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Clark Memorandum: Spring 1993

J. Reuben Clark Law Society

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CLARK

MEMORANDUM

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SPRING 1993

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John Snyder



PROMISED



LANDS

HUGH NIBLEY

This address was given
October 9, 1992, at the
Bill of Rights Symposium



Another World:

When I first came to Provo shortly after World War II, I was approached by Brother Virgil Bushman, who had been called to revive the mission to the Hopi Indians after it had languished during the war. He urged me to go with him and promised me that I would see an ancient world that would edify me. I eagerly complied, and on a cold bleak morning in March we approached the Third Mesa from the west. The landscape was utterly desolate, nothing in sight but sand and rock. Brother Bushman assured me that these were the fields of the Hopi. The men would come down every morning afoot or on their donkeys to walk out into the sand for a few miles and there with a stick push down five kernels of corn 20 inches into the sand, hoping they would strike the underground moisture from the Denebito Wash. Each stalk of corn would grow only two feet or so and never bear more than a single ear of corn. This was their staff of life, their security, their capital. And yet they had survived all the rigors of nature and the fierce pressure of white intruders since the 16th century. Later I learned that Sister Theresa Harvey's house in Walpi on the First Mesa had been the first one measured by the new tree-ring dating method and was found to be over 800 years old.

I was stunned by what I saw in Walpi as we came through a low arch at dawn out onto the spectacle of a splendid drama in progress. **Here, on a high bleak rock surrounded by nothing but what we would call total desolation in all directions, was a full-scale drama in progress in the grand manner of the ancients.** The only witnesses were a few shivering little kids and some hunched up old people on stone benches. Everything was being carried out with meticulous care; all the costumes were fresh and new, nothing that could be bought in a store, nothing artificial—all the dyes, woven stuff, and properties taken from nature.

What an immense effort and dedication this represented! And for what? These were the only people in the world that still took the trouble to do what the human race had been doing for many millennia—celebrating the great life cycle of the year, the creation, the dispensations. I told Brother Bushman that there should be 52 dancers, and that is exactly what there were. Fifty-two was not only the sacred number of the Asiatics and the Aztecs, but it was also the set number of dancers in the archaic Greek chorus. The dancing place was the bare plot the Greeks called the *konistra*, the sand patch where this world came in contact with the other at the crucial periods of the year. That was the

Photographs, © Dan Budnik: Woodfin Camp

time when the *orcus mundi* was open—*mundus patet*, that is when the mouth of the other world was open and the spirits of the ancestors would attend the rites. By the altar, of course, was the *sipapuni*, the mouth of the lower world, matching that same archaic Roman *orcus mundi* at which the spirits from above and below could meet with their relatives upon the earth. This was the essential year rite, found throughout the world from the earliest times. On either side of the altar was a small evergreen, adorned like Christmas trees with prayer feathers, for as in countless ancient societies these dramas were sacred. I have written extensively on this theme, which is called patternism, but we can't go into it now. Suffice it to say, it was a miracle of survival, commonly recognized as the only surviving instance of the fully celebrated year cycle in all the world.

Almost the first house one came to in mounting up the climb to Hotevila where this was taking place was the dwelling of Tom and Belle Kuyushva. Tom was a *kikmongui*, an honored elder, the nearest thing to a chief among these egalitarian and independent people, who have always eschewed any type of power structure. He wore all the splendid regalia, the silver and turquoise of an honored person, and was present in the seat of honor when Brother Bushman gave his first sermon. He spoke only about 20 minutes, and at the end, old Tom, who knew not a word of English, came up and asked to be baptized. Brother Bushman explained, "But you have only just barely heard me speak!"

"But I know it's true," said Tom, who was 90 years old, incidentally, and all his life had been thoroughly immersed in the doctrines and teachings of his people. He pointed to his breast and said, "I know it's true in here." He was soon baptized and became an elder, and we should note that they had to go clear to Gallup to find enough water for baptizing. That's how desolate the land was; there was what they called Jacob's Well in Oraibi, but the water was poisonous. There was indeed a spring in Hotevila, which gave the place its name. The WPA wanted to relieve the women of Polacca from the trouble of going down the long trail to the water and fetching it up again on their heads, by installing a pump. This was vigorously opposed by all. Were these people insane to reject such a convenience? Not at all. It was a way of life that your ancestors and mine had practiced for thousands of years since the days of Rebecca at the well. When the U.S. government wanted to install electric lines in Hotevila, the people repeatedly took down the poles. The government officials would put them up again and the people would take them down again—they actually rejected the blessings of electricity and a ready water supply. I talk about these things to show how different their ways were from ours.

Since this is Homecoming week, I may suggest a parallel. All the time my children were growing up, it was a special thrill for all of us to go out in front of the house during Homecoming week to watch the lighting of the Y. The long zigzag trail of flickering torches crept up the mountain (a good 1,000 feet), dividing and slowly enclosing the giant emblem with mysterious flickering orange flames until the final glory. It was exciting, strenuous, thoroughly unnecessary,



"The men would come down every morning afoot or on their donkeys to walk out into the sand for a few miles and there with a stick push down five kernels of corn twenty inches into the sand, hoping they would strike the underground moisture from the Denebito Wash."

and everybody loved it. How silly, how wasteful, how impractical! Now we just throw a light switch and it's all done—as convenient and inspiring as lighting a billboard. That is the difference between our cultures. The torches on the mountainside served no practical purpose whatever, but the water trail up the mountain had been an absolute necessity for many centuries; what greater imperative to preserve the operation just as it is, where an act of drudgery becomes an act of devotion and even fun? Pumps can and do break down.

The day after that first dance was Easter Sunday. I was met in New Oraibi by a delegation of Hopi men, who announced that they had just been in a session with the Mennonite, Baptist, and Methodist missionaries, who had explained exactly why our Book of Mormon tells very much the same story as their own traditions. The explanation was this: When the great chief Tuba (for whom Tuba City was named) became a Mormon, he went to Salt Lake to marry his wives in the temple there. While he was there Joseph Smith got hold of him and pumped him for all the secrets of the Hopi. Then he sat down and wrote it all down in what became the Book of Mormon. It was not hard for me to set them straight simply by throwing out a few dates. The point of this story is the promise of common ground that we have

with this strange people—the Book of Mormon is their story.

There is considerable general knowledge about certain salient traits of the Hopi which are not peculiar to them but characteristic of almost all Indians. The first of these is the way they see all things together.

I was seeing in a sacred manner the shapes of all things in the spirit [says Black Elk] and the shape of all shapes as they must live together like one being. And I saw that the sacred hoop of my people was one of the many hoops that made one circle, wide as daylight and as starlight, and in the center grew one mighty flowering tree to shelter all the children of one mother and one father. And I saw that it was holy [Black Elk Speaks: Being the Life Story of a Holy Man of the Oglala Sioux (New York: Pocket Books, 1972, c1959), 36]

Here we have that peculiar idiom which makes the Indian a total alien to our own culture. The culture is completely religious and therefore completely consistent. If you wrote an essay on Hopi farming, it would be an essay on Hopi religion; on Hopi hunting, it would be an essay on Hopi religion; an essay on Hopi family life would be an essay on Hopi religion; on Hopi games the same—everything they do and

think is about their religion. As they see all things as a whole, all joined in a single divine pattern, like a great sand painting, so they feel that all who share a common life should act together. I have often heard them say when they join the Church it will be all together—as soon as we set them the example. This mysterious but very real oneness is beautifully expressed in our scriptures, Moses 6:63, which might have been written by Black Elk:

And behold, all things have their likeness, and all things are created and made to bear record of me, both things which are temporal, and things which are spiritual; things which are in the heavens above, and things which are on the earth, and things which are in the earth, and things which are under the earth, both above and beneath: all things bear record of me

They have not only survived but prospered on their desolate mesas, the last place on earth anyone would covet. We find it foolish that they constantly protest the slightest change in the way of doing things—but it all hangs together, just as our projects continually fall apart as we insist on sanctifying growth and change.

