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## Clark Memorandum: Spring 2011

J. Reuben Clark Law Society

BYU Law School Alumni Association

J. Reuben Clark Law School

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CLARK MEMORANDUM

J. Reuben Clark

Law School

Brigham Young

University

Spring >> 2011



LAW AND BECOMING

Elder D. Todd Christofferson

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DEAR ALUMNI AND FRIENDS,

Spring has come to Provo, albeit with some snow, and final examinations and graduation will be upon us shortly. New graduates and students will soon be heading off literally all over the world for jobs, summer clerkships, and externships. Most of us can relate to their feelings of anticipation, excitement, and uncertainty as they embark on the challenges that await them.

I have always viewed learning the law as something like learning to speak a foreign language. For the first few weeks of class, we can feel completely at sea and wonder whether it will ever be possible to communicate in this new language of the law. Even as we begin to develop a legal vocabulary and to learn a series of doctrines and rules, we still struggle with how to apply the rules to a particular fact pattern. We hear a story but don't simultaneously see the legal issues, ambiguities, alternative narratives, and potential resolutions to the problem described in the story. We read a contract but don't understand the risks or incentives associated with particular provisions. At the beginning, everything is halting translation.

Just like in every foreign language class, most of us remember those in our 1L classes who were stellar law linguists and who, for some reason, just got it. Translation seemed to come faster for them; their comments sounded more fluent; and, at times, they carried on a conversation with the faculty member that made us wonder whether we were learning the same language.

But the wonderful thing about learning a foreign language or the language of the law is that both yield up their secrets with enough effort. At some point we start hearing and seeing meaning without churning through a cumbersome translation process. For some this may come more quickly than others, but for all who are willing to work hard, it comes. Of course we continue to admire the gifted law linguists among us, but once we learn how to speak, the real question is how we use our language. 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 and what you do with the law that matters.

For graduates and students that time is now upon them. Although legal fluency is a lifetime's project—which is part of what attracted so many of us to the law—I am confident that our students have all of the language skills they need to succeed.

Many of our 1Ls will be putting their legal and foreign language skills to use in international settings. This year 48 students will do an international externship with placements across the continents in Africa, Asia, Latin America, Australia, Europe, and the Middle East. What Professor Jim Backman began as a modest externship program in 1992 has grown into a worldwide program with a remarkable breadth of opportunities.

Our 3Ls will graduate and head off for jobs all over the country. Continuing in a long tradition at BYU, in 2011, 12 graduates (a couple from prior years) will start in clerkships with federal appellate and district courts, as well as state supreme courts. The geographical distribution of our graduates reflects our national presence. Typically, about 40 percent of our graduates end up in Utah and 60 percent elsewhere.

Frankly, as is the case in law schools across the country, too many of our 3Ls are still looking for work. In my conversations with other deans, I have sensed that we are comparatively well off, mainly because of a remarkable network of alumni and friends who recognize the quality of our students. Despite our relative strength, an increase in legal employment opportunities can't come fast enough for the students and for our Career Services Office, which has been working overtime. In addition to increased efforts there and a job initiative in which our alumni have been helpful, last year we created a public service fellowship that provides funds for 10 recent graduates to work part-time in public interest and public service positions for up to nine months while they continue to search for permanent employment. I appreciate the support of alumni and friends to make this possible.

More than that support, I appreciate the examples of alumni and friends who over the years have used their training in the language of the law to comfort, persuade, lead, and serve. As our students leave Provo and spread across the world, joined by a strong cadre of students in the Law Society, I am confident that they will continue in this great tradition and become not just impressive legal linguists but also committed practitioners of the ennobling work of the law.

Warm regards,



JAMES R. RASBAND



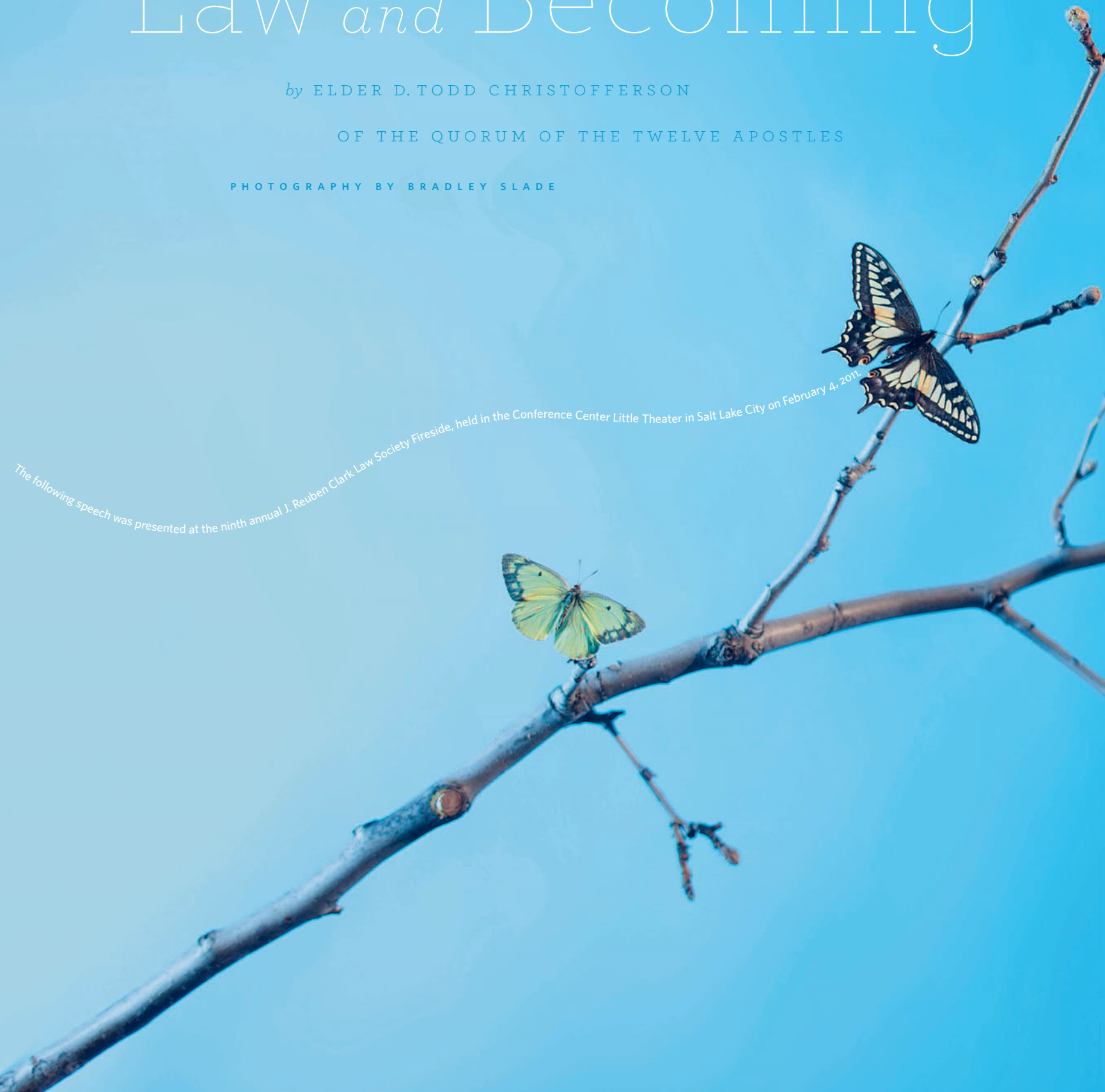
# Law *and* Becoming

by ELDER D. TODD CHRISTOFFERSON

OF THE QUORUM OF THE TWELVE APOSTLES

PHOTOGRAPHY BY BRADLEY SLADE

The following speech was presented at the ninth annual J. Reuben Clark Law Society Fireside, held in the Conference Center Little Theater in Salt Lake City on February 4, 2011.







Let me express, first of all, the honor I feel at being invited to address you this evening. You are an audience of accomplished individuals with demonstrated commitment to what is good and right. I appreciate your character and your good will.

It is also a great honor for me to be introduced by a man I respect as highly as Ralph Hardy. I first became acquainted with Ralph in the early 1970s when Kathy and I and our two young children at the time moved to Maryland following my graduation from law school. During my years in the Washington area, Ralph and I practiced law together and served concurrently as bishops. Ralph was kind enough to tutor me in things relating to the practice of law as well as to leadership in the Church. I learned a great deal from his example that benefits me still today in my current calling and service.

Ralph's intellect and judgment are exceptional. Over the years important political figures and many others have come to rely on his wisdom. I know from personal observation how highly Ralph is regarded among the senior leaders of the Church. His recommendations and insights are regularly sought and gratefully received. We all understand the thoughtfulness and experience behind his counsel. I am by no means alone in my conviction that Ralph's exceptional talent and devotion not only do great credit to the legal profession, but, even more important, represent a tremendous blessing for The Church of Jesus Christ of Latter-day Saints.

Ralph, I am grateful that you would do me the honor of this introduction in your typically gracious manner, and I take this occasion to express to you publicly my deepest admiration.

I have titled my remarks this evening "Law and Becoming." By this I mean to talk about the vital role of law in what we may become. In speaking of becoming, I am taking the long view not only of what a person may be able to make of himself or herself in the space between birth and death, but also of the eternal potential of men and women. And, in speaking of law, I want to reference not only matters of our codes and courts but also the laws of God.



Through revelations granted to the Prophet Joseph and his predecessors, we learn some profound things about our relationship to God and our ultimate destiny. We learn that Jesus Christ, as the Son of God, progressed "from grace to grace, until he received a fulness"<sup>1</sup> and that we may follow in that same path. He said, "For if you keep my commandments you shall receive of his fulness, and be glorified in me as I am in the Father; therefore, I say unto you, you shall receive grace for grace."<sup>2</sup> In explaining the natural conclusion of this pattern, Joseph Smith said:

*Here, then, is eternal life—to know the only wise and true God; and you have got to learn how to be gods yourselves, and to be kings and priests to God, . . . by going from one small degree to another, and from a small capacity to a great one; from grace to grace, from exaltation to exaltation, until you attain to the resurrection of the dead, and are able to dwell in everlasting burnings, and to sit in glory, as do those who sit enthroned in everlasting power.<sup>3</sup>*

Joseph Smith also referred to God's use of law in this process:

*The first principles of man are self-existent with God. God himself, finding he was in the midst of spirits and glory, because he was more intelligent, saw proper to institute laws whereby the rest could have a privilege to advance like himself. The relationship we have with God places us in a situation to advance in knowledge. He has power to institute laws to instruct the weaker intelligences, that they may be exalted with Himself, so that they might have one glory upon another.<sup>4</sup>*

I cite one more teaching from the Prophet that adds the remaining element to this equation—agency:

*All persons are entitled to their agency, for God has so ordained it. He has constituted mankind moral agents, and given them power to choose good or evil; to seek after that which is good, by pursuing the pathway of holiness in this life, which brings peace of mind, and joy in the Holy Ghost here, and a fulness of joy and happiness at His right hand hereafter; or to pursue an evil course, going on in sin and rebellion against God, thereby bringing condemnation to their souls in this world, and an eternal loss in the world to come.<sup>5</sup>*

All of this declares that we have a potential made possible by God beyond anything we can fully comprehend or appreciate at present. And we recognize, of course, that none of us will achieve the ultimate end, the status of eternal life with God our Father, in a matter of days or years or with-



## Introduction of Elder D. Todd Christofferson of the Quorum of the Twelve

BY ELDER RALPH W. HARDY JR.  
OF THE SEVENTY

On the warm Friday afternoon of September 5, 1975, my 30-year-old law firm colleague, David Todd Christofferson, and I found a place behind the already occupied rows of metal chairs and sat on the cool, green grass in front of the gleaming, new J. Reuben Clark Law School Building on the BYU campus. On a sudden impulse we had caught a plane in Washington in order to witness this historic dedication of the new law school building by President Marion G. Romney—and in the presence also of BYU President Dallin Oaks, founding dean Rex Lee, Chief Justice Warren Burger, and Justice Lewis Powell of the Supreme Court. Even though we had studied law at other distinguished institutions, we knew that this was a seminal event and the coming of age of a law school that would forever add definition and substance to our professional lives as well as strength to the Church. Little did I realize on that beautiful afternoon that I was sitting on the grass with a future Apostle of the Lord Jesus Christ, although—already—had someone vouchsafed that fact to me, I would not have been the least bit surprised.

I first became acquainted with Elder Christofferson when I took a taxi to the United States Courthouse in Washington to see this newly minted, 27-year-old law clerk to U.S. District Court Chief Judge John J. Sirica. The famous *Watergate* case was still in its infancy, and virtually nobody knew the extent to which that case would eventually go. I was on a recruiting errand. I met in the judge's chambers with this bright young lawyer with such a pleasing countenance and easy smile. Eventually I secured from him a commitment to join my law

firm after what we both assumed would be his one-year commitment to the judge. I should add that, for our firm, as you can imagine, Elder Christofferson was a very big “get.” In addition to his almost unbelievable clerkship opportunity with Judge Sirica, Elder Christofferson had been a BYU Edwin Hinckley scholar, student-body academic vice president, an exceptional Duke law student, and an editor of the *Duke Law Journal*.

Nevertheless, with the growing complexity and riveting national attention on the *Watergate* case increasing exponentially, the standard one-year commitment expanded into three years, and Judge Sirica would call our firm several times to declare, regarding his able young law clerk: “I just can’t let him go—he’s too valuable. He’s the only one I can talk to!”

During the long pendency of the *Watergate* case, the *Washington Post* described Elder Christofferson as “a former Mormon missionary who serves as Judge Sirica’s clerk and alter ego” and added that “Todd, now a tall, soft-spoken, blond-headed young man,” had “served as a missionary in Argentina.” In its “1973 Person of the Year” cover story on Judge Sirica, *Time* magazine illustrated the exceptionally close relationship between this judge and his law clerk by observing that “while the technicians continued their studies [for any evidence of tampering], [Judge Sirica] and his young law clerk, Todd Christofferson, listened to the [White

House] tapes through headphones in a jury room.” Thirty years later I was privileged to be in the completely filled ceremonial courtroom of the United States Court of Appeals for the District of Columbia Circuit to attend a retrospective on the *Watergate* case that featured on the dais many of the still-living lawyers, television correspondents, and defendants in that national drama. What was most interesting was the attention and great respect that was accorded to Elder Christofferson, whom everyone remembered well. He was, as you would imagine, the recipient of many questions—which he fielded with his trademark grace, humor, and good judgment. When Judge Sirica died in 1992, the family asked Elder Christofferson to speak at his funeral in Washington. What counsel would you have expected Elder Christofferson, then of the Seventy, to have given on that occasion? Yes! It was the doctrine of the plan of salvation.

While residing in the Washington D.C. Stake, Elder Christofferson soon found himself called as a bishop. Then, less than five years later, he accepted an exciting professional opportunity as in-house counsel to a health care company in Tennessee. This was followed by his appointment as senior vice president and general counsel of Tennessee’s Commerce Union Bank. He was called as a stake president in Nashville and, at the end of his tenure, became a regional representative. Finally, in the rapidly

consolidating world of banking, Elder Christofferson became associate general counsel of the giant NationsBank in Charlotte, which later acquired Bank of America and retained that name. We all know the rest of the story. The Lord had already charted for this able lawyer another long-term path. Shortly after moving to Charlotte, he was called, in 1993, to the First Quorum of the Seventy and, in 1998, to the Presidency of the Seventy. Then, on April 12, 2008, Elder David Todd Christofferson was ordained to an apostleship. I have dwelled somewhat on the early judicial clerkship of a young Elder Christofferson because this unique experience—occurring at the very epicenter of perhaps the greatest American political crisis since the Civil War—helped refine the keen instincts, exceptional scholarship, sound judgment, and advocacy skills that would enhance both his successful professional career and his ministry. This being said, however, what many in the world would not know is that, more than any other factor, Elder Christofferson’s mode of life and careful approach to his many responsibilities have been informed through the tutelage of the Spirit.

