is often associated with almsgiving, which can easily lead to a distorted understanding of what charity really means. The British have a phrase, “as cold as charity,” which they use to describe the heart and attitude of charity given in a way that is condescending or self-righteous.

When we act with genuine charity, we seek to lift others up or to give them a boost, perhaps while we stay below.⁴³

Charity in Loving

The third degree of charity involves the way we care for and love others. Charity in this sense is celestial.

Perhaps the most moving definition of charity is found in the Book of Mormon. The prophet Mormon declared, “Charity is the pure love of Christ, and it endureth forever; and whoso is found possessed of it at the last day, it shall be well with him.”⁴⁴

There seems to be a progression from the easier to the more difficult among the three degrees of charity. We cannot hope to have genuine charity if we are not charitable

as listeners and givers. Not surprisingly, cultivating the “pure love of Christ” involves taking steps. We do not simply develop such love instantly; for most of us, it will be a lifelong process. Ultimately, it is a gift of God.

CONCLUSION

In conclusion, I stand with Paul in declaring the centrality of faith, hope, and charity. In saying this, I am constrained to acknowledge that we often find most appealing those ideals that we recognize we fall short of ourselves. This is certainly true in this case with me.

Nevertheless, I do have faith. God is our Father and we are His children, with all that implies. I pray that the wind and dust in the desert of criticism will not blind us to the truths of the gospel and that we may seek and find our own postcritical naïveté—a place where we can sing with wholehearted childlike amazement (as we have this morning):

*Then sings my soul, my Savior God, to thee,
How great thou art! How great thou art!*⁴⁵

I testify that Jesus Christ is the Savior and Redeemer of the world, and of you and even of me, and that He is mighty to save!⁴⁶

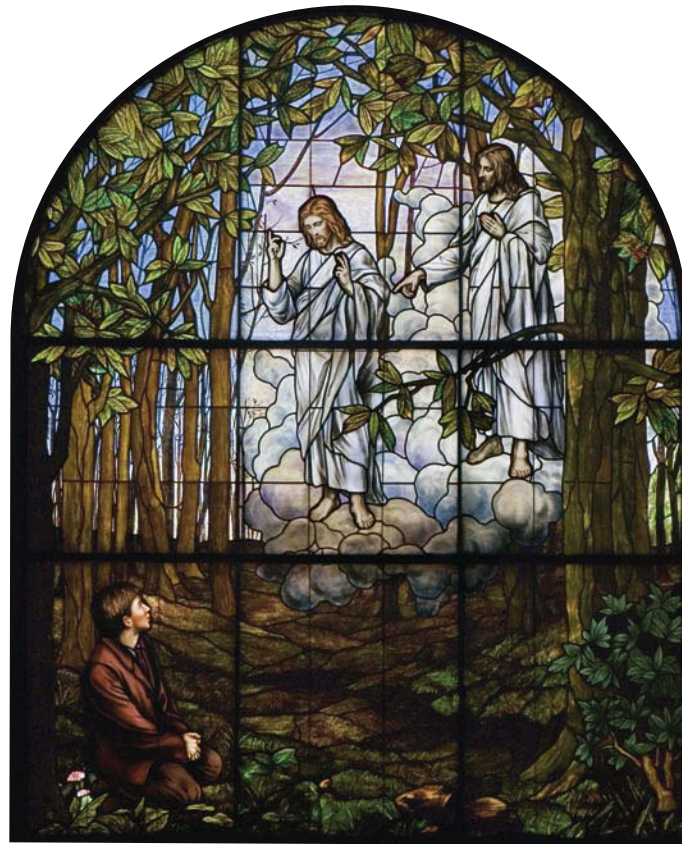
This faith gives me hope that Christ’s Atonement is sufficient for us—for you and for me. I have hope that through the principles and ordinances of the gospel and by making and keeping covenants, we will be saved as “children of God: and if children, then heirs; . . . joint-heirs with Christ.”⁴⁷ I am grateful that our Savior is our Advocate with the Father, pleading for us, and also pleading with us, to come unto Him.

I testify that charity—Heavenly Father and Jesus Christ’s pure love for us—is real. I pray that we may be blessed with a more abundant measure of charity in accordance with the work of our hands and the desires of our hearts.

Finally, I am grateful that “God so loved the world, that he gave his only begotten Son, that whosoever believeth in him should not perish, but have everlasting life.”⁴⁸ In the name of Jesus Christ, amen.

ART CREDITS

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I am grateful that our Savior is our Advocate with the Father.

NOTES

- 1 Brett Scharffs is professor of law at J. Reuben Clark Law School at Brigham Young University and associate director of the International Center for Law and Religion Studies. Professor Scharffs is a graduate of Georgetown University, where he received a BSBA in international business and an MA in philosophy. He was a Rhodes scholar at Oxford University, where he earned a BPhil in philosophy. He received his JD from Yale Law School, where he was senior editor of the *Yale Law Journal*. Professor Scharffs was a law clerk on the U.S. Court of Appeals, D.C. Circuit, and worked as a legal assistant at the Iran-U.S. Claims Tribunal in The Hague. Before teaching at BYU, he worked as an attorney for the New York law firm Sullivan & Cromwell. He has previously taught at Yale University and The George Washington University Law School and is a recurring visiting professor each year at Central European University in Budapest. In his 12-year academic career, he has written

50 articles and book chapters and has made more than 150 scholarly presentations in 20 countries. He is currently finishing two books: *Law and the Limits of Logic* and *Law and Religion: U.S., International, and Comparative Law Perspectives*. He is currently program chair of the Law and Religion Section of the Association of American Law Schools (AALS). He and his wife, Deirdre Mason Crane Scharffs, are the parents of three children. Thanks to Suzanne Disparte and Megan Grant for research assistance. Copyright © Brett G. Scharffs, 2009.

- 2 1 Corinthians 13:1–2, 13.
- 3 See Moroni 1:4.
- 4 See Moroni 7:20–48 (verses 20–39 discuss faith, 40–43 hope, and 44–48 charity).
- 5 Moroni 10:18, 20–21.
- 6 See 1 Corinthians 13:8.
- 7 Dr. Haught’s discussion was an adaption of Paul Ricoeur’s thought. See Paul Ricoeur, *The Symbolism of Evil*, trans. Emerson Buchanan (Boston, Massachusetts: Beacon Press, 1967), at 347–57; see also John F. Haught,

The Cosmic Adventure: Science, Religion and the Quest for Purpose (New York: Paulist Press, 1984), at 94–95.

8 Ricoeur calls this “primitive naïveté” or a “precritical form of immediate belief” (*Symbolism of Evil*, at 351–52).

9 *Songbook*, 5.

10 1 Corinthians 13:11.

11 See *Symbolism of Evil*, at 351 (“Does that mean that we could go back to a primitive naïveté? Not at all. In every way, something has been lost, irremediably lost: immediacy of belief.”).

12 *Symbolism of Evil*, at 352 (“I believe that being can still speak to me—no longer, of course, under the precritical form of immediate belief, but as the second immediacy aimed at by hermeneutics. This second naïveté aims to be the postcritical equivalent of the precritical hierophany.”).

13 1 Corinthians 14:20.

14 See Daniel 3.

15 Daniel 3:19.

16 Daniel 3:22.

17 Daniel 3:27.

18 Daniel 3:17–18 (emphasis added).

19 I express my gratitude to Brent Bowles for helping me appreciate this aspect of this story. See Dennis E. Simmons, “But If Not . . .,” *Ensign*, May 2004, 73–75.

20 Many years ago I heard a story about a pioneer couple, and it deeply impressed me. They had joined the Church and, with their infant child, made the difficult trek to Utah. Their journey was treacherous, and along the way their only child died. Husband and wife were heartbroken, and neither would ever be the same again. But their responses to this tragedy were very different. The husband became hard, bitter, and angry with God and the Church, and he developed a heart of stone. His wife, on the other hand, became more empathetic to the suffering of others and developed a deep spirituality and trust in Heavenly Father. Her heart became tender and soft.

Perhaps this story made such an impression on me because I recognized in myself the capacity to respond to life in both of these ways. When confronted with disappointment or difficulty, I can become withdrawn and distant, I can turn inward, and I can feel my heart harden. But I have also taken the other road—perhaps the road less traveled—in which I respond with a softening of my heart. To me, this story represents the very different reactions we can have to the hard realities of life: we can remain in the desert of criticism, or we can seek a deeper faith—our own “postcritical naïveté.”

21 In an address to the Wisconsin State Agricultural Society in 1859, Abraham Lincoln observed, “It is said an Eastern monarch once charged his wise men to invent him a sentence, to be ever in view, and which should be true and appropriate in all times and situations. They presented him the words: ‘And this, too, shall pass away.’ How much it expresses! How chastening in the hour of pride!—how consoling in the depths of affliction!”

(Abraham Lincoln, address before the Wisconsin State Agricultural Society, Milwaukee, Wisconsin [Sept. 30, 1859], in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 471, 481–82 [Roy P. Basler ed., 1953].)

22 See 1 John 2:1–2 and Moroni 7:28.

23 D&C 45:3–5.

24 I express gratitude to Louis Pope for drawing my attention to the distinction between Jesus Christ the Advocate and Lucifer the accuser.

25 Compare Moses 1:39 with Moses 4:3–4.

26 See 2 Nephi 1:14–15 and Jacob 6:5.

27 See 2 Nephi 2:27.

28 D&C 45:1, 3, 6.

29 D&C 45:1 begins, “Hearken, O ye people of my church, to whom the kingdom has been given; hearken ye and give ear to him who laid the foundation of the earth.” And in verse six, the verse following the passage about Jesus pleading our cause, Christ again pleads with us: “Hearken, O ye people of my church, and ye elders listen together, and hear my voice while it is called today, and harden not your hearts.” We see something similar in Moroni’s account of his father Mormon’s words, in which Mormon pleads with us to “cleave unto every good thing” (Moroni 7:28) and teaches that Christ has said, “Repent all ye ends of the earth, and come unto me, and be baptized in my name, and have faith in me, that ye may be saved” (Moroni 7:34). The passage in 1 John describing Jesus as our Advocate with the Father is also followed with an admonition to keep the commandments (see 1 John 2:3–5).

30 See 1 Corinthians 13:13; see also Moroni 7:46.

31 See 1 Corinthians 13:2; see also Moroni 7:46.

32 Moroni 7:46.

33 D&C 88:125.

34 1 Timothy 1:5.

35 See, e.g., 1 John 4:8; see also Ether 12:34.

36 Alma 34:29.

37 When listening with charity, we are not primarily concerned with ourselves and planning our response, but with seeking genuinely to understand. Being a generous listener reduces the distance between oneself and others.

38 2 OED 288, 1978. A related definition of *charity* in *The Oxford English Dictionary* is “[a] disposition to judge leniently and hopefully of the character, aims, and destinies of others, to make allowance for their apparent faults and shortcomings; large-heartedness. (But often it amounts barely to fair-mindedness towards people disapproved of or disliked, this being appraised as a magnanimous virtue.)” (2 OED, at 289). This sense is summed up in the OED as “fairness; equity.” *Cruden’s Dictionary of Bible Terms* includes this dimension of charity in its expansive definition of the term. “A person endued [with charity] does not interpret doubtful things to the worst sense, but the best; is sorry for the sins of others, but rejoices when any one does well, and is apt

to bear with their failings and infirmities” (ed. Alexander Cruden [Grand Rapids, Michigan: Baker Book House: 1958], s.v. “charity”).

39 1 Corinthians 13:5.

40 Eugene Garver, “Why Should Anybody Listen? The Rhetoric of Religious Argument in Democracy,” 36 Wake For. L. Rev. 353, 378–79 (2001). Garver continues, “Like friendship, being trustworthy involves complicated relations between speaker and hearer” (“Why Should Anybody Listen?” 378). Thus, listening with charity involves not just the skillful use of techniques; rather it reflects a certain type of disposition or character. Indeed, the techniques may vary. For example, sometimes charity requires looking beyond the words spoken, while sometimes it requires taking words at face value. But the underlying attitude of the charitable listener will remain constant. Listening with charity will always involve generosity, trust, good faith, and being large hearted and fair-minded.

41 Moroni 7:44.

42 Moroni 7:45.

43 It may be that because the modern ear associates the word *charity* with *alms-giving*, and because such giving often magnifies rather than reduces the differences between ourselves and others, that most modern translations of the New Testament render the Greek word *agape* as *love*, rather than *charity*, in order to avoid the minimalist, even negative, associations of *charity*. *The Encyclopedia Americana* notes, however, that “in the Middle Ages the Latin word *caritas*, from which *charity* is derived, was filled with the richest meanings of self-denial and self-sacrifice for the sake of others. It was only in the post-Reformation period that charity became identified with alms-giving. To the Reformers, giving alms was a pretended means of winning merit, and this led to the rejection of ‘charity’ in Biblical texts and hence in general religious usage among Protestants.” Nevertheless, *The Encyclopedia Americana* continues, “the word is too rich in meaning to be abandoned: pure charity is the noblest of virtues” (International edition, s.v. “charity”).

44 Moroni 7:47. The LDS Bible Dictionary defines *charity* as “[t]he highest, noblest, strongest kind of love, not merely affection; the pure love of Christ” (s.v. “charity,” 632). To his disciples, Jesus said, “A new commandment I give unto you, That ye love one another, as I have loved you, that ye also love one another. By this shall all men know that ye are my disciples, if ye have love one to another” (John 13:34–35).

45 “How Great Thou Art,” *Hymns*, 1985, no. 86. Text: Stuart K. Hine, *Author’s original words are *works* and *mighty*. Music: Swedish folk melody, ca. 1891; arr. Stuart K. Hine.

46 See 2 Nephi 31:19–20.

47 Romans 8:16–17.

48 John 3:16.

BY DALE A. KIMBALL¹

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*The following speech
was presented at the BYU
Law School Founders
Day commemoration at
Little America Hotel
in Salt Lake City, Utah,
on August 27, 2009.*

...

GOOD EVENING,
LADIES AND GENTLEMEN.
IT IS SO GOOD TO SEE
ALL OF YOU. I AM GRATEFUL
YOU ARE ALL HERE,
REGARDLESS OF WHO PAID
FOR YOUR DINNER.

ELDER QUENTIN COOK
IS HERE, AND I APPRECIATE
THAT. HOWEVER, HE
HAS TO BE HERE BECAUSE
HE IS MY COUSIN AND
BECAUSE I ATTENDED HIS
EXCELLENT SPEECH
TO J. REUBEN CLARK LAW
SOCIETY IN MARCH
OF THIS YEAR.

...

PHOTOGRAPHY
BY BRADLEY SLADE

STORIES THAT DEFINED OUR LAW SCHOOL



THOSE
EARLY
DAYS WERE
FULL OF
PROMISE.

It is always good to see President Samuelson. I call him President/Elder/Cec. He and I were in the Utah Air National Guard together many years ago. The official slogan of the Utah Air National Guard is "Sleep well. Your Air National Guard is awake." However, the unofficial enlisted men's slogan was "Sleep well. Your Air National Guard does." Whatever the slogan, we did our duty and we served.

Thank you so much, Bruce, for that wonderful and kind introduction. We have now been friends of the Hafens for 45 years. It has been a priceless friendship, and we too also hope that the friendship continues forever. One of my goals in life is to outlive the "Lee-Kimball-Benson story." My only defense is that even though I started it, Rex Lee and Dee Benson perpetuated it. I freely confess before all of you that that is no defense at all.

It is good to be here to celebrate the founding of a great law school, to be reminded of the importance of that interesting experiment begun so many years ago. I was honored then to be asked to play a small role in the beginning and am honored again to be asked to speak in this setting where we annually and collectively consider where we are going with respect to J. Reuben Clark Law School.

I was privileged to give the keynote speech on the occasion of the 25th anniversary of the charter class graduation on October 19, 2001. Perhaps a portion of a letter from Bill Wingo extending that invitation will at least partially describe my qualifications for this effort tonight. I quote from the Wingo letter:

As the committee has considered the program for the reunion, we have all felt that our classmates would enjoy hearing from you because of your involvement over the years with students, alumni, and faculty of the Law School. Not only were you our professor and friend, but you have also had opportunities as a practicing lawyer and judge to assess the impact of the Law School on the legal community and society in general. You are probably in as good a position as anyone to evaluate whether the "grand adventure" upon which we embarked in 1973 has, in retrospect, been worth the cost.

Incidentally, he also said in the letter, and I quote, "We are confident that the black robes of the judiciary and the 'weightier matters of the law' have not smothered your keen wit that we so enjoyed during law school."