From the beginning there was conflict between those who were willing to be ingratiating and comply to pressure from the U S government and those who rigidly opposed it. The one party was labeled progressive of course, and the other, who called themselves the traditionalists, were called the "Hostiles." The leader of the traditional party in Oraibi was Tewa Queptewa, about whom many stories were told. I have talked with him often and bought many Kachina dolls, which he made of strictly native materials and sold for a dollar and a half apiece, never more or less. The anthropologists were fighting among themselves for these dolls for which they could get high prices, and yet the great chief was practically giving them away. We just can't understand a thing like that. In 1906 there was a showdown between the progressives and Tewa Queptewa's party. They settled in a sensible fashion by a tug-of-war, the losing party going off to Moencopci. Tewa Queptewa's daughter, Mina Lansa, was entrusted with the national treasures, always kept by a woman. Her husband, John Lansa, was the leader of the traditionalists.

One evening as it was getting dark, I was passing by their house, the northernmost house in Old Oraibi, when Mina came out and beckoned me vigorously to come in. I wondered what I had done wrong because new infringements of the whites were causing considerable tension. In the house the chief elders were seated all around the room. A small kitchen table and chair were in the middle of the room and a coal oil lamp was on the table. Mina told me to sit on the chair; then she went out of the room and soon returned with a bundle, something heavy wrapped in a blanket. She put it on the table and then unwrapped it. It was the holy tablet, the Hopi Stone no less, the most sacred possession of the people. I knew what I was expected to do and started talking.

By an interesting coincidence I had spent the previous

week in Cedar City with President Palmer. He was a patriarch as well as stake president and taught anthropology at the college there. He had been initiated into the Paiute tribe and took me out to their sacred place in the plain southwest of Parowan. The building of the highway had put an end to the rites of initiation that once took place there, but President Palmer described the teachings and ordinances as far as was permitted. In particular he told the story of the three days of darkness as if the descent of the Lord had taken place at that spot—it is common for people to transfer ancient legends to their own ambience—an event much like that described in Third Nephi.

Tobats was the God of all Creation; his son Shinob was the peacemaker full of love and eternally young. One day the Evil One, Oo-nu-pit, killed Shinob. At once a great darkness fell upon the whole earth. Tu-weap; it was absolute blackness for three days. In this chaos everyone was groping around amidst howling and lamentation. Finally, a voice from the top of the mountain spoke; it was Tobats the Father. He told them to move about with outstretched arms calling out to each other and joining hands with whomever one touched. Thus they formed lines, and the lines were instructed to join with each other and people in the lines were to cry out for husbands and wives and children until all families had reformed; then the noise ceased and a voice told them to climb the mountain or mesa where Tobats was. They worked their way up the mountain toiling in human chains and finally forming a huge circular formation like the hoops of Black Elk's people, with Tobats in the middle. Then Tobats said he would shoot an arrow straight up (this is the well-known Indian and worldwide theme of the arrow-chain to heaven). His arrow produced a tiny spark of light; but the second arrow brought light which grew like an explosion until it flooded all the land. The blackbird and the flicker have been honored ever since because their feathers were used for the arrows—they are perpetual reminders of the great event. And thus the Indians typically re-edit according to the tribe and the land, those stories whose origin is lost in a distant past.

There were many things on the Hopi Stone that are never shown in the sketchy reproductions of it, but the main items were the wanderings of the people and upheavals of nature, the arrow-chain to heaven and the light descending from the clouds. I started to explain things in terms of what I had learned from President Palmer a few days before. As I talked, the elders began whispering among themselves with some animation. Suddenly Mina snatched the stone from the table, clutched it tightly, and said excitedly, "You are a smart man—but you don't know everything!" Was I on the right track? I suspect so because some years later, in 1965, when I was wandering in the sad desolation of Oraibi, now emptier than ever, I was approached again with an invitation to come to the house and see the Hopi Stone. When I got there, there was confusion and excitement; something had happened. We would have to call it off. Everyone was going to where the meeting of the Tribal Council had just been held. The Tribal Council was a

creation of the Bureau of Indian Affairs, compliant to the will of the powers of the East, whose authority the traditionalists had never recognized. They had just that day leased a tract of the sacred Black Mesa to the Peabody Coal Company. The company had generously offered in return to provide trailer houses for the entire tribe if they would move to Los Angeles. A more colossal culture gap could not be imagined.

Here it is necessary to speak of that strange passion for the land with which all Indians seem to be obsessed. This state of mind can best be explained by reference to the Book of Mormon. In his great sermon to the Nephites, the Lord declares, "For behold, the covenant which I have made with my people is not all fulfilled" (3 Nephi 15:8). "And behold, this is the land of your inheritance; and the Father hath given it unto you" (v 13; emphasis added). Again he tells them to "write these sayings after I am gone . . . that these sayings which ye shall write shall be kept and shall be manifested unto the Gentiles, that through the fulness of the Gentiles, the remnant of their seed, who shall be scattered forth upon the face of the earth because of their unbelief, may be brought in" (3 Nephi 16:4). We are to take note of what they have written, and it is this: "Verily, verily, I say unto you, thus hath the Father commanded me—that I should give unto this people this land for their inheritance" (v 16; emphasis added). The Hopi Stone, beautifully done on highly polished porphyry, is such a writing as the Nephites were ordered to make—a deed to the land. The Lord concludes with a final repetition: "And the Father hath commanded me that I should give unto you this land, for your inheritance. And if the Gentiles do not repent after they have scattered my people . . . the sword of my justice shall hang over them at that day" (3 Nephi 20:14–15, 20).

What could be clearer? This land has been given to that particular branch of Israel as an inheritance for their children in perpetuity—it is their sacred obligation to hold it for their children; they cannot possibly sell it or allow it to be taken from them. That would be unthinkable, and that we never seem to understand.

N e v e r t h e T w a i n

S h a l l M e e t :

It would be hard to imagine two cultures more opposed than our own and that of the Indians. Typical of the total misunderstanding that still prevails is a statement by Ronald Vertrees, president of the Customs Clearing House, a Denver-based drilling supply firm, in a letter to the

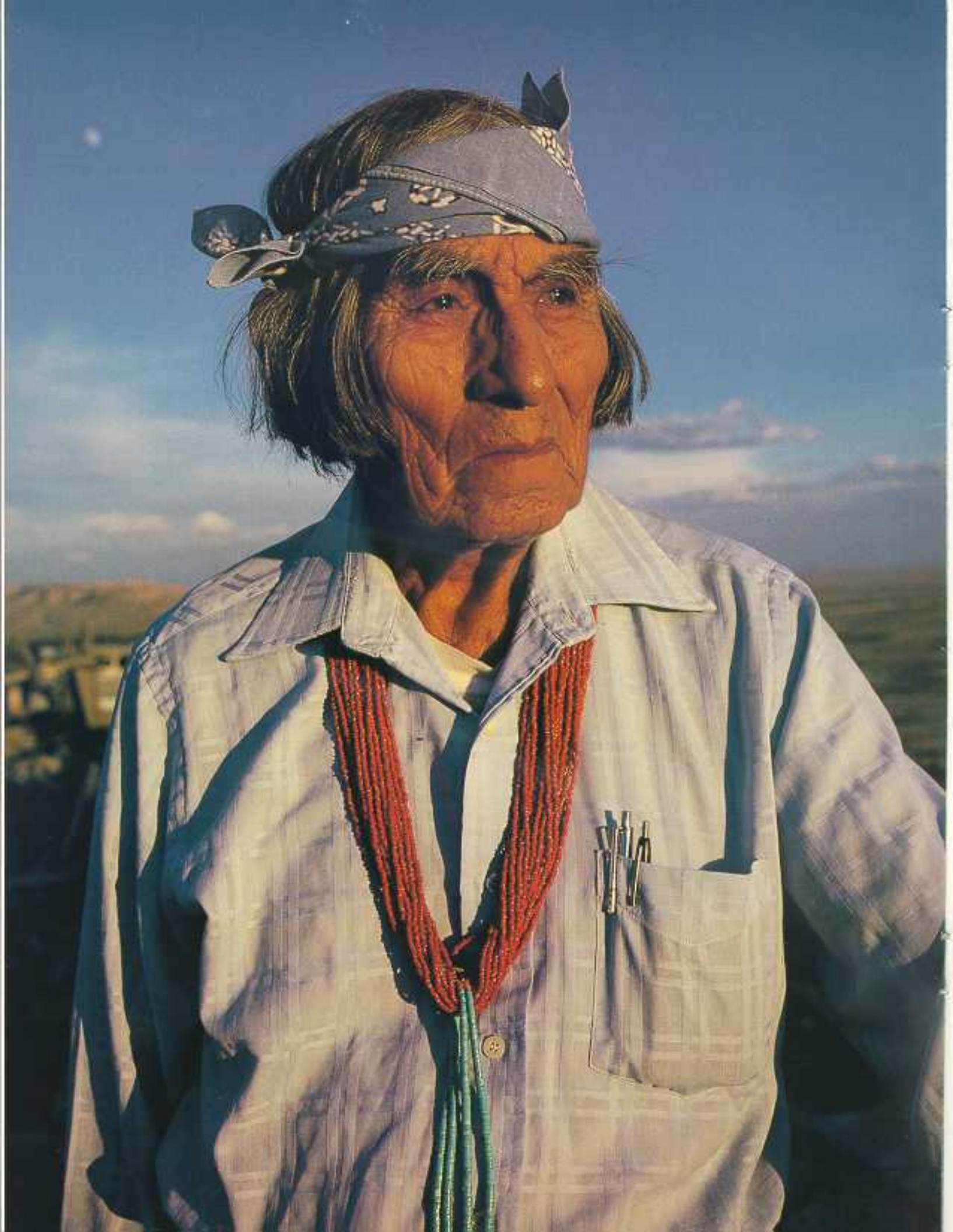
Navajo Tribal Council protesting favored treatment by the council in hiring Navajos on their own reservation