Elder Christofferson’s best friend and confidant (who is here with us tonight) is the love of his life and his eternal companion, Kathy, whom he married in the Salt Lake Temple in 1968. The Christoffersons have been blessed with five children and nine grandchildren. Throughout his nearly 18-year ministry as a General Authority, Elder Christofferson, with uncommon, understated eloquence and precision, has given inspired counsel on many important gospel topics. For aspiring and current lawyers, however, his addresses and writings have been particularly insightful. This evening, J. Reuben Clark Law Society is highly honored to have the privilege of hearing the instruction of this servant of the Lord and fellow member of the bar.



out substantial help. We require the help of one another and an incalculable measure of divine grace originating in Christ and administered through the Holy Ghost. Nevertheless, our own choices will always be critical to what we become. And the capacity and power to choose are, as Joseph Smith declared, dependent on laws instituted by or under the authority of God.

Such laws link particular actions to fixed outcomes. If a given choice did not always and invariably yield the same result, we could not in the end control outcomes, and the power to choose would be meaningless. And even with law, if we are not free to act, either to follow or reject it, we likewise could not use law to progress from grace to grace. I believe that Satan's proposals in the premortal world attacked both of these principles. He wanted to be vested with a power of compulsion over the souls of men and with the honor or power of God:

*And I, the Lord God, spake unto Moses, saying: That Satan, whom thou hast commanded in the name of mine Only Begotten, is the same which was from the beginning, and he came before me, saying—Behold, here am I, send me, I will be thy son, and I will redeem all mankind, that one soul shall not be lost, and surely I will do it; wherefore give me thine honor.<sup>6</sup>*

Had Satan been granted power to dictate our choices, we would have become nothing more than his puppets, eternally dependent upon him. It is my personal opinion that in demanding "Give me thine honor," Satan was also coveting God's power to establish the law, and that it was his intention to use that power arbitrarily—to apply, revoke, and change laws in an arbitrary fashion that would destroy our power to act independently and to choose our destiny. For whatever reason, Satan was exceptionally persuasive in lobbying for his approach. Happily, his plan was rejected, although echoes continue to reverberate in the world around us.

The deities of ancient Greek and Roman mythology were often arbitrary beings. While they were supposed to possess remarkable powers, they were ruled by their passions. As they fought and jockeyed for position among themselves, or simply vented feelings of lust, anger, or frustration, mere mortals were sometimes caught in the cross fire. We can be grateful, to say the least, that the true and living God is nothing like the imaginary Zeus or Jupiter.

The scripture states, "There are many kingdoms. . . . And unto every kingdom is given a law; and unto every law there are certain bounds also and conditions."<sup>7</sup> Apparently, laws with their conditions and bounds may vary in different kingdoms or spheres—as, for example, the laws of the several kingdoms that prevail in our postmortal life. The Lord says that His celestial kingdom is populated by those who are "sanctified through the law which I have given unto you, even the law of Christ,"<sup>8</sup> and that those who cannot abide this celestial law must inherit a lesser kingdom whose law they are able and willing to follow.<sup>9</sup> While differing laws may apply in different parts of God's creation, the laws that do apply do not themselves vary. Such beings and creations as are subject to them can rely on them to achieve their divine potential. We are told that those who are governed by law are preserved, perfected, and sanctified by the same.<sup>10</sup>

Under the umbrella of divine law and order applicable to the "kingdom" that is our present mortal world, God delegates to us, His children, the opportunity and responsibility to establish laws and legal systems to govern human relations and conduct. Let me quote from section 134 of the Doctrine and Covenants:

*We believe that governments were instituted of God for the benefit of man; and that he holds men accountable for their acts in relation to them, both in making laws and administering them, for the good and safety of society.*

*We believe that no government can exist in peace, except such laws are framed and held inviolate as will secure to each individual the free exercise of conscience, the right and control of property, and the protection of life.<sup>11</sup>*

These standards—(1) that laws are to be made and administered for "the good and safety of society" and (2) that they must secure to each individual the rights of life, property, and conscience—bespeak a legal environment in which man may progress toward his divine destiny, to become what God has ordained he may become. They establish the stability, order, and means whereby each



individual may exercise moral agency. They produce a setting wherein each person, if he or she so desires, can “come unto Christ, and be perfected in him”<sup>12</sup> and all that that entails.

In the infant days of The Church of Jesus Christ of Latter-day Saints, the Lord expressed in a revelation to Joseph Smith the wisdom and benefit of organizing the Church and its work “according to the laws of man; That your enemies may not have power over you; that you may be preserved in all things; that you may be enabled to keep my laws.”<sup>13</sup> I read this to mean that, as a general principle, submission to the laws of man will offer very real protections, providing in effect a safe haven within which we can act to obey and serve God.

In his book *The Clash of Orthodoxies*, Robert P. George has an interesting chapter titled “What Is Law?” He examines the debates among legal thinkers and philosophers in the English-speaking world over the last century, beginning with Oliver Wendell Holmes, about the origins and nature of law. He cites, for example, the group whose legal realist movement flourished to some extent in the 1930s and 1940s. These scholars debunked the idea of legal objectivity; to be realistic, they maintained, we “should abandon the idea that law pre-exists and is available to guide legal decisions.”<sup>14</sup> They argued that judges’ reasoning and citation of laws as the basis of their decisions are in reality “mere legal rationalization of decisions reached on other grounds.”<sup>15</sup>

George reviews other theories such as “legal positivism,” which in some versions holds to “the idea that law ought not to embody or enforce moral judgments.”<sup>16</sup> Other proponents, however, acknowledge that the content of legal rules reflects “nothing so much as the moral judgments prevailing in any society regarding the subject matters regulated by law.”<sup>17</sup> For George himself, “legal rules and principles function as practical reasons for citizens, as well as judges and other officials, because the citizens appreciate their moral value.”<sup>18</sup> He subscribes to the proposition *lex iniusta non est lex* (an unjust law is not law), by which he means, if I understand him correctly, that it is essential for the laws and legal systems created by man to have a basis in natural law or morality.<sup>19</sup>

In his 1993 encyclical letter titled “Veritatis Splendor,” Pope John Paul II expressed the relevant Catholic doctrine in these words:

*Only by obedience to universal moral norms does man find full confirmation of his personal uniqueness and the possibility of authentic moral growth. . . . These norms in fact represent the unshakable foundation and solid guarantee of a just and peaceful human coexistence, and hence of genuine democracy, which can come into being and develop only on the basis of the equality of all its members, who possess common rights and duties. When it is a matter of the moral norms prohibiting intrinsic evil, there are no privileges or exceptions for anyone. It makes no difference whether one is the master of the world or the “poorest of the poor” on the face of the earth. Before the demands of morality we are all absolutely equal.*<sup>20</sup>

Latter-day Saints would necessarily be included among those who believe in preexisting and universal natural law—or, as we might express it, law rooted in the preexisting justice and order of God. I firmly agree that insofar as humanly possible, man’s laws and legal systems should be tied to God’s laws and should reflect the same ultimate purpose: to foster our becoming all that we can become here and hereafter. People instinctively appreciate the value of law that has valid moral underpinnings because it is in their nature as spiritual beings and children of God—the ultimate moral Being. The light of Christ that we sometimes call conscience lights every person who comes into this world.<sup>21</sup>

Some of you may be thinking, “This is all very grand, but where, for example, does tax law fit in?” I would answer that it probably does not, since tax codes are the work of the devil, right? But in all seriousness, even the very mundane can have a role if it is supportive of—or at least not inconsistent with—overarching divine principles and purpose. The Uniform Commercial Code, for example, would seem to have little if any contribution to make in helping us achieve our divine potential, but even something so unethereal can have value as part of a larger legal structure that supports fundamental fairness, minimizes strife, rewards honest labor, preserves stable families, and, ultimately, enshrines moral agency.

Returning again to the Doctrine and Covenants:

*We believe that all governments necessarily require civil officers and magistrates to enforce the laws of the same; and that such as will administer the law in equity and justice should be sought for and upheld by the voice of the people if a republic, or the will of the sovereign.*<sup>22</sup>





Here, more specifically, we come to many of you in the profession of law. You live in societies where the system of “civil officers and magistrates” includes judges and lawyers who occupy a vital role in administering the law “in equity and justice.” You whose first loyalty is to God can press in a variety of ways for laws and systems that track the divine model or that at least do not undermine it. Let me be clear that I am not speaking of any endeavor to impose upon society by some sort of fiat what we see as the appropriate application of divinely revealed principles. We cannot, and we make no attempt to do so. I am speaking of advocacy and persuasion. At the same time, it will not do to pretend that an individual or group may not participate in the debates and processes that shape our laws simply because their arguments are based on moral norms or because their moral vision is not shared by all citizens. Essentially all legislation is based on moral judgments—religious, secular, or otherwise, and all parties to the ongoing contest seek to have their ethical and moral concerns heard. In the end we are governed by those that prevail in the public mind. It is not an imposition of religion for religionists to take part in the discussion, and there is no justice in one side with deeply held values seeking to silence another because it espouses different deeply held values.

Consider the example of William Wilberforce and others of his time who sought to conform the laws of Great Britain to a higher moral standard of equity and justice. Wilberforce is rightly remembered and revered for his central role in the abolition of the slave trade that was then dominated by British ships. For some 18 years, beginning in 1789, he labored as a member of Parliament to end this evil commerce and lay the groundwork for the abolition of slavery altogether:



*Wilberforce's involvement in the abolition movement was motivated by a desire to put his Christian principles into action and to serve God in public life. . . . [He] sensed a call from God, writing in a journal entry in 1787 that “God Almighty has set before me two great objects, the suppression of the Slave Trade and the Reformation of Manners [moral values].”<sup>23</sup>*

Initially, Wilberforce's bills in the House of Commons were easily defeated. Then, just as momentum began to build, the French Revolution and slave revolts in the West Indies caused a shift back to caution and delay. During the protracted campaign, “Wilberforce's commitment never wavered, despite frustration and hostility. He was supported in his work by fellow members of the so-called Clapham Sect. . . . Holding evangelical Christian convictions, and consequently dubbed ‘the Saints,’ the group lived in large adjoining houses in Clapham.”<sup>24</sup> Finally, in 1807, Wilberforce's Abolition Bill passed the House of Lords and was presented to the House of Commons. “As tributes were made to Wilberforce, whose face streamed with tears, the bill was carried by 283 votes to 16.”<sup>25</sup>

It is significant to recognize that while Wilberforce, as a member of Parliament, took the leading role in official circles, the active and devoted efforts of many others with no political portfolio were essential to success in the campaign to end the slave trade. The collaboration of Thomas Clarkson, a fellow graduate of Wilberforce at St. John's Cambridge, was especially important. Also critical was the part played by members of the Society for Effecting the Abolition of the Slave Trade, a group made up primarily of like-minded British Quakers and Anglicans that included Clarkson and that Wilberforce joined in 1791.

*The society was bigbly successful in raising public awareness and support, and local chapters sprang up throughout Great Britain. Clarkson travelled the country researching and collecting firstband testimony and statistics, while the committee promoted the campaign, pioneering techniques such as lobbying, writing pamphlets, holding public meetings, gaining press attention, organizing boycotts and even using a campaign logo: an image of a kneeling slave above the motto “Am I Not a Man and a Brother?” designed by the renowned pottery-maker Josiah Wedgwood. The committee also sought to influence slave-trading nations such as France, Spain, Portugal, Denmark, Holland and the United States, corresponding with anti-slavery activists in other countries and organising the translation of English-language books and pamphlets. These included books by former slaves Ottobah Cugoano and Olaudah Equiano, who had published influential works on slavery and the slave trade in 1787 and 1789, respectively. They and other free blacks, collectively known as “Sons of Africa,” spoke at debating societies and wrote spirited letters to newspapers, periodicals and prominent figures, as well as public letters of support to campaign allies. . . . The campaign proved to be the world's first grassroots human rights campaign, in which men and women from different social classes and backgrounds volunteered to end the injustices suffered by others.”<sup>26</sup>*



William Wilberforce and his allies provide an encouraging example of success after much labor and against daunting opposition. Not every effort, however, will succeed—at least not initially. Consider a more recent example in the arena of things that bear on marriage and families and the rearing of children. The “no-fault” divorce laws that have been adopted in the United States and elsewhere were warned against decades ago by President David O. McKay and others. The disastrous consequences visited on the institution of marriage since then are clearly evident, with children being the primary victims—some of whom, given their suffering, are now reluctant to marry and rear families themselves. But whatever the setbacks in our striving to sustain family or other moral imperatives among our fellowman, surely we must, as Paul declared, fight the good fight.<sup>27</sup> Mohammed is reported to have said, “Who[so]ever sees a wrong and is able to put it right with his hand, let him do so; if he can’t, then with his tongue; if he can’t, then in his heart, and that is the bare minimum of faith.”<sup>28</sup>

Of all the moral imperatives we seek to embrace and defend in our legal systems, in my opinion it is individual agency and accountability that must always be preeminent, because agency is so basic to realizing our God-given potential. On the one hand, we should uphold those legal and political concepts that protect legitimate individual action, and, on the other, we should oppose those theories and schemes that exert unjust dominion or diminish predictability and consistency in the operation of law. True, there is some degree of compulsion in any law, but generally it is the kind designed to preserve space and opportunity for life, liberty, and the pursuit of happiness. Other proposals, however, look to compel our acceptance or tolerance of actions that offend the moral conscience. A potential example would be the case of a doctor being forced to participate in an abortion against his or her conscientious objection on pain of forfeiting the right to practice medicine.

All man-made legal systems are imperfect and include elements of injustice. Still, you can strive to make the legal system within which you live and work come as close as possible to the perfectly just “legal system” of God. You can take as your guide not only the wisdom of similarly minded men and women from the past but also the teachings of the scriptures, prophets, and the Holy Spirit. In this, as in other matters, you are invited to study out in your own mind concepts regarding the standards, direction, and even the specifics of what the law should be, how the legal system should be structured, and how it should operate and then to ask God if it be right.<sup>29</sup> Surely you are entitled in your role and sphere to revelation on things that bear so directly on not only the present estate of man but also his ultimate future.

God finds His glory, as Joseph Smith said, in providing laws by which other beings can come to enjoy the same perfections and glory He possesses.<sup>30</sup> Our view and motivations should be the same. Rather than seeing law as an instrument of domination, it is our mission to use it as an enabling power to help men and women achieve greater independence and ultimate potential. We do so by acting to have our earthly governmental and legal systems mirror as closely as possible the divine order.

After all I have said in praise of law and all the effort I have enjoined you to make in sustaining and defending a moral order, we must in the end acknowledge that we cannot achieve ultimate justice apart from Jesus Christ. To establish and preserve the law is a great good, but the greatest good we can do in helping others become what they can become will be to lead them to the Savior. Only His Atonement has the power to overcome all weakness and imperfection and to make right all injustice. Only He can convert offense and injury into blessings; only He can bring life again to a life unjustly cut short; only He can return a perfect body for one diseased or malformed; only He can reinstate beloved associations lost and make them permanent; only He can make right the suffering entailed upon the innocent by ignorance and oppression; only He can erase the impact of sin on one who is wronged; only He can remove the stain and effect of sin in the sinner; only He can eliminate sorrow and wipe away all tears;<sup>31</sup> only He can provide immortality; only His grace can compensate for our inadequacy and justify us before that law that enables us to become joint heirs of eternal life with Him. Of the glorious reality of the living Christ, I bear my witness.