There is no longer any way to measure either my wit or my intellect, for that matter. People who never laughed at anything I said before I became a judge now laugh at almost every joke I tell. People who appeared to believe that I was somewhat intellectually impaired before I went on the bench now suggest to me I have become brilliant.

The law and lawyers have been interesting and important to me since I was a teenager thinking about how I wanted to spend my working life. The law always seemed to me to be a fascinating career coupling the academic with the practical, doing some good, serving, and making a decent living. I have not been disappointed. A close friend

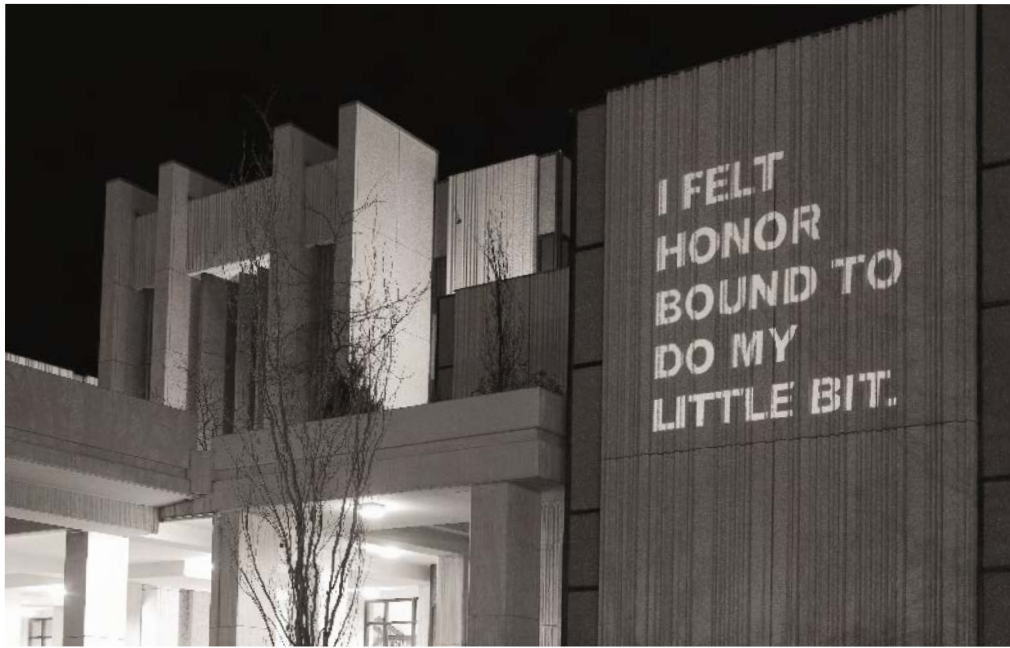
and law school classmate, Roger Thompson, put it this way: "For me, law was a magical combination of logic, reason, history, advocacy, and public policy. It appeared to offer many opportunities for employment and public service. It also provided a foundation in problem solving that could be used in almost any activity."² These insightful comments, unbelievably, were contained in a dunning letter seeking to raise funds for the University of Utah's law school.

Each person associated with BYU Law School has a story. Each of you so connected has a story. My story explains why I care so much about the success of J. Reuben Clark Law School.

My story is this: I graduated from BYU in August 1964 and from the University of Utah College of Law in June of 1967. Beginning in the late '60s, rumors started about a law school at BYU. One day in 1971 my friend and law partner, Keith Rooker (known to many students in the earlier classes at the Law School as Professor Kingsfield), told me that he had heard an announcement that the law school was a go. I did not feel good about it. I now quote from page 18 of Carl Hawkins' interesting book on the founding of the Law School. Carl, who is here tonight, summarized what I told him better than I could resummairize it myself.

Dale Kimball, a 1967 graduate of the University of Utah College of Law, was practicing in the same Salt Lake City law firm as Keith Rooker in 1971 when he heard the announced plans for a law school at BYU. Kimball feared that the school would become a captive of [extremists] and would, therefore, not be taken seriously in the legal academic world and detract from the reputation of BYU and the Church.

Several months after Rex Lee had been appointed as the founding dean of the new law school, he opened a dialogue with Dale Kimball and asked him to think about joining the faculty. Kimball had never seriously considered teaching before then, but he felt some sense of obligation if asked to serve to help Lee make the law school into one that would be worthy of respect. Kimball did not think, however, that he could break away from his law practice before 1974, when the new law school would begin its second year of classes.³



I am sure that Keith sold me to Rex. Bruce Hafen, I am sure, also had a hand in it. Bruce and I were law school classmates and friends. Also, my older brother, Lyn, had served a mission in Mexico with Rex. Incidentally, my brother Lyn told me that anything that Rex Lee was associated with would be a successful first-class operation.

When asked to help, I felt I had a duty to comply. I felt like I had to put my money, so to speak, where my big mouth had been. I felt honor bound to do my little bit to have this law school become a real law school with an excellent faculty and superb students—a law school respected among law schools. I had no right to be worried. In a legal sense, I had no standing—I was nobody. I admit it was highly presumptuous. Rex Lee and Bruce Hafen were involved. Dallin Oaks had been a noted and respected professor at the University of Chicago Law School and had a vision of a first-class law school backed and supported by the board of trustees. Carl Hawkins and other reputable, experienced law faculty types signed up. Some perspective and realistic humility took over as I realized I was greatly honored to even be thought of by anyone as part of this effort.

Those early days were full of promise. Who can forget the first years at the St. Francis School over on Ninth East rented from the Catholic Church, affectionately known to many of us as St. Reuben's. Who can forget the Charter and other early classes, the members of which exhibited some degree of courage in taking a chance on a new law school. Many of those, perhaps not surprisingly, were characters exhibiting a great deal of independence. I share with you a letter I received from one of them back in 2001.

I am just writing to thank you for taking the time to speak to the Freedom Academy students on August 2. By all accounts, you did an outstanding job and your remarks were well received. I am particularly appreciative that you were willing to step up and do this after your colleague and my former friend, Judge Benson, dropped the ball. This, of course, is no surprise to you.

Further, I regret ever having spread rumors about you in law school, and I promise to stop spreading any other rumors in the future as well.

Again, thank you for helping out.

With warmest regards,

Paul M. Warner / United States Attorney

Incidentally, within the last month, Paul Warner, now one of our magistrate judges, told me that he had been a whiz at math when it was just numbers. He further said

though that when they started to mix in the letters, he was lost. I assume that the “they” in his complaint was the conspiratorial educational establishment in his junior high school.

I recall the Order of the Cuff. I recall with nostalgia being charged by some students of being in substantial overcompliance with the dress and grooming code. I recall most of all serious and sustained effort on the part of the students, the faculty, and the administration to produce—to create—good, able, honest lawyers.

The stories continue to this day. Let me tell you one more recent story. In late 2005 or early 2006, I received a telephone call from a friend of ours who lives near Eureka, California. She said that she was a good friend of a young woman who was graduating from NYU who wanted to go to BYU Law School. The young woman was not a member of the Church, but her mother had joined a few years before. Her father, incidentally, is a doctor who had been in a difficult business relationship with an LDS partner. The young woman was an excellent student and a fine athlete. Princeton had offered her a golf scholarship. NYU had offered her an academic scholarship, which she accepted. My friend said, “Help her get into the Law School.” I said I would do what I could. I called Tom Lee, who agreed to interview her. She was so anxious to attend that she flew to Salt Lake City and drove to Provo for interviews. I had done what I could: I called Tom Lee. Tom apparently did what he could. Most important, the young woman was impressive and was admitted. She joined the Church while she was attending law school and, perhaps more remarkably, so did her father. The intelligent, able, and friendly women students at the Law School were instrumental in her conversion. She was a very good student and was managing editor of publication of the *Law Review*. She graduated in April of this year and is working in San Diego. She and thousands of others (about 5,000 to date) have attended the Law School, have been shaped and influenced by it and all it offers, and then have proceeded to scatter and do good and influence their part of the world.

Why does it matter whether lawyers are properly educated and trained? Why does it matter what lawyers do? What difference does it make what LDS lawyers do and how

well they do it? I quote from a speech given by James D. Gordon III, then acting dean of J. Reuben Clark Law School, to entering law students on August 20, 2008:

*Lawyers help make the rule of law possible. They do so as law clerks, judges, legislators, and members of local governments. They do so by representing entities and private parties, by enforcing the law, by defending against government overreaching, by resolving disputes, by solving problems, and by helping the civil and criminal justice systems to function. They counsel and help people to comply with the law and protect and vindicate people's rights. They are essential to a free society.*⁴

Incidentally, I am pleased to reveal that Jim Gordon started as a practicing lawyer in my old firm.

The history of our own people demonstrates the difficulties encountered when the law is not honored. We were in some instances subject to mob activities and the perversion of the law. In those instances when due process was afforded the LDS people in Ohio, Missouri, and Illinois, it was almost always because a courageous local lawyer or judge was willing to help vindicate rights rather than allow power and corruption to carry the day. To again quote Jim Gordon, “If any people believe in due process of law, in protecting people's constitutional rights, and in the rule of law instead of mob rule, it should be the Latter-day Saints.”⁵

Lawyers have the capacity to provide a specialized type of service. Lawyers have unique knowledge and skills that most do not have. Lawyers have access to the systems provided to resolve disputes and settle differences in civilized and lawful ways. Lawyers have the duty and responsibility to counsel and to help others with respect to some of their most important and profound affairs.

Despite being periodically maligned, this nation is generally fortunate to have many members of the legal profession who are honorable, fair, effective, and reasonable advocates. Most lawyers I know believe in the rule of law. Consider the range of legal advice provided by lawyers to members of society. People quibble over fence lines and boundaries. People need to be prosecuted and defended ably. Most business arrangements require honest and careful lawyering to achieve the ends desired by

LET US

the parties. Our employment relationships provide fertile areas for dispute resolution. Civil rights and freedoms are violated and must be defended and vindicated. We see honest disputes over benefits and retirement issues. There are many public and private land issues. There are interesting questions regarding patents, trademarks, trade names, domain names, and on and on and on. It is so critical that able, fair, intelligent, honest lawyers represent their clients with a commitment to the rule of law. Additionally, lawyers are often in the forefront of many service organizations, contributing time and money. In many respects we would be vastly poorer as a country without our able lawyers.

Years ago when I was serving as a regional representative, I was assigned by one of the senior brethren to help him call a new stake presidency in one of my stakes. I picked him up at his home on both Saturday and Sunday. I took him home both days after our work and meetings. We talked of many things. One of the interesting items that he shared with me (and I don't know whether this is still true, but I suspect that it is) was that lawyer members of the Church had among the highest rate of Church dropouts. However, he also told me that those who were in were really in. Those lawyers who remained active members, he said, because of their training, capacities, and experience were among the foremost in leadership abilities, in solving problems, and in the ability to render effective service. Apparently what is true in society is true in the Church as well.

Lawyers have much power for good or ill in American life. Except for the most recalcitrant and belligerent clients, lawyers can calm

SHOW UP.

and soothe. Lawyers can often impose sense and rationality on persons and situations leading to settlements or trials focused on real issues rather than on some of the peripheral nonsense that pervades some of our trials. Occasionally, in civil matters, you may just have to walk away from a dishonest or impossible client even though it is economically painful. I am not suggesting, incidentally, that you not represent those charged with crimes. (Sometimes the double negative is useful and necessary.) They are entitled to intelligent and fair representation. It is absolutely critical that good advocates hold the federal and state governments to their burdens of proof to ensure that the enormous power of the prosecutor is wielded fairly. It is also very important that prosecutors, particularly those who are LDS, not abuse prosecutorial power or hide evidence or do other nefarious things that we occasionally observe or hear about.

By properly performing their jobs and public service, LDS lawyers can have enormous power and influence for good in the Church and in society. It is critical and important that lawyers, including LDS lawyers, are properly educated and trained and faithfully perform the huge functions that have been carved out for them in the American nation from its inception.

Since each person associated with the Law School has a story, perhaps each also has a vision or a hope of what it ought to do, what it should be, and what kinds of lawyers it should produce. I offer my vision and my hopes.

In part, I share a portion of the view President Marion G. Romney expressed in the dedication of the Law School in 1975 when he said that at least one of the purposes for this enterprise ought to be “to teach, train, and inspire . . . students to be topflight lawyers and superior judges.”⁶ Competence is a valuable quality in any undertaking. It is surprising to me that some lawyers who have undergone seven years of higher education aren’t more competent, aren’t more able.

There are many intelligent, dedicated lawyers who exercise excellent judgment, who give their clients first-rate advice, who argue motions well, and who are superb in trying cases. There are brilliant and able practitioners who guide their clients through difficult business and tax transactions and who are very skilled at negotiating the complications associated in dealing with various administrative agencies.

And yet it is very disappointing to read incoherent briefs and listen to weak and rambling arguments. It is almost heavenly to listen to lawyers skillfully examine and cross-examine witnesses. It is painful to witness those who do not and to observe some lawyers who seem to have little acquaintance with the rules of evidence. We expect our mechanics, our doctors, our contractors, our accountants, our teachers, all who serve us, and all on whom we rely to know what they are doing. It is not too much to ask that lawyers trained at J. Reuben Clark Law School will be skillful, knowledgeable, informed, and good at what they do. Clients need competence. Courts need competence. Justice and society are served by good, skillful, competent, able, reasonable lawyers. Consequently, much of my hope and vision would be for competency—a consistently high level of the practice of law.

We have an obligation to be competent in what we do. Elder Neal Maxwell said it this way: “We cannot let the world condemn our value system by calling attention to our pro-

fessional mediocrity.”⁷ My father, Griff Kimball, perhaps foreshadowing Donald Trump, said it this way: “You’re fired! You and Bob are fired!” This happened late one morning on a hot summer day on my dad’s farm in Draper, Utah. He suggested that my best friend and I, if we couldn’t or wouldn’t thin his sugar beets properly, could get out of his field. We left partly ashamed and partly hoping that, for a while at least, we did not have to continue one of the worst jobs on earth. We had been abysmal. We had been paying no attention whatsoever to a job that requires constant and close attention. We had been talking about baseball and girls and throwing, fairly successfully, dirt clods at each other. My dad was right. Our lack of competence was going to cost him money in the fall when the beets were harvested. However, as he always did, a short time later he found us and said, “I am going to give you boys a chance to redeem yourselves.” He was big on redemption. Thereafter we performed competently. We did good work. We were redeemed. May we all be able to say we do good work or be redeemed when we do not.

I suggest also that commitment and diligence are critical in the law and with respect to any endeavor that matters. You can be highly competent but not be committed. A lawyer not committed is not much of a lawyer no matter how competent. I quote Elder F. Burton Howard about commitment. He was speaking primarily of Church commitment, but his statement has general application:

*The Church does have many needs, and one of them is for more people who will just do what they have agreed to do, people who will show up for work and stay all day, who will quietly, patiently, and consistently do what they have agreed to do—for as long as it takes, and who will not stop until they have finished.*⁸

There is a great need for lawyers to be committed, to do what they say they will do, to be where they say they will be, to perform in a manner implied by their professional degree, and to finish what they start. These qualities do not seem to me to be too much to ask of anyone, let alone professionals. Was it Woody Allen or Kareem Abdul Jabbar who said (joined by many others I am sure) that much of success in life is assured by just showing up. Let us show up.



Hugh Nibley has urged that there ought to be a gospel culture. He suggests a good beginning point would be our 13th Article of Faith⁹: “We believe in being honest, true, chaste, benevolent, virtuous, and in doing good to all men.” We teach and talk a great deal about chastity and virtue; I am not taking issue with that. However, perhaps more emphasis on honesty would be useful. From where I sit, I would suggest that one of the greatest needs in today’s world and in our Church is honesty. In our Court we see the unpleasant consequences of dishonesty in a variety of ways in both criminal and civil cases. It appears to me that an uncomfortable number of members of the Church seem to believe that it is permissible to steal from people if it is not done violently or at gunpoint. They are wrong. Neither is it moral nor honest to file false or inflated insurance claims. It is not moral or honest to cheat on tax returns. It is not moral or honest to not work for what you get. It is not moral or honest to not pay people employed by you what they are worth.

I remember with sorrow the former local Young Women president standing in front of me for sentencing after being convicted of social security fraud. I confess that I am tired of reading about alleged LDS Ponzi schemes and other fraudulent behavior by members of the Church. Some is only alleged. Let me assure you that much has been proven in various forms and in various forums. Surely if more of us were less greedy and less gullible there would at least be more forced honesty. I restate: One of the greatest needs in our society is for more honesty. Not only should we be truthful, but we should not engage in the games of material omissions. Remember the point about lawyers having a disproportionate influence for good or for ill. Lawyers can often cut off fraudulent behavior at the inception. Lawyers can not only be honest themselves but also be good examples to those around them in connection with

behaving honestly in business and personally. I plead with all associated with this law school to be pillars of honesty.