"Given the historical facts, we consider ourselves to be members of the conquering and superior race and you to be members of the vanquished and inferior race. We hold your land and property to be spoils of war, ours by right of conquest. Through the generosity of our people, you have been given a reservation where you may prance and dance as you please, obeying your kings and worshipping your false gods."
Contacted Monday, Vertrees said he had no regrets about sending the letter [that appeared conspicuously in the Salt Lake Tribune, January 17, 1986, and has elicited no comment]

As is well known and often noted, the Treaty of Guadalupe Hildago in 1848 recognized the sovereignty of the Indian Nations. Between 1876 and 1893 trading posts, missions, and schools were established—for profit. It was the Presbyterians and not business or government that built the small hospitals at Keams and Kayenta. One day I picked up an old Navajo woman who had just finished making a blanket at her hogan near the sacred Blue Canyon (since dismantled by Peabody); we went to the trading station at Tuba City, where the man offered her \$5 for her beautiful blanket. I was standing by, witnessed the deal, and instantly offered to buy the blanket. The man was furious—I bought it for \$10 instead of the \$100 he could have got. I gave the old lady another \$5 and we parted happily, though I have felt guilty ever since; later I went back but found the hogan deserted—the Navajos had been driven out.

At the turn of the century, schooling was compulsory for Hopi boys, who were forced to cut their hair and forbidden to speak Hopi. Those elders who protested were labeled the "Hostiles." In 1891 and 1894 the Hostiles were rounded up and arrested by U.S. troops and imprisoned for a time. In 1906 young people were sent to Carlisle Indian School in the East; smaller children were sent to Keams Canyon; and the *kikmongui*, the most influential men, were sent to the Sherman Indian School in California. When Albert B. Fall became secretary of the interior in 1921, a familiar plot was played out. The name of Albert Fall should still ring a bell—Teapot Dome Oil and the scandals of the Harding administration. Standard Oil had discovered the oil on the reservations in 1921, and Fall went all out to take over

Along with various schemes to defraud the Indians of their land, oil, and mineral rights would be injected a plan by Fall's Commissioner of Indian Affairs, Charles H. Burke, to deny the Indian what freedom of religion he still enjoyed. Freedom of Religion, as provided for in the Bill of Rights, rarely, until recent times, was even considered as to applying to religions of the Indians of the United States [and today we still deny them peyote] . . . in fact it was government policy to aid missionaries in converting the Indians to one or another of the Christian denominations [and, incidentally, turn them against the Mormons]. Definite stipulations curtailing Indian freedom of religion were contained in the official Bureau of



Indian Affairs regulations, often referred to as its "Religious-Crimes Code." [Harry C. James, *Pages from Hopi History* (Tucson: University of Arizona Press, 1974), 185]

The suppression of the Sun Dance ceremony at the instance of missionaries and government officials "led to the enactment of a regulation which, although aimed particularly at the Sun Dance, concluded that 'all similar dances and so-called religious ceremonies, shall be considered "Indian offenses" [punishable by] incarceration in the agency prison for a period not exceeding 30 days'" (James, 185-86).

In 1922 the Senate passed the Bursum bill, taking the most valuable agricultural lands of the Pueblo Indians of New Mexico (James, 186) In the following year Commissioner Burke wrote to all Indians:

I feel that something must be done to stop the neglect of stock, crops, gardens, and home interests caused by these dances or by celebrations, pow wows, and gatherings of any kind that take the time of the Indians for many days. No good comes from your "giveaway" custom at dances and it should be stopped. . . You do yourselves and your families great injustice when at dances you give away money and other property, perhaps clothing [had he never heard of Christmas?] I could issue an order against these useless and harmful performances, but I would much rather have you give them up of your own free will. I urge you to hold no gatherings in the months when the seedtime, cultivation, and the harvest need your attention, and at other times can meet for only a short period and have no drugs, intoxicants, or gambling and no dancing that the Superintendent does not approve. If at the end of one year the reports show that you reject this plea then some other course will have to be taken [James, 187; emphasis added]

Need we recall that God commanded Moses to lead the people in the great feasts at the seed time, cultivation, and harvest? Just as he commanded them to waste their time resting on the Sabbath?

Three hundred and seventy formal treaties with the Indians which by the Constitution are the law of the land have nearly all been violated as 90 percent of the land has been taken from them. The Dawes Act of 1887 was held as a liberating gesture, for it allowed individual Indians to own the land privately and, best of all, to sell it, which was the purpose of the whole thing, of course. In 1934 the Indian Reorganization Act set up the tribal councils for a democratic representation. The Indian votes no by not voting at all—after all the yes votes are counted, it is assumed that the rest vote no, since all must vote. Oliver Lefarge explained that to the commission, but they went ahead and installed tribal councils with the tiniest possible number of Indians approving—the no votes did not count.

In 1946 the Indian Claims Act compensated Indians in

money for their lands, but deprived them of all title. The government could claim to be acting in good faith since we sincerely believed that *anything* could be honestly and fairly had if *enough* money was offered for it. The most vicious proviso of the act allowed lawyers to receive 10 percent of the fee that was paid, and an army of lawyers descended from all sides to help the Indians settle the compulsory compensation. The Utes did not want the money—they wanted the land, and they still say so. But Ernest L. Wilkinson was able to make a settlement for 30 million dollars, collected his 10 percent, and came to Provo trailing clouds of glory, and talking loudly of Manifest Destiny.

I got to know him quite well, beginning with our clash at the very first faculty meeting. He had given a degree to a friend in Washington, and some of the faculty protested that degrees should be bestowed or at least approved by the faculties of colleges, such being the immemorial practice of universities. A paper was circulated to that effect, and some people signed it. Wilkinson stormed into that first faculty meeting in a towering rage: This has nothing to do with right or wrong, whether it was moral or immoral is irrelevant. The only question is, was it *legal*? Who would dare question him on a point of law? Who signed this protest? I had signed it, so I stood up—and I was the only one. "Come and see me in my office!" I did, and we became good friends—being a lawyer, he was not at all upset by adversarial confrontation; in fact, he enjoyed it. I was his home teacher at the time, and he started out at the Y by familiarizing himself with the students with a fireside at his house followed by other such firesides, some of which I attended. The theme of his discussion in all of these was, "What is the difference between being dishonest and being shrewd?" He illustrated each time by his own case. When he was in Washington, fresh out of law school, he was looking for a job and so found himself in Senator King's office. The senator was not there, but the secretary allowed him to use the phone for what he said was an urgent call. It was urgent indeed, for he called up the office of Justice Charles Evans Hughes and said, "This is Senator King's office speaking. I would like to recommend a certain young man of high qualifications to work for the justice." And so, he became a clerk to the celebrated Chief Justice Charles Evans Hughes—not dishonest, just shrewd.

At the second faculty meeting we got another shocker. The family that owned the farm on Temple Hill, where President Wilkinson wanted the land for expansion, refused to sell. President Wilkinson would appeal to eminent domain, but it was his introductory remark that rocked us: "I never yet saw a contract I couldn't break," he boasted. I mention this because this has been our ace card in dealing with the Indians through the years—aptness in breaking and ignoring contracts.