## NOTES

- 1 D&C 93:13.
- 2 D&C 93:20.
- 3 *History of the Church*, 6:306.
- 4 *History of the Church*, 6:312.
- 5 *History of the Church*, 4:45.
- 6 Moses 4:1.
- 7 D&C 88:37–38.
- 8 D&C 88:21.
- 9 See D&C 88:21–24.
- 10 See D&C 88:34.
- 11 D&C 134:1–2.
- 12 Moroni 10:32.
- 13 D&C 44:4–5.
- 14 Robert P. George, *The Clash of Orthodoxies* (Wilmington, Delaware: ISI Books, 2001), 219.
- 15 *Clash*, 219.
- 16 *Clash*, 222.
- 17 *Clash*, 223.
- 18 *Clash*, 226.
- 19 See *Clash*, 227–28.
- 20 Pope John Paul II, “Veritatis Splendor,” 6 August 1993, 91; emphasis in original.
- 21 See D&C 84:45–46; 88:7–14; 92:2.
- 22 D&C 134:3.
- 23 Wikipedia, William Wilberforce, 31 January 2011, 8:23 p.m.
- 24 Wikipedia.
- 25 Wikipedia.
- 26 Wikipedia.
- 27 See 2 Timothy 4:7.
- 28 Qanta A. Ahmed, “Fulfilling Our Duty as Muslim-Americans,” *Wall Street Journal*, 7 January 2011, A11.
- 29 See D&C 9:8.
- 30 See Moses 1:39.
- 31 See Isaiah 25:8.

—Special thanks to  
Cliff Miles for the use  
of his beautiful  
butterfly collection.



A dramatic black and white photograph of a stormy sky over a field. The sky is filled with dark, heavy clouds, with a bright light source breaking through near the horizon, creating a strong contrast. The foreground shows a field of crops, possibly corn, with a line of trees in the distance.

# AMBIGUITY IN

BY ELDER BRUCE C. HAFEN

THE FOLLOWING SPEECH WAS PRESENTED AT J. REUBEN CLARK LAW



# LAW AND IN LIFE



SCHOOL AT BRIGHAM YOUNG UNIVERSITY ON OCTOBER 21, 2010.

PHOTOGRAPHY BY MITCH DOBROWNER

W

e have many Ls here today who are already worrying about final exams. During my first year, my wife, Marie, and I lived in a little apartment on 13th East in Salt Lake City. We were expecting our first baby, Jonathan, who is now an active worker in the BYU Law School Alumni Association and whose daughter Sarah is here today.

As finals approached, I was so consumed by my daily study routine that it was like living in a diving bell. I just lived at my little worktable, constantly briefing cases and preparing outlines. I knew our baby would come soon, but my mind was elsewhere. Then one night I had this really vivid dream. I saw myself in my study nook, slaving away. I thought somebody was watching me. I looked over my shoulder and saw Marie standing in the doorway with a little boy who was about seven years old.

I said, "Is that our new baby?" She said, "Yes." I replied, "Well, he's pretty old, isn't he?" She said, "Yes, and we're sorry to disturb you—we know you've got to study. We just have one little question. Then we'll leave you alone. You haven't had time to give our boy a name in Church, and it's becoming kind of a problem."

I looked at this forlorn-looking child. "You don't have a name?" He said, "No . . . no, Dad, but it's okay. You need to study." I said, "Well, are you in school?" "Yeah. I'm in second grade." "Well, if you are in school, the kids have to call you something. What do they call you?" and he said, "Vargel." "Vargel?!" I asked. "Do you like that name?" "Well, it's okay. . . ." I awoke clawing the air. In the morning I said to Marie, "When is the next fast Sunday?"

First-year law students are often frustrated to discover that our legal system is characterized not by hard, fast rules but by legal principles that often appear to contradict each other. One new student said he had a "low tolerance for ambiguity." He had recently returned from a mission, where his life was highly structured. But in law school he felt totally at sea, groping to find whatever would tell him all the rules of law. Let's put his questions into a larger perspective. Ambiguity is not only part of law school—it is often part of life.

When we are young, most of us tend to think in terms of black or white; there isn't much gray in our perspective. So most younger LDS adults have a childlike optimism and a loyalty that make them wonderfully teachable. One older BYU student said that one thing he likes about being in a student ward full of freshmen and sophomores is that when topics like faith or repentance are discussed, nobody yawns.

As time goes on, however, experience often introduces a new dimension to our perspective. We may begin to see a kind of gap between the real and the ideal, between what is and what ought to be.

Imagine two circles, one inside the other. The inner boundary is "the real," or what is. The outer boundary is "the ideal," or what ought to be. We stand at the inner boundary of reality, reaching to move our reality closer to the ideal. We first see the gap between these two boundaries when we realize that some things about ourselves or others are not what we expected—or what we wish they were. This realization can be frustrating.



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Even our experience with Church institutions can introduce us to this gap, in part because our idealistic expectations may be very high. For example, a new BYU student may find it hard to be one among 30,000 students battling the red-tape machine that seems to control the processes of admission, registering for classes, or transferring credits from another school. A new student may feel unknown and nameless to a student ward bishop who is inundated with many new ward members all at once. Or he may brush up against a faculty member whose attitudes about the Church are more flexible (or more rigid) than he had expected them to be.

At a more personal level, perhaps an important prayer goes too long unanswered or one suffers a surprise health setback or an unexpected conflict with a family member. Perhaps one becomes conscious of the imperfections of other Church members or leaders or of one's own parents. When we become acquainted at an adult level with those who have been our heroes, we naturally begin to see their human limitations. Or perhaps one has an encounter with anti-Mormon literature or one discovers differing doctrinal views among Church leaders.

Experiences like these can produce uncertainty and ambivalence—in a word, *ambiguity*—and we may yearn for simpler, easier times when life was more clear and felt more under our control. We might sense within ourselves the beginnings of skepticism, of unwillingness to respond to authority or to invitations to commit ourselves to demanding goals or projects.

Not everybody will encounter what I have been describing, and not everyone must encounter it. But sooner or later, many Church members do run into at least some forms of ambiguity. Our basic doctrines are clear, potent, and unambiguous. But we can encounter some uncertainty even in studying the scriptures. Consider, for example, when Nephi took Laban's life in order to obtain the brass plates. That exceptional case is not easy to interpret





until the reader realizes that God Himself, who gave the original commandment not to kill, was also the source of Nephi's instructions.

Consider also the case of Peter on the night he denied any knowledge of his Master. We typically regard Peter as something of a coward. We assume his commitment wasn't strong enough to make him rise to the Savior's defense. But I once heard President Spencer W. Kimball say that the Savior's statement that Peter would deny Him three times just might have been a request to Peter, not a prediction. Jesus might have been instructing His chief Apostle to deny knowing Him in order to ensure strong leadership for the Church after the Crucifixion. So perhaps we shouldn't judge Peter too quickly.

Consider other scriptures. The Lord has said that He "cannot look upon sin with the least degree of allowance" (D&C 1:31). Yet elsewhere He said, "I have forgiven you your sins" (D&C 64:3) and "Neither do I condemn thee: go, and sin no more" (John 8:11). Justice is indeed a divine law, but so is the doctrine of mercy. At times these two correct principles can seem inconsistent, until the unifying higher principles of the Atonement bring them together.

God has given us correct principles by which we may govern ourselves, yet these very principles may at times be in conflict. Choosing between two principled alternatives (two "goods") is more difficult than choosing in a stark and obvious contrast between good and evil.

A common question among law students (and lawyers) is how to balance one's duties to family, Church, and school or profession. One young mother had a large family, a responsible Church calling, and a busy husband. She was bewildered about what should come first in her life and when. Someone told her, "Well, just be sure you put the Lord's work first." Her reply: "But what if it is all the Lord's work?"

THE MISTS OF DARKNESS IN  
LEHI'S DREAM SYMBOLIZE LIFE AS  
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Church and family life are not the only topics in which the right answer is not always on the tip of our tongues. Think about the recent U.S. war in Iraq. With the hindsight of a few years, was that war a colossal mistake or was it a heroic act of liberating a nation? Or consider whether we should sell everything except what is truly necessary for our survival and donate our surplus to those with far greater needs than ours. We might also ask how much governmental intervention into the regulation of business and private life is too much—or not enough.

The people on the extreme sides of such questions often seem very certain about the right answer. But some people would rather be certain than right.

We also encounter ambiguity in literature. One BYU teacher said that great literature will usually raise a profound question, explore the question skillfully, then leave the matter for the reader to resolve. If the resolution seems too clear or too simple, maybe the literature isn't very good or perhaps the reader has missed its point.

So life is full of ambiguities, because some uncertainty is characteristic of the mortal experience. The mists of darkness in Lehi's dream symbolize life as we face it on this planet. There are, thankfully, many things in mortality that are very certain and very clear—beautifully represented by the iron rod in Lehi's dream. But much complexity still surrounds us.

Given, then, the existence of a gap for most of us between where we stand and where we would like to be, and given that we will have at least some experiences that make us wonder what to do, I suggest three ascending levels of dealing with ambiguity.

At level one, I've noticed two typical attitudes. One of them occurs when we simply do not—perhaps cannot—even see the problems that exist. Some people seem almost consciously to filter out any perception of a gap between the real and the ideal. For them, the gospel at its best is a firm handshake, an enthusiastic greeting, and a smiley button. Their mission was the best, their ward is the best, and every new day is probably going to be the best day they ever had. These cheerful ones are happy, spontaneous, and optimistic, and they always manage to hang loose and relax. They are able to weather many storms that seem formidable to more pessimistic types, although one wonders if they have somehow missed hearing that a storm is going on.

A second group at level one has a different problem with the gap between what is and what ought to be. This group eliminates the distance between the real and the ideal by, in effect, erasing the inner circle of real-

ity—and thereby removing the gap. They cling to the ideal so single-mindedly that they just don't feel the frustration that would come from facing the real facts—perhaps about themselves, about others, or about the world around them. People in this group have sometimes written letters to the editor of the *Daily Universe* expressing their shock at discovering that something at BYU falls short of perfection.

Those in this group struggle to distinguish between imperfections that matter a great deal and those that may not matter much. For instance, Hugh Nibley once said that some people think it is better to get up at 5:00 a.m. to write a bad book than to get up at 9:00 a.m. to write a good book. While self-discipline is a virtue, he didn't think the exact hour when we arise is quite as important as what we do once we are up.

I recall listening to a group of young Church members discussing which of the two types of people just described offered the best model for their emulation. They felt they had to choose between being relaxed, carefree, and happy about everything in life or being an intense, uncompromising perfectionist. As I listened, I began to see that both categories suffer from the same limitation. There isn't much real difference between a forced superficial happiness and a frantic concern with apparent perfection.

Both perspectives lack depth; they understand things too quickly, and they draw conclusions from their experience too easily. Neither is well prepared for adversity, and I fear that the first strong wind that comes along will blow them over. Their roots haven't sunk deep enough into the soil of experience to establish a firm foundation. Both groups reflect the thinness of a philosophy that is untempered by common sense.

## LEAD, KINDLY LIGHT

*Lead, kindly Light, amid th'encircling gloom;*

*Lead thou me on!*

*The night is dark, and I am far from home;*

*Lead thou me on!*

*Keep thou my feet; I do not ask to see*

*The distant scene—one step enough for me.*

*I was not ever thus, nor pray'd that thou*

*Shouldst lead me on.*

*I loved to choose and see my path; but now,*

*Lead thou me on!*

*I loved the garish day, and, spite of fears,*

*Pride ruled my will. Remember not past years.*

*So long thy pow'r hath blest me, sure it still*

*Will lead me on*

*O'er moor and fen, o'er crag and torrent, till*

*The night is gone.*

*And with the morn those angel faces smile,*

*Which I have loved long since, and lost awhile!*

TEXT John Henry Newman, 1801–1890

MUSIC John B. Dykes, 1823–1876

It would help them if they were more realistic about life, even if that took them out of their comfort zone. That discomfort—the very discomfort you feel with law school's ambiguity and in life—can motivate you to lean into the wind and experience some real growth. After all, the true Church is intended not only to comfort the afflicted but also to afflict the comfortable.

Let us then step up to level two, where we see what Jacob called “things as they really are” (Jacob 4:13). Only then can we deal with reality in a meaningful and constructive way. If we are not willing to grapple with the frustration that comes from facing bravely the uncertainties we encounter, we may never develop the kind of spiritual maturity that is necessary to reach our ultimate destination. Heber C. Kimball once said that the Church must yet pass through some very close places and that those who are living on “borrowed light” will not be able to stand when those days come (in Orson F. Whitney, *Life of Heber C. Kimball* [Salt Lake City: Bookcraft, 1967], 450). What is borrowed light? It is living off someone else's testimony and not really dealing with whatever the issues are for you.

So we must learn how to form judgments of our own about the value of ideas, opportunities, or people who may come into our lives. We can't depend on somebody else's light to tell us whether a certain idea is “Church approved,” because new ideas don't always come along with little tags attached saying whether they have been reviewed at Church headquarters. Whether in the form of music, books, friends, or opportunities to serve, there is much that is lovely or of good report or praiseworthy that is not the subject of detailed discussion in Church manuals, conference talks, or courses of instruction. Those who aren't open to people or experiences that are not obviously related to some Church word or program may well live less abundant lives—and make fewer contributions—than the Lord intends.

One of today's cultural soft spots is that we live in the age of the sound bite. If you can't express a thought in a short phrase or reduce it to a quick text message, some think it must not matter very much. Be careful about that. That reductionist approach can destroy real thought, impairing our capacity to think about what is going on and to help solve real problems. Don't just pick the label that kind of seems “in.”

We must develop enough independence and judgment that we are ready for the shafts of adversity and contradiction that may come to us. When those times come, we can't be living on borrowed light. Don't be deceived by the clear-cut labels others may use to describe circumstances that are, in fact, not so clear. Our encounters with reality and disappointment are actually vital stages in the development of our maturity and understanding.

Now, having considered the value of a level-two awareness, there are still some serious hazards at this stage. One's acceptance of the clouds of uncertainty may be so complete that the iron rod seems to fade into the blurring mists and skepticism becomes a guiding philosophy. This perspective can come from erasing the outer circle representing the ideal, or what ought to be, and then focusing too much on the inner circle of reality. Sometimes you want to eliminate the frustration of the gap between the real and the ideal by just giving up on your ideals. And you can be persuaded to do that by your disappointment in seeing what some people do with their ideals when they are too shallow about them.

I spoke earlier of a new law student's low tolerance for ambiguity. But I also saw that by the time our law students reached their third year of study, some of them could develop such a high tolerance for ambiguity that they were skeptical about everything. Where formerly they felt that they had all the answers but just didn't know what the questions were, now they seemed to have all of the questions but few of the answers. Who wants answers? Isn't law school only about questions?

People who take too much delight in their finely honed tools of skepticism and dispassionate analysis will limit their effectiveness in law practice, at home, in Church, and elsewhere because they can become contentious, arrogant, and unwilling to commit themselves. I have seen—and I suspect you have seen—some of them try out their new intellectual tools in a Church classroom. A well-meaning teacher will make a point that the skeptic considers a little silly, so he yields to an irresistible urge to leap to his feet and publicly deflate the teacher's momentum.

These overly analytical types always look for opportunities to point out the exception to any rule anybody can state. They delight in cross-examining the unsuspecting mother-in-law. Or someone offers a good idea in gospel doctrine class, and they see a clever way to shoot it



down. Then they sit there chortling because they have popped another idealistic bubble that people were liking until they heard the skeptical question. When some of those bubbles pop, out goes much of the feeling of trust, loyalty, harmony, and sincerity so essential to preserving the Spirit of the Lord.

If that begins to happen in our ward, in our home, or in our marriage, we may be eroding the fragile fabric of trust that binds us together in all loving relationships. People may come away from their encounters with us wondering how we can possibly have a deep commitment to the gospel and say some of the things we say.

I am not saying we should always just smile and nod our approval, implying that everything is wonderful and that our highest hope is for everybody to have a nice day. That is level one. I am encouraging us to realize the potential for harm as well as good that can come with what education and experience can do to our minds and our way of dealing with other people.

These dangers are not limited to our relations with others. They can become very personal, prying into our own hearts in unhealthy ways. The ability to acknowledge ambiguity is not a final form of enlightenment. Once our increased tolerance and patience enable us to look longer and harder at difficult questions and pat answers, we must be careful that our basic posture toward spiritual things doesn't shift from being committed to being noncommittal. That is not a healthy posture.