President Spencer W. Kimball stated his vision for the Law School in terms of broad community and societal needs. He wanted lawyers who would “be responsive to community needs, to heal and cure the inevitable conflicts of our society, . . . to . . . serve the world.”¹⁰ This sounds to me like an appeal to go about doing good as the Master did and an appeal to *be* good. It is a call to serve the poor, the outcast, the ill, and the helpless—legally and generally. Joseph Smith said that a good person not only would be prompted to do good in his or her neighborhood but also would range far and wide seeking such opportunities.¹¹ Our Book of Mormon teaches in the first chapter of Alma, verse 30, that good members of the Church should do good to all, help all, and share with all “whether out of the Church, or in the Church.” More specifically, Joseph Smith said we are “to feed the hungry, to clothe the naked, to provide for the widow, to dry up the tear of the orphan, to comfort the afflicted, whether in this church, or in any other, or in no church at all, wherever he finds them.”¹² In short, we need to minister to each other. The institutional Church does much institutional good. There is a great need for all of us, particularly educated and professional lawyers, graduates of the Law School, to go about doing good and being good. I remember a release from a particularly difficult Church calling that had lasted for many years. I remember thinking on that occasion that I would now have the time to do much more unassigned and unstructured good. I have done some, but I still have much to learn and much to do in that effort.

Many years ago as a young missionary in northern California, I met then Elder Howard W. Hunter, who was a relatively new member of the Quorum of the Twelve. He was touring our mission. I was to help. At the end of his tour he said he needed to pick up some trunks belonging to his son who had returned from a mission in Australia. The son had flown to Los Angeles and on to Salt Lake City. The trunks had been shipped to San Francisco. Some of my mission assignments included much of the mission business. My mission president said,

“You know about these things. Take Elder Hunter to the piers and help him get these trunks.” Elder Hunter knew the name of the ship. I made a few calls and ascertained at which pier the relevant ship was docked. In those days San Francisco was still one of the major world ports. I got the mission station wagon, Elder Hunter got in, and off we went. I said, “Do you have any shipping documents?” He said, “No.” I said, “Do you have a bill of lading?” He said, “No.” I said, “Do you have any documents at all relating to these trunks?” He said, “No.” I said, “I don’t think we’re going to get them.” He said, “Have some faith, Elder. We will.”

We reached the pier and parked. We or rather he talked his way through the clerks in the outer office and through the clerks in the inner office, and we arrived at the main office man. After a discussion with him, he said that if we went out onto the pier and could persuade the longshoremen to find and bring the trunks to us, we could take them. After Elder Hunter talked to the longshoremen, they found the trunks and offered to and did carry them to the car for us. All of this was a miracle to me.

Transactions at the piers worked with proof and documents. Longshoremen do not do favors. I knew Elder Hunter had been a lawyer, and this helped affirm my mid-teen decision to be a lawyer, since I had never before observed anyone equaling his abilities. However, later, as I reflected on this experience, I realized that his legal abilities were actually irrelevant. What mattered was that after spending a few moments with him, not one person dealing with him could believe that he would lie. He did not advertise his goodness, but it was apparent to the toughest of the tough within a minute or two. The toughest of the tough went out of their way to help him and accommodate him just because of what he was. What he was, what he had become, a magnificently good person, was what Elder Dallin H. Oaks suggested in one of his conference speeches that we all ought to become¹³—particularly, I say, those who have had any connection to J. Reuben Clark School of Law.

Thank you for this opportunity. If we are competent, if we are committed, if we are honest, and if we are good, a magnificent legacy for J. Reuben Clark Law School is assured.

NOTES

- 1 Dale A. Kimball is a judge for the United States district court for the District of Utah.
- 2 Letter from Roger H. Thompson to Dale A. Kimball, dated October 1, 2001.
- 3 Carl S. Hawkins, “The Founding of the J. Reuben Clark Law School,” *BYU Studies*, 18.
- 4 James D. Gordon III, “Lawyers and the Rule of Law,” *Clark Memorandum*, spring 2009, 4.
- 5 *Id.* at 5.
- 6 Marion G. Romney, “Why the J. Reuben Clark Law School?” Dedicatory Address and Prayer of the J. Reuben Clark Law Building, *Dedication: To Justice, to Excellence, to Responsibility: Proceedings at the Convocation and Dedication of the J. Reuben Clark College of Law, Brigham Young University, Provo, Utah, September 5, 1975*, 47.
- 7 Bruce C. Hafen, *A Disciple’s Life: The Biography of Neal A. Maxwell* (Salt Lake City: Deseret Book Co., 2002), 380.
- 8 F. Burton Howard, “Commitment,” *Ensign*, May 1996, 27–28.
- 9 See *Temple and Cosmos: Beyond This Ignorant Present*, vol. 12 of *The Collected Works of Hugh Nibley: Ancient History* (Salt Lake City: Deseret Book Co., 1992), 543.
- 10 Spencer W. Kimball, “Honoring the Trust of Our Founding Fathers,” *Dedication: To Justice, to Excellence, to Responsibility: Proceedings at the Convocation and Dedication of the J. Reuben Clark College of Law, Brigham Young University, Provo, Utah, September 5, 1975*, 20.
- 11 *History of the Church*, 4:226–27.
- 12 Editor’s reply to a letter from Richard Savary, *Times and Seasons*, March 15, 1842, 732; Joseph Smith was the editor of the periodical.
- 13 Dallin H. Oaks, “The Challenge to Become,” *Ensign*, November 2000, 32.



FIRST NAME

MIDDLE NAME

LAST NAME

DATE OF BIRTH

The Fractured Membership
Rights of the Undocumented Worker

STATUS

ILLUSTRATIONS BY EDEL RODRIGUEZ FORM 132B-1D

STILL

ON

THE

BORDER

By Carolina Núñez¹

THE

United States workforce includes over eight million undocumented immigrants.²

They work in the shadows to evade deportation, and they accept jobs and working conditions that their documented counterparts will not accept. As invisible as their day-to-day work may be, undocumented workers are an integral, though unsanctioned, part of the U.S. economy. They build our houses, tend our crops, and slaughter our livestock. They help satiate the American craving for affordable abundance. At the same time, unauthorized immigrants are not supposed to be here, and their mere presence undermines our understanding of community and membership. Relied upon but unwelcome, among us but uninvited, undocumented workers labor on the border of inclusion and exclusion and are the subjects of a series of challenging questions: Should undocumented workers enjoy the same workplace protections that authorized workers enjoy? When and how much should immigration status matter? Does being here count for anything? Who belongs?

Who is a member?

Unfortunately, the answers to these questions are less than clear. For much of U.S. history, undocumented workers have enjoyed many of the same rights that U.S. citizens have enjoyed by virtue of mere presence within U.S. territory. Recently, however, some undocumented workers have found that they cannot effectively enforce many of their statutorily protected employment rights, including the right to participate in union organizing activities, work in a discrimination-free environment, and be compensated for work-related injuries. Undocumented workers, it seems, are not considered full “members” of the employment protection franchise. Although this trend is not surprising given rising concern and anger over the large number of undocumented immigrants filling U.S. jobs, the denial of membership rights to individuals based solely on unauthorized status is actually a significant deviation from the theory of membership developing in broader U.S. law. Outside of the employment sphere, courts are not looking to status to determine membership. Rather, they are increasingly affording rights to individuals based on more fundamental indicators of membership including an individual’s ties to the surrounding community and subjection to U.S.-imposed obligations. Here, I argue that the distribution of employment-related rights should conform to this emerging, more nuanced approach, not merely for the sake of a consistently applicable membership theory but to avoid the draconian incentives produced by effectively denying undocumented immigrants work-related rights.

I. The Concept of Membership

The distribution of rights, regardless of type, boils down to a single question: Who belongs? This question follows naturally from the assumption that members—those who belong—deserve a certain type of treatment, and those who are not members deserve another. In that sense, the distribution of membership rights is as much about determining who *does not* belong as it is about determining who *does* belong.

Two competing mechanisms or theories for sorting members from nonmembers have historically coexisted in the United States: the territorial approach and the status-based

approach. Broadly speaking, the status-based approach distributes membership rights based on an individual’s legal status. Under such a conception of membership, undocumented immigrants have no formal, consensual relationship with the state and therefore are not members, while citizens enjoy the full suite of rights available. In contrast, territoriality distributes membership rights and benefits according to geographic boundaries without regard to legal status. Under a territorial approach, individuals within the state boundaries are members entitled to all rights offered by the state, while individuals outside the state boundaries have no guaranteed rights.

Territoriality enjoys wide support in the academic community, no doubt because of its broad inclusiveness. However, skeptics have challenged territoriality’s theoretical underpinnings, and the challenge is not an easy one to meet. What is it about territorial presence that requires the distribution of full membership rights? Why reward territorial presence at all? Territoriality’s supporters offer three potential responses to these questions.

COMMUNITY PRESERVATION

One potential rationale for territoriality is the community preservation rationale. Under this rationale, equality of membership is important, not because all individuals deserve membership rights equally, but because equality of membership preserves the nature of the community. This argument is not about fairness to strangers, but it is about preservation of a system, i.e., egalitarianism is worth preserving, not because newcomers to the territory deserve to be treated as equals, but because those who were already here desire to live in an egalitarian community and do not want to risk becoming a part of a future subclass of residents. Under this rationale, even an individual’s consent to substandard treatment could not justify unequal treatment because the effect would be the same—the perpetuation of a second-class caste.

Community preservation explains various scholars’ and courts’ espousal of territoriality. Owen Fiss, for example, has argued that the principle of self-preservation is implicit in the Fourteenth Amendment as “a statement about how society wishes to organize itself, and prohibits subjugation, even voluntary subjugation, because such a practice would

disfigure society.”³ Indeed, “[w]e ought not to subjugate immigrants, not because we owe them anything, but to preserve our society as a community of equals.”⁴

MUTUALITY OF OBLIGATION

A second possible rationale for territoriality is the mutuality of obligation rationale: the state owes individuals within the territory membership rights because those individuals are subject to the obligations imposed by the state. Under this rationale, territorial presence evidences the individual’s acceptance of the state’s jurisdiction over her. This concept flows from Westphalian notions of territorial sovereignty under which the nation-state is a unitary, self-contained actor with complete and exclusive jurisdiction over the people within its territory. Under such a system, no state may act within the boundaries of another sovereign nation-state. Thus, a nation-state may only impose obligations on and protect the population within its territorial borders. If a nation-state can only apply its rules within its territorial boundaries, then *where* an individual resides, rather than *who* the individual is, determines *which rules* apply. That is, presence within the nation-state’s territory determines an individual’s obligations. The nation-state, in turn, affords those individuals whatever membership rights and benefits it has undertaken to provide residents.

The mutuality of obligation rationale for territoriality makes perfect sense in a purely Westphalian system. The reality, however, is that states often do impose obligations outside their borders and selectively suspend obligations within their own territory. Embassies, for example, function as islands of immunity from the obligations imposed by the host state within its territory even though embassies operate within the host state’s territory. States also routinely pass laws to govern the acts of their nationals abroad. This incongruous relationship between modern notions of jurisdiction have led some to call for the rejection of territoriality and the adoption of a model based entirely on mutuality of obligation.

COMMUNITY TIES

Many have defended territoriality based on a community ties rationale. Under this view

of territoriality, territorial presence serves as an indicator of an individual's ties to other individuals and entities within the territorial boundaries of the state. This view of territoriality is attractive in its recognition of real human relationships as a basic social fabric, but the question remains: What is it about the existence of human relationships that requires the bestowal of membership rights?

One answer is that an individual's ties to the surrounding community foster commitment and loyalty to the surrounding community. As an individual becomes dependent on her surrounding community, her personal interests align with those of the community. The individual is therefore more likely to make valuable contributions to the community and refrain from harming it in order to augment her own existence within the community. Affording membership rights to such an individual rewards her contribution.

Another answer is that as strangers develop ties to the surrounding community, they begin to help define the character of the community. In other words, not only do the individual's ties to the community merit the individual's inclusion as a member, but the *community's ties to the individual* require inclusion of that individual. By including such an individual, the state preserves the community's character, which is a function of its members' social affiliations. This argument is merely a restatement of what I have termed the community preservation rationale. That is, those who are members owe individuals who have formed ties to the community nothing. Rather, they owe it to the community—to themselves—to preserve those ties and the community built on those ties.

Despite the appeal of the community ties rationale, it does not hold up well in practice. First, in today's world, ties to other individuals and entities do not necessarily depend on physical proximity. In fact, as the popularity of Internet-based social networking sites suggests, individuals may easily maintain affiliations with individuals in other countries. It is also entirely possible for an individual to have very few affiliations with those inside the country in which she resides. Moreover, even where an individual does have ties to others within the same nation-state, these affiliations may



stem from a shared interest, familial ties, or professional obligations, rather than from physical proximity.

Second, territoriality's binary conception of members and nonmembers—in which those within the territory are full members and those outside the territory receive nothing—does not coincide with this affiliations-focused rationale. The types, depth, and number of community ties vary by individual. Community ties distribute across a spectrum, not on a binary toggle. Is there a threshold number and type of connections required of a "member"? If community ties underlie territoriality, shouldn't an individual with more connection to the surrounding community have a greater claim on membership rights than one whose only connection to the surrounding community is mere presence in it?

II. Territoriality's Metamorphosis

Courts have begun to recognize territoriality's failure to always produce results consistent with its underlying rationales. Territorial presence, it turns out, is an inadequate proxy for the more fundamental indicators of membership encompassed by territoriality's underlying rationales. While a century ago U.S. courts held territorial presence to be an inviolable guarantee of many membership rights, strict territoriality has recently begun to wane. Instead of distributing rights based exclusively on an individual's territorial presence, modern courts have begun to distribute rights to individuals only where consistent with the rationales of territoriality. Thus, territoriality is undergoing a transformation; in this new conception of membership, which I call the "postterritorial" approach; courts are

shedding their preoccupation with geography and focusing on mutuality of obligation, community preservation, and community ties as the driving forces behind the distribution of membership rights.

Territoriality's metamorphosis has gained momentum only in the last several decades. In early U.S. history, being present in the United States categorically secured a great deal of membership rights for aliens within the United States, although the rationale for a territorial distribution of rights remained undeveloped for many years. In *Yick Wo v. Hopkins*,⁵ for example, the Supreme Court emphatically proclaimed, without explanation, that the Fourteenth Amendment's guarantees "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."⁶ In the years following *Yick Wo*, the Court routinely held that immigrants, even those that were not lawfully within U.S. territory, were entitled to membership rights by virtue of their presence within U.S. borders.⁷ However, the rationale for such a territorial conception of membership remained vague.

It was not until a century later, and perhaps due to increasing concerns about the wisdom of offering constitutional rights to undocumented immigrants, that the Court offered a detailed defense of territoriality's guarantee of membership rights to all within the national territory. In *Plyler v. Doe*,⁸ the Court invalidated a Texas statute that allowed local public schools to deny enrollment to undocumented children. Those children, the Court reasoned, were within the United States and therefore entitled to the equal protection of Texas law. In arriving at that conclusion, the Court offered a mutuality of obligation rationale for territoriality. The Court reasoned that Texas was under an obligation to protect all those upon whom it could impose obligations—all individuals within Texas borders. As a second rationale for territoriality, the Court emphasized the need to preserve the national community's character. The Court reasoned that education "has a fundamental role in maintaining the fabric of our society."⁹ According to the Court, we must afford unauthorized immigrants a public education in order to preserve "a democratic system of government,"¹⁰ ensure that individuals will be able to "lead

economically productive lives to the benefit of us all,"¹¹ and "sustain[] our political and cultural heritage. . . ."¹²

Some of the first hints that territorial presence would no longer categorically guarantee rights to aliens within U.S. territory appeared just a few years after *Plyler* in *Verdugo-Urquidez*.¹³ There, the Supreme Court, in a plurality opinion, suggested that territorial presence may not be enough for some membership rights to attach. The Court's opinion boldly recharacterized *Yick Wo* and its progeny: "These cases . . . establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."¹⁴ The defendant in *Verdugo*, a Mexican national who had been brought to the United States against his will while U.S. law enforcement agents searched his house in Mexico without a warrant, had not established such connections: "[T]his sort of presence—lawful but involuntary—is not of the sort to indicate any substantial connection with our country."¹⁵ The Court stopped short of requiring an individual to have significant community ties in the U.S. as a prerequisite to the enjoyment of membership rights, but its language certainly suggested that affiliations might be indicative of membership within the U.S.