When I got out of the Army in 1946, I made a beeline for the Colorado Plateau, lived with a ranch family in Hurricane, and traveled all over the area in roads at that time marked on the maps with such inviting admonitions as "Do not enter without guides," "Carry water," and

"Make inquiries" The impressive thing was the utter desolation into which the Indians had been turned out to starve like scapegoats in the desert. But before long the same vast area was buzzing with activity. Helicopters and specially equipped trucks were everywhere looking for uranium. Promptly a decree from Washington forbade any Hopi to go out of sight of his mesa. That was a hard one to enforce, so it was followed up by another that, in order to operate, one would have to have at least \$10 million capital. So the Hopis were out of it.

What a turnabout! For all those years they had nothing we wanted—having turned them out from any valuables they happened to be sitting on—but now even this desolate place had the very things we wanted most of all. We on the other hand always believed quite sincerely that what they most wanted and needed must surely be our superior knowledge and technology. Technology was all we had to offer after all, but as we have seen they refused that—even vital water pumps for Polacca were turned down, and attempts to electrify Hotevila in 1984 and 1986 were deliberately wrecked—we would say vandalized, which is exactly how they reviewed our activities on the land. The supreme irony is that our technology will not work without their energy, locked up in the coal, the oil, the natural gas, the uranium, and the water, which we are exhausting at a record rate. You are probably familiar with the so-called Hopi-Navajo controversy. I have watched Hopi and Navajo barter in total silence, since neither understood the other's language, and in perfect amity. They would meet and celebrate their powwows together, and everybody had a great time. But that has stopped since the discovery of coal and oil on the sacred Black Mesa—controversy has been stirred up between them, though the Hopis have been perfectly content to let the Navajos graze on the northern areas, as they have for generations. The game has been to push the Navajos off land the Hopis do not use, and so let the Big Boys move into it. I heard Barry Goldwater declare on TV that if the Navajos did not move out of their homes, he, as commander of the Arizona National Guard, would send in his helicopter gunships and drive them out. Our little Vietnam. Finally, the so-called Trilateral Commission of energy and military interests has recommended that the entire Colorado Plateau be set aside as a "National Sacrifice Area," in which the coal, oil, uranium, natural gas, timber, and water could be extracted, the power developed in huge coal-burning plants immune to EPA regulation against pollution, with power lines, railroad lines, and slurry lines crossing the area to take the final product to the great cities of the coast and to animate the million light bulbs, which are the glory of Las Vegas. It was a sacrifice area because there would be no obligation whatever to observe any niceties in extracting the stuff and especially in restoring any of the landscape after it had been ruined. Naturally, in this scheme the Hopis have been considered nothing but a primitive obstruction—hence the generous offer to move them all to the dire inner city of Los Angeles.

The Two Ways:

The ancient doctrine of the Two Ways is a lively one with the Hopis. A thing is either Hopi or Ka-Hopi. When I first went there they spoke of *three ways*: those of the Hopi, the Pahana, and the Momona—the Mormons, who in the early days were manifestly not typically Pahana and who, in fact, were constantly denounced by them to the Indians. But one of the best Indian men I know told me recently that the Indians no longer consider the Mormons their friends. And it is not hard to understand why. There is a bitter joke among the Navajo today: "What is the Peabody Corporation?" Answer, "A bunch of Mormon lawyers getting rich." A list of the 19 principal corporations seeking the wealth of the Colorado Plateau in order of the money invested begins with Pacific Gas and Electric, with the controlling stock owned by the Rothschild family. We go down the list of awesome and familiar names such as the City Bank of New York controlling the Public Service Company of New Mexico; number four in the list is the Arizona Public Service Corporation with its huge coal-burning power plants selling electricity far and wide, the main investor being the LDS Church. We go on to Standard Oil of Ohio controlled by British Petroleum Ltd.; the Gulf Corporation by the Mellon and Hunt families; Utah International by General Electric; Peabody Coal Company by Equitable Life of New York; El Paso Gas, Coal, and Power by the LDS Church; and Shell Oil and Mobile Oil by Bankers Trust of New York, Hess family, John Paul Getty, Manufacturers Hanover Bank, Citibank, J P Morgan.

Is all this for the Indian's own good? When the Navajos asked for an increase in the royalties they were receiving for their coal from \$.15 a ton to \$1.50 a ton, they were roundly denounced, according to the *New York Times*, by Mormon lawyers—for jeopardizing the sanctity of a contract. Had they no shame?

With increasing interest in the Indians and a considerable growing literature on the subject, the Mormons are regularly given a black eye in books and articles. A black eye they would not deserve if they would only pay a little more attention to their scriptures. **There is one common ground, one common need, between us and them, and it is the Book of Mormon. Consider how much it tells us about the present situation.** First of all, we accept the Great Spirit—we do not consider the Indians heathen. King Lamoni mistook the visiting superman Ammon for the Great Spirit, a mistake his descendants have made more than once to their loss. To his servants he said, "I know



**"I have talked with [Tewa Queptewa] often
and bought many Kachina dolls, which he made of strictly native materials
and sold for a dollar and a half apiece, never more or less."**

that it is the Great Spirit; and he has come down at this time to preserve your lives" (Alma 18:4) But Ammon explained that he was not the Great Spirit, but there is a Great Spirit and he is God, the same God Ammon: "Believest thou that there is a God?" Lamoni: "What are you talking about?" Ammon: "Believest thou that there is a Great Spirit?" And he said, "Yea." And Ammon said "*This is God* This Great Spirit is God who created all things " (see Alma 18:2-4, 24-28; emphasis added) Can we not safely say that we believe in that same Great Spirit who is God, just as we believe in Allah when we understand who he is?

In the second place we believe the one thing the Indians are constantly emphasizing, that all things are spiritual To be carnally minded, says the Book of Mormon, is death But to be spiritually minded is eternal life Carnal mindedness embraces those four things which both Nephis declare will destroy any society, namely, seeking for power, gain, popularity, and the lusts of the flesh (1 Nephi 22:23, 3 Nephi 6:15) For particulars see your local *TV Guide*

In the third place is their attitude to nature, which is their livelihood, beautifully summed up in the Doctrine & Covenants:

For, behold, the beasts of the field and the fowls of the air, and that which cometh of the earth, is ordained for the use of man for food and for raiment, and that he might have in abundance

But it is not given that one man should possess that which is above another, wherefore the world lieth in sin

And wo unto man that sheddeth blood or that wasteth flesh and hath no need [D&C 49:19-21]

'This is the creed of the Hopi which so shocks us If you live on a soaring rock 200 yards long and 50 yards wide with a hundred other families, you will find little room to accumulate the things of this world

What we are speaking of is that ideal society described in the Book of Mormon as established by the Lord in person, to succeed and fulfill the Law of Moses—that society we should both emulate

And there were no contentions and disputations among them [the Hopi, as we all know, are the peaceable people and do everything to avoid violence—are we that way?], *and every man did deal justly one with another* [no money, no law courts].

And they had all things in common among them ["if one

has corn, we all have corn"]; *therefore there were not rich and poor, bond and free, but they were all made free, and partakers of the heavenly gift*

And the Lord did prosper them exceedingly in the land; yea, insomuch that they did build cities. [4 Nephi:2-3, 7; emphasis added]

But it wasn't easy—they had to work at it exactly as the Hopis do, meticulously carrying out all the prescribed functions. These are, it is true, mere "forms and observances," but they "point their minds forward," as with the Nephites—did not old Tom in Hotevila instantly recognize and accept the gospel because he was the most thoroughly trained man of the village in his own religion?