Many people these days think it is naïve to be committed to such basic ideals as marriage or professionalism or patriotism. For instance, it is increasingly popular for people to feel hemmed in by marriage commitments; they prefer what some call a "nonbinding commitment," a term that sounds quite trendy. But I don't know what a nonbinding commitment is. And I don't think that the people who use that term know what it is either. It just sort of gives them an escape. They think they can have it both ways: being committed but not being committed. Be careful about that.

Indeed, in many ways, a Church member who moves from a stage of commitment to a stage of being tentative and noncommittal is in a worse position than one who has never experienced a basic commitment. The previously committed person may too easily assume he has already been through the "positive mental attitude" routine and "knows better" now, as he judges. He may assume that being submissive, meek, obedient, and humble is the "been there, done that" part of his life and he has now outgrown the need to be that way again. Those are the assumptions of a hardened heart. In spiritual things—in our relationship with the Lord, the scriptures, and the Church—the shift from being committed to being noncommittal can actually be a switch from one shallow extreme to another.

I once learned quite a lesson about the way a highly developed tolerance for "being realistic" can inhibit the workings of the Spirit in our lives. When I had been on my mission in Germany about a year, I was

assigned to work with a brand-new missionary. Just after he arrived, I was called to a meeting in another city. He stayed to work in our city with another new missionary whose companion went with me. We thought it would be good for their character to tract. There was no MTC in those days, so these two knew only a couple of sentences in German between them.

After returning, I asked how his day had gone. He said eagerly that they had found a woman who would surely join the Church. They hadn't really talked with her, because she spoke no English. But he felt an unusually strong spiritual impression about her and her family. In our mission it was rare to see anyone join the Church, let alone a whole family. I asked for more details, but in his excitement he had forgotten to write down either the name or the address. He knew only that they were on the top floor of a five-story apartment house, and he thought he'd recognize the name next to the doorbell.

"Great," I thought, contemplating all those flights of polished staircases. I explained that people who are polite don't necessarily intend to join the Church. But off we went to find her. He couldn't remember the street name either, so we picked a likely spot in our tracting area and began climbing stairs.

After a frustrating couple of hours, I decided I had to level with him. Based on my months of experience, I said it simply wasn't worth our time to hunt any longer. Stunned, Elder Keeler said, "I told you what I felt about her. Are you telling me we're not going to find her?" I tried patiently to explain the realities of missionary work in Europe. His eyes filled with tears as he said, "I came on my mission to find the honest in heart. The Spirit told me that that woman will someday be a member of the Church. Won't you help me find her?" I mumbled something like, "Maybe the Spirit was just telling you to write down the name and address."

So I raced him up one staircase after another. "Elder Keeler, had enough?" "No," he said. "We've got to find her." I stepped up the pace and decided to move so fast he would beg to stop—then maybe he would get the message. Finally, out of breath on a fifth floor, he saw the name by a doorbell and said, "I think that's the one!" She came to the door. He jabbed my ribs with his elbow and whispered, "That's the woman! Talk to her!"



That was over 40 years ago. Not long ago Marie and I were with that woman, her husband, and all of their four children and their spouses in the Frankfurt Temple. We saw the father, now a temple sealer, seal their youngest daughter and her new husband for eternity. The mother has been a Relief Society president. The father has been a bishop. Three of the children have served missions, and all four have married other faithful Europeans in the temple. Her grandson was in our home in Utah this summer, and he has just received his mission call.

That experience is a lesson I can never forget about the limitations of skepticism and a tolerance for ambiguity. I hope that I will never be so aware of reality that I am unresponsive to heavenly whisperings. So, be realistic, be honest and open, but don't let those things harden your heart.

The most productive response to ambiguity is at level three, where we see things not only with our eyes wide open but with our hearts wide open as well. When we do that, there will be many times when we need to take action, even though we want more evidence before knowing exactly what to do. Such occasions may range from following the counsel of the Brethren when we don't understand the reasons for their counsel to accepting a Church calling when we are too busy to take on any more duties. My experience has taught me always to give the Lord and His Church the benefit of any doubts I may have when such a case seems too close to call.

The willingness to be believing and accepting in these cases is not the same as blind obedience. Don't confuse the two—a good lawyer can see the difference. You can develop a loving and knowing kind of obedience that is not blind at all. G. K. Chesterton once distinguished between “optimists,” “pessimists,” and “improvers,” which roughly corresponds to our three levels of dealing with ambiguity. He concluded that both the optimists and the pessimists look too much at only one side of things—that's level one and level two. Neither the extreme

#### ART CREDITS

Photographs by Mitch Dobrowner

Pages 12–13: *Mushroom Cloud*

Page 15: *Arcus Cloud*

Page 16: *Arm of God*

Page 20: *Clouds*

optimists nor the extreme pessimists would ever be of much help in improving human conditions, because people can't solve problems unless they are willing to acknowledge that a problem exists while also remaining loyal enough to do something about it.

Chesterton said the evil of the excessive optimist (level one) is that he

*will defend the indefensible. He is the jingo of the universe; he will say, "My cosmos, right or wrong." He will be less inclined to the reform of things; more inclined to a sort of front-bench official answer to all attacks, soothing every one with assurances. He will not wash the world, but whitewash the world.* [G. K. Chesterton, *Orthodoxy* (New York: Cosimo, Inc., 2007), 62]

On the other hand, the evil of the pessimist (level two) is "not that he chastises gods and men, but that he does not love what he chastises." In being the so-called "candid friend," the pessimist is not really candid. Chesterton continued:

*He is keeping something back—his own gloomy pleasure in saying unpleasant things. He has a secret desire to hurt, not merely to help. . . .*

*. . . He is using that ugly knowledge which was allowed him [in order] to strengthen the army, to discourage people from joining it. [Id., 61]*

In going on to describe the "improvers" (level three—from optimists to pessimists to improvers), Chesterton talked about women who are so loyal to those who need them:

*Some stupid people started the idea that because women obviously back up their own people through everything, therefore women are blind and do not see anything. They can hardly have known any women. The same women who are ready to defend their men through thick and thin are . . . almost morbidly lucid about the thinness of his excuses or the thickness of his head. . . . Love is not blind; that is the last thing that it is. Love is bound; and the more it is bound the less it is blind. [Id., 63]*

Chesterton's arranging of these categories makes me think of one other way to compare the differing perspectives people bring to the way they cope with ambiguity. Consider the image of "lead, kindly Light," an image about light in a gathering storm. At level one, people either do not or cannot see that

AT LEVEL ONE, PEOPLE EITHER DO NOT  
OR CANNOT SEE THAT THERE ARE BOTH A KINDLY  
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BETWEEN THE LIGHT AND THE GLOOM.

there are both a kindly light and a gloomy fog; or, even if they see both, they don't see the difference between the light and the gloom. At level two, the difference is acutely apparent, but one's acceptance of the ambiguity might be so pessimistic as to say, "Remember that the hour is darkest just before everything goes totally black." Some people just focus on the light, others on the darkness. We need to see both and keep moving. "Lead, kindly Light, amid th'encircling gloom; Lead thou me on!"

Consider one final illustration from a lawyer who understood levels two and three. His eyes were fully open to the reality, including the pain, of seeing things for what they were. Yet he had moved beyond that to a third level where his mature perspective permitted him to subordinate what he saw with those wide-open eyes to what he felt in his wide-open heart.

This lawyer was my father. He was in his mid-50s and had a busy professional life with heavy obligations that often took him out of town for several days at a time. He was tired. At an earlier time in his life he had served for 10 years in a state presidency.

His good friend was called to be the bishop of their ward. He said he couldn't accept the assignment unless my father would serve as his first counselor. Well, it's one thing to be called as a bishop's counselor when one is young and full of enthusiasm and one's time is not heavily committed. One might understandably have a different attitude at a later, busier time in life. Here are my father's inner thoughts as he wrote them that day in his journal:

*My first reaction was, if it be possible, let this cup pass from me. . . . I know something of the work required of a bishopric; it is a constant, continual grind. . . . I am busy and my [personal] affairs demand what spare time and energy I have. In some respects I am not humble and prayerful enough; I have not always been willing to submit unquestioningly to all the decisions of the Church . . . but neither do I feel that I can say no to any call that is made by the Church, and so now I add to my first reaction, "Nevertheless, not as I will, but as Thou wilt."*

*I will resolve to do it as best I can. There will be times when I will chafe under the endless meetings, but I am going to get completely in tune with the [Church] program. I do not intend to get sanctimonious, but there must be no reservations in my heart about my duties. It will not be hard for me to pay my tithing and attend regularly, as I have been doing that. But I will have to learn, I suppose, to love the Deseret News, or at least the Church Section, as much as I love the Tribune. . . . I will have to get to the temple more often. . . . I will have to become better acquainted with the ward members and be genuinely interested in them and their problems. . . . I will have to learn to love every one of them and to dispose myself in such a way that they might find it possible to feel the same toward me. Perhaps in my weak way I will have to try and live as close to the Lord as we expect the General Authorities to do.*


My father was an honest man who chose to have a believing heart. His approach makes me want to deal directly, but humbly, with life's ambiguities. I want to be as childlike as my education has taught me to be tough-minded, able to help solve a problem rather than just describe it.

May we be honest and courageous enough to face squarely the uncertainties we encounter, try to understand them, and then do something about them. Perhaps then we will not be living on borrowed light. "Love is not blind; that is the last thing that it is. Love is bound; and the more it is bound the less it is blind."



“S E R V E  
G O D,  
L O V E M E,  
*and* M E N D”

by A N N E T T E W. J A R V I S

he title of this lecture is a quote from Shakespeare's *Much Ado About Nothing*. I had the pleasure of watching this play at the Shakespeare Festival in Cedar City with my 14-year-old daughter this past summer. As we watched, I heard this line, which I had heard several times before, as I have seen this play on both film and stage, but this time it struck me as







the encapsulation of what I have learned in my life and my career.

You may recall that *Much Ado About Nothing* is a comedy with two main characters, Benedick and Beatrice, each being the witty representative of their gender in castigating the opposite gender. As Shakespeare has their friends play on their egos and their inherent good natures (despite their prickly exteriors), these two people, who swore never to engage in the folly of love, develop and demonstrate a truly caring relationship with each other. As the play develops, Beatrice's cousin Hero is maligned by the evil character Don John, and, choosing to believe the slander, Hero's fiancé, Claudio, abandons and humiliates her at the marriage

altar. Beatrice is devastated by this injury to her beloved cousin, and thus when Benedick comes to confess fully his love for her and asks her how he can demonstrate this love, she orders him to kill Claudio, Benedick's best friend. When Benedick cannot talk Beatrice out of what to him seems an unreasonable demand, he reluctantly agrees to challenge Claudio to a duel. Benedick returns after making the challenge to report to Beatrice that he has done her bidding, and, after some witty repartee, the two have a serious moment. Benedick asks how her cousin fares. Beatrice reports that her cousin is very ill. He then asks Beatrice how she herself fares, and she reports that she is also very ill. He responds, in an uncharacteristic show of serious tenderness: "Serve God, love me, and mend."<sup>1</sup> I would suggest that this advice, seriously and lovingly given, is a template for success in our profession or, better said, a template for how to assess success in our lives.

#### SERVE GOD

The first advice Benedick gives is to "serve God." This statement is reminiscent of the admonition found in the New Testament:

*Consider the lilies how they grow: they toil not, they spin not; and yet I say unto you, that Solomon in all his glory was not arrayed like one of these.*

*If then God so clothe the grass, which is to day in the field, and to morrow is cast into the oven; how much more will he clothe you, O ye of little faith?*

*And seek not ye what ye shall eat, or what ye shall drink, neither be ye of doubtful mind.*

*For all these things do the nations of the world seek after: and your Father knoweth that ye have need of these things.*

*But rather seek ye the kingdom of God; and all these things shall be added unto you. . . .*

*For where your treasure is, there will your heart be also.*<sup>2</sup>

In this passage Jesus reminds us that the secular things in our careers—earning money for food, drink, and fancy clothes—are all things that "the nations of the world

*This  
article  
comprises  
excerpts  
from an  
Honored  
Alumni  
Lecture given  
at BYU Law  
School on  
October  
23, 2010.*

seek after." Thus, when we focus primarily on this goal, we are like everyone else. What should distinguish us as followers of Christ is the focus of our minds, our hearts, and our souls on the kingdom of God. This seems like a pretty obvious component of success, but its obvious nature does not prevent the enticements of the trappings of material and worldly success from diverting many from a focus on serving God.

Does this scripture literally mean that we should not worry about how to feed and clothe ourselves and our families? I don't think so. I think it is a lesson in priorities. If we serve God, if we seek the kingdom of God first, we will find personal success, whether or not it is success that is defined as such in the world. Success without serving

God can never be true success because we can never be successful when we act counter to our inherent nature. We are children of our Heavenly Father, and if we are not serving Him, we are not acting consistently with our divine heritage. The Apostle Paul asks: "Who shall separate us from the love of Christ? shall tribulation, or distress, or persecution, or famine, or nakedness, or peril, or sword?"<sup>3</sup> He answers:

*For I am persuaded, that neither death, nor life, nor angels, nor principalities, nor powers, nor things present, nor things to come,*

*Nor height, nor depth, nor any other creature, shall be able to separate us from the love of God, which is in Christ Jesus our Lord.*<sup>4</sup>

While nothing can force or create a separation between us and the love of God, we need to remember that we can separate ourselves from that love by our own choices and our own actions resulting from these choices.

Does our devotion to God ever interfere with our sought-for success in our careers? Absolutely. We have both time and financial commitments to our Church with which others do not have to contend. We have family commitments that many of our colleagues find to be inconsistent with success. We have standards that we abide by that sometimes make us the focus of derision or disdain. We deal with people who are ignorantly intolerant of our religion who judge us in the context of their preconceived (and most often ill-conceived) notion of what our religion means or is. Our religion is not a passive religion. Rather, it requires daily sacrifice of time, of money, of missed business opportunities, and sometimes even a sacrifice of worldly acclaim. "Serve God" has to be the first foundation of any success.

#### LOVE ME

Benedick's second admonition is "love me." He is talking to Beatrice as his future wife, and his advice really is a reminder to focus our efforts on loving our families. As with the admonition to serve God, we cannot find true success in our lives without being devoted to our families. And to go a step further, we cannot truly be devoted to our families without making sacrifices in our careers on their behalf. In fact, I would venture to say that if you have not made any sacrifices in your career for your family, you should question whether you really value your family above your career.

With five children, decisions made by and for our family did not always meet with universal approval by each of the children. When these situations arose, I would always remind the unhappy child or children that we were a family and that as a family we had to sacrifice for each other. While a particular decision might be for the benefit of only one family member—requiring the rest of the family to sacrifice for that family member—each of us knew in turn that when our time of need came, the family would sacrifice for us as well.



There were many times in my career when my choices made to meet the needs of my family came at the expected price of a failed or curtailed career. I worked part-time for many years at a time when this was highly unusual and with the attendant stigma that came (and sometimes still comes) with this choice that I was not truly devoted to my career or somehow was not keeping up with my peers. When I was invited by my firm to work in a home office, I agreed to do so to finish paying off my husband's medical school debt, but I had no expectation that my career would go anywhere. I mean, in a time before e-mail and the Internet, with four children at home, including a new baby, how could I possibly succeed in my career? I anticipated that this family-driven choice sounded the death knell of my career. It was surprising for me to discover that my mostly New York clients did not care about my unorthodox working arrangements. They only cared about whether they were being represented and advised well.

Because of my choice to work part-time and then in a home office, I also watched my male contemporaries pass me by with higher pay, wider acclaim, and better work opportunities. It was at times very painful to realize that, from a career advancement perspective, I was being left behind in my profession, and I was not sure I would ever be able to catch up. Even after I moved into a more mainstream practice of my career, I still had to suffer enduring discrimination, particularly on the issue of unequal (meaning lesser) pay for women. A female colleague recently sent me an article on a new study conducted by professors at Temple University and the University of Texas–Pan American concluding that women attorneys are still paid significantly less than their male counterparts and that such disparity is not performance based—women lawyers being found to be just as productive as men. I did not need to read a study to conclude this. I lived this. I was not able to control this part of my career until recently, so I focused instead on building in the flexibility I needed to meet my family needs, on developing the skills I needed to be a good lawyer, and on feeling good about that.