Territoriality's transformation is perhaps most obvious in Supreme Court precedent determining the rights of individuals outside U.S. borders. While strict territoriality would categorically exclude such individuals from the distribution of membership rights, the Supreme Court has recently rejected strict territoriality in favor of a more functional, postterritorial approach. This is a significant departure from early precedent. In *Ross*,¹⁶ a seminal case that governed U.S. law for several decades, the Court denied that a sailor on a U.S. merchant ship had a Sixth Amendment right to a jury trial, even though he had been tried by a U.S. consular court in Japan: "[t]he Constitution can have no operation in another country."¹⁷ Notably, the Court defended the territorially based denial of constitutional rights based on the absence of mutual obligations between the petitioner and the U.S. government. The Court suggested that a government has no obligation to an individual outside its own territory because the state

cannot impose any obligations upon individuals abroad. Rather, the U.S.'s only obligation was to Japan to conduct its consular affairs on mutually agreed terms.

Reid v. Covert,¹⁸ decided more than 70 years later, signaled a shift in the Supreme Court's approach. There, the Court held that two U.S. citizens living abroad and convicted by a U.S. military court for the murder of their husbands enjoyed the right to a trial by jury and indictment by a grand jury. Backtracking on its reasoning in *Ross*, the Court suggested that mutuality of obligation *did* require the U.S. to offer the defendants the requested membership rights. The Court reasoned that when the U.S. enforces obligations on citizens abroad, it must also offer corresponding protections: "[W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. . . . When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land."¹⁹

Reid rejected strict territoriality in favor of an approach based on mutuality of obligation. While much of the *Reid* opinion focused on the defendants' U.S. citizenship as the cornerstone of mutual obligation (and therefore suggested that a status-based approach to membership would govern), the Court's recent opinion in *Boumediene v. Bush*²⁰ indicated that aliens, too, may enjoy some Constitutional protection outside of U.S. borders. In *Boumediene*, the Court squarely faced a question of membership—of which membership model to apply to determine whether enemy combatant detainees held at Guantanamo Bay were members for purposes of enjoying a right to the writ of habeas and the protections of the Suspension Clause. In its lengthy opinion, the Court struggled to define the contours of membership, acknowledging that formal status and territorial presence within the U.S. were traditional indicators of membership.

However, despite the detainees' lack of status and territorial presence, the Court held that Congress could not deny them the privilege of habeas corpus without complying with the Suspension Clause. In rejecting a strictly territorial approach, the Court

observed that the U.S. was the sole entity imposing its laws at the naval station. No other government had effective jurisdiction over Guantanamo Bay. Thus, there was no reason the United States could not, in practice, afford constitutional protections to the detainees. In effect, the Court highlighted territoriality's failure to preserve the notion of mutual obligations. The Court's argument can, in part, be read as a critique of Westphalian notions of territoriality: since governments can and do impose obligations abroad, they also can and ought to afford corresponding protections: "Even when the United States acts outside its borders, its powers are . . . subject 'to such restrictions as are expressed in the Constitution.'"²¹

A bird's-eye view of territoriality's role in U.S. law suggests that strict territoriality may not survive into the next century. This is not to say that territory no longer matters; it does. But territory no longer defines relationships in the way it once did, nor does territory pose the impenetrable barrier of sovereignty and exclusive jurisdiction idealized by Westphalian territorial preeminence. Territorial presence is thus no longer a consistently adequate proxy for fundamental indicators of membership. In territoriality's stead, a more flexible post-territorial membership approach is emerging in which membership is not based on the fiction that territorial presence signifies membership in a society but on actual indicators of membership—community ties and mutuality of obligation—as well as an effort to preserve the character of the national community. Courts are looking to the rationales that historically justified territoriality and evaluating membership with direct reference to those rationales. In that sense, territoriality is not dying; it is making a transformation to keep up with the realities of modernity. Thus, courts are now asking and will likely increasingly be asking whether an individual (or class of individuals) (1) has significant and substantial ties to the surrounding community and (2) is subject to U.S. law in a way that triggers the U.S. government's reciprocal obligations. However, even where an individual does not seem to evidence these two aspects of membership, courts will need to evaluate whether denying rights will threaten the character of U.S. society.

III. Territoriality's Demise in the Employment Sphere: Where Work and Borders Collide

Given strict territoriality's decline in U.S. law, it should come as no surprise that with respect to employment-related rights, immigrants can no longer solely rely on their territorial presence to secure protections. However, territoriality's decline in the employment sphere has not followed the same trajectory that territoriality has followed outside the employment sphere. In employment-related cases, courts are not focusing on the rationales underlying territoriality to distribute membership rights. Rather, in this realm, territoriality is giving way to the status-based membership model rather than to the developing postterritorial model discussed above. For documented workers, this poses no obstacle to the enjoyment of employment rights, as authorized status secures membership rights under the status-based model. Undocumented workers, however, having no legal status under the law, have increasingly found themselves excluded from the effective enjoyment of many employment-related rights.

It was the Supreme Court's 2002 decision in *Hoffman Plastics*²² that solidified the status-based model's encroachment into the employment sphere. There, the petitioner, Castro, had been unlawfully fired from his job because he was engaging in union organizing efforts, an activity protected under the National Labor Relations Act. Castro brought a claim for back pay (payment for work that would have been done if not for the unlawful termination of employment). However, during the resolution of his claim, Castro admitted he had no authorization to work in the United States and that he had secured employment at Hoffman with a fraudulent Social Security card. The Supreme Court acknowledged that Castro was protected under the National Labor Relations Act by virtue of his presence in the United States, but it refused to award Castro back pay. The Court reasoned that awarding back pay would run counter to the Immigration Reform and Control Act's underlying policy of preventing the employment of undocumented immigrants. (Passed in 1986, IRCA imposes civil and criminal penalties on

employers who knowingly hire or continue to employ unauthorized workers.) Castro's only remedy—and Hoffman's only sanction—was an order to cease and desist from engaging in violations of the NLRA and to post a notice of that order at Castro's former work site.

The *Hoffman* majority opinion highlights the duality of the undocumented worker's position in the workplace. Undocumented workers labor on the border of the territorial and status-based models. By recognizing that undocumented workers present in the United States are "employees" covered under the NLRA, the Supreme Court offered a measure of inclusion and membership to Castro and all undocumented workers. However, Castro's membership ended there. Castro's status as an undocumented immigrant foreclosed back pay because, under IRCA, Castro could not legally have worked at Hoffman during the period for which back pay was awarded.

Hoffman has added a new dimension to both federal and state employment law litigation. Immigration status has now become a relevant factor in the distribution of various employment rights in many jurisdictions. In *Escobar v. Spartan Security Service*,²³ for example, the court held that back pay was not available to a claimant who had been undocumented at the time of his employer's alleged sexual harassment, sexual discrimination, and retaliation even though the claimant had since gained authorization to work legally in the U.S. Similarly, a federal district court in Florida held that the estate of an undocumented employee injured in a forklift accident could not recover lost U.S. wages in its claim against the forklift manufacturer.²⁴ Citing *Hoffman*, the court reasoned that lost wage compensation was sufficiently like the back pay denied in *Hoffman* for the court to find that immigration status precluded its award to an undocumented worker: "Awarding lost wages is akin to compensating an employee for work to be performed. This Court cannot sanction such a result."²⁵ In what is likely the most expansive view of *Hoffman*, a Virginia court ordered a worker's compensation claimant to respond to the employer's discovery request regarding immigration status.²⁶ Citing *Hoffman*, the court held that the claimant's immigration status was relevant, not merely to the remedies available, but to



Undocumented
workers
contribute to
a collective
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value to an
enterprise.

the claimant's qualification to bring suit at all: "Essentially, Plaintiff's argument that he is entitled to make a workers' compensation claim, even if he is an illegal alien, is 'foreclosed by federal immigration policy. . . .'"²⁷

The fractured view of membership widely applied to the distribution of employment rights and benefits creates significant concerns on many levels. Perhaps most disturbing, the *Hoffman* approach to undocumented workers undermines federal immigration policy, the very issue with which the majority claimed to be concerned. As many have argued, the exclusion of unauthorized immigrants from labor protections is likely to create incentives for employers to continue hiring unauthorized workers. First, removing back pay as an available remedy for the violation of any employee's employment rights severely diminishes an employer's incentive to

fulfill its employment obligations. The remedies approved by the majority in *Hoffman*, an order that the employer cease and desist its illegal conduct and post a notice to employees of the NLRA violation, are a small price to pay for improper termination of an employee. With no remedy to enforce an ostensibly legally ensured right, employees will have little incentive to report their employers' labor law violations, especially where employers threaten to expose an undocumented worker's legal status during litigation. As a result, undocumented workers will have little option but to continue working under substandard conditions.

This, in turn, encourages the hiring of undocumented workers, a practice specifically prohibited by IRCA and ostensibly the very focus of IRCA. As the *Hoffman* dissenters recognized, the denial of back pay "lowers the cost to the employer of an initial labor law violation. . . . It thereby increases the employer's incentive to find and to hire illegal-alien employees" or at least encourages employers to hire "with a wink and a nod those potentially unlawful aliens whose unlawful employment (given the Court's views) ultimately will lower the costs of labor law violations."²⁸

In addition, the reverse incentives created by the failure to afford equal remedies to undocumented immigrants erode workplace standards for all employees, especially where undocumented workers compose a high percentage of the workforce. Where undocumented workers are readily available and easily coerced into remaining quiet about labor law violations, documented workers, too, will be reluctant to report those violations out of a fear of being replaced by an undocumented worker or as a result of pressure from undocumented coworkers who do not want to risk exposure of immigration status. Statistics suggest this dynamic may indeed be present: industries in which undocumented workers compose a high percentage of employees (which are often the most dangerous and lowest paying industries) exhibit a high incidence of wage and hour law violations.

In addition to the troubling incentives created by the use of a status-based approach to deny employment-related rights and benefits to undocumented workers, the status-based approach is inconsistent with the emerging postterritorial approach to membership

emerging outside of the employment sphere. Territoriality's trajectory in the employment sphere represents a stray branch in the overall trajectory of membership theory within U.S. law. While outside the employment sphere territoriality is undergoing a transformation into a more principled, nuanced membership approach, territoriality as it has historically applied in the employment sphere is giving way to an even more formalistic approach. To avoid the undesirable incentives created by the use of a status-based model in the employment sphere and to bring the distribution of membership rights within the employment sphere in line with territoriality's broader transformation, courts must begin to employ the emerging postterritorial approach to distribute employment-related rights.

Under the developing postterritorial approach to membership, undocumented workers, as a category, are members of the employment sphere entitled to the full distribution of membership rights available in that sphere. First, undocumented workers have significant affiliations with their surrounding community. Their employment, alone, ensures the existence of these ties. Undocumented workers contribute to a collective effort and add value to an enterprise. Their employers and the broader economy rely on undocumented workers to perform what are often undesirable and dangerous tasks that few authorized workers care to perform.

Second, the principle of mutuality of obligation further suggests that undocumented workers, despite their lack of work authorization, are members entitled to full membership rights. On one level, and as articulated in *Boumediene*, the only law that applies to undocumented workers in the United States is U.S. law, and the government must not impose obligations upon undocumented immigrants without also affording corresponding protections. But on a more specific level, the relationship between employee and employer is one of reciprocal obligations. An employee subjects herself to the requirements and instructions of an employer on the express assumption that the employee will abide by legally imposed standards. To allow an employer to circumvent these standards by denying undocumented immigrants certain remedies is to approve of the employer's refusal to fulfill its reciprocal obligations to

an employee—it allows employers to govern employees without legal constraint.

Third, and perhaps most important, the failure to enforce the rights of the undocumented worker is likely to create a subcaste of workers without enforceable rights. Aside from leaving a group of residents without full legal recourse for blatant violations of employment rights, this threatens our societal norms of equal rights in the workplace and ultimately endangers the rights of authorized workers and citizens. Absent full protection for undocumented workers, employment standards could be weighed down by the sheer number of undocumented immigrants working under subpar conditions. A bifurcated system of employment protections in which one group enjoys more remedies than the other cannot be sustained for long; such a system brings to mind Thomas Jefferson's warning against the passage of the Alien and Sedition Acts: "The friendless alien has indeed been selected as the safest subject of a first experiment; but the citizen will soon follow. . . ."²⁹

IV. Conclusion

The increasing presence of undocumented workers in the U.S. labor force poses challenging questions for courts and elected officials about the meaning of immigration status, presence in the United States, and, as I have argued here, the broader concept of membership. I do not claim to have all the answers to these questions. Rather, my hope is that I have given a larger context to questions surrounding undocumented workers, and more broadly, undocumented immigrants. Membership rights can be distributed many different ways. It is important that the U.S. choice of a membership approach be a deliberate, conscientious choice that furthers our overall policies and goals rather than the result of a hasty reaction to surging unauthorized immigration. In the employment sphere, I believe U.S. law has diverged from a broader U.S. commitment to and trend toward a more principled approach to membership. But it is not too late to correct the course of employment rights distribution. Indeed, commentators from both ends of the political spectrum are calling for an overhaul of our immigration policy. My hope is that analyzing the undocumented worker through the lens of member-

ship may help illuminate the difficult path that lies ahead as the United States engages in immigration reform and makes difficult decisions about who belongs and what belonging here means.

NOTES

- 1 D. Carolina Núñez is a visiting assistant professor of law at J. Reuben Clark Law School. She graduated from the Law School in 2004.
- 2 Jeffrey Passel & D'Vera Cohn, *Pew Hispanic Center, A Portrait of Unauthorized Immigrants in the United States* 12 (2009).
- 3 Owen Fiss, *The Immigrant as Pariah*, 23 *Boston Rev.* 5 (Oct./Nov. 1998).
- 4 *Id.*
- 5 *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).
- 6 *Id.* at 369.
- 7 *See, e.g., Wong Wing*, 163 U.S. 228 (1896).
- 8 *Phyller v. Doe*, 457 U.S. 202, 226 (1982).
- 9 *Id.* at 221.
- 10 *Id.* at 221.
- 11 *Id.* at 221.
- 12 *Id.* at 203.
- 13 *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990).
- 14 *Id.* at 271 (1990) (emphasis added).
- 15 *Id.*
- 16 *In re Ross*, 140 U.S. 453 (1891).
- 17 *Id.* at 464.
- 18 354 U.S. 1 (1957).
- 19 *Id.* at 6.
- 20 128 S. Ct. 2229 (2008).
- 21 *Id.* at 2258 (quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)).
- 22 *Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Board*, 535 U.S. 137 (2002).
- 23 *Escobar v. Spartan Sec. Serv.*, 281 F. Supp. 2d 895 (S.D. Tex. 2003).
- 24 *Veliz v. Rental Service Corp. USA, Inc.*, 313 F. Supp. 2d 1317 (M.D. Fla. 2003).
- 25 *Id.* at 1336.
- 26 *Xinic v. Quick*, 69 Va. Cir. 295, 2005 WL 3789231 (Va. Cir. Ct. 2005).
- 27 The court was unhindered by the relevant workers' compensation statute, which defined an "employee" as "every person, including aliens and minors, in the service of another under any contract of hire . . . whether lawfully or unlawfully employed. . . ." Va. Code Ann. § 65.2-101 (emphasis added).
- 28 *Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Board*, 535 U.S. 137, 156 (2002).
- 29 Thomas Jefferson, "Drafts of the Kentucky Resolutions of 1798," in 7 *The Writings of Thomas Jefferson, 1795-1801*, (Paul Leicester Ford, ed. 1896).



PHOTOGRAPHY BY BRADLEY SLADE

By James R. Rasband¹

On behalf of my faculty colleagues as well as the rest of the administration and staff, I welcome you to BYU Law School. Among the many choices and opportunities you have had, I am convinced you have chosen well. We all consider it our duty to help ensure that your choice bears good fruit.

The theme for my remarks today will be a familiar one that I believe is applicable to all of us—students, faculty, administration, and staff. It comes from the book of Luke: “Unto whomsoever much is given, of him shall be much required: and to whom men have committed much, of him they will ask the more” (Luke 12:48; see also D&C 82:3).



All of us who gather today do so as the beneficiaries of the sacrifices and efforts of others. We all inherit a law school with a strong foundation and excellent reputation because of the efforts of so many students and faculty who have passed through our halls.

You are the beneficiaries of an incredibly low tuition because of the generosity and sacrifice of many, many members of the Church. In these economic times, that generosity is welcome because it will allow you to avoid incurring so much debt, particularly if you are careful with your expenses over the next three years. But in light of the economic times and the many competing uses for those funds, it makes the gift of the tithe payers all the more remarkable. This is particularly the case because the vast majority of them will not ever be able to partake of this gift themselves. Parents and spouses are also likely giving much—financially and emotionally—so that you can be here and succeed.