And they did not walk any more after the performances and ordinances of the law of Moses; but they did walk after the commandments which they had received from their Lord and their God, continuing in fasting and prayer, and in meeting together oft both to pray and to hear the word of the Lord

And there was no contention among all the people, in all the land [4 Nephi 1: 12-13]

To this day, and against fearful cultural and economic opposition, the Hopi persist in their fasting and their prayers; they meet together unfailingly to pray each week. All the villages come together for ceremonies at one place. There the Baho-feathers are always in evidence, for they are the call to prayer. But the dances are also accompanied by sermons, teaching things of life and death, even as temple sessions of the Latter-day Saints in the early days were followed by dancing and as the great celebrations of Israel as ordered by Moses always required rejoicing and dancing to the sound of the timbrel, the sackbut, and the drum. I have seen such happy ring dances of Jewish elders performed near the Wailing Wall in Jerusalem while members of our LDS tour group expressed the strongest disapproval of such undignified goings-on. In times of upheaval and destruction, the Hopi have survived by coming together on the mountain tops and singing together, uniting their voices in hymns of praise, until the evil passes. Even so, I can still hear my grandmother fervidly singing, "When thy judgments spread destruction, Keep us safe on Zion's hill, Singing praises, Singing praises, Songs of glory unto thee" ("Guide Us, O Thou Great Jehovah," *Hymns*, 1985, no. 83). That goes back to the Jaredites and their sing-ins while crossing the violent ocean.

After 200 years the Nephites relaxed and reverted to the easier program of privatization: "And from that time forth they did have their goods and their substance no more common among them. And they began to be divided into classes" (4 Nephi 1: 25-26). Business was booming, and they built many churches of Christ, "and yet they did deny the more parts of his gospel. And this church did multiply exceedingly because of the power of Satan who did get hold upon their hearts" (vv. 27-28). This is surely an omi-

nous statement. The people claimed to worship Christ, and they did have parts of the gospel, but Satan was their inspiration. We will consider their condition later, but first let us ask whether there is any chance at all of our two cultures merging with their present teachings intact. In D&C 10: 34-52 we read that the gospel is to go to the Lamanites and all nations through the Book of Mormon. "Yea, and this was their (the Nephites') faith—that my gospel might come unto their brethren the Lamanites, and also all that had become Lamanites because of their dissensions" (v. 48). That broad and inclusive term includes a rich ethnic mix, specified in the Book of Mormon as Nephites, Zoramites, Mulekites, and Jaredites, become Lamanites, as well as broad implications of other people, including former inhabitants of the land, making contacts. "They did leave a blessing upon this land in their prayers [how very Indian!].

And now, behold, according to their faith in their prayers [also very Indian, that obsessive faith in prayer itself] will I bring *this part* of my gospel to the knowledge of my people" (vv. 50-52; emphasis added).

Would not that have a disruptive effect on their established traditions? On the contrary, it would strengthen them: "Behold, I do not bring it to destroy that which they *have* received, but to build it up. And for this cause have I said: If this generation [of Lamanites] harden not their hearts, I will establish my church among them" (D&C 10:52-53, emphasis added). But what effect will this have on the members of the restored Church—if the Indians have nothing to lose by joining the Church, do the Church members stand in any danger of contamination? Not at all!

Now I do not say this to destroy my church, but I say this to build up my church;

Therefore, whosoever belongeth to my church need not fear, for such shall inherit the kingdom of heaven

But it is they who do not fear me, neither keep my commandments but build up churches unto themselves to get gain, yea, and all those that do wickedly and build up the kingdom of the devil . . . it is they that I will disturb [D&C 10:54-56; emphasis added]

We need the resources of "backward people" for raw materials as we need their markets for expansion. It is the old imperialist game with energy as the good of first intent. But they don't need anything we have, neither our goods nor our money; all they want is the land. For that matter, our own people are soon glutted with the products of the ever-expanding corporate giants. Nothing amazed me more in the remote backwaters of the Faiyum in Egypt, among villages unchanged for five or six thousand years (and looking and acting very much like Hopi villages, incidentally) in this most stable of all civilizations, than to see the landscape dominated by enormous American billboards, "Come to Marlboro Country!" The Americans won't take any more of the poison stuff, so now it must be forced on the poor backward Egyptians; and so now we, too, must be prodded,

wheedled, shamed, and beguiled into buying more stuff by enormously costly and ingenious sales campaigns; every ten minutes our absorption in the soap or sport or documentary is interrupted with a “message” demanding our instant and undivided attention. No wonder we have lost all capacity for concentration or critical thought and, above all, reflection and meditation, preeminent Indian skills.

In 1540 when Pedro de Tovar came up to Bear Chief, who was standing to greet him on the rise at Old Oraibi, the chief reached out his hand to establish the visitor’s identity by offering him the sacred handclasp, the *nachwach*—was he really the promised White Brother? Naturally, the Spaniard, who had come looking for gold and nothing else, thought he was asking for money and placed a coin in his hand. Have you any signs or tokens? asked the chief. Yes, I have money, replied the visitor. From that moment the Hopis knew he was not the one they were looking for and to this day have never been converted to Christianity. We are most fortunate in possessing Satan’s game plan, which he gave away in a fit of temper in the Garden of Eden. The perennial source of wealth, the treasures of the earth, are to be controlled by the convenient symbols of a money economy, gold and silver; these are used to buy up kings and presidents, armies and navies, popes and priests, everything being controlled by “secret combinations, to get power and gain” (Ether 8:22, 18ff), and the result is a rule of “blood and horror on the earth.” Adam rejected the plan, but Cain bought into it and so became “master of this great secret, that I can murder and get gain” (Moses 5:31)—the great design which at last is nearing fulfillment in our day of converting all living things into marketable commodities (see Jerry Mander, *In the Absence of the Sacred: The Failure of Technology and the Survival of the Indian Nations* [San Francisco: Sierra Club Books, 1991]).

We may be puzzled about the Indian’s insistence in viewing all things, including the earth itself, as alive, though it is a doctrine clearly taught by Joseph Smith, Brigham Young, and other of our prophets. **We say a human is worth more than an owl, but as Black Elk puts it, what do we care for humans? To reverence life is to reverence all life.**

I could see that the Wasichus did not care for each other the way our people did before the nation’s hoop was broken. They would take everything from each other if they could, and so there were some who had more of everything than they could use, while crowds of people had nothing at all and maybe were starving. [Black Elk Speaks, 184]

The first revelation in the Doctrine and Covenants puts us into the picture the Indian sees of us:

Every man walketh in his own way, after the image of his own god, whose image is in the likeness of the world, and whose substance is that of an idol, which waxeth old and shall perish

in Babylon, even Babylon the great, which shall fall. The hour is not yet, but is nigh at hand, when peace shall be taken from the earth, and the devil have power over his own dominion. [D&C 1:16, 35]

And so we get to the ultimate prophecies, which we also share with the Indians.

And I command you that ye shall write these sayings after I am gone

But wo unto the unbelieving of the Gentiles [who] have scattered my people [and trodden them underfoot].

At that day when the Gentiles shall sin against my gospel, and shall be lifted up in the pride of their hearts above all nations, and above all the people of the whole earth, and shall be filled with all manner of lyings, and of deceits, and of mischiefs, and hypocrisy, and murders, and priestcrafts, and whoredoms, and of secret abominations. [Again consult your TV Guide.] [3 Nephi 16: 4, 8, 10; emphasis added]

Note that lying comes first in the list, a judgment that few will dispute today (see cover of *Time*, 5 October 1992).

And if they shall do all those things, and shall reject the fulness of my gospel, I will bring the fulness of my gospel from among them

And then will I remember my covenant which I have made unto my people and I will bring my gospel unto them

And the Gentiles shall not have power over you; and ye shall come unto the knowledge of the fulness of my gospel

But if the Gentiles will repent and return unto me, behold they shall be numbered among my people, O house of Israel. And I will not suffer my people [to] tread them down. [3 Nephi 16:10–14]

There is an ominous note here which we cannot pursue.

The promise is repeated in the last speech to the Nephites: “Verily, verily, I say unto you, thus hath the Father commanded me—that I should give unto this people this land for their inheritance” (3 Nephi 16:16).

And it shall come to pass that all lyings, and deceivings, and envyings, and strifes, and priestcrafts, and whoredoms, shall be done away

But if they will repent I will establish my church among them, and they shall come in unto the covenant and be numbered among this the remnant of Jacob, unto whom I have given this land for their inheritance

And they shall assist my people, the remnant of Jacob, and also as many of the house of Israel as shall come, that they may build a city, which shall be called the New Jerusalem. [3 Nephi 21:19, 22–23]

Throughout these explicit prophecies it is the Gentiles who join “the Lamanites and also all that [have] become Lamanites,” (D&C 10:48) not the other way around. If we are to be saved we must move in their direction.