In an oft-quoted statement among lawyers, Joseph Story said: “[The law] is a jealous mistress, and requires a long and constant courtship. It is not to be won by trifling favors, but by lavish homage.”<sup>5</sup> Anyone who has practiced law understands this analogy and the enticements of the 24/7 approach modern attorneys take to the practice.

How do we cope with this disparity between the realities of modern law practice and our need to devote time to our families? When we compare ourselves and our successes with others, we will always be disappointed. As I used to say to my children, just remember that no matter how smart you are, there will always be somebody smarter. We need to find satisfaction in doing the best we can in the sphere in which we find ourselves, large or small. We should not fall into the trap of competing with those who have accepted the law as their jealous (and only) mistress.

We also need to redefine the meaning of success. My father, now in his 80s, is an electrical engineer who had a very successful career and is a well-recognized inventor. He recently said to me that when you get to his age you realize that it is only family that matters. No matter how successful we are in our careers, it is only a fleeting aspect of



ALMA PRO-  
GRESSES FROM  
A GRANDIOSE WISH  
TO A FEELING  
OF CONTENTMENT  
IN WHATEVER  
SMALL SPHERE HE  
FINDS HIMSELF  
WITH THE HOPE FOR  
THE OPPORTU-  
NITY TO CHANGE  
EVEN ONE LIFE.  
THIS IS A  
GREAT PATTERN  
FOR REDEFINING  
SUCCESS.





IN REALITY  
OUR JOBS  
ARE NOT MUCH  
DIFFERENT  
THAN DOCTORS.  
AS LAWYERS,  
WE ARE, OR  
SHOULD BE,  
PROBLEM SOLVERS.  
WE ARE THERE  
TO HEAL,  
OR MEND, THE  
PROBLEMS  
OF OTHERS.

this life. You may be king of the hill in your profession today, but there will always be others charging up the hill to take your place. Remember, however, that you will never be replaced as the mother or father or sister or brother or daughter or son in your family.

In a well-known passage from the Book of Mormon, Alma starts with the wish “O that I were an angel”<sup>6</sup> and ends up with the hope that if he can be an “instrument in the hands of God to bring some soul to repentance,”<sup>7</sup> he will feel successful. Alma progresses from a grandiose wish to a feeling of contentment in whatever small sphere he finds himself with the hope for the opportunity to change even one life. This is a great pattern for redefining success.

“Love me” reminds us that you must love and sacrifice for your family as the second foundation of real success.

#### MEND

The third piece of advice Benedick gives is to mend. Beatrice and her cousin have suffered a great injustice, and they both are made unwell by the wrong done them. Beatrice’s response to this injustice is to ask Benedick to

kill Claudio, the perceived source of the injustice. When Benedick is unable to talk her out of this demand for retributive justice, he returns, having made the challenge, but advises her that rather than seeking revenge, she should focus her efforts internally to mend.

My husband is a doctor, and when our oldest son was very young, he once explained, in response to a question as to what his parents did: “My dad helps sick people. My mom works for money.” I think this assessment is not far off from the public perception of what we do as lawyers. In reality our jobs are not much different than doctors. As lawyers, we are, or should be, problem solvers. We are there to heal, or mend, the problems of others. We are entrusted with resolving the injustices suffered by our clients. Sometimes those injustices are at the hands of other parties. Sometimes, as in my area of the law—bankruptcy—the source of the harm is less focused, but its impact can be widespread. It can be an unattributed injustice, being a by-product of a distressed economy or a changing industry or business environment or honest management mistakes; but it is a problem that we, as lawyers, are uniquely qualified to solve.

Similar to the reaction of Beatrice, our society has become so litigious that when any injustice is suffered, the first response is to sue. Sometimes this is the best response, but a good lawyer will understand the options and will help a client to mend, to figure out a solution that will focus on and then remedy the real problem, not just the emotionally perceived one. When I started practicing business bankruptcy law, I thought that at least this was not a practice that had an emotional component. It was not like divorce law, for example. This was a mistaken perception. I quickly learned that people are very emotional about money. In addition, my area of the law deals with people’s jobs, their abilities to support their families, their investments in their businesses, honestly made mistakes with serious consequences, and sometimes betrayal by dishonest or downright fraudulent behavior. I now understand that every area of the law has an emotional component. Like Benedick counseled Beatrice, we as lawyers need to help

our clients work through emotionally charged situations and mend.

One of the things I love about practicing bankruptcy law is that, most of the time, bankruptcy lawyers know when to quit fighting. We litigate to bring about a business solution, understanding that with scarce resources and money, creative approaches are warranted. We understand that we are not just lawyers but counselors. As with all lawyers, our job is often to sacrifice our own inclinations in order to serve our clients. At times that may mean keeping an even temperament in an abusive or heated situation. It may mean that we settle a case that we feel certain we could win. It may mean that we submerge our ego or emotional investment in a course of action to accept a better solution for a client's business needs. It may mean that we forego higher fees we could earn if the client were to choose a certain legal remedy because another legal remedy is a better fit for the client. Our job is to help our clients mend, to fully understand their problems, and to address them with caring and competence.

What I have found to be most important to clients who end up seeking to redress their injustices in the courts is simply to know that they have been heard, that they have been listened to and understood, and to feel that they have been fairly judged. It is our job to make sure this happens by being competent lawyers and helping clients, whether big or small, to mend. Harper Lee said it best, through the voice of her literary creation, Atticus Finch, when he said in his closing argument:

*There is one way in this country in which all men are created equal. . . . That institution . . . is a court. . . . Our courts have their faults, as does any human institution, but in this country our courts are the great levelers, and in our courts all men are created equal.*<sup>8</sup>

We, as lawyers, provide access to this great societal equalizer. Serving our clients, or mending their injuries, should be the third foundation of success.

All three foundations of success I have mentioned are bound together by a common focus on others. This shared theme takes us back to the admonition in the scriptures: "For whosoever will save his life shall lose it: and whosoever will lose his life for my sake shall find it."<sup>9</sup> As a woman entering

a profession at a time when there were very few practicing women lawyers, I struggled as a minority to find my way and to belong in this profession. What I discovered in my quest—something I did not even realize until I was there—was that when we talk about belonging, we need to change our focus. We need to stop focusing on ourselves and start focusing on others. When we focus on others, then we can belong, no matter how different we feel and are. Long before I even understood the foundations of my success in this profession, this is what I was inadvertently learning.

None of us are ever entirely responsible for success in our careers. None of us are self-made men or women, as is so well articulated in the oft-quoted phrase of John Donne: "No man is an island."<sup>10</sup> Each of us stands on the shoulders of others. Sometimes those supporting shoulders come from unexpected places. For me, it was, surprisingly, the intercession and support of some of the New York partners in my firm during critical years. One of these partners, who started working with me while I was working part-time in a home office, initially required that I check in with him every single day, as he was concerned about whether I could adequately handle a difficult case for one of his very important clients. After he had watched me in action, he became one of my greatest advocates. While, during that period, I saw limited prospects for my career as a home office lawyer in the late '80s, he and other of my New York partners looked beyond my unconventional trappings and saw a talented problem solver for whom they provided work opportunities and political support within the firm. Remembering the kindness of these partners to me, I have tried to emulate them when I am now asked for favors to help others in their careers. Success brings more ability to help others, and that is the obligation of those who succeed.

Last week, at a meeting of the American College of Bankruptcy, I heard a report on a historical project done by the college wherein bankruptcy practitioners from the 1930s and 1940s (all men, of course) were interviewed. During this time period, virtually all bankruptcy practitioners nationwide were Jews. As was explained by these men, that was because other areas of practice were not open to Jews. They were openly

discriminated against, and none of the large firms would hire them. Bankruptcy law at that time was not a mainstream practice for large firms. It was looked down on, so it was an area open for these excluded Jews to fill in with their own small boutique firms. I found it interesting that the area of practice I eventually specialized in—which was not what I intended to choose in law school—has historically been a haven for the excluded in the profession. Somehow, as a discriminated minority myself, I find it fitting to eventually have been welcomed by this same specialty.

Harper Lee once wrote: "People who have made peace with themselves are the people I most admire in the world."<sup>11</sup> I agree. Perhaps, in the end, that is why we admire her literary creation, Atticus Finch, so much, because Harper Lee created a lawyer she admired, a lawyer who was not perfect but who was a person who had made peace with himself. If we are to belong in this profession, we also need to make peace with ourselves. I would suggest that we can do this through serving God, loving our families, and mending the wrongs suffered by our clients. In focusing our efforts on others, in losing ourselves in serving others, we can be at peace with ourselves. By focusing our education, our abilities, and our opportunities on others, we can, in some small way, change this difficult profession into something a bit better. "Serve God, love me, and mend." With your legal education, you have a wonderful opportunity to make a difference in the world. Do it.

#### NOTES

- 1 William Shakespeare, *Much Ado About Nothing*, act 5, scene 2, line 95.
- 2 Luke 12:27–31, 34.
- 3 Romans 8:35.
- 4 Romans 8:38–39.
- 5 Joseph Story (1779–1845), "The Value and Importance of Legal Studies" (5 August 1829).
- 6 Alma 29:1.
- 7 Alma 29:9.
- 8 Harper Lee, *To Kill a Mockingbird* (New York: HarperCollins, 1960), 339.
- 9 Matthew 16:25.
- 10 John Donne, *Devotions upon Emergent Occasions* (1624), no. 17.
- 11 Caldwell Delaney papers, University of South Alabama Archives, Mobile, Alabama, Nelle Harper Lee to Helen Waterman, 20 November 1961, quoted in Charles J. Shields, *Mockingbird: A Portrait of Harper Lee*, 288.





# DO

# U.S. COURTS

# DISCRIMINATE

# AGAINST TREATIES?

## EQUIVALENCE, DUALITY,

## AND NON-SELF-EXECUTION\*

BY DAVID H. MOORE

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Article II of the Constitution authorizes the President, “by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”<sup>1</sup> The Supremacy Clause declares that, like the Constitution and statutes, “all” treaties “shall be the supreme Law of the Land.”<sup>2</sup> Despite use of the word “all,” some treaties are not automatically enforceable in U.S. courts. The Supreme Court held in



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1829, in the landmark case of *Foster v. Neilson*, that only self-executing treaties immediately provide rules of decision.<sup>3</sup> The majority of foreign relations scholars oppose expansive classification of treaties as non-self-executing. That opposition has recently trained on the Supreme Court's decision in *Medellín v. Texas*,<sup>4</sup> and understandably so, as *Medellín* arguably eclipsed *Foster* as the Court's most important pronouncement on the domestic status of treaties and endorsed a broad notion of non-self-execution.<sup>5</sup>

One of the ways in which scholars challenge non-self-execution is by asserting that it violates a constitutional principle of equivalence.<sup>6</sup> As discussed below, various arguments countering the equivalence thesis have been offered to date. I offer a new response. This response turns on the recognition that all three sources of supreme federal law have a dual nature. Treaties are primarily international agreements and secondarily domestic law. The Constitution and statutes, by contrast, primarily function as domestic law but also play a role in international relations, particularly when they apply extraterritorially. Comparing judicial treatment of all three sources along their secondary axis reveals that treaties receive not just equivalent treatment but better treatment than at least statutes even under a broad notion of non-self-execution. This novel comparison thus lends support to the doctrine of non-self-execution.

## I The Equivalence Thesis and Counterarguments

As noted, some scholars have opposed broad classification of treaties as non-self-executing on the grounds that it violates a constitutional requirement of equivalent treatment. The Supremacy Clause designates the Constitution, statutes, and treaties as supreme federal law.<sup>7</sup> In doing so, the argument goes, the Supremacy Clause requires equivalent treatment of all three sources.

Defenders of non-self-execution have responded, in effect, with three principal arguments. First, scholars have argued that non-self-execution does not result in differential treatment. Just as treaty makers may create something less than a judicially enforceable treaty, those authorized to amend the Constitution or to make statutes

may create something less than preemptive, judicially enforceable federal law.<sup>8</sup> For example, statutes may “expressly eschew preemption of state law, . . . authorize states to opt out of federal requirements, . . . and . . . not impose binding obligations.”<sup>9</sup> Similarly, those with authority to enact constitutional law have crafted constitutional provisions with limited reach. Initially, the Constitution was amended to add “a Bill of Rights applicable only to the federal government.”<sup>10</sup>

Second, scholars have argued based on constitutional text, history, purpose, and precedent that the Constitution does not require equivalence. They note, for example, that the Supremacy Clause fails to address the relation of all three sources of federal law.<sup>11</sup> Thus, the Constitution is superior to laws and treaties notwithstanding the fact that the Supremacy Clause lumps all three sources together. Just as there is no sense that the Supremacy Clause limits the Constitution's superior status as the source of lawmaking and treaty-making authority, there is no reason to believe that the Supremacy Clause precludes authority to enter treaties that attempt less than the Supremacy Clause allows.<sup>12</sup> The Supremacy Clause explicitly binds state judges to the Constitution, laws, and treaties in the face of inconsistent state constitutional and statutory law.<sup>13</sup> This provision requires judges to follow the dictates of the federal Constitution, treaties, and laws, but it does not say that these sources must dictate preemption of state law.

The Supremacy Clause's purpose also indicates that treaties need not receive equivalent treatment. The Constitution and statutes were included in the Supremacy Clause to secure the domestic lawmaking supremacy of the federal government in areas of delegated authority. Treaties, by contrast, were not included to secure another avenue of supreme domestic lawmaking but to secure federal foreign affairs supremacy in response to a history of state treaty violations.<sup>14</sup> To the extent that non-self-execution turns, for example, on treaty maker intent, it appears consistent with the purpose behind inclusion in a way that similar treatment of the Constitution and statutes might not.

Third, scholars argue that treaties' dual nature justifies differential treatment. Treaties not only function as domestic law,

they also play a role in foreign relations.<sup>15</sup> Indeed, they are primarily instruments of foreign affairs and secondarily domestic law. A treaty cannot exist without consent from a foreign sovereign. The inclusion of treaties in Article II, rather than Article I, highlights the international nature of treaties. Article II addresses executive power and does not speak expressly of legislative authority.<sup>16</sup> The dual view of treaties has also been confirmed by the Supreme Court as recently as *Medellín*.<sup>17</sup> Treaties' dual nature as instruments of foreign affairs and domestic law produces a variety of differences between statutes and treaties. For example, treaties often use broad terminology to extract consent from global diversity.<sup>18</sup> This terminology and the concepts it reflects may not readily cohere with U.S. law, the operation of the U.S. legal system, or typical U.S. terminology, “even when the policies of the treat[y] are otherwise [consistent] with U.S. law.”<sup>19</sup> These differences, the argument goes, justify differential treatment and, in particular, less judicial enforcement of treaties than is afforded statutes.<sup>20</sup>

## II An Expanded Duality

The dual nature of treaties, upon which this final argument relies, has been widely acknowledged and is not particularly controversial.<sup>21</sup> The controversy results from reliance on treaty duality to undercut the equivalence thesis and support non-self-execution.<sup>22</sup>

This article accommodates concern for the exclusive reliance on treaty duality, at least partially, by taking treaty duality only as a starting point. The article goes further to introduce, and build on, the duality of the Constitution and statutes. Given the inordinate focus on treaty duality, the dual nature of the Constitution and statutes has been overlooked in the self-execution debate. Treaties are not the only source of law that affects international affairs.