You have been given much not just by others but also by your Maker. This is a remarkably gifted class whose collective experience and knowledge will be a well from which I hope you will all drink deeply during your three years here. The truth is that one of the greatest gifts this law school will give you is to introduce you to your classmates. In this group gathered today in this moot court room are those who I hope and expect will become your lifelong friends.

All of us are persons to whom much has been given. It is not cause for congratulation—although I can't help but pause and congratulate ourselves on putting together another such fantastic class—rather, it is cause for reflection and, ultimately, for sacrifice. There truly is much required of each one of us.

Now, I recognize that today, of all days, despite sterling academic credentials that place you among the top classes in the country, many of you probably do not feel like the person who has been given 10 talents. More likely, many are wondering whether they've been given enough talent for the task ahead. And if you are not wondering that today, you surely will over the next weeks and months as you are subjected to searching Socratic questioning or as you hear a classmate's response and think, Why didn't I see that? What am I missing?

Let me assure you that all of you have the capacity to succeed. You are those who have been given 10 talents. When you leave law school, you'll have even more. The question will be how you will use them.

But for now, as you embark on this endeavor, there may be times when you will be tempted to think that you lack the necessary ability. As a counterweight let me suggest a couple of areas in which it is important to have some perspective.

First, it is wise to remember that when we do something for the first time, it is almost always difficult. When you begin preparing for class, it may take you a couple of hours to read, brief, and understand a three- to four-page case. Even then, you will walk into class, thinking that you are surely prepared, only to find out that the issues and questions raised by the case run much deeper than you had imagined.

Think for the moment about a garden-variety torts case, a personal injury case, where an older gentleman—we'll call him Smith—was driving across an elevated causeway, lost control, hit a wooden guardrail, and plunged 100 feet to a severe injury, after which he sued the county that had constructed the bridge.

In preparing for class, you'll need to read and understand this basic plotline of facts, but that won't be enough. Nor will it be enough just to understand the legal issue and doctrine in the case: here, was the county's construction of the causeway and guardrail negligent, reasonable, and the cause of the injury?

In addition to the facts and the legal rule, you'll also need to think about the procedural posture of the case: should the court assume the allegations of Smith are true because it is the county who has moved to dismiss the case or vice versa?

You'll need to look at other cases and consider how this particular case fits with precedent and whether it is distinguishable in meaningful ways.

Likewise, you'll need to consider what a word like *reasonable* means. Think about how often each of us confidently asserts that a particular argument is "unreasonable" or a particular policy "unfair." Part of learning the law is learning to unpack such words and give them content and meaning.

In the causeway crash case, for example, is reasonableness defined simply by our quick intuitive judgment of what we think a county should do to make its roads safe? Is the answer an economic one—to look at the costs of installing stronger guard rails vs. the number of accidents prevented? Is the answer a look at custom? Does it matter how other counties and states are building guardrails? And for any potential rule adopted, what sort of social impacts will it create? Will counties respond by building better guardrails or building fewer roads? What is the best way to care for persons, like Smith, who suffer severe injuries? Is it the judicial system or some form of social insurance? And for all of these questions, what is the relative role of courts, the legislature, and the executive branch in such decisions?

In the hands of superb faculty, this sort of dialogue and the complexity of class discussion will go much further and peel back many more layers than this quick peek at the issues.

At the beginning, the process may feel a bit excruciating, particularly if you are on the proverbial Socratic hot seat, but you will improve over time if you give it your best effort.

Everything takes longer when you begin. Experience tends to be a little painful and a little embarrassing. But the alternative is no growth.

I began law practice in September 1990 in Seattle, Washington, following a clerkship in San Diego. I had not yet taken a bar examination, mostly because when I headed off to do a clerkship I hadn't yet decided where I wanted to practice law, and I certainly wasn't eager to take the bar exam twice. What this meant was that from September until April or May of the next year, I would not be able to appear in court or sign any court pleadings. In all of my correspondence with opposing counsel, my signature read: "James R. Rasband, not yet admitted to the bar."

That fall, soon after I started, I was approached by a partner to handle an unlawful detainer case, an ideal opportunity for a young associate. The basic idea of an unlawful detainer is that a tenant who is in possession of a leased property refuses to pay rent or leave the premises. This particular case involved a western-wear store in Ellensburg, Washington, about 100 miles east of Seattle. As I recall, the tenant had not paid rent for

*This
address was
given to
the entering
first-year
students of
J. Reuben
Clark Law
School on
August 19,
2009.*

a little more than a year, and the landlord decided he needed the help of the legal system.

These are very straightforward cases, but everything took me a great deal of time because I was so new. I puzzled over every step and would have preferred not to bill most of my time because much of it was wasted. The partner in charge, however, told me to write it down and that he would write off what was unnecessary once the case was resolved.

One early puzzle I remember was filing what is called a “motion to shorten time.” Basically, a motion to shorten time—as the title suggests—is a request for the court to shorten the amount of time normally required for a particular legal procedure. I’d never heard of a motion to shorten time. I read the rules. I thought about the equity. I looked at cases. I thought about the theory. I can’t recall precisely, but I probably spent five hours on that motion to shorten time. Later, I would learn that all I needed to do was dictate a quick note to my secretary and have her prepare the motion for my signature. It was probably a 10-minute task and certainly no more than 30 minutes.

The motion to shorten time was not the only task that took me more time than an experienced attorney. I was young and learning.

In any event, the case moved forward and we succeeded. It was certainly not a triumph of brilliant lawyering on my part. It’s not too difficult to prove unlawful detainer when the defendant failed to pay rent for at least a year on a commercial lease.

Once the case was over, the Washington statute under which we proceeded allowed us to seek attorneys’ fees. The partner in charge told me to draft the motion and seek fees from the other side. Knowing how long everything had taken me, I was a bit queasy. We cut back the request some but plainly not enough, because I will never forget the response from opposing counsel.

Opposing counsel dissected the fee request and my billing statements line by line. The motion to shorten time, he said, could be prepared by a reasonably competent attorney in 30 minutes, but it took “James R. Rasband, not yet admitted to the bar,” and he quoted, five hours. And so it went, this task or that task could have been performed

by a reasonably competent attorney in one hour, but it took “James R. Rasband, not yet admitted to the bar,” four hours.”

By the time of the fee request, I had been admitted to the bar, much to the surprise of my opposing counsel. Unfortunately, that meant that I was fully capable of arguing the fee motion to the court. I headed over to Ellensburg to take my whipping. As luck would have it, the opposing counsel had filed his response brief late and the court refused to consider it. The judge, who had done many, many unlawful detainer cases, assigned a reasonable fee, and we were done.

Here I was, after three years of law school and one year of a clerkship on the Ninth Circuit. I was still learning and still



feeling inadequate. Now, the truth is that BYU does a much better job with teaching you some basics of lawyering skills than I received. Nevertheless, you are likely to find your own versions of motions to shorten time. It’s okay. In fact, it is necessary. Spend the time to get it right. Don’t be worried or ashamed that your first effort takes longer. It almost always gets easier as you go.

Let me suggest a second counterweight to the almost inevitable feeling as you begin law school of lacking the necessary talent. Please keep in mind that lasting happiness and peace is not a function of comparing yourselves to others.

Last spring Elder Quentin L. Cook, who is a member of the Quorum of the Twelve

Apostles of our sponsoring church, spoke at a fireside sponsored by J. Reuben Clark Law Society, a society made up predominantly but not exclusively of LDS attorneys, which most of our graduates join in addition to the BYU Law School Alumni Association. Elder Cook, as most of you know, is an attorney, as are two of his three children—a daughter and a son, who is a graduate of our law school.

In one section of his address, Elder Cook suggested that too often our sense of happiness is derived from our perception of how we are doing vis-à-vis others. He told a story of how, years ago, he had been running a health care system and hired a consultant to help the company resolve some merger issues. The consultant had started by asking the group to list some of the skills that were important to what they needed to do, such as delegation, public speaking, working with others, etc. Elder Cook recalled listing out the various skills, at which point the consultant asked him to list individuals who he had met in his lifetime that were the very best in each area. Elder Cook related:

As I recall there were approximately 10 of these skills. He then listed them across the top of the whiteboard and asked me, using an ABC grade formulation to identify how each of these superstars performed in the other nine areas. To my great amazement, I realized that no one got straight As across the board. Most had significant numbers of Bs, and many had some Cs.

The consultant then pointed out that what each of us do in life is compare ourselves with the A+ performers in each category that we value, and then we feel inadequate and unsuccessful in what we are doing.

You might ask, “Why am I sharing this with you?” Law and the process of becoming a lawyer are very competitive. The respect for credentials can reach an inappropriate level where they are virtually “idols.” . . . In the botchhouse environment of the law, there are many people who are very skilled, and there is always somebody who seems to be better in all the ingredients that make up the qualifications to be a lawyer. Notwithstanding these issues, I would ask, “Do we have to be an A in everything to be happy?”

Elder Cook went on to suggest that our position vis-à-vis others cannot be the source of happiness. It is ephemeral, and we will always find some character or attribute where another person appears to be scoring higher.

It is our own best effort that must be the source of peace.

I have always thought of learning the law as being something like learning a foreign language. For some, learning the language may come easily. It just clicks. For others, it comes with great difficulty. But for all who are willing to work hard at it, it comes.

To this I would add that the categories of legal skills upon which law school tends to focus are just a part of the broader equation of being a lawyer. Just like speaking a language doesn't make the missionary, knowing the law isn't enough to make the lawyer. It's what you do with the language or what you do with the law that matters.

Whether you are someone for whom the language of the law comes quickly or one for whom it comes at a more regular pace, look for ways to help others. Learning is a gift that ought to be shared. It is the paradox of charity that the giver benefits more than does the receiver. This is certainly true in education. Those of us who have taught know this best. There is no better way to learn something than to teach it. As you work to help classmates—in study groups, in carrels, and elsewhere—your own legal skills will develop even faster. By help, I do not mean just spending time to explore the permutations of any particular legal doctrine. I mean also taking the time to comfort during times of stress or sorrow and taking the time to broaden your social circle. These too are lawyering skills.

Although I want you to have some perspective at what is likely a time of uncertainty, my primary goal is that we recognize how much we have been given and ask what should be required of this group of students and this law school to whom so much has been given by those with so much less. Let me suggest a few ways in which we can exemplify our recognition of this blessing.

First, I suggest that as you learn the skills of analyzing, taking apart, and making arguments that are the staple of a legal education, you remember how critical it is to deploy those skills with charity and civility.

Charity may seem easy today, particularly where the primary concern may be a faculty member dissecting your argument. But soon, perhaps too soon, it may not be. Experience suggests that the humility may start to wear off for some as we move fur-

ther into the semester. Former dean Reese Hansen, when he spoke to the entering class, sometimes recalled, "It is often said that the boorish behavior of first-year law students has ruined more Thanksgiving Day family dinners than any other single factor."

I always nervously chuckled at Dean Hansen's remarks, knowing that I myself had spoiled the occasional dinner because I just couldn't resist taking out my shiny Socratic pin and popping someone's balloon.

I am not suggesting that we do not stand up for our principles or that we refrain from advocating causes about which we are passionate. Instead, what I hope is that as you study the law, one of the lessons you internalize is the importance of what I would call charitable disagreement.

At a basic level, charitable disagreement should take the form of civility. The study of law is the study of the rules that regulate human behavior. Because you come from different backgrounds and have had different experiences, it is likely—indeed certain—that you will not see eye to eye with all of your classmates about what rules are best for ordering society. I hope that what that leads to in your classrooms is robust debate. It is out of such debate that real learning comes. Feel free to disagree vigorously and to disagree often, but to disagree respectfully.

Professor Brett Scharffs once told me that his mother used to say that if you find yourself disagreeing, and I paraphrase from memory, "there is no need to shout or get angry. If you are right, you don't need to. And if you are wrong, you don't want to."

The law is an adversarial profession, but it works best and is most ennobling and satisfying when it is practiced with respect for opposing counsel and opposing clients. The best place to practice those traits before you enter the workplace will be in your classrooms here at the Law School.

Civility is, in some measure, a lesser law. When I speak of the importance of charitable disagreement, my hope is that we do more than simply be civil. Instead, I hope you will learn to dispute with real concern and care for those with whom you disagree. I hope you will listen, really listen, to your classmates and work to understand their arguments and positions in a charitable light. When you attempt to see another's position charitably, they often reciprocate.

This is not just a function of Christian kindness. It is also good lawyering. When you understand another's views in their best light, you will be better able to evaluate the wisdom and strength of your own, or your client's, position. It is neither charitable nor wise to assume that because a classmate disagrees he is misinformed, unreasonable, or unthinking. In law practice, whether in deal-making or in litigation, once you understand the concerns animating the other side, it is much easier to find an acceptable resolution. Even if you can't find a solution, you will better understand the nature of a just resolution to the dispute.

Your education to this point, and the skills of careful analysis and critical thinking that we hope you will hone during law school, will give you significant power and influence in society, indeed, in almost any group of which you are a part. As dean of this law school, that is precisely what I want. I want you to be influential leaders. But as you wield your influence, remember that worthy influence can be maintained only "by persuasion, by long-suffering, by gentleness and meekness, and by love unfeigned" (D&C 121:41).

Let me now suggest a second expectation where so much has been given. It is the expectation that we work hard to take advantage of our blessings and then to make them available to others. Hard work is a life-long way to give back a little of what we have been given. This isn't just work at the office; it is work in the community, in your church, and in your home.

Later this fall we intend to give each of you a DVD documentary about the life of J. Reuben Clark Jr., after whom this law school was named. President Clark, of course, was a former member of the First Presidency of the Church, a former ambassador to Mexico, and a former undersecretary of state. Before all of that he grew up on a farm in Granstville, Utah. One of my favorite passages in the DVD quotes three diary entries from President Clark's father describing his 12-year-old son, Reuben:

MONDAY

A very stormy morning. Snowing and the wind blowing from the north. Snow drifting. We advised the children not to go to school. Reuben thought he could stand it and so went. Edwin and Elmer remained at home.

TUESDAY

A bitter cold morning. I think we are now having the coldest weather that I have ever experienced in the month of February. The boys started to go to school this morning but it was so cold and stormy that we called two of them back. Reuben had got out of bearing. Edwin and Elmer remained at home.

WEDNESDAY

*The weather was extremely cold last night and this morning. . . . We thought it was too cold to send Edwin and Elmer to school today, but Reuben would rather miss his meals than to miss a day from school. He is getting along well with his studies. [David H. Yarn Jr., *Young Reuben: The Early Life of J. Reuben Clark, Jr.* (Provo, Utah: Brigham Young University Press, 1973), 51–52]*

My hope is that this same sort of passion can energize our entire learning community at the Law School. When you finish here, I hope you will have a lifelong passion for learning. The truth is that the critical and analytical thinking skills that we teach in law school are only the beginning of real learning, because they are the tools with which you will read, study, and learn for the remainder of your life.

What I also hope that you develop or, more properly, retain—because most of you already possess this in abundance—is the capacity to work until the task is done. Let it be said of BYU graduates that they always do their share and more. Certainly, save time for your family and friends. Relationships are more important than prominence in the workplace. Nevertheless, integrity demands that you give a full measure of effort in your employment. The gifts you have been given demand that you give much of yourself.

Let me take just a moment on another expectation that flows from the privilege and status afforded a lawyer—namely, the expectation of integrity. You have probably heard the term before that a lawyer is “an officer of the court.” This means that a lawyer owes a duty not just to her client but also to the court. A lawyer has a duty to the public to ensure that judicial proceedings are fair. More broadly, a lawyer has a duty to place professional standards and integrity ahead of any individual or client advantage.

Integrity is also something that goes to the very heart of what an academic institution, and particularly a law school, does. At the end of your time at law school, you are

not paid. What you receive instead is a “credential.” Think about that word. It comes from the Latin word *credentia*, which means “trust.” The dictionary defines the word “credential” as “that which entitles one to confidence, credit, or authority.” In essence, what the Law School certifies to the world upon your graduation is that you are entitled to the confidence, credit, and trust of your clients.

As you begin law school, recognize that many of you will be under the greatest academic pressure in your life. The workload is significant. Being graded on a curve alongside so many hardworking and accomplished classmates can be stressful. The deadlines in law school are typically firmer than in your prior academic work. With all of these pressures, the temptation to cut corners in law school can be great. Please remember that no temporary success on a paper or an exam is worth the price of your integrity.

Let me mention a final duty that accompanies our privileged status: the obligation to serve those who are less fortunate. Law—along with medicine and the clergy—is one of the three original professions. As traditionally understood, members of a profession were held to a specific code of ethics and required to swear some form of oath to uphold those ethics, thereby “professing” to a higher standard of accountability. The essence of being a genuine professional, whether a doctor or a lawyer, was the expectation that a professional would use her privileged position and her specialized knowledge for all who required it and not simply for personal advantage.