ON BEING WISE STEWARDS OF THE

SACRED LAND

Larry Echohawk

AS I TRAVEL the length and breadth of Idaho and this country, I find today an interest in and fascination with Native Americans and their culture. Dances with Wolves was more than just a rejection of the Saturday afternoon John Wayne good-guy/bad-guy, cavalry-versus-the-Indians movie. It was an awakening experience, taking Americans beyond the stereotypes of a mythical Hiawatha, or a grieving Chief Joseph, or a scowling Sitting Bull, or an Indian with tears trickling down his cheek at the sight of garbage lying beside the exhaust-polluted highway. It was an appeal to the American people to know their own roots. Because no matter which continent your grandparents came from, if you are American, you are part Indian in your roots. As D. H. Lawrence said, "The American Indian will never again control the continent; but he will forever haunt it."

Illustration by
Robert Neubecker

For Native Americans the earth is sacred. The Pawnee account of creation is of an ancient people emerging from darkness into a lighted world—a holy place. It is less an explanation of the Earth's beginnings than an expression of the constant creative outpouring of the Great Spirit. Creation is not what happened thousands or millions of years ago; it is what is happening right here and now in this holy place.

The body simply returned to the earth, contributing to the rebirth of the land and the continuation of life. That is why, in Nevada today, Indian tribes refuse to accept millions of dollars awaiting them in the federal treasury if they will cede the land of their ancestors. As a Crow chief said in 1912, "The land as it is, is my blood and my death. It is consecrated. And I do not want to give up my portion of it."

No. The tears shed on that trail from the Platte to the Cimarron were shed for loss of a homeland, loss of the Great Herd (slaughtered for their tongues and hides), loss of a way of life lived in harmony with the land.

Sadly, the white American's relation to the land has most often been summed up in two words: Manifest Destiny—to tame the wild lands from the Atlantic to the Pacific Ocean. To the

Indians, those lands weren't "wild" but bountiful: the seed corn, the Great Herd, all the plants and animals—an outpouring of the creativity and generosity of the Great Spirit. Chief Luther Standing Bear of the Sioux said it best:

WHEN IT BECAME IMPORTANT TO DESTROY THE TRIBES, THE GOVERNMENT KNEW, INSTINCTIVELY, THAT THE KEY WAS TO BREAK EACH TRIBE'S TIE TO THE EARTH, TO DESTROY ITS ROOTEDNESS IN THE LAND AND THE ANIMALS.

We did not think of the great open plains,

the beautiful rolling hills and winding streams with tangled growth as "wild." Only to the white man was nature a "wilderness" and only to him was the land "infested" with "wild" animals and "savage people."

To us, it was tame. Earth was bountiful and we were surrounded with the blessings of the Great Mystery. When the very animals of the forest and the fields began fleeing from the approach of the settlers, then it was that for us the "Wild West" began.

The center of each tribe's communal existence is a sacred mountain, river, plateau, or valley. Diversity springs from each tribe's relation to its own land and the animals that inhabit it. The Hopi identity revolves around the "rain dance" of the arid Arizona deserts. The Plains Indians find the Great Spirit in the "seed of their corn" and in the buffalo, while the Coastal Indians of the Northwest find it in the salmon.

The tribal community is not just the members themselves but all these interdependent "species," or "peoples." You cannot become a tribal member by subscribing to a creed. As shown in *Dances with Wolves*, you became a tribal member only by living with the tribe and adopting its own particular harmony with nature. This interdependence of the species on one another and on the earth culminates in the tribal member's experience of death. Death, to the Indian, was not to be feared or fought. Each composed a death song, unique to that person; death was met, singing the song, as a final affirmation of the individual's existence and personal integrity. At death, the Indian rejoined the earth, with no casket as protection against nature, and no headstone to mark the

When it became important to destroy the tribes, the government knew, instinctively, that the key was to break each tribe's tie to the earth, to destroy its rootedness in the land and the animals. The process began with confinement to a reservation. Between 1833 and 1856, the Pawnees were forced to cede some 23 million acres of their aboriginal lands, leaving them with just one one-hundredth of what had been theirs. They were kept from journeying at will over those lands to hunt; from visiting their ancestral grave sites; from seeking visions on the high grassy hills; from pursuing enemies in response to attack; from taking the Sacred Pipe to visit and "adopt" members of other tribes.

When the Pawnee tribe was finally uprooted in the winter of 1874 and relocated from Nebraska to "Indian territory" in present-day Oklahoma, the tribe, like so many others before it, had its own "Trail of Tears." Those tears came not from the freezing wind and bitter cold; winter buffalo hunts had accustomed them to that. Nor did they come from the lives lost to Sioux attacks. The more settled Pawnee had already known death at the hands of the nomadic Sioux.

Today, the "Wild West" is in danger of becoming an amusement park replica of its former self. Like the salmon, anything truly wild is today approaching extinction.

The American Indian was the continent's first endangered species. From 1388 to 1876, the Pawnee nation dwindled from 11,000 members to fewer than 2,500. Today, as then, the losses most frequently came not from direct slaughter, but from destruction of life-sustaining habitat.

The exception, of course, was the buffalo, brought to the verge of extinction by direct slaughter: from 1872 to 1874, more than 7 million buffalo were killed by white hunters for their hides,

the carcasses left to rot. With the Great Herd gone, the tribes could not survive; by the turn of the century, after relocation to "Indian territory," the Pawnees numbered fewer than 700.

We live today in a throw-away society. We talk about recycling and run pilot programs to re-use several percent of our enormous waste. The American Indian knew there was no "away" to which things could be thrown. The buffalo hunters who left those carcasses to rot were incomprehensible—and sacrilegious—to the Indian, who wasted nothing. Buffalo meat sustained life; the hide served as covering for the lodge, sacks for storage and carrying, bed coverings, clothing, saddles, lariats, and halters; the sinew made strings for bows, twine, and thread; the hooves were used for mallets; bones as scrapers and chisels; ribs as the warriors' bows. Even the animals' bladders became water bags on the annual treks, and their fat a base for mixing paint.

In 1965 Stewart Udall asked: "Is a society a success if it creates conditions that impair its finest minds and make a wasteland of its finest landscapes? What does material abundance avail if we create an environment in which our highest and most specifically human attributes cannot be fulfilled?" He summed up the challenge of our times:

History tells us that earlier civilizations have declined because they did not learn to live in harmony with the land. Our successes in space and our triumphs of technology hold a hidden danger: as modern man increasingly abrogates to himself dominion over the physical environment, there is risk that his false pride will cause him to take the resources of the earth for granted—and to lose all reverence for the land.

America today stands poised on a pinnacle of wealth and power, yet we live in a

land of vanishing beauty, of increasing ugliness, of shrinking open space, and of an over-all environment that is diminished daily by pollution and noise and blight.

This, in brief, is the quiet conservation crisis.

I have spoken to you today of the Native American culture with which I grew up. But I am also an American, an Idahoan, and a realist, and I understand full well that the hands of time do not turn in reverse. Nor would I want them to. But I believe that in the Native American's oneness with nature are lessons for all of us.

Recently, I had occasion again to ponder one of those lessons. When the state of Idaho won its suit against a company that dumped tons of toxic

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chemicals into the Little Salmon River, the judge in the case did something new. He recognized not only the commercial and recreational value of the lost fish, but their "existence value" as well. Those fish have value, he said, simply because they are there.

We've all had that feeling, that deep sense of oneness that, once experienced, stays with us forever. And we know that whether we ever fish, or even watch salmon spawn, our lives are richer simply because they're there, making their way a thousand miles to the ocean and back in a journey as ancient as the land itself. Likewise, we may never backpack into the wilder-

ness, but it enriches our spirit and makes us more fully human just to have it there—to know that mountains that existed thousands of years before we did will exist thousands of years after we're gone.

Indeed, all the most powerful images of Idaho—a hawk riding thermals above the Snake River Canyon, jagged peaks reaching for the sky, a river rushing to the sea a thousand miles away—are tributes to the power and beauty of nature and the blessings its creatures enjoy.

We in Idaho live close to nature—so close we're in danger of taking it for granted. But history has taught us that species can be destroyed, mountains can be leveled, forests can be clear-cut. We humans have the power to destroy nature, and it is our fundamental responsibility—to ourselves, to our children, and to the earth itself—to see that we exercise that power with extreme care.