Statutes affect foreign relations in many ways. At one extreme, statutes applied within U.S. territory can have foreign relations impact even when applied to U.S. nationals. Statutes of this type might include the federal death penalty, which generates opposition from abolitionist countries.<sup>23</sup> Other statutes have an even more direct impact: namely,



statutes that specifically target foreign nationals—such as immigration laws<sup>24</sup>—or that authorize or command foreign actions by U.S. officials.<sup>25</sup> Arguably, statutes that regulate not only actions at home but actions abroad, especially the acts of foreign nationals, are prototypical of statutes' secondary, foreign affairs role.<sup>26</sup> Such statutes are not uncommon; the United States has regulated foreign activity through inter alia, antitrust, securities, copyright, trademark, intellectual property, bankruptcy, tax, corporate, criminal, labor, civil rights, and environmental law.<sup>27</sup> The extraterritorial expansion of U.S. law has, unsurprisingly, been met with opposition from foreign states.<sup>28</sup>

With regard to the Constitution, a similar spectrum exists. Constitutional limitations on domestic regulation of domestic conduct, such as limitations on regulation

### III A New Comparative Axis

Given the dual nature of the Constitution, statutes, and treaties, domestic judicial treatment of these sources might be compared along several axes. Critics of non-self-execution compare the judicial treatment of these sources in their domestic roles.<sup>35</sup> This assessment involves either comparing two things (constitutional and statutory law) that do not possess a dual nature (if one is unpersuaded by the prior section) with one (treaty law) that does, or comparing three things that have a dual nature but comparing the treatment of two sources (the Constitution and statutes) in their primary function and a third (the treaty) in its secondary function.

The latter approach is better than comparing the treatment of all three sources

Constitution, statutes, and treaties in their areas of secondary application is a matter of domestic law.<sup>40</sup>

### IV Treatment of the Constitution, Statutes, and Treaties in Their Areas of Secondary Application

The comparison is also timely as the Supreme Court has recently issued relevant opinions for each source of law. The Court's most recent foray into the extraterritorial<sup>41</sup> application of the Constitution occurred in *Boumediene v. Bush*,<sup>42</sup> in which the Court concluded that aliens detained as enemy combatants at Guantánamo Bay "have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause."<sup>43</sup> In *Medellín v. Texas*, the Supreme Court

## NEITHER CONGRESS IN ENACTING STATUTES

## NOR THE CONSTITUTION IS CONFINED IN U.S. COURTS

## BY THE DICTATES OF INTERNATIONAL LAW.

of hate speech, can produce foreign relations issues. In ratifying the International Covenant on Civil and Political Rights, for example, the United States entered a reservation, refusing to assume an obligation to prohibit "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence"<sup>29</sup> insofar as such a prohibition would contravene constitutional (and statutory) free speech protections.<sup>30</sup> The scope of government actors' constitutional authority both to make decisions related to foreign affairs<sup>31</sup> and to take actions outside U.S. territory<sup>32</sup> also bears heavily on foreign relations. The scope of constitutional protections available to aliens likewise affects our relations with others.<sup>33</sup> Numerous foreign and international officials, for instance, filed amicus briefs in support of the Guantánamo detainees in *Boumediene v. Bush*.<sup>34</sup> Indeed, at the heart of the Constitution's secondary role seems to lie the question whether constitutional limits constrain federal conduct outside U.S. territory.

in their foreign affairs applications. In the foreign affairs arena, the relevance of constitutional limits and statutes is governed by domestic law. While international law certainly addresses states' authority to act in certain ways and, in particular, to apply their law outside their borders,<sup>36</sup> neither Congress in enacting statutes<sup>37</sup> nor the Constitution<sup>38</sup> is confined in U.S. courts by the dictates of international law. Thus, domestic law controls the extraterritorial roles of statutes and constitutional constraints. By contrast, the United States recognizes that treaties, at least in their extraterritorial legal dimension, are governed by international law, which defines such things as what qualifies as a treaty, how treaties are formed and terminated, and rights upon breach.<sup>39</sup> The comparison of the Constitution, statutes, and treaties in their foreign affairs roles thus mixes bodies of law.

Comparing judicial treatment of the Constitution, statutes, and treaties in their areas of secondary application avoids this problem. The legal treatment of the

handed down its most important decision on the domestic status of treaties in roughly 200 years, and perhaps ever.<sup>44</sup> The *Medellín* Court assessed whether U.S. treaty commitments in relation to the International Court of Justice (ICJ) were self-executing, rendering ICJ judgments preemptive, judicially enforceable federal law.<sup>45</sup> Endorsing a broad notion of non-self-execution,<sup>46</sup> the Court concluded that the relevant treaty obligations were not self-executing.<sup>47</sup> And, while there has long been uncertainty regarding how to ascertain the extraterritorial reach of statutes, with divergent views in the literature and even in Court precedent, two relatively recent cases arguably provide a general framework: *Hartford Fire Insurance Co. v. California*<sup>48</sup> and *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*,<sup>49</sup> both of which addressed application of U.S. antitrust law beyond U.S. borders.

A comparison of the judicial treatment afforded the Constitution, statutes, and treaties in their area of secondary application in *Boumediene*, *Hartford Fire*,

*Hoffmann-La Roche*, and *Medellín* reveals that statutes fare the worst. While the intent of the relevant lawmakers surfaces in the treatment of each source, the analysis of intent, and particularly the relation of intent to functional considerations, differs with each, leading to differing levels of judicial discretion to enforce the law in its area of secondary application.

1. *Judicial Treatment of the Constitution.* In *Boumediene*, the Court attempted to identify the original intent behind constitutional habeas; only when that attempt failed did the Court conduct its functional analysis. On these facts, one might conclude that the Court assigns a dominant role to original intent in constitutional extraterritoriality. That role, however, may be more formal than real.

The majority could have grounded its decision in original intent, perhaps supplemented by functional considerations.<sup>50</sup> The

dence of original intent.<sup>53</sup> Its discussion of precedents that engaged in functional analyses suggests that the functional test may be the primary means for determining constitutional reach rather than a secondary approach to be taken only in the face of an indiscernible original intent.

Unbound by original intent, the functional analysis gives the Court significant discretion to determine the reach of constitutional limitations.<sup>54</sup> In (at least recent) historical context where the judiciary generally has given the Constitution limited extraterritorial scope, the discretion tends to expand the Constitution's foreign role.<sup>55</sup> Relatedly, the discretion ensures a prominent role for the judiciary in fixing the Constitution's reach. The *Boumediene* Court made that fact explicit in rejecting the government's formalist approach to the reach of habeas partially on separation of powers grounds, arguing that the government's formal, de jure sov-

in identifying the domestic effect of treaties. The *Medellín* Court relied, in small part, on express evidence of the treaty-makers' intent regarding self-execution.<sup>58</sup> This reliance may have resulted from the availability of evidence directly on point, in which case the difference between *Medellín* and *Boumediene* may not be in their commitment to intent, but rather in the scope of evidence available to identify intent.

However, *Medellín* attempted to tether its analysis to intent—even when invoking functional considerations—in a way that *Boumediene* did not. Like *Boumediene*, *Medellín* focused on functional considerations, such as the practical consequences of treating ICJ judgments as judicially unassailable federal law.<sup>59</sup> In *Medellín*, however, the functional considerations mix with, rather than arise separate from, consideration of the treaty-makers' intent.<sup>60</sup> Perhaps this was because the functional considerations

## A SEPARATION OF POWERS IN WHICH THE JUDICIARY TAKES SECOND SEAT IN

### LAWMAKING AND FOREIGN AFFAIRS . . . LIMIT[S] JUDICIAL OPPORTUNITY TO CLASSIFY A TREATY AS SELF-EXECUTING AND IMMEDIATELY ENFORCEABLE AS DOMESTIC LAW.

majority's conclusion that the evidence of original intent was indefinite may have been sincere, but it may also have been an attempt to shunt the confines of original intent to allow the Court to reach its own conclusion on the scope of constitutional habeas informed by a multifactored, functional analysis. Even in the face of originalist uncertainty, the Court made statements to suggest that it would not always be bound by original intent. The Court characterized legal commentary and settled precedent from 1789 as potentially "instructive" in its analysis.<sup>51</sup> Relatedly, the Court left open the possibility (as it had before) that the scope of constitutional habeas has expanded since ratification, rendering precedents from 1789 the beginning point of analysis.<sup>52</sup> Moreover, when the Court turned to its functional analysis it made no attempt to cast the analysis as an exercise in constructive intent. Nor did it attempt, in any significant way, to bolster its functional analysis with evi-

reignty limitation on habeas would allow the President and Congress "to switch the Constitution on or off at will" in "a striking anomaly in our tripartite system of government."<sup>56</sup> Likewise, while the Court recognized the need for deference to the Executive with regard to the procedural and substantive standards governing detention of possible terrorists, the Court emphasized the need for judicial review of detention as well.<sup>57</sup>

*Boumediene* thus introduces a significant level of judicial discretion into the Constitution's foreign affairs role. The political branches do not control the Constitution's extraterritorial reach by statute or treaty. The Court fixes that reach and does so in light of functional considerations that elide the restraints of more categorical approaches based on such things as formal sovereignty.

2. *Judicial Treatment of Treaties.* The intent of the lawmakers appears to play a larger role

led to a conclusion consistent with the evidence of the treaty-makers' intent. But the Court seems to treat both evidence of the Executive's and Senate's understanding during the advice and consent process and the functional considerations as evidence of actual intent. Indeed, in the final sentence of its self-execution analysis, the Court states: "Nothing in the text, background, negotiating and drafting history, or practice among signatory nations suggests that the President or Senate intended the improbable result of giving the judgments of an international tribunal a higher status than that enjoyed by 'many of our most fundamental constitutional protections.'"<sup>61</sup>

In light of the coupling of evidence of actual intent with functional considerations, the intent identified is arguably more constructive than actual. As a result, the attempt to tie functional considerations to intent may be little different than the *Boumediene* Court's shunting of original intent. Yet the







*Medellín* Court acknowledges some need to ground its decision in the authority of the lawmakers. Consequently, *Medellín* arguably manifests at least a marginally greater commitment to lawmaker intent than does *Boumediene*. This commitment restrains the judiciary in classifying treaties as enforceable domestic law.

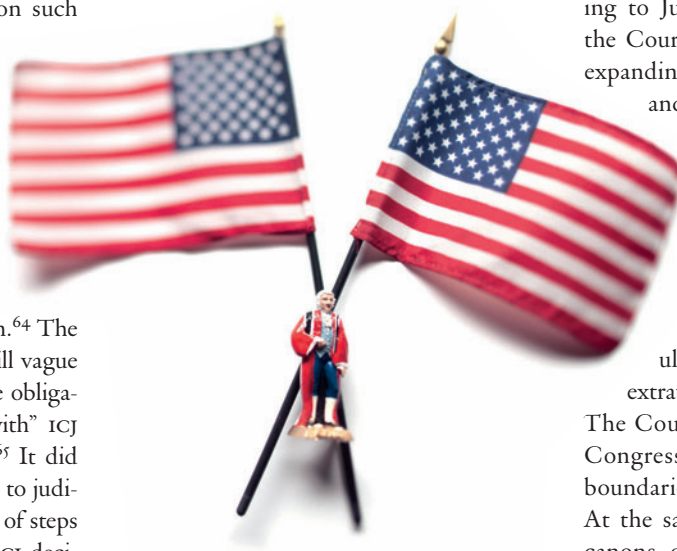
The functional considerations that inform the self-execution analysis also constrain—rather than expand, as in *Boumediene*—judicial enforcement of treaties. The functional considerations in *Medellín* reflect a separation of powers vision in which the political branches take the lead in foreign affairs and lawmaking.<sup>62</sup> To illustrate, suppose that a treaty imposed a broad obligation such as the duty to provide due process. A court could certainly fill such an obligation with content as courts do in enforcing the Constitution.<sup>63</sup> However, the *Medellín* Court presumed that if treaty obligations are not specifically defined, Congress did not intend judicial enforcement absent congressional implementation.<sup>64</sup> The political branches generally should fill vague treaty obligations with content. The obligation to “undertake[ ] to comply with” ICJ judgments was such an obligation.<sup>65</sup> It did not suggest an immediate obligation to judicially enforce judgments but a range of steps that might be taken to implement ICJ decisions.<sup>66</sup> Under *Medellín*’s separation of powers perspective, the political branches should elect those steps. Although this line of thinking limits judicial enforcement of treaties, many critics of non-self-execution agree that treaty obligations may be non-self-executing if they are vague.<sup>67</sup> The Court’s other separation of powers judgments are more controversial.<sup>68</sup>

First, the Court considered whether other parties to the relevant treaties made ICJ judgments immediately enforceable in their domestic courts.<sup>69</sup> The absence of persuasive evidence that other states adopted this practice supported a finding of non-self-execution on the implicit presumption that the political branches may, but the judiciary should not, assume unilateral obligations on behalf of the United States.<sup>70</sup>

Second, the judiciary should be reluctant to classify a treaty as self-executing if

the practical consequences of doing so “give pause.”<sup>71</sup> Treating commitments toward the ICJ as self-executing threatened the possibility of unassailable ICJ judgments that preempt state and federal law and void criminal convictions and sentences.<sup>72</sup> The Court presumed that express election of such consequences should be left to the political branches,<sup>73</sup> notwithstanding the fact that the political branches arguably chose those consequences in accepting the relevant treaty obligations.<sup>74</sup>

Third, the Court should be sensitive to the effect of self-execution on political branch discretion and U.S. foreign relations.<sup>75</sup> Justice Breyer’s dissenting, case-by-



case, multivariate approach to self-execution would label a treaty self-executing in some contexts and not in others based on a judicial determination and would hamper the United States’ ability to enter treaties with other countries.<sup>76</sup> Branding the relevant treaty obligations self-executing would also remove the option of deciding whether and how to comply with ICJ judgments.<sup>77</sup> Perhaps that result would not be troubling in certain circumstances. However, international law and the U.S. treaty makers contemplated the possibility of both noncompliance and U.S. veto of any Security Council attempts at enforcement, and the judiciary, under *Medellín*’s separation of powers, should not limit that discretion.<sup>78</sup>

Fourth and relatedly, the relevant treaties established international means of enforcing treaty obligations relative to the ICJ.<sup>79</sup> The Court presumed in such circumstances that

the treaty makers would not expect the treaty to be self-executing, obviating—at least in some situations—the need for the contemplated international enforcement.<sup>80</sup>

As noted, each of these considerations reflects a separation of powers in which the judiciary takes second seat in lawmaking and foreign affairs. The considerations fall short of establishing a formal presumption of non-self-execution.<sup>81</sup> Together, however, they limit judicial opportunity to classify a treaty as self-executing and immediately enforceable as domestic law.<sup>82</sup> That result, though arguably inconsistent with *Boumediene*’s expansion of judicial authority, was not accidental. In responding to Justice Breyer’s proposed analysis, the Court emphasized the impropriety of expanding the judiciary’s foreign affairs and lawmaking power through self-execution analysis.<sup>83</sup>

### 3. Judicial Treatment of Statutes.

Restrictions on judicial discretion to classify treaties as self-executing, however, are not as severe as those on the extraterritorial application of statutes. The ultimate determinant of statutory extraterritoriality is congressional intent. The Court recognizes, for example, that Congress can apply a statute beyond the boundaries imposed by international law.<sup>84</sup> At the same time, the Court enlists two canons of interpretation to fix statutes’ extraterritorial reach: the presumption against extraterritoriality, which assumes that Congress legislates only for U.S. territory, and the *Charming Betsy* canon, which seeks a statutory interpretation that is consistent with international law.<sup>85</sup>

Application of each canon can involve functional considerations. In *United States v. Bowman*, for example, the Court found the presumption against extraterritoriality overcome given the nature of the activity Congress sought to prohibit—conduct easily and as likely committed abroad as at home—and the practical consequences of preventing the statute from reaching the extraterritorial conduct.<sup>86</sup> Functional considerations inform application of the *Charming Betsy* canon as well. In determining whether a particular extraterritorial application is consistent with international law, courts should first identify one of five

grounds recognized in international law for exercising prescriptive jurisdiction.<sup>87</sup> Some of these grounds parallel functional considerations in *Boumediene*: whether the regulated person or activity is within the state's territory, whether the person regulated or harmed is a national of the regulating government, and whether regulation is necessary to a state's core interests, including security interests.<sup>88</sup>

Functional considerations likewise guide the reasonableness analysis that ensues when a state has a basis to exercise prescriptive jurisdiction but that exercise targets "a person or activity having connections with another state."<sup>89</sup> Reasonableness may turn on such things as whether there is a territorial link between the action or actor regulated and the regulating state, the effect of the regulation on justified expectations, "the extent to which another state may have an interest in regulating the activity," and "the likelihood of conflict with regulation by another state."<sup>90</sup> These considerations focus on the effect of extraterritorial application of a statute on another sovereign's authority.<sup>91</sup> Many of these factors track *Boumediene*'s consideration of such things as the link of the government activity regulated (i.e., apprehension and detention) to U.S. territory and the link between the detainees and the United States.