This is why the Rules of Professional Conduct provide that “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay” (Model Rule 6.1.). Helping the less fortunate is part of the compact between lawyers and society. This service obligation, along with the obligation of ethical conduct, is what undergirds the unique and privileged position of lawyers. Thus far, states and the public have largely allowed state bars (in other words, groups of lawyers) to regulate who is able to practice law and what rules govern a lawyer’s conduct. This privilege brings corresponding duties.

These days it seems as though every job is labeled a profession, partly, I imagine, because of the historical connotation

of privilege and authority associated with the professional label. At the same time, the understanding of law as one of the original noble professions seems to be dissipating. To fight the former would seem to be a misplaced focus on retaining a privileged position in the hierarchy of job categories. But we must not give in to the latter trend of law drifting from its noble professional moorings. How powerful it would be if every BYU student and graduate took seriously the traditional professional label, working diligently to obtain knowledge and skills worthy of the title and then sharing those skills with integrity and a felt obligation to give back for what we have all been given. Let it not be on our watch that the professional label is further drained of its content.

I’d like to conclude by quoting two speakers who spoke to the very first Law School class when the Law School was founded. Their challenge rings down through the years and is no less compelling today than it was 36 years ago.

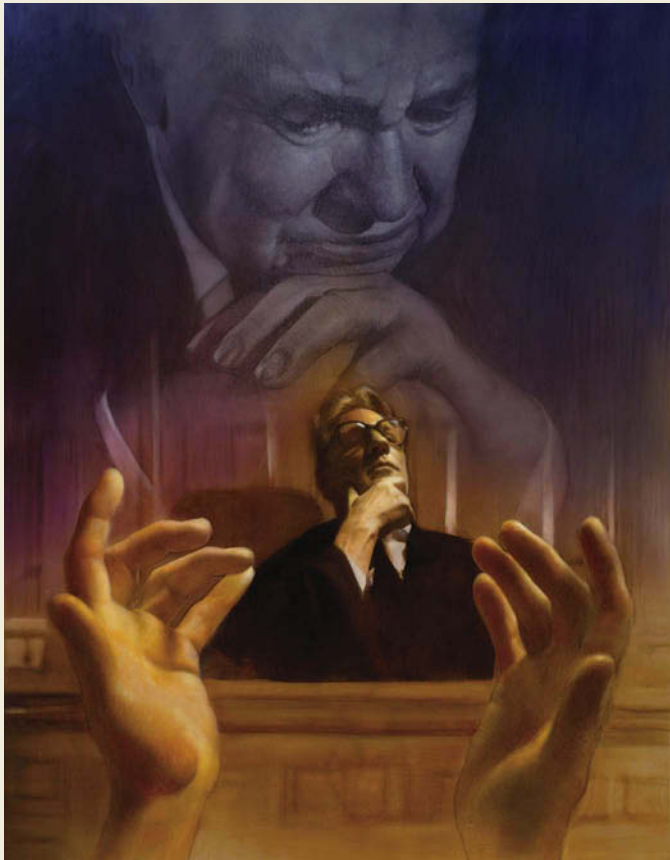
Speaking to the Law School’s charter class, President Marion G. Romney, then a counselor in the First Presidency of the Church, said:

You have been admitted for your superior qualifications. Appreciate your opportunities; make the best of them. Set a high standard for your successors to emulate. You know why you are here, what your school, the Board of Trustees, your own loved ones, and yes, your Father in Heaven expect of you. Don’t let any of them nor yourselves down. . . . Be your best. Society needs you, your country needs you, the world needs you.

At the same meeting, then university president and now Apostle Dallin H. Oaks added: “We are privileged to participate in this great venture. It is our duty to make it great. He who builds anything unto the Lord must build in quality and flinch at no sacrifice toward that end.”

To their words of challenge, I add my words of welcome. I and my colleagues are excited that you have decided to join us at the Law School, and we are eager to begin with you the ennobling adventure of learning and then practicing law.

¹ James R. Rasband is the dean of J. Reuben Clark Law School at Brigham Young University.



The following excerpt is from Harry J. Haldeman, "Talk of the Month: 'There Is a Law,'" *New Era*, July 1975, 16–19.

"There Is a Law"

BY HARRY J. HALDEMAN

At a Young Adult area conference held on Catalina Island, the Santa Barbara Region delegates were assigned to meet in the courtroom of city hall for one session of the conference. At the end of the session, Brother Harry J. Haldeman, priesthood leader of the region's Young Adult program, stood at the judge's bench and addressed the hushed courtroom of eager young people. This is the story he told.

In the early 1950s I was the bishop of the Rosemead Ward of the Los Angeles California East Stake. It was an average-size ward of about 500 people. There were full-time mis-

sionaries in the area who were tracting up and down our street. One day they came to the home of a certain man who allowed them to come in, and they briefly told their introductory story and made their introductory comments. For some strange reason unknown even to himself, this man, whom I will call Bob, invited them to come back.

Bob was subsequently taught the gospel, and his wife and small son were also present. At the conclusion of the lessons, Bob decided he would become a member of The Church of Jesus Christ of Latter-day Saints. His wife, however, was totally disinterested. She felt that she no longer loved her husband because he was essentially and very tenaciously a continuing drunk. But he stayed sober during weekdays and maintained a good job. He had drunk for years—so much so that he had

essentially destroyed all of her affection. She cared nothing about what he did, nor did she believe that he would ever join the Church or, if he did join, that he would ever be able to abstain from the use of alcohols. So she said to him, "If you want to join their church, you go ahead. But I'm not interested. Sometimes I think that the only reason I am staying with you is for the security of myself and our son, not for any other reason."

So with this really rather negative aspect in view, Bob was baptized. Due to the commitments of his prebaptismal interview and teaching, he totally abstained from that day on from the use of alcohol and tobacco, much to the surprise of his own wife. Needless to say, she began to see the fruits of his conversion and the reality of it in his life. She began to soften her attitude. She commenced to take a closer look at the Church and subsequently was baptized along with her son.

In the year or so that followed, Bob made excellent progress in the Church. I called him to be the Scoutmaster of the ward troop. He accepted the call and was functioning in his calling and doing a very fine job.

Because of his many years of drinking, he had amassed a long record of drunk driving convictions and other tainted and sordid types of convictions relative to his drinking; his driver's license had finally been taken away from him. He was therefore not allowed to drive, and he scrupulously observed this ruling, with his wife doing the driving for them in the family. . . . However, there came a time when he left his employment as an expeditor for a manufacturing operation and took a job with another concern; it was a much better job. As in his previous job, he expected

to depend on car pools for his transportation to work, but on the very first morning when he had to report, there was no opportunity to become a part of a car pool. So with great fear and apprehension, he decided he had no choice but to drive.

On his way to work he was proceeding in a normal and orderly fashion, when for some small offense—I think it was associated with changing lanes or some such thing—he was stopped by a policeman. It was, of course, immediately ascertained that he did not have his driver's license in his possession. Only he knew the real consequence of that fact.

That day when I returned home from work, Bob called me and said, "Bishop, I am sorry to say this, but I am resigning as the ward Scoutmaster. I am resigning my ward teaching assignment, and I will not attend church for an extended period of time. I want to be excused from everything and to be left alone. That's really all that I have to say."

. . . Finally, after a period of time, he told me briefly that he had been picked up for a driving offense, and because of his long history and record of drunk-driving violations, he knew absolutely that he would be sent to prison when he was taken to court. He said to me, "You don't want to have your Scoutmaster be a jailbird, and the Church doesn't want to be associated with people of this quality, so I am dissociating myself from the Church and from my callings, and if you will just leave me alone and not be concerned about me, eventually I will find my way back."

He refused to tell me where the traffic violation had occurred or when he was to appear in court. His wife knew

little about it, but with a bit of detective work I was able to find out where he was to appear, the seriousness of the offense, and the hearing date that was set for him. . . . Bob did not know I was coming, and I can't remember whether his wife knew or not. Nonetheless, on the date he was to be arraigned, his wife and I appeared in court at the same time. . . .

The first defendants were called to appear, one after another. They pleaded; the judge decided on whether to convict or acquit and the extent of sentences and fines. He finally called the name of my friend, Robert. As he did, he was handed the large document that represented this man's record with the law enforcement agencies throughout the state of California.

As Robert stood before the judge, the judge spent several minutes eyeing page after page of the record confronting him. He finally looked up at Robert and simply said, "Are you guilty or not guilty of driving without a license?" Robert said, "I am guilty, Your Honor." The judge was obviously upset and aggravated, almost moderately enraged, at the record before him and at the idea that this man would drive under those conditions and that he had had little or no imprisonment for all of these offenses. So, after a few blistering words of observation and chastisement, he brought down his gavel as he said, "One year in the county jail."

He directed Bob to step over to the jury box, which was empty—there being no jury that day—so he could empty his pockets into the little basket that was provided and then sit there until he would be taken in the sheriff's bus to the county jail.

I had come with the purpose of testifying in his behalf. I had

prepared myself and had prayed diligently to the Lord that as his servant and as the bishop to this man, I might have the opportunity to speak to the court and hopefully mitigate to some degree the nature of his punishment. . . . I stared ahead and was struck essentially dumb and numb in my feelings as the quick conviction and sentencing took place. As Robert walked from his position in front of the bench and sat down as he had been instructed, I felt frozen to where I was sitting, speechless and overcome with remorse. As I sat staring, I felt I had failed him. I suppose if I had sat there long enough and pondered everything, I would have wondered if the Lord had failed me; I had come into the room with great faith, having done all I could on my own to find my way there, to arrange my time, to pray diligently and hope for the chance to say something in his behalf. But the deed was done; the man was convicted.

At that point the court clerk handed the judge the next record for the next person to be called up. There was a moment or two delay in calling the next defendant. The judge seemed to be perusing his record. I said nothing. I did not raise my hand, nor did I move my head or body. I had no particular expression on my face. All of a sudden, without any visible reason, the judge raised his head, peered directly across that courtroom into my eyes, and said to me in a loud voice, "Sir, do you have something that you want to say to this court?"

With that there was silence. In a rather shocked condition I finally said, "Yes!" For him to make this statement to me when I had made no sign or signal was a most amazing circumstance. I was then more overcome than

before by my opportunity. I remember it took me several seconds before I had the composure to stand. I slowly rose to my feet and said in a somewhat weakened and quivery voice, "Yes, Your Honor, I did come to speak to this court on behalf of the man you have just sentenced." With that he looked over at my friend, Bob, and as I mentioned his name, I noticed that the clerk slowly passed back onto the top of the desk in the view of the judge the same record he had had.

"Well," said the judge, "what would you like to say?"

I swallowed rather hard a couple of times; I noticed that Bob looked at me. Up to this time he had been sitting with his head down. I said, "Your Honor, I am a bishop in The Church of Jesus Christ of Latter-day Saints, and since I've known him he has been a faithful member. Since the day of his baptism, he has never touched one drop of alcohol, smoked one cigarette, or drunk one cup of coffee because he promised he would not do these things if he could be baptized. He has accepted the call to be a Scoutmaster, and he is a good Scoutmaster. The boys of his troop love him, and we need him, and he has promised me he will continue to be that kind of a man. I thought that perhaps before you sentenced him, you might like to know these things."

There was a pause. I am sure that it could only have been a few seconds. It seemed like a long while to me. The judge turned to Bob as he sat across the room in the jury box and said to him, "Is what this man said true?" Bob raised his eyes to the judge and said, "Yes, Your Honor. It's all true." Then the judge asked, "Will you ever break your promise to this man?" And Bob said, "No, Your

Honor. I will never break my promise to that man."

There was a silence again for a moment, and the judge said, "One of the finest men I have ever known was a man named J. Reuben Clark Jr. He was a classmate of mine in law school. He was a great man, and I was always impressed with him when we were students together. I believe he is one of the presiding officers of your church. In view of my great feelings for him, and my knowledge of the great influence of the Mormon Church, and the obvious influence it has had on this man, and his promise, I will suspend the sentence." With that he brought down his gavel again and said, "Sentence suspended. You may go."

With that Robert arose. The bailiff handed him the basket with his personal belongings. His wife and I walked forward to meet him as he walked through the gate, and the three of us, arm in arm, walked out of the courtroom with tears streaming down our faces.

It was undoubtedly one of the most beautiful examples that I have ever experienced of the truth that if a man will walk as far as he can walk, do all that he can do, pursue his responsibilities to the full degree of which he is capable, pray while he is doing it, and then put his faith in the Lord, in the hour and the moment of need, our Father in Heaven will step forth and help fight his battles. The great name, the personal influence, and the great reputation of President J. Reuben Clark Jr., combined with the faithfulness of a member who had done as he had promised he would in the waters of baptism and a bishop who, though totally inadequate, had done what he could—all this combined to change the course of history in the life of one man.

Reese Hansen, former dean of the Law School and current president of the Association of American Law Schools, and James L. Ferrell, Yale Law School graduate, managing director of The Arbinger Institute, and author of *The Peacegiver*, were the main speakers at the J. Reuben Clark Law Society Leadership Conference held at Aspen Grove on October 1-2, 2009. The following excerpts are taken from their talks.



J. Reuben Clark Law Society Leadership Conference

REESE HANSEN

On the Formation of J. Reuben Clark Law Society

It was in the fall of 1988, 21 years ago, when J. Reuben Clark Law Society was formally organized. I was associate dean of the Law School, and Bruce Hafen was the dean. The idea that sparked its creation came in a conversation Bruce had with Ralph Hardy. Even then a well-known member of the Church practicing law in Washington, D.C., Ralph said that because he was known in the profession as a Mormon and because BYU Law School had become widely known as the “Mormon Law School,” his reputation in the profession reflected on the Law School and the Law School’s reflected on his. He said that whether we liked it or not, we were hooked at the hip. So out of that conversation grew the idea to organize a special kind of professional organization that promoted professional

excellence among lawyers who supported the Law School and who were guided by the example of President J. Reuben Clark. It was hoped that such an organization would be beneficial to both. I think it is fair to say that it has proven to be beneficial to both.

Responsibility to Give Service

This passage of scripture has held special attention for me:

There began to be some disputings among the people; and some were lifted up unto pride and boastings because of their exceedingly great riches, yea, even unto great persecutions;

For there were many merchants in the land, and also many lawyers, and many officers.

And the people began to be distinguished by ranks, according to their riches and their chances for learning; . . .

Underlined in my scriptures is the phrase “and their chances for learning.” There is more:

. . . yea, some were ignorant because of their poverty, and others did receive great learning because of their riches. [3 Nephi 6:10–12]

I think that scripture says so much about what we see now in our society about the opportunity for education, the chances for learning. You have been blessed with learning. The graduates of our Law School and members of the Law Society have had great opportunities and chances for learning. Because of this, you are in a position that others only dream of. Less than 4/10 of 1 percent of the people in the United States are lawyers. I know there is talk about too many lawyers, but let me tell you, if you are not a lawyer and want to become a lawyer, you will find that it’s not so easy. Your opportunity for education enables you to practice law and have privileges and access to power that only the tiniest fraction of people in our country even dare to dream about. And

because you have had that opportunity, you have a solemn duty. Your education obligates you to use your skills in helping and healing and community building, and heaven knows we need it everywhere.

Bridging the Divide

You may feel that your “Mormonness” makes you so different from others that you’ll never be able to fit in and make a place in the organization. These feelings produce two common consequences that I have observed.

One is studious avoidance of any identification with the Church. This, of course, is hopeless because you can’t possibly keep it secret. The fact of the matter is that we are a bit different, and it shows up in ways that others will notice. So studious avoidance of identification is not the way I recommend going.

The other thing I’ve seen happen is a strong assertion of your personal moral code in

the group. I think that's unwise and ineffective. There will be opportunities in the course of your service where basic principles come up, and you will have opportunity to make your point. But browbeating people with your private moral code is not effective and won't get you very far. You're going to be involved and sometimes you're going to get your way in these groups and sometimes you're not going to get your way. So what are you going to do when you don't get your way? Well, you can resign and go home to your office and your work and do the things you do, or you can tough it out and work with it over time and have a positive experience. In my experience, it's better to stay and to work than it is to flee out of some disappointment.

JAMES L. FERRELL

On Attitude and Civility

One's attitude can be looked at as a way of being. Let me suggest that there are two ways of being. One way is seeing other people counting in the way that we count. For instance, I see my wife, and she counts like I count; her ideas count like my ideas count. I ought to consider them equally; I ought to ponder them equally. When we see someone that way—counting as we count—then we're seeing that person as a person. But we don't see everyone in this light. Then we say, "He almost counts like I count; or she counts more than I do." In that case, they don't really count the same at all.