No matter what some would have us believe, we don't need to trade one value off against another. We don't need to pollute our rivers, clear-cut our forests, destroy our heritage to have jobs. As Cecil Andrus once put it so beautifully: "We must be able to make a living, but it must be a living worth making."

Now, as we confront the complex issues of the '90s, let us stop and remember that circling hawk, that towering mountain, that incredible salmon. And as we seek to find the elusive balance between our pocketbooks and our spirits, let us remember the words of that Crow chief: "The land as it is, is my blood and my dead. It is consecrated."

Let us be wise stewards of this consecrated land.

Larry Echohawk is the attorney general of Idaho and a member of the Law School's Board of Visitors. This address was given at BYU's September 1991 conference, "The Twenty-First-Century Native American: A Futuristic Symposium."





H Y S T E R I A

A N D T H E

B I L L O F

R I G H T S

Judge Monroe McKay

*This address was given October 9, 1992,
at the Bill of Rights Symposium*

M

Y COLLEAGUES WOULD FEEL
INSECURE IF I DIDN'T TELL A
STORY IT'S A RITUAL INTRODUC-

tion to anything I have to say Once Clarence Darrow was asked, "Mr. Darrow, did you ever get into trouble because you were misunderstood?" And he said, "Oh my, yes, but a heck of a lot less than if I had been understood."

Those who took what they laughably called classes from me will tell you that no matter what the label of the course was, the substance, if any, was always the same. So those of you who have heard me before might recognize only a difference of emphasis rather than a change in the underlying message.

Contrary to popular belief, I always write out for myself a conclusion of what I hope to achieve. But I've taught in Mormon Sunday School long enough to know that if there's a trigger that pulls down a curtain over the brain, it's to announce in advance your objective. I have an objective, but, to bedevil you, I will not announce it.

Illustrations by Brant Day

By good fortune, not of my own creating, what they asked me to speak about fits perfectly into my fundamental thesis: the Bill of Rights has never enjoyed real, widespread support, though verbally it is almost adored. The reason is perfectly understandable if not perfectly justifiable; the Bill of Rights has no practical consequences in society except in reprehensible, disgusting, frightening circumstances.

When I grew up there were three kinds of sermons in the Mormon Church: pay your tithing, live the Word of Wisdom, and they're coming to get us. That is the entrenched minority mentality with which I grew up: nobody will protect us and on the

strategic measures to solve caseload concerns. We began to do what we all want but don't agree with when it's done, and that is to implement what we learned on M.A.S.H. as triage. We have to determine that this patient is going to die, so let him die; this patient hurts like heck, but nothing is going to happen in the next two hours, so let him lie here and scream; this patient we have a very good chance to save if we take care of him right now. That's the same problem we run into when we decide certain cases deliberately rather than accidentally across the board. Thus there's a body of cases that can be quickly disposed of with minimal risk of serious error

slot, drop-it-in-the-box basis proposed to dismiss it as frivolous. But I was persuaded that it wasn't frivolous, though two colleagues considered it so. They felt it didn't even require an answer from the defendants.

I wrote a dissent from the order that dismissed the case. Because of procedural circumstances, the dissent did not get filed. I invoked a court rule that says no case may be ordered or submitted on the briefs unless by unanimous vote of all three panel members. I proposed in my dissent that we appoint counsel and have it argued to a regular panel. They didn't agree, so it was sent back into the inventory. I was out of the case.

When I grew up there were three kinds of sermons in the Mormon Church:

slightest pretext they will do anything to destroy, inconvenience, or upset us. It comes to me in my adult life as an incomprehensible shock that in my own community the response to the Bill of Rights seems to flow from an internal majoritarian orientation.

I REPEAT MY OPENING THESIS: THE BILL OF RIGHTS HAS NEVER ENJOYED WIDESPREAD SUPPORT. I WISH TO USE THE INDIAN SWEAT-LODGE CASE TO ILLUSTRATE MY point. I like this case because it arises in a unique circumstance. We're talking about liberties—protected liberties—but in a prison context. We justifiably have determined to restrict the liberty, within the constraints of the Constitution, of those who are confined in those premises.

What happened in the sweat-lodge case? In an Oklahoma State prison, a Native American prisoner brought an action because they had denied him his medicine bags. Officials were also going to force him to cut his hair, and they would not permit him or any Native American prisoners to enter a sweat lodge.

To understand the rest of the story, I must give some procedural background. Our court has undertaken

Any of you who believe in zero-based anything don't belong in this world. If you had the Supreme Court working all year on one case, every fourth year there would be a clear-cut mistake after all that effort. But we're talking now about minimizing the trouble. One way we do that is to send certain cases to a screening panel. One judge looks at it without consultation and sends a quick proposed solution to the three other judges on the panel. They read it and typically agree with the choice. So only a few minutes are taken. I participate as a voting member on over 600 cases a year. How would you like your more serious matters to be decided by someone who has to divide their attention to your work with 599 other people in 365 days? Those are the problems with which we are confronted in the judicial system.

The sweat-lodge case came to a screening panel for dismissal. The trial court said the prisoner was not entitled to any relief. Though a prisoner with limited education wrote the petition, he still spelled out a violation of the First Amendment. He even had the good wit to cite the Fourteenth Amendment. The judge adopted the magistrate's report and threw the case out.

It came to a panel that I was on. The judge who got it on a random-

Unfortunately for my colleagues, it came back through some procedural quirk to another panel—and guess who showed up on that panel? At that stage we couldn't agree on how to dispose of it. We did agree that it was a serious case, and since it was a screen case, we had the option of sending it to the oral-argument calendar. The oral-argument panel appointed counsel to argue the case. One judge, who originally considered the case frivolous, joined in a decision saying it was a serious allegation of a constitutional violation. It was remanded to the trial court for further proceedings—appointment of counsel, opportunity to develop the factual record, and so on.

The original judges were troubled because the word "construct" was attached to "sweat lodge," and in their white, male, affluent minds they imagined a vast expenditure of state funds to build a chapel (a chapel which, of course, was built for our Christian friends in prison). Had the judges known more about this tiny, little, strange group of Americans (the original ones I might add), they would have treated more sympathetically the arguments I introduced originally.

A sweat lodge is a little place out in

an open courtyard where you turn prisoners loose (especially if they get into trouble in the cells) There's a lot of dirt out there, so you scoop out a little hole and heat up some rocks and toss them in Then you bend three or four sticks that you've pulled down from any tree around, just enough to bend them over and throw a piece of canvas or a couple blankets over the top Then you toss a little water on the rocks Now that's the "construction" that is necessary The problem is that in the very setting in which the Bill of Rights has its validity—the protection of the obnoxious, the strange, and the unusual—it gets a negative response It seems to me that

TO FURTHER ILLUSTRATE, LET'S LOOK AT THE SUPREME COURT THE COURT HAS VIEWED SKEPTICALLY JEWISH PEOPLE WHO WANT TO wear odd articles of clothing in the Army The Court has viewed skeptically Muslims claiming to be restrained by a prison rule that says you don't come back into the prison during work detail until the work is over In these cases, the Supreme Court is saying, "Yes, you've got rights, but society can't be expected to adjust to meet everybody's claim" Why did the Supreme Court glibly toss that off instead of going right through the roof? The system has already accommodated the Court and their fellows;

were not Christian One more example. I got a letter from the dean of one of the United States' most distinguished divinity schools in support of an applicant wanting to clerk in my chambers Thinking he was helping, he wrote, "Now this is a scholarly man, a dispassionate man, a brilliantly educated man. Though he is a Mormon, yet he proved himself capable of understanding Christian principles"

If you're not threatened by now, let me give you a dictum you ignore at your peril. You do not get to decide, when the power of government is invoked, who you are If you reject that, you do it at your peril and in

pay your tithing, live the Word of Wisdom, and they're coming to get us.

this response is the flip side of the whole notion of the Bill of Rights

Now, let me tell you the response we got from the state: It's a fire hazard. (I didn't have to turn to the record for an answer—they light Catholic candles in the chapel where Catholic prisoners worship at state expense) Well, it's a safety hazard (Never mind that every prison in the state of Nebraska has a sweat lodge Never mind that on my desk was an article and a series of pictures of a member of the Utah Governor's personal staff entering the sweat lodge at the Utah prison) The problem here was equal protection in a First Amendment setting