The considerations in the statutory context, however, are critically different. In *Boumediene*, functional considerations supported judicial discretion to extend the Constitution's protections extraterritorially. In *Medellín*, functional considerations informed treaty-maker intent. In the statutory context, the Court has expressly rejected "excessive reliance on functional considerations and reconstructed congressional intent" in fixing extraterritoriality.<sup>92</sup> Functional considerations in the statutory context are not permissive guidelines for the courts to decide "what Congress would have wanted."<sup>93</sup> Instead, functional considerations inform whether the presumptions against extraterritoriality and violation of international law are overcome. These presumptions restrain both Congress and the courts from applying statutes extraterritorially. As the Supreme Court has illustrated, most recently in *Morrison v. National Australia Bank Ltd.*, the presumptions sometimes will

hold, obstructing extraterritorial application of statutes.<sup>94</sup> And in all cases, the presumptions will restrict judicial discretion in statutes' area of secondary application.<sup>95</sup>

In short, the roles of lawmaker intent, functional considerations, and ultimately judicial discretion differ significantly in the Constitution's, statutes', and treaties' areas of secondary application. In some cases, original intent might control the extraterritorial reach of the Constitution. At least when original intent is indeterminate, however, a functional analysis ensues. The functional analysis provides the judiciary greater discretion to extend constitutional limitations in foreign relations. With treaties, the analysis also focuses on intent, but functional considerations combine with evidence of actual intent to form a sort of hybrid intent. These separation of powers-inspired considerations tend toward non-self-execution, but do not erect a formal presumption against self-execution. As a result, courts retain limited but still significant discretion to enforce treaties as domestic law. The functional considerations bearing on the extraterritorial reach of statutes, by contrast, inform presumptions that Congress did not intend to regulate extraterritorially or in excess of international law. These presumptions limit judicial discretion to apply statutes extraterritorially. The result is that the hurdles the Constitution and treaties face prior to judicial enforcement in their secondary areas are flatter than the hurdles statutes must overcome before being applied extraterritorially, notwithstanding the inclusion of all three sources in the Supremacy Clause.

## CONCLUSION

Despite claims that a broad doctrine of non-self-execution discriminates against treaties and thus violates a constitutional requirement of equivalent treatment, comparison of judicial treatment of the Constitution, statutes, and treaties in their areas of secondary application reveals that even a broad notion of non-self-execution does not discriminate against treaties. The expanded duality and new comparative axis discussed above thus support a broader view of non-self-execution than has been endorsed by most foreign relations law scholars.

## NOTES

\*This article consists largely of excerpts from an essay that originally appeared in 110 Colum. L. Rev. 2228 (2010).

1 U.S. Const. art. II, § 2, cl. 2.

2 *Id.* art. VI, cl. 2.

3 27 U.S. (2 Pet.) 253, 314–15 (1829), abrogated by *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833).

4 552 U.S. 491 (2008).

5 See Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 Sup. Ct. Rev. 131, 132 [hereinafter Bradley, *Treaty Duality*]; David H. Moore, Medellín, *the Alien Tort Statute, and the Domestic Status of International Law*, 50 Va. J. Int'l L. 485, 486, 490–91 (2010) [hereinafter Moore, Medellín and the ATS]; Carlos Manuel Vazquez, *The Separation of Powers as a Safeguard of Nationalism*, 83 Notre Dame L. Rev. 1601, 1611–12, 1618–20 (2008) [hereinafter Vazquez, *Safeguard of Nationalism*].

6 See Carlos Manuel Vazquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 Harv. L. Rev. 599, 611–28 (2008) [hereinafter Vazquez, *Treaties as Law of the Land*]; Tim Wu, *Treaties' Domains*, 93 Va. L. Rev. 571, 577–78 (2007).

7 U.S. Const. art. VI, cl. 2.

8 David H. Moore, *Law (Makers) of the Land: The Doctrine of Treaty Non-Self-Execution*, 122 Harv. L. Rev. F. 32, 34 (2009) [hereinafter Moore, *Law (Makers) of the Land*], at [http://www.harvardlawreview.org/issues/122/december08/forum\\_57.php](http://www.harvardlawreview.org/issues/122/december08/forum_57.php); see also Ernest A. Young, *Treaties as "Part of Our Law"*, 88 Tex. L. Rev. 91, 95, 113, 125–28, 137, 140 (2009) (explaining that statutes can be non-self-executing in the same manner as treaties).

9 Moore, *Law (Makers) of the Land*, *supra* note 8, at 34 (footnotes omitted); see also, e.g., Bradley, *Treaty Duality*, *supra* note 5, at 141 & n.42; Young, *supra* note 8, at 126–27; Nick Rosenkranz, Medellín v. Texas: Part I: Self-Execution, The Federalist Society Online Debate Series (Mar. 28, 2008), at <http://www.fed-soc.org/debates/dbtid.17/default.asp> (on file with the *Columbia Law Review*) (noting "Congress regularly passes non-binding resolutions" and enacts non-preemptive and aspirational statutes). But see David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. Davis L. Rev. 1, 42 (2002) (arguing that under Supremacy Clause, statutes may disclaim field preemption but not conflict preemption); Vazquez, *Safeguard of Nationalism*, *supra* note 5, at 1620–21 (disputing analogy between nonbinding resolutions and non-self-executing treaties).

10 Moore, *Law (Makers) of the Land*, *supra* note 8, at 34; see Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 Colum. L. Rev. 973, 977 (2009) (noting not all Bill of Rights guarantees have been applied to the states via Fourteenth Amendment).

- 11 See, e.g., John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 Colum. L. Rev. 2218, 2249–51 (1999) [hereinafter Yoo, *Public Lawmaking*].
- 12 See Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. 399, 446 (2000); Moore, *Law (Makers) of the Land*, *supra* note 8, at 34–35.
- 13 U.S. Const. art. VI, cl. 2.
- 14 See, e.g., Bradley, *Treaty Duality*, *supra* note 5, at 144–47; Vasan Kesavan, *The Three Tiers of Federal Law*, 100 Nw. U. L. Rev. 1479, 1512 (2006); Moore, *Law (Makers) of the Land*, *supra* note 8, at 33.
- 15 See, e.g., Bradley, *Treaty Duality*, *supra* note 5, at 133, 182.
- 16 See U.S. Const. art. II, § 2; John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 Colum. L. Rev. 1955, 1966 (1999) [hereinafter Yoo, *Globalism*]; Yoo, *Public Lawmaking*, *supra* note 11, at 2234. But cf. Kesavan, *supra* note 14, at 1508–12.
- 17 *Medellin v. Texas*, 552 U.S. 491, 505 (2008).
- 18 See Bradley, *Treaty Duality*, *supra* note 5, at 158.
- 19 *Id.* at 157–58.
- 20 See *id.* at 132–33, 157, 182.
- 21 See, e.g., *Medellin*, 552 U.S. at 504–05; Kesavan, *supra* note 14, at 1512; Yoo, *Globalism*, *supra* note 16, at 1958.
- 22 Compare Vazquez, *Treaties as Law of the Land*, *supra* note 6, at 605–06, with Bradley, *Treaty Duality*, *supra* note 5, at 157–60.
- 23 Federal Death Penalty Act of 1994, 18 U.S.C. §§ 3591–99 (2006).
- 24 See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581, 605–06 (1889); Calderon to Congress: Pass Immigration Reform, CBS News (May 20, 2010), at <http://www.cbsnews.com/stories/2010/05/20/world/main6502952.shtml>.
- 25 See, e.g., 22 U.S.C. §§ 6441–42, 6445, 6450, 7814 (2006).
- 26 See, e.g., Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 Va. J. Int'l L. 505, 556 (1997).
- 27 Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 Minn. L. Rev. 815, 846–49 (2009).
- 28 *Id.* at 857–58, 864–65.
- 29 International Covenant on Civil and Political Rights art. 20(2), Dec. 19, 1966, S. Exec. Doc. E, 95–2 (1978), 999 U.N.T.S. 171.
- 30 See 138 Cong. Rec. 8070 (1992).
- 31 See, e.g., *Medellin v. Texas*, 552 U.S. 491, 524 (2008).
- 32 See Kal Raustiala, *Does the Constitution Follow the Flag?* 36–38 (2009).
- 33 See, e.g., Brief of Amicus Curiae Alcan Alumínio do Brasil, S.A. in Support of Petitioner, *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1986) (No. 85-693), 1986 WL 727580, at \*11–\*12 (arguing if United States does not provide sufficient constitutional protections against exercise of personal jurisdiction over foreign nationals, other countries might assert broad jurisdiction over U.S. nationals).
- 34 See, e.g., Amicus Curiae Brief of 383 United Kingdom and European Parliamentarians in Support of Petitioners, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (No. 06-1196), 2007 WL 4790793, at \*2.
- 35 See, e.g., Vazquez, *Treaties as Law of the Land*, *supra* note 6, at 611, 613.
- 36 See Restatement (Third) of the Foreign Relations Law of the United States §§ 402–04 (1987).
- 37 See, e.g., *id.* §§ 402 cmt. i, 403 cmt. g.
- 38 See, e.g., *Roper v. Simmons*, 543 U.S. 551, 575–78 (2004).
- 39 See, e.g., Vienna Convention on the Law of Treaties art. 1, May 23, 1969, S. Exec. Doc. L, 92-1, 1155 U.N.T.S. 331; Letter of Submittal from the Department of State to the President, Vienna Convention on the Law of Treaties, *supra*.
- 40 See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229, 2244–62 (2008); *Medellin v. Texas*, 552 U.S. 491, 504, 519 (2008); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004).
- 41 But cf. *Rasul v. Bush*, 542 U.S. 466, 480 (2004) (treating Guantánamo as “within ‘the territorial jurisdiction’ of the United States” for purpose of presumption against extraterritoriality [quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)]).
- 42 128 S. Ct. 2229 (2008).
- 43 *Id.* at 2240.
- 44 See Bradley, *Treaty Duality*, *supra* note 5, at 132.
- 45 *Medellin*, 552 U.S. at 504–05.
- 46 Moore, *Medellin and the ATS*, *supra* note 5, at 490–91.
- 47 See *Medellin*, 552 U.S. at 506, 513–14, 518.
- 48 509 U.S. 764 (1993).
- 49 542 U.S. 155 (2004).
- 50 See *Boumediene v. Bush*, 128 S. Ct. 2229, 2303–07 (2008) (Scalia, J., dissenting); cf. Burnett, *supra* note 10, at 1032–33.
- 51 *Boumediene*, 128 S. Ct. at 2244 (majority opinion).
- 52 *Id.* at 2248.
- 53 The Court merely states that the government’s de jure sovereignty argument finds “scant support” in “the history of common-law habeas corpus” and is “inconsistent with [the Court’s] precedents and contrary to fundamental separation-of-powers principles.” *Id.* at 2253.
- 54 See, e.g., *id.* at 2303 (Scalia, J., dissenting); *id.* at 2279 (Roberts, C.J., dissenting); Burnett, *supra* note 10, at 978.
- 55 See Raustiala, *supra* note 32, at 218, 243.
- 56 *Boumediene*, 128 S. Ct. at 2259 (majority opinion).
- 57 *Id.* at 2276–77.
- 58 *Medellin v. Texas*, 552 U.S. 491, 510 (2008).
- 59 *Id.* at 517–18.
- 60 See, e.g., Moore, *Law(makers) of the Land*, *supra* note 8, at 45.
- 61 *Medellin*, 552 U.S. at 523 (quoting *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 360 [2006]).
- 62 Moore, *Medellin and the ATS*, *supra* note 5, at 491, 500–03.
- 63 Moore, *Law (Makers) of the Land*, *supra* note 8, at 42.
- 64 See *id.*
- 65 See *Medellin*, 552 U.S. at 508.
- 66 *Id.* at 508–09 & n.5.
- 67 See, e.g., Carlos Manuel Vazquez, *Laughing at Treaties*, 99 Colum. L. Rev. 2154, 2179–80 (1999).
- 68 See Moore, *Law (Makers) of the Land*, *supra* note 8, at 46.
- 69 *Medellin*, 552 U.S. at 516–17.
- 70 See Moore, *Law(makers) of the Land*, *supra* note 8, at 45; Moore, *Medellin and the ATS*, *supra* note 5, at 502.
- 71 *Medellin*, 552 U.S. at 517.
- 72 *Id.* at 517–18.
- 73 See *id.* at 518.
- 74 See David Sloss, *Medellin v. Texas: Part I: Self-Execution, The Federalist Society Online Debate Series* (Mar. 28, 2008), at <http://www.fed-soc.org/debates/dbtid.17/default.asp>.
- 75 See Moore, *Medellin and the ATS*, *supra* note 5, at 501–02.
- 76 *Medellin*, 552 U.S. at 515.
- 77 *Id.* at 507–11.
- 78 See *id.* at 511.
- 79 *Id.* at 507–11.
- 80 *Id.*
- 81 See, e.g., *id.* at 533 (Stevens, J., concurring); Bradley, *Treaty Duality*, *supra* note 5, at 171–72.
- 82 See Moore, *Medellin and the ATS*, *supra* note 5, at 491.
- 83 See *Medellin*, 552 U.S. at 514–16 (majority opinion).
- 84 See *United States v. Bowman*, 260 U.S. 94, 97–98 (1922).
- 85 See, e.g., Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts*, 576–77, 617 (4th ed. 2007).
- 86 See *Bowman*, 260 U.S. at 97–102.
- 87 See Restatement (Third) of the Foreign Relations Law of the United States §§ 402, 404.
- 88 *Id.* § 402 & cmt. f.
- 89 *Id.* § 403(1).
- 90 *Id.* § 403(2).
- 91 See *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004).
- 92 *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2891 (2010) (Stevens, J., concurring in the judgment); see also *id.* at 2877–81 (majority opinion).
- 93 *Id.* at 2881.
- 94 *Id.* at 2883.
- 95 See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Geo. L.J. 479, 490 (1998).

#### ART CREDITS

Page 28: Still-life photography by Bradley Slade. Archival images: Library of Congress, Prints and Photographs Division, LC-DIG-hec-23477, LC-USZ62-42843, LC-USZ62-132384. Page 33: Still-life photography by Bradley Slade. Archival images: Library of Congress, Prints and Photographs Division, LC-DIG-hec-25405, LC-USZ62-132384.



## JRCLS WEST AFRICAN CHAPTER FORMED

The first meeting of the West African Chapter of J. Reuben Clark Law Society was held in Nigeria in August 2010, bringing the total number of international chapters to 24 in 18 different countries. Elder Declan O. Madu, an Area Seventy from Owerri, in Imo State, was named chair of the new chapter with Ted Goh, from Accra, Ghana, as chair-elect. The meeting was attended by 32 lawyers, students, General Authorities, and a justice of the Nigerian High Court.

Elder Madu, Justice Ikpomwem, Nigerian government attorney Chijioke Okoro, and Elder Adesinna J. Olukanni of the Seventy spoke. J. Reuben Clark Law Society international chair Nancy Van Slooten joined the proceedings via Skype and also addressed the gathering. Later, at a fireside, Elder John B. Dickson of the Seventy, who is serving as the first counselor in the Africa West Area presidency, spoke.



Van Slooten pointed out benefits of membership in the Society to the West African community. She said that members there would reach out, mentor each other and younger attorneys, look for opportunities for pro bono service, and seek to be an influence for good.