Now, on the issue of civility: If I have only uncivil words and uncivil actions toward my fellow beings, I have uncivil views of them. There are good ideas for dealing

with incivility, beginning with complying with rules. They govern outward actions; but thinking that that alone solves the problem of civility is a mistake. It might be a good step, but there's something deeper that needs to happen than outward actions—whether we're in a courtroom or whether we're at home with our family members—that will go to the root of the problem.

So if we have this distinction of seeing people as people who either count like I count or not, we have an uncivil attitude, an uncivil way of being, even a violent way of being. We are moving away from the fundamental truth that all people really count the same.

The Scriptures and Civility

There is something very interesting in the way that the law of the gospel is set up that speaks right to the heart of this issue. So I'm going to take a look at the law as it's conceived in the gospel and see the cure for the lack of civility.

When the children of Israel were in the desert, there was a plague of fiery serpents whose bites were lethal. The Lord told Moses to make an image of a fiery serpent—a brass serpent—and put it up on a pole. All who would look at the brass serpent would live. Now, we read in the scriptures that the brass serpent was in similitude of the Savior. But I ask myself this question: "If the brass serpent is in similitude of the Savior, what is the fiery serpent in similitude of?" I'd like to submit to you that the fiery serpent is in the similitude of the law in the gospel. How? Well, think about it. The fiery serpents, what did they do? They brought the people to Christ because they wanted to be saved. That's

the purpose of the law: it brings us to Christ just like the fiery serpents brought the people to the type of Christ. The people needed to look outside of themselves to be saved.

That's what the law does. By being bitten by the law, by being bitten by our brokenness under the law, it forces us to something beyond ourselves; it forces us to Him. How does it do this? Let's look at the scriptures: "For whosoever shall keep the whole law, and yet offend in one point, he is guilty of all" (James 2:10). Can that be true? Adam and Eve committed how many transgressions in the Garden of Eden? One. And as a result they became separated from God. What would have happened if they had committed two or 20 transgressions, would they have been more separated? No, separated is separated. We are separated from God, and we have a tremendous need, which is one of the great purposes of the law, to bring us to the Savior.

Back in Jesus' day there were people who misunderstood that basic point and felt that they were better than other people because they were better keepers of the law. They'd missed the whole point of the law, which was to bring us all to our knees and help us all realize our insufficiency, so we not only keep the laws that we covenant to keep, but we realize we need more, we need Him, and we fall at His feet, so we can be changed.

Let's look at Romans 5:20 where Paul says, "Moreover the law entered, that the offence might abound." Now why would that be the case? Why is it that somehow it's good if the offense abounds? Romans 3:19 tells us: "Now we know that what things soever the law saith, it saith to them who are

under the law: that every mouth may be stopped, and all the world may become guilty before God." Under the law we all become guilty before God; no one's better, no one's worse on that score. We all count the same. I can't really elevate myself if I realize that I'm just as condemned as another. When the people of King Benjamin really deeply saw the truth, they saw themselves as less than the dust of the earth. It's no good for us to be saying, "Yes, but I'm a better speck of dust than you are." Romans 3:20, 23 reads: "Therefore by the deeds of the law there shall no flesh be justified in his sight: for by the law is the knowledge of sin. . . . For all have sinned, and come short of the glory of God."

Then Romans 3:27, on the issue of civility, says, "Where is boasting then? It is excluded." If we really understand the law, and we realize that it brings us to Christ, then we realize that boasting is excluded except in Him. If that's the case, it's pretty hard to be uncivil to someone else when boasting is excluded; we're in this together. I'm no better than my wife, I'm not better than my child, I'm no better than my neighbor who struggles with XYZ sins that perhaps I don't struggle with; I've got my own struggles, and they separate me just as much as yours do. Paul then says this in Romans 3:28, 31: "Therefore we conclude that a man is justified by faith without the deeds of the law. . . . Do we then make void the law through faith?" And his answer: "God forbid: yea, we establish the law." In other words, no, this doesn't mean that the law doesn't matter; it's the law that brings us to Christ. But it will only bring us to Christ if we realize that we're all broken, and that I'm no better than anyone else.



THOMAS R. LEE



BRETT G. SCHARFFS

New Professorships at Law School

Dean James Rasband recently announced two new appointments to BYU Law School professorships. Thomas R. Lee is now the Rex J. and Maureen E. Rawlinson Professor of Law, and Brett G. Scharffs is the Francis R. Kirkham Professor of Law. "I congratulate both Professor Lee and Professor Scharffs and express appreciation for their many contributions to the Law School," Rasband said.

Professor Lee uses his expertise in trademark law as a member of the International Trademark Association and as a member of the editorial board of *The Trademark Reporter*. He has argued trademark infringement cases in federal district courts and appellate courts throughout the country. Professor Lee was the associate dean for Faculty and Curriculum at BYU Law School for the 2008–09 school year. He teaches courses in intellectual property law and civil procedure while serving on the Advisory Committee to the Utah Supreme Court on the Utah Rules of Civil Procedure. He has published numerous law review articles and represented

the state of Utah in litigation challenging the 2000 census. Lee joined BYU Law School in 1997. Before coming to BYU he clerked for Judge J. Harvie Wilkinson III, U.S. Court of Appeals for the Fourth Circuit in 1991–92 and for Justice Clarence Thomas, United States Supreme Court, 1994–95.

Professor Scharffs is the associate director of the International Center for Law and Religion Studies. His scholarly interests include law and religion, corporate law, international business law, and philosophy of law. Professor Scharffs clerked for the Honorable David B. Sentelle on the U.S. Court of Appeals, D.C. Circuit, and he worked as a legal assistant to the Honorable George H. Aldrich at the Iran-U.S. Claims Tribunal in The Hague. Before teaching at BYU, Scharffs worked as an attorney for the New York law firm Sullivan & Cromwell. Before coming to BYU Law School, he taught at Yale University and The George Washington University Law School. He is currently serving as a program chair of the Law and Religion section of the American Association of Law Schools.

Bonneville International president and CEO Bruce Reese was chosen as *Radio Ink's* Radio Executive of the Year on December 1, 2009.

Long known and respected for his industry leadership, Reese has been with Bonneville since 1984 and rose to his current post in 1996. He has chaired both the NAB Radio Board and the NAB Joint Board and helped establish the NAB FASTROAD program designed to help develop new technology for broadcasters. As a member of the NAB Executive

Bruce Reese Named Radio Executive of the Year

Committee, he played a key role in the selection of new NAB president/CEO Gordon Smith.

Reese has also served on the boards of the Associated Press and the RAB and currently chairs the NABEF board, while Bonneville is the charter sponsor of NABEF's Celebration of Service to America Awards.

Under Reese's leadership, Bonneville, with 31 radio stations, has solidified a reputation for strong community service and involvement. As a community leader himself, Reese is active on the board of the United Way of Salt Lake City, with the BYU Alumni Association, and on the board of Intermountain Healthcare.





MICHAEL GOLDSMITH

1951–2009

Michael Goldsmith, BYU Law School professor since 1985, died from respiratory failure due to amyotrophic lateral sclerosis (ALS) on November 1, 2009. He was 58 years old and was an advocate for ALS fund-raising the last two years of his life.

Goldsmith was diagnosed with ALS, also known as Lou Gehrig's disease, in September 2006. While attending a Baltimore Orioles fantasy baseball camp, he realized that July 2, 2009, would mark the 70th anniversary of Lou Gehrig's farewell speech at Yankee Stadium.

In a personal essay published in *Newsweek* entitled "Batting for the Cure," Goldsmith called on major league baseball to make July 4, 2009, ALS–Lou Gehrig's Day. That essay was read by Bud Selig, the commissioner of baseball, who implemented Goldsmith's idea. On that day every major league baseball park in which a game was being played held on-field ceremonies commemorating Lou Gehrig's famous speech and raising funds for research. Goldsmith himself threw out the first pitch in Yankee Stadium after a commemorative ceremony.

A nationally recognized expert in the Racketeer Influenced and Corrupt Organizations Act (RICO), Goldsmith taught classes in evidence, criminal procedure, trial advocacy, and complex criminal investigations. He won the Best Professor of the Year award six times and taught his final class in the spring of 2009. A former assistant United States attorney as well as counsel to the New York State Organized Crime Task Force, Goldsmith offered students personal insights in his classes. He wrote extensively on RICO,

asset forfeiture, and electronic surveillance and previously served as vice chair of the ABA Criminal Justice Section, RICO Committee. In 1994, President Clinton appointed Goldsmith to the U.S. Sentencing Commission. From 1996 to 1997, Goldsmith served as the commission's vice chair.

Dean James R. Rasband of BYU Law School said, "I have great admiration for Michael, not only for the way in which he continued to work so diligently and successfully to benefit others with ALS but also for his lasting contributions to the Law School.

Michael Goldsmith with daughter, Jillian.



Class Notes

E-mail your professional news to
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THE SPRING ISSUE OF THE CLARK

MEMORANDUM PUBLISHES NEWS OF THE

GRADUATES OF J. REUBEN CLARK LAW

SCHOOL. DUE TO SPACE CONSTRAINTS, IT IS

NOT ALWAYS POSSIBLE TO PUBLISH

EVERY SUBMISSION FOR THE CLASS NOTES.

CLASS OF 1976

Danny L. Ferguson has opened Ferguson Law PLLC in Boca Raton, Florida. The firm will focus primarily on community association and condominium matters.

David V. Sanderson died on October 13, 2009, from cancer. He worked at various Phoenix law firms, most recently DeConcini, McDonald, Yetwin & Lacy.

Jeffrey Young has been recognized by 5280 and ColoradoBiz magazines as one of the top 6 percent of wealth managers in the Denver area, a "Five Star Best in Client Satisfaction Wealth Manager."

CLASS OF 1977

R. Bruce Johnson was appointed chair of the Utah Tax Commission. He has served as a tax commissioner since 1998.

Randy Olsen has served 26 years for the state of Alaska's Department of Law (five years criminal prosecution, then miscellaneous civil, including 15 years of tort defense). In 2003 he was appointed superior court judge. He and the former Jerri Jeffries (BS Nursing, 1972) are the parents of eight children.

Fred Voros, formerly chief of the Criminal Appeals Division of the Utah Attorney General's Office, has been appointed and confirmed to the Utah Court of Appeals.

CLASS OF 1978

David P. Hirschi has recently formed the new firm of Hirschi Steele & Baer PLLC, located in Salt Lake City. Dave was formerly a member of Hirschi Christensen PLLC, which he helped form in 2002. The new firm concentrates its practice in the areas of real property law, land-use planning, corporate law and finance, business organizations, title insurance defense, and commercial litigation. He also serves as the current chair of the Utah Land Use Institute and as a member of the executive committee of the Business Section of the Utah State Bar.

Armand Duane Johansen, partner, Johansen Thackeray Commercial Real Estate, Salt Lake City, has been called as a mission president.

CLASS OF 1979

John Casperson has been in the Seattle area for 25 years after five years in Alaska. He and his wife, Connie, have 15 children, including six adopted from Ethiopia. They have lived on an island in Puget Sound for the past 20 years and have homeschooled all of their children. Two have served missions for the LDS Church and two are out now. John has a finance and commercial practice, with an emphasis on maritime law and a niche specialty in fishing rights.

Jeffrey A. Dahl practiced 27 years with Lamb, Metzgar, Lines & Dahl PA, which was dissolved

in 2006. He moved to Keleher & McLeod PA as of counsel. He has since become a shareholder with the firm, practicing in general civil litigation. Of note, he recently filed a large class action in federal district court on behalf of Navajo employees of the Bureau of Indian Affairs alleging discrimination.

Annette W. Jarvis, a partner at the firm of Dorsey & Whitney LLP, has been named the cochair of the firm's Finance and Restructuring Department.

Jay Douglas Pimentel is vice president and associate general counsel for TriNet. He oversees employment law, operations, legal compliance, and contracts as they relate to TriNet and its vendors and customers. Jay is the author of several legal articles in the area of corporate and employment law, and he has led information workshops and Webinars in the areas of employment law, policies, and procedures. He currently serves in the legal affairs council of the National Association of Professional Employer Organizations (NAPEO).

Dennis Richardson traveled to Fuhou, China, as part of the 2009 Oregon Legislative Trade Delegation to China. He has served as an Oregon state representative since 2007.

Mark Stringer serves as director of health care services and contract compliance officer for TruHearing, Inc., a Utah company in the health-care industry with 1,400 offices nationwide. He is also executive producer for Antares Research and Development, a film and literary company out of Lake Geneva, Wisconsin. He recently married Esther Sutherland Smith.

CLASS OF 1980

M. Gay Taylor-Jones retired in June 2009 after spending 25 years with the Utah Office of Legislative Research and General Counsel. She served as general counsel for the Utah legislature for 23 of those years. Gay now has more time for her new family; having married a widower, Stan Jones, she now has six married children and 20 grandchildren.

CLASS OF 1981

George Mark Albright, president of and an attorney at Albright, Stoddard, Warnick & Albright, and his wife, Karyn, are presiding over the Washington DC South Mission. They recently had all 10 LDS members of the U.S. House and Senate speak at their mission conference. Mark plans on returning to his Las Vegas law firm upon completion of this assignment.

Drew Quinn reports that her late mother-in-law, Alice Badger Quinn, has seven direct descendants and three in-laws who have either graduated from or are currently enrolled at J. Reuben Clark Law School: Drew's husband, Anthony Quinn '80, Alice Jardine '77, Rodney Jarvis '85, Stephen Q. Wood '05, Rachel Wood '08, Jason Jardine '04, and Analise Quinn '11. Drew Quinn '81, Annette Jarvis '79, and Brad Jardine '78 are the spouses.

CLASS OF 1982

David Carlson is a patent attorney and partner in a successful practice. His son-in-law, Dave Conlee, is now attending BYU Law School and training to also be a patent attorney. David has just been awarded the Silver Beaver for many years of active service in the Boy Scouts of America.

James Layton, Missouri solicitor general, has been elected to be a member of the American Academy of Appellate Lawyers.

CLASS OF 1983

Warren Gubler was elected to the city council in Visalia, California.

Nancy Van Slooten has been appointed international chair of J. Reuben Clark Law Society. Her family just moved to Draper, Utah, after living in Atlanta, Georgia, for 13 years. She and her husband, John, have six children.

Kirk Wickman serves as chief administrative officer of Angelo, Gordon & Co., one of the world's largest hedge funds. Kirk is based in New York City. He previously served as general counsel of Morgan Stanley's Global Wealth Management business, Skandia's U.S. insurance business, and Aetna's financial services business (now part of ING). Kirk previously was a partner of Kirkland & Ellis in Chicago and New York. Kirk and his wife, Sheryle, live in NYC during the week and return home to Connecticut on weekends.

CLASS OF 1984

J. Kevin West is the editor of the *Idaho Employment Law Letter*. He was selected to be included in the 2009 edition of *The Best Lawyers of America* in the category of health care law.

CLASS OF 1985

Dennis Sears, senior law librarian at BYU Law School's Howard W. Hunter Library, has been named council chair of the American Association of Law Libraries. He previously was chair of AALL's Foreign, Comparative, and International Law Special Interest Section.

Christopher L. Wight has been recognized by *Utah Business* magazine as a member of the "2010 Utah Legal Elite" in the practice area of intellectual property. He is a veteran of the biopharmaceutical industry. An alumnus of Brinks Hofer Gilson & Lione, where he began his professional career as an associate attorney from 1985 to 1988, Christopher subsequently served for 14 years as a leader in the intellectual property departments of two internationally recognized biopharmaceutical companies. He returned to Brinks in 2006.

CLASS OF 1986

Calvin Collins is now president of esco's engineered-products group. He has served as the engineering and manufacturing firm's vice president, general counsel, and secretary.

Keith N. Hamilton's book *Eleventh-Hour Laborer: Thoughts and Reflections of One Black Member of The Church of Jesus Christ of Latter-day Saints* is coming out in the spring of 2010 (for purchasing information see www.keithnhamilton.com). Keith recently finished his second term of service on the Utah Board of Pardons and Parole.

David Palmer now serves as a family judge on the Maricopa County Superior Court. His prior work was as Maricopa County Court Commissioner from 2004 to 2009.

CLASS OF 1987

Mike Dang serves as director of commercial real estate for Kamehameha Schools, the largest private landowner in the state of Hawaii. His work includes land planning; entitlements; for-sale, income, and mixed-use property development and redevelopment; affordable housing; and transit-oriented development.

Jim F. Lundberg was elected to the Mapleton City Council. He works as associate general counsel for Novell in Provo.