Justice Ikpomwem set down expectations of the judiciary for LDS attorneys. He said LDS lawyers are expected to say no to all forms of injustice and, as stated in Amos 5:15, he or she must “hate the evil, and love the good” to help establish justice.

Elder Dickson said that he believed members in the chapter had been prepared for this day “with unique and God-given talents.” He said, “The Lord wants righteous, believing, and faithful people to stand as a light on the hill in these trying times. We must be some of those men and women.”



# Class Notes

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SUBMISSION FOR THE CLASS NOTES.

## CLASS OF 1976

**Conrad Houser** became semiretired as president of Geovic Energy at the end of 2010. He continues as an expert legal witness in mining litigation and a due diligence consultant. Pro bono work continues to be one of his highest priorities.

**Cheryl A. Russell** died August 8, 2010, in Salt Lake City. She had served as Logan City Justice Court judge since 1992.

## CLASS OF 1977

**David R. Bird** was awarded the Patrick Conner Award for his distinguished service to the mining industry at the 95th Annual Convention of the Utah Mining Association. He was honored for his work as a trusted advisor and lobbyist for various Utah mining companies as well as the Utah Mining Association. According to the Utah Mining Association, Bird's leadership, knowledge, and close working relationships with Utah's government leaders and policy makers has been a great benefit to the mining industry for many years. Bird, a natural resources lawyer, has been a generous contributor to various charities and served on the Utah State Bar Commission and later as president of the bar. He also served on the Utah Foundation Board and the Utah Manufacturers Association board of directors.

**Douglas Holt** is serving his 12th year as Graham County Superior Court judge in Safford, Arizona. He is a member of the Arizona Judicial Council and a senior member of the Presiding Judges Committee for the Arizona Judiciary.

**Scott R. Jenkins** was admitted to the Utah State Bar and the U.S. District Court, District of Utah, in 1978 and the U.S. Court of Appeals, Tenth Circuit, in 1979. He has more than 30 years of experience advising individuals, entities, and charitable organizations on legal matters affecting their lives, families, and businesses, including business organization, public offerings, private placements, and SEC reporting.

**Stephen L. Roth** was unanimously confirmed by the Utah Senate to be a

judge on Utah's Court of Appeals on February 26, 2009. He has been a judge in West Jordan since 2002 as well as an adjunct professor at the University of Utah.

## CLASS OF 1981

**Charlene Barlow** has been appointed to the Third Judicial District Court, which serves Salt Lake, Summit, and Tooele Counties. Prior to her appointment she served as the section chief of the Criminal Division of the Utah Attorney General's Office, as the Provo City attorney, as the Orem City attorney, and as a prosecutor in the Utah County Attorney's Office.

**Glade Myler** spoke on February 26, 2010, in Logan, Utah, as part of the College of Humanities, Arts, and Social Sciences Distinguished Alumni Speakers Series at Utah State University. He is a senior deputy attorney general in Carson City, Nevada. Myler mainly practices administrative law, including emergency management and homeland security for the state of Nevada.

## CLASS OF 1982

**Kenneth M. Anderson** has joined Locke Lord Bissell & Liddell as a partner based in the firm's Houston, Texas, office. He was formerly Vinson & Elkins' syndicated finance practice group chair. His practice expertise is in energy finance.

**M. James "Jim" Brady**, former Mapleton City mayor, was confirmed by the Utah Senate as a judge of the Fourth District Court. He has been a partner in the Provo law firm Bradford & Brady for the past 24 years.

**Stephen Mikita**, Utah assistant attorney general, recently joined the board of directors of the Spinal Muscular Atrophy Foundation with four other experienced business, media, and law leaders. SMA works to find a cure for Spinal Muscular Atrophy.

**Monte J. Stiles** was honored November 17, 2010, by the Idaho State Bar with its Professionalism Award. Stiles has served as a federal prosecutor for the U.S. Attorney's Office in Idaho since

1987. From 1982 to 1987 he worked for the Ada County Prosecutor's Office in Boise.

**Kevin J. Worthen** was called as an Area Seventy in the April 2010 general conference of The Church of Jesus Christ of Latter-day Saints.

## CLASS OF 1983

**Dane O. Leavitt**, of Cedar City, Utah, was called as an Area Seventy in the April 2010 general conference of The Church of Jesus Christ of Latter-day Saints.

**D. James Tree** is mentioned in a Yakima, Washington, newspaper article for mentoring his son-in-law in the state's law clerk program. Students like Tree's relative and paralegal, Tim Anderson, can take the bar without attending law school. Tree spends five to six hours a week in this work. His main legal practice is in disability law.

## CLASS OF 1984

**David Lynch** has recently been appointed chair of the Department of Criminal Justice at Weber State University in Ogden, Utah.

## CLASS OF 1985

**Peter A. Thompson** was appointed to the Maricopa County Superior Court by Arizona governor Jan Brewer. He currently is serving as a Maricopa County Superior Court commissioner in Phoenix.

## CLASS OF 1986

**Sherene T. Dillon** was appointed by Utah governor Gary R. Herbert to the Second District Juvenile Court (covering Davis, Morgan, and Weber Counties). She is currently with Utah's Office of the Guardian Ad Litem. She will take office after being confirmed by the Utah State Senate.

**Mitch Edwards** is headphone company Skullcandy's new chief financial officer and general counsel in Park City, Utah. He previously was CFO and general

counsel for the software distributing company BitTorrent.

**William Tilleman** has worked on the Canada Energy Commission and has been a visiting professor at Harvard in addition to having other legal assignments. He is a federal justice for the Queen's Bench of Alberta.

## CLASS OF 1988

**Dan Curriden** has accepted an in-house counsel position with AAA of Northern California, Nevada, and Utah. As of 2011 he and his wife have three next-generation Cougars at the Y and look forward to seeing a lot more of Provo.

**Robert N. Johnson**, an immigration attorney, joins as a shareholder the Atlanta, Georgia, offices of Baker, Donelson, Bearman, Caldwell & Berkowitz.

## CLASS OF 1989

**David McGrath** is a senior vice president and managing legal counsel for Zions First National Bank.

## CLASS OF 1990

**Matthew Bryan** spoke at the ABA Intellectual Property Law Conference in Washington, D.C. He works in Geneva, Switzerland, as the director of the Patent Cooperation Treaty Division of the World Intellectual Property Organization. Over 140 countries are parties to the PCT, which is an agreement for international cooperation in the field of patents.

## CLASS OF 1991

**Michael F. Krieger** ran with the bulls in Pamplona, finished his sixth marathon, and had one of his sons graduate from high school and enroll at BYU. Mike has enjoyed growing the IP practice at Kirtson & McConkie and is a little nervous about what life will be like as an empty nester.

**Kumen Taylor** is a partner with Hutchison & Steffen at its Bountiful, Utah, office. He practices primarily in the areas of civil and commercial litigation

and also litigates cases involving employment and real estate law.

**Erin Lee Truman** is now of counsel to Hutchison & Steffen at its Las Vegas office. Erin is a trial lawyer and will head Hutchison & Steffen's Alternative Dispute Resolution Department, which includes both mediation and arbitration.

#### CLASS OF 1994

**Gary Bryner**, a political science professor and former Law School adjunct professor at BYU, died March 10, 2010. He graduated from the Law School while teaching at BYU.

**Lauralyn Cabanilla** is an attorney, member of the Provo City Council, and a lieutenant colonel in the U.S. Army Reserves. She will be going to Iraq in August to serve in the military.

**Michael Rawlins** has joined the law firm Durham Jones & Pinegar (DJP). Michael is a shareholder in the firm's Las Vegas office, doing commercial litigation, construction and mechanic's lien litigation, real estate litigation, intellectual property litigation, and representation of creditors in bankruptcy proceedings.

**Benjamin C. Stahmann** was hired last month by Oklahoma State University Foundation in Stillwater, Oklahoma, to serve as its senior director of gift planning. His prior work was as director of tax and legal services with the National Boy Scouts of America Foundation in Irving, Texas.

**Christopher L. Thomas** joined the Denver office of the labor and employment law firm Ogletree, Deakins, Nash, Smoak & Stewart as a shareholder. He and three others formerly with the immigration practice group of Holland & Hart in Denver will serve as their new firm's immigration practice group for the western United States. Christopher was a partner at Holland & Hart.

#### CLASS OF 1996

**Martin W. Bates** was appointed the new superintendent of Granite School District in Salt Lake City, starting September 1, 2010. He most recently was the assistant superintendent in the district over administrative and legal services. Martin has served as an assistant to the superintendent since 1999 and in other district administrative capacities since 1997. Granite is the largest district in Utah, with 89 schools, 3,000 teachers, and 68,400 students.

**David Moore**, a BYU law professor, was the main participant in an online symposium sponsored by the *Virginia Journal of International Law*. He discussed his recent essay in VIII: "Medellin, the Alien Tort Statute, and the Domestic Status of International Law." David's essay looks at the U.S. Supreme Court case *Medellin v. Texas* and its impact on

the Alien Tort Statute in the context of how treaties are considered in American law.

#### CLASS OF 1997

**James E. Lake**, a patent lawyer, joined the IP law firm Zarian, Midgley & Johnson in Boise and Spokane. He was a shareholder at Wells St. John in Spokane.

**Elizabeth Sewell** has been published in a coauthored casebook, *Law and Religion: Cases in Context* (Aspen Publishers Legal Education, 2010). The book is edited by Leslie C. Griffin of the University of Houston and has sections by 14 coauthors. Elizabeth is currently associate director at the International Center for Law and Religion Studies at J. Reuben Clark Law School.

#### CLASS OF 1998

**Richard C. Blake** was named a partner at Wilson Sonsini Goodrich & Rosati in Palo Alto, California, specializing in private and public offerings, public company representation, mergers and acquisitions, and corporate governance counseling.

**Dane Watkins Jr.** has been elected to serve as a judge for the Seventh Judicial District in Idaho. His service on the bench follows nine years as the Bonneville County prosecuting attorney.

#### CLASS OF 1999

**Paul C. Farr** was appointed by Herriman City to be its new justice court judge. Paul has been a partner with the law firm Morgan, Minnock, Rice & James in downtown Salt Lake City. He lives in Herriman, Utah.

**Sarah Leeper** was recently elected as a partner with the law firm Manatt, Phelps & Phillips LLP. Sarah works in the firm's 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.

**Matt Martinez**, an immigration attorney, was recently elected a shareholder at the Phoenix law firm Fennemore Craig.

#### CLASS OF 2000

**Patrick Malone** has joined Barrick Gold of North America as senior counsel.

**Clate Mask**, the current president of Infusionsoft, was recently interviewed on a business blog by entrepreneur Sramana Mitra.

#### CLASS OF 2001

**Jeffrey R. "Jeff" Atkin** was elected partner last week by the law firm Foley & Lardner in Los Angeles. A former

senior counsel, Jeff works with energy, finance, transactional, and securities law.

#### CLASS OF 2003

**Chad B. Balfanz** was promoted to major in the U.S. Army Judge Advocate General's Corps. He previously taught constitutional law at West Point. Chad and his family currently reside in Charlottesville, Virginia, where he is pursuing an LL.M. in international law. His wife, Cathy, gave birth to their third child, Tristan Chad Balfanz, in November 2010.

**Michael P. Brooks** is director of BYU's University Accessibility Center and president of the Utah Chapter of the Association on Higher Education and Disability (AHEAD). He was recently appointed as chair for the Disability Issues Advisory Committee at BYU. A licensed psychologist, Michael will become an associate clinical professor in the Counseling and Career Center. **Edward L. Carter** was a newspaper reporter before he went to law school and clerked for Judge Aldisert of the Third Circuit Court of Appeals. Edward currently is an assistant communications professor and serves as the associate department chair of the Department of Communications at BYU.

#### CLASS OF 2004

**Carolyn E. Howard** was profiled in the *Salt Lake Tribune*, emphasizing her good work with students at Utah Valley University in Orem, Utah.

**Carolina Núñez** has just published an article that is now available on SSRN: "Fractured Membership: Deconstructing Territoriality to Secure Rights and Remedies for the Undocumented Worker," *Wisconsin Law Review*, 2010.

#### CLASS OF 2005

**Ryan Bellows** was a Twenty Under 40 Award winner on November 4, 2010. These annual awards are given by the *Reno Gazette-Journal* "to exceptional business leaders under 40 years of age who work in the Greater Reno-Tahoe [Nevada] market."

**Ronald K. Fuller** is the 2010 recipient of the LexisNexis John R. Johnson Memorial Scholarship, given to a law school graduate pursuing a library school degree. The scholarship was announced at the American Association of Law Libraries annual meeting in Denver, Colorado. Ronald currently is an assistant librarian and adjunct professor of law at the S. J. Quinney Law Library at the University of Utah in Salt Lake City.

**Rob Mooney** has started his own firm in Salt Lake City, the Law Office of Robert P. K. Mooney PLLC, focusing on commercial litigation. Rob prepared to open his practice by working under the trial lawyers at Holme Roberts & Owen LLP

and Burbidge Mitchell & Gross, working exclusively in commercial litigation.

**Lorianne Updike Toler** found a previously unknown copy of the U.S. Constitution in November 2009 while researching at the Historical Society of Pennsylvania.

#### CLASS OF 2006

**Paul S. Holdaway** has become a shareholder of the intellectual property firm Wells St. John PS after four years as an associate attorney. His patent practice is focused on electrical and software technologies and includes client and inventor counseling, application preparation, and prosecution of applications before the United States Patent and Trademark Office.

**Daniel C. Swinton** has been elected as president of the Association for Student Conduct Administration (ASCA). The association has approximately 1,700 members at over 700 colleges and universities nationwide. Daniel is currently assistant dean of students and director of student conduct and academic integrity at Vanderbilt University. He and his wife, Julia, live in Nashville, Tennessee, with their three children; they are expecting their fourth in May.

#### CLASS OF 2008

**Michelle Bushman** is the lead author of a new geological study about a desert oasis near Death Valley, California. Her study looks at where the water comes from that flows out of the ground at Ash Meadows, Nevada, about 90 miles northwest of Las Vegas on the California/Nevada border. The water feeds about 22,000 acres of wetlands in the middle of the desert at the oasis, which is home to the largest concentration of endemic life in a local area in the country. The study concludes that the water comes from the area of the Nevada Test Site, not from other areas as previously assumed. Michelle is an attorney with Ford & Huff in Lehi, Utah. She received both a master of science degree and a JD at BYU in 2008.

#### CLASS OF 2009

**Benjamin Kearns** has joined the law firm Best, Best & Krieger in their Ontario, California, office. He previously worked at the firm as a summer associate in 2008. **Tyler V. Snow** has joined the law firm Christensen & Jensen. He concentrates his practice on product liability, insurance defense, commercial litigation, and personal injury.

**David Stott** has published an article that was originally a paper in the law school class "Joseph Smith and the Law," taught by Professor Jack Welch. David was an associate at Cravath, Swaine & Moore in New York City prior to now clerking for a federal judge, also in New York.



# 2011: A Year for Milestone Anniversaries of the Law School

*Anniversaries remind us of the shoulders we stand on and of our obligation to make today something worth celebrating in the future.*

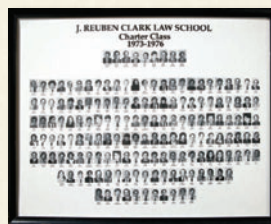


## 40th ANNIVERSARY

The first announcement of J. Reuben Clark Law School was on March 9, 1971, when Harold B. Lee, president of The Church of Jesus Christ of Latter-day Saints, made known both the building of a new law school at BYU and the retirement of then BYU president Ernest L. Wilkinson.

## 35th ANNIVERSARY

The first graduating class of BYU Law School received JD diplomas on April 18, 1976.



## 140th ANNIVERSARY

The birth of J. Reuben Clark Jr. was on September 1, 1871, in Grantsville, Utah.



## 50th ANNIVERSARY

The death of J. Reuben Clark Jr. was on October 6, 1961, in Salt Lake City, Utah.

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@law.byu.edu](mailto:wisej@law.byu.edu).

**Clark Memorandum**

J. Reuben Clark Law School  
Brigham Young University