Robert L. Maxwell received BYU's Karl G. Maeser Professional Faculty Excellence Award. He is currently chair of the Metadata and Special Collection Cataloging Department at BYU's Harold B. Lee Library.

John E. McClurg, vice president, CSO, Honeywell's Global Security Organization,

has been listed as one of the "Most Influential People in Security, 2009" in the December edition of *Security* magazine.

CLASS OF 1988

David Harmer was the Republican nominee for the U.S. House of Representatives from California's 10th congressional district in a November 2009 special election. In a district that President Obama carried by a 32-point margin (65 percent to 33 percent), David far outperformed expectations, raising \$838,000 and holding his opponent, the sitting lieutenant governor, to only 53 percent of the vote.

Lisa Broderick Thornton has returned to work after spending years raising five children. She is now a partner in Christensen Thornton PLLC in Salt Lake City. Because Lisa has a daughter with Prader-Willi Syndrome, she is especially passionate about helping families with special needs. Her firm also handles appellate work, civil litigation, and divorce actions.

CLASS OF 1989

Donald Walker is now a mediator with the Antidiscrimination and Labor Division of the Utah Labor Commission. He mediates employment discrimination, housing discrimination, and wage claims. All four of his children are still at home: Josh is 27 and doing as well as can be expected, given his paraplegia.

CLASS OF 1990

Melinda C. Hibbert serves as Layton High School's PTA president in Utah. A stay-at-home mom for the past 15 years for her four children, she recently reactivated her Utah Bar license to help with some local projects.

John Swallow is now a chief deputy in the Utah attorney general's office. He oversees all the civil litigation for Attorney General Mark Shurtleff.

Dan R. Waite, a partner with Lewis & Roca LLP in its Las Vegas office, was named 2009 Pro Bono Attorney of the Year by the Legal Aid Center of Southern Nevada.

Weidong Wang has been appointed by WSP Holdings Ltd., a pipe manufacturer in China, as an independent director of the company. He is also a partner at DeHeng Law in China.

CLASS OF 1991

Marilyn Branson Massey Halligan has worked at the U.S. Department of Justice's Civil Division in Washington, D.C., since graduation. As a document management specialist, she provided discovery and trial support for classified stealth aircraft cases. Then, seven years ago, she accepted the position of project manager for the Civil Division Records Management Program. Marilyn oversees the staff who create and maintain active case files, as well as a storage facility where thousands of closed cases are processed for transfer to the Federal Records Center.

CLASS OF 1992

Dave Berndt started a new position in January 2010 as legal counsel and director of human resources at Boston Medical Center working with the physicians organization.

Keith Cope joined the firm of Berg & Associates after working for several years as a deputy district attorney with Shasta County, California.

Kevin Laurence, a partner at Stoeel Rives LLP, coauthored a treatise titled "Patent Reexamination and Reissue Practice," from which he teaches a multiday course for the Patent Resources Group twice a year in Florida and California. He and his wife, Patrice, have five children and reside in Bountiful, Utah.

CLASS OF 1993

D. Chris Albright, a partner at the Las Vegas, Nevada, law firm of Albright, Stoddard, Warnick & Albright, received the 2009 Judge Sally Loehrer Pro Bono Service Award from the Legal Aid Center of Southern Nevada for outstanding pro bono services rendered in a civil case. The award stemmed from his work on behalf of indigent clients who had been defrauded in a real estate scam, for whom he was able to obtain a substantial punitive damages judgment after a bench trial.

CLASS OF 1994

Laura H. Cabanilla left prosecuting with the Utah County Attorney's Office about eight years ago and joined the firm of Espin | Weight in Provo. She was recently elected as a citywide member of the Provo City Council and serves as a lieutenant colonel in the Army Reserve. Her triplets, who were three when she started law school, and her youngest child are all grown up. **Sam Oramas**, of La Puente, California, is now vice principal at Nogales High School. His prior position was assistant principal at Laguna Hills High School.

CLASS OF 1995

Craig Aramaki is now the chief digital officer at McCann Erickson's advertising office in Salt Lake City. Before this he was president of digital services at Euro RSCG Edge in Portland, Oregon. **Shawn T. Farris** was recently invited by the dean of the Nanjing School of Law in the People's Republic of China to be a guest lecturer in the spring of 2010. He will give lectures on topics of American jurisprudence. **Kristin Gerdy** is now an alto in the Mormon Tabernacle Choir. **Victor Guzman** and his family were featured in a 9/11 tribute on Mormon Messages at the following link: http://www.youtube.com/watch?v=mkWc_EKLs4E

David Hardy is running unopposed for the post of general jurisdiction judge in Washoe County, Nevada, where he has served the past five years as a family court judge. He is also working on a PhD at the National Judicial College with his dissertation topic on Nevada's territorial supreme court.

Thomas L. Low has been appointed to serve in Provo as a Utah Fourth District judge. He had been the Wasatch County attorney since 2003. **David G. Turcotte** is vice president of Vista de Sirena, a company developing condominiums in Costa Rica. **Kristin VanOrman** has been selected to serve as a Utah state chair for the Council on Litigation Management.

CLASS OF 1997

Kirsten Hall McNelly is a shareholder with the Lansing-based firm of Foster, Swift, Collins & Smith PC. She focuses her practice on family law, environmental litigation, and medical malpractice defense. **James Swink** was chosen by the Cache County Council to be the new Cache County attorney.

CLASS OF 1998

Nathan Benson is the new lead systems administrator for the Center for High Performance Computing at Utah State University. **Brett L. Mortensen** is now a partner at Stoel Rives in Salt Lake City, where his main work is in complex business litigation. He recently copresented a seminar titled "Preventing Theft of Your Intellectual Property." **Brett L. Tolman** became a shareholder at Ray, Quinney & Nebeker after serving as u.s. attorney for the District of Utah from 2006 to 2009.

CLASS OF 1999

Sarah Leeper was recently elected as a partner with the law firm Manatt, Phelps & Phillips LLP. She works in the San Francisco office, where her practice focuses on representing water, energy, and telecommunications companies in matters before the California Public Utilities Commission, FCC, and FERC. Sarah is married to Steven Egli, and they reside in Mill Valley, California. **Cherice Siebert** first practiced law as a deputy prosecuting attorney for the city and county of Honolulu. Her husband, Dan, works for the u.s. State Department; for the last seven years they have lived in Swaziland, Lesotho, and Peru. In June she is moving to Dhaka, Bangladesh. In between learning new languages, navigating new cultural experiences, and keeping up with four children, Cherice has volunteered as chair of the American International School of Lesotho and served on the policy committee of the Franklin D. Roosevelt International School in Lima, Peru.

CLASS OF 2000

Leslie Gallacher has been promoted to senior director of international development at XanGo. In her new position, Gallacher will be responsible for the development, implementation, and execution of XanGo's international expansion strategy, including new product launches in all of XanGo's international markets. **Christy Myers Smith**, Phoenix's JRCLS chair-elect, has been appointed deputy general counsel to Arizona's governor. Previously, she was assistant general counsel for SunCor Development Company.

CLASS OF 2001

Jeffery R. Atkin was elected partner at Foley & Lardner LLP. Jeff is in the Los Angeles office and specializes in renewable energy law. **Jon D. Hill** is leaving his law firm (Thelen) to join Farella Braun & Martel as an associate in San Francisco, California.

CLASS OF 2002

Steven Brown died on August 11, 2009. He was an attorney at Dempsey, Roberts & Smith in Las Vegas. **Ray Jones** has recently returned to Snell & Wilmer's Las Vegas office. Previously, Ray was in-house counsel for KB Homes in its Southwestern Division. Drawing on his experience as a missionary in Mexico, Ray authored a pamphlet titled "You Don't Have to Pretend: A Spanish Primer for Lawyers," which is designed to assist the Las Vegas legal community in meeting the needs of the Spanish-speaking population. **Gustavo Lamanna** has been practicing municipal redevelopment and affordable housing law in Los Angeles at the firm of Kane, Ballmer & Berkman since 2005. The firm was started by the late Eugene Jacobs, one of the patriarchs of community redevelopment law in California and a J. Reuben Clark Law School professor. Gustavo also volunteers his time teaching bar review with the Pro Bono Bar Review, started by the late u.s. district judge Robert Takasugi. After completing the L.A. Marathon in 2004, Gustavo has continued with half marathons. **Ryan Marshall** of Brinks Hofer Gilson & Lione, one of the largest intellectual property law firms in the United States, has been recognized by *Utah Business* magazine as a "2010 Utah Legal Elite" in the practice area of intellectual property.

James P. Neel was tenured and recently promoted to consul in the Foreign Service. Currently serving in Shanghai, China, Jim and his wife, **Jaimee Macanas Neel** (also '02), are a tandem Foreign Service couple. Both were awarded Meritorious Honor Awards by the State Department in 2008. Jim and Jaimee are looking forward to learning Arabic this year for their next assignment to the u.s. Embassy in Cairo, Egypt. They are enjoying exploring the world with their son, Jimmy.

Paul H. Tsosie has been appointed chief of staff to Assistant Secretary of Indian Affairs Larry EchoHawk, a former BYU law professor. Paul joined the Interior Department from his law practice with Calvin Hatch ('02), Tsosie & Hatch, in West Jordan, Utah.

CLASS OF 2003

Edward L. Carter received the BYU Class of 1949 Young Faculty Award. He recently posted a coauthored study on gender and u.s. Supreme Court oral argument results on the Social Science Research Network (SSRN). In November 2009 he was awarded an LLM (with distinction) in intellectual property from the University of Edinburgh School of Law in Scotland. He is an assistant professor of communications at BYU. **M. Todd Hales** was promoted to partner at McDermott Will & Emery. He practices in the area of intellectual property, media, and technology.

Evan Robbins has closed his law practice and accepted a faculty position at Metropolitan State College of Denver, teaching criminal justice.

Jonathon Tichy was recently named a shareholder at Prince Yeates and appointed as honorary consul of the Czech Republic in Salt Lake City. Following graduation he successfully organized and implemented a legal and governmental affairs strategy to obtain official recognition for the LDS Church in Slovakia. In October 2006 the Church became only the 17th government-recognized church in that country. Jonathon has also published a variety of articles on religious freedom issues in the Vienna Law School's *Austrian Journal of Law and Religion* and in treatises published by the Institute for Church-State Affairs and the Slovakian National Library.

CLASS OF 2004

Jerry Salcido of Baker & McKenzie LLP in Palo Alto, California, represented the California Homeschool Network in submitting an amicus brief jointly filed by California's three largest homeschool organizations—California Homeschool Network, Homeschool Association of California, and Christian Home Educators Association of California—in the case *Jonathan L. v. Superior Court*, 165 Cal. App. 4th 1074 (2008). The court agreed to rehear its February 2008 decision that essentially made homeschooling illegal in California. On rehearing, the court reversed its previous decision, adopted most of the reasoning of the homeschool organizations' brief, ruled that California statutory law permits parents to homeschool their children, and suggested that any government interference with parents' right to homeschool their children must survive a strict scrutiny constitutional analysis. The case received international attention.

CLASS OF 2005

Robert Avery and **Hutch Fale** started their own law firm in Utah County.

Daniel Carr has moved to Houston and accepted a position as an attorney with ExxonMobil Global Services, negotiating procurement contracts.

Russell W. Hall III opened the law office of Russell W. Hall III in Myrtle Beach, South Carolina, in 2009. His primary focus is adoption law, and he blogs about adoption law at www.southcarolinaadoptionlaw.com. He and his wife, Marie, are expecting their sixth child on April 1, 2010.

Lorianne Updike Toler stepped down as president of the Constitutional Sources Project in February 2009 to prepare for further graduate studies in England, where she began reading constitutional legal history at Oxford University in October 2009. She and her husband, Lance, currently reside in London.

Daniel H. Walker has been named assistant secretary of the Ensign Group, a parent organization for various health care companies. He has served as the deputy general counsel of Ensign Facility Services and as associate general counsel for securities since 2007.

CLASS OF 2006

Matthew W. Cannon was honored by Southern Utah University with a retired No. 9 football jersey. He is a member of the litigation section at Ray, Quinney, & Nebeker. **Julio Carranza** has been appointed a founding board member of the Martinez Foundation. The Foundation awards undergraduate scholarships to students of color from Washington State. **Betsy Haws** is currently working pro bono with a team of lawyers on the *habeas* cases of several Guantanamo Bay detainees. She is an associate at Snell & Wilmer. **Brandon S. Kinsey**, after three years as an associate at Byrne, Benesch & Villarreal PC, formed the law firm of Garcia, Hengl, Kinsey & Villarreal PC in Yuma, Arizona, in April 2009. He focuses his practice on business litigation. He and his wife, Jessica, have two children.

CLASS OF 2007

Nancy Kennedy married Samuel Maas Major on August 29, 2009, in Salt Lake City. **Ellie Khabazian** recently opened a solo litigation practice in Newport Beach, California. You can reach her at ellie@lawthought.com. **Robin K. Lunt** started work as the new assistant general counsel for the National Association of Regulatory Utility Commissioners in Washington, D.C. **Ben Updike** passed the Arizona Bar in 2008 and began working for the state of Arizona at the Department of Revenue in the transaction privilege tax appeals section. He handles sales tax protests through negotiation and hearings. He lives in Mesa, Arizona, with his wife, Anne, and their two-year-old son, Will.

CLASS OF 2008

Cherie N. Felos was elected to the Attleboro City Council in Massachusetts in November. She serves as chair of the council's ordinance committee and as a member of the personnel and public safety committees.

CLASS OF 2009

Matthew Baker received first prize in the ABA-sponsored Smith-Babcock-Williams Writing Competition for a paper he wrote in Professor John Fee's Land Use Planning class. His paper was published in the winter 2009 edition of *The Urban Lawyer*, an ABA publication. **Nicholas U. Frandsen** has joined Parsons Behle & Latimer's Salt Lake City office. He concentrates his practice on general commercial litigation.

STORIES AND LIVES:

Learning Morality from Example

The following excerpt is taken from Harry J. Haldeman's article "There Is a Law," on page 32 of this issue of the Clark Memorandum. He relates the true story of a convert to the Church who was sentenced to one year in jail for past drunk driving convictions but was then defended by a bishop who testified of the man's repentance. The story concludes with another testimony—that of the judge—and the ripple effect of an exemplary life in the law.

The judge said, "One of the finest men I have ever known was a man named J. Reuben Clark Jr. He was a classmate of mine in law school. He was a great man, and I was always impressed with him when we were students together. I believe he is one of the presiding officers of your church. In view of my great feelings for him, and my knowledge of the great influence of the Mormon Church, and the obvious influence it has had on this man, and his promise, I will suspend the sentence." With that he brought down his gavel again and said, "Sentence suspended. You may go."

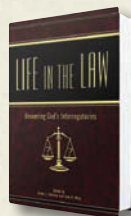
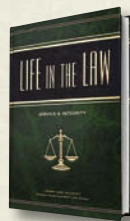
With that, Robert arose. . . . His wife and I walked forward to meet him as he walked through the gate, and the three of us, arm in arm, walked out of the courtroom with tears streaming down our faces.

. . . The great name, the personal influence, and the great reputation of President J. Reuben Clark Jr., combined with the faithfulness of a member who had done as he had promised he would in the waters of baptism and a bishop who, though totally inadequate, had done what he could—all this combined to change the course of history in the life of one man.

Second Volume of *Life in the Law* Now Available

Eight years after the publication of *Life in the Law: Answering God's Interrogatories*, a second compilation of memorable articles and addresses is complete and available for purchase.

Life in the Law: Service & Integrity features the thoughts of law professionals including Thomas B. Griffith, Sandra Day O'Connor, Kevin J. Worthen, W. Cole Durham Jr., and Larry EchoHawk. The words of Church leaders such as Gordon B. Hinckley, James E. Faust, and Neal A. Maxwell also inspire.



Hardcover (\$20) and paperback (\$12) versions of *Life in the Law: Service & Integrity*, as well as *Life in the Law: Answering God's Interrogatories*, are available for purchase online at <http://www.jrcls.org/publications/order.php>, at the BYU Bookstore, or in the Law School Accounting Office.

Student prices are \$16 and \$10.

J. REUBEN CLARK DVD

The Legacy of J. Reuben Clark takes the viewer from Clark's earliest childhood days in the farmlands of Grantsville, Utah, through his law school education at Columbia University and his years of government and Church service. The 35-minute DVD (\$14.95) may be ordered online at www.jreubenclark.org or by calling 1-800-963-8061.

The *Clark Memorandum* welcomes the submission of short essays and anecdotes from its readers. Send your short article (750 words or less) for "Life in the Law" to wisej@lawgate.byu.edu.

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