The final argument on the sweat lodge (which amused me because I happened to have on my desk a double-bunking case under the Eighth Amendment) was that letting these Native Americans go unsupervised into this little thing—four feet each way with just a little dome—represented a security risk I thought there was a little incongruity in that argument In the end the court affirmed the sweat lodge as central to the Native American's religion and concluded that refusing it violated the prisoner's First Amendment rights

we have Christian chapels, and we have a Christian workday schedule

What if we get a request from somebody who is offended by that? What if, for instance, we get a Jewish majority state? Guess what the work schedule is going to be? Now I know you're not threatened personally by that That's what troubles me in my own community—we are not threatened by that analogy Even with all the Jewish people in the United States, we're sure they'll never get into one state in large enough numbers to control it Even if they did, we could always move to Utah Let me remind you of three little incidents that should disturb you in your majoritarian mentality when examining the Bill of Rights

A certain well-known Mormon led a successful political movement in a nearby state by force of his personality When the time came for his party's convention, another member of the group suggested that they needed somebody other than a Mormon to lead the movement He was offended by that and asked, "Is there something we disagree on?" The response was, "No, but we need a Christian to lead our movement"

In North Carolina, a county organization threw the Mormon softball team out of the league because they

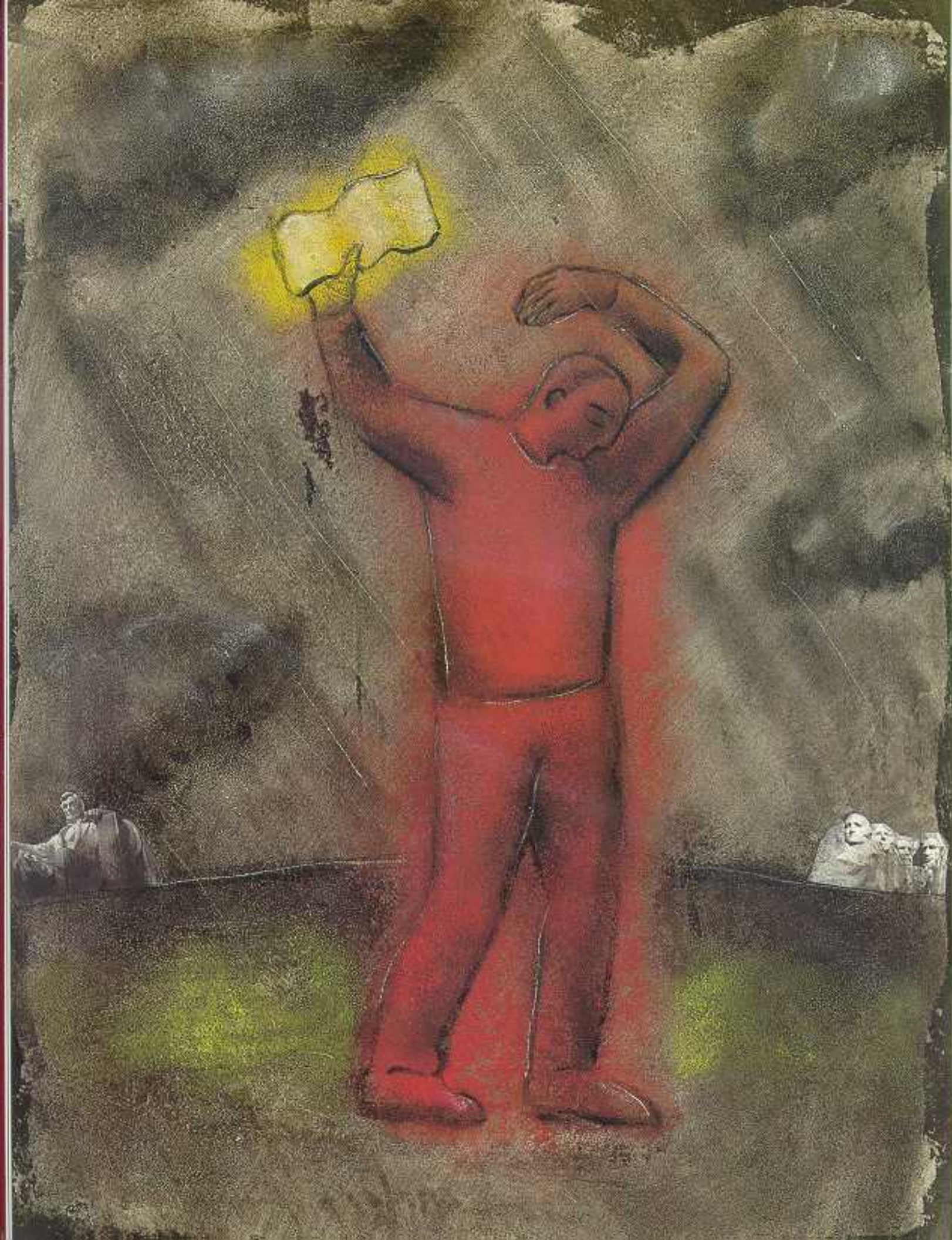
ignorance of your own history and in ignorance of the movements that are afoot in today's society

I opened by saying the Bill of Rights by design never is invoked in circumstances when anyone with a majoritarian mentality can gag it down. So the founders selected a tiny handful of matters they carved out as none of the majority's business Those who were then in the majority recognized that there are no true majorities—only uneasy shifting alliances Any member of today's majority may be tomorrow's hated minority

Look at the flag-burning case This may surprise you: I'm personally not troubled if we wanted to write a statute that outlaws flag desecration. But let me tell you about the problems you'll have, however, if you set about to.

Pass an act that says you shall not desecrate the flag—it will be a crime. Suppose I put on a T-shirt with the American Flag on it—the stars under my sweaty right arm and the end of the bars under my sweaty left arm, and "I Love America" and the Pledge of Allegiance below it. Would you arrest me? Your instinct is no—it might be covered by the statute but your instinct is not to arrest me

How about the Fourth of July pic-



nic? Let's talk about those flag replications that we hang around the table so we can dribble our gravy on them. Somebody might be so patriotic that they leave their flag out in the storm and lightning strikes it and burns it up. We know whom we'll arrest—the person who does what the person in the flag-burning case did. Guess what distinguishes the flag-burning case from these scenarios? It's the message contained in the conduct.

I'd like to challenge you students of statutory construction to write a bill that legitimately exempts everything you would protect in dealing with the flag: a bill that would stop the conduct in the flag-burning case but not make criminal all the things that you don't want to make criminal. Do all this without saying explicitly that we intend to prosecute a flag burner wishing to send a negative message about the country or the flag—a classic First Amendment definition.

I sometimes get a little lonely. My colleagues think I enjoy being a crank and a crackpot. But what I'm telling you today has been the central burden of my active life. It has been the central burden of my life since I went to my first sacrament meeting and stayed awake and listened.

WE HAD IN MY DAY, AS YOU REMEMBER, THREE SUBJECTS: THE WORD OF WISDOM, PAY YOUR TITHING, AND THEY'RE coming to get us. Living in my day were children of those who left the blood of their feet on the Mississippi ice as they were driven out of Illinois. Let me describe us (the Mormons) from the view of people like Governor Ford, who had the power to decide with gunpoint who we were.

We were blasphemers. We still are. That is why the dean from a most distinguished divinity school in the United States would write to me, "Though he is a Mormon, yet he

proved himself capable of understanding Christian principles" (That is the thesis of the film *The Godmakers*.) We were adulterers. We were enslavers. Unless you are good students of history, you will not know the principal cliché of Lincoln's campaign. It wasn't freedom for the slaves; it was save the union. But the popular campaign

there are more effective methods of achieving the same goal.

If you think hysteria won't arise again, you can't yet be 30 years of age. It happens in society so quickly that we wonder where it came from. Having been the object of it a time or two in my life, maybe I'm oversensitive and I probably exaggerate. The only way the

The only way the Bill of Rights has any chance of ameliorating unconstitutional hysteria is if generously enforcing it becomes a habit of mind and emotion for our principal opinion makers.

talked about those twin relics of barbarism—slavery and polygamy.

I recommend you read *Reynolds v United States*, written by the United States Supreme Court. It is still out there and still being cited as the law of this country. It includes a discussion of the conduct of most of your forebears, comparing them to the East Indians who burned the living widows on the funeral pyres of their husbands. *Reynolds* is still the law of the United States. When the 52 percent majority decides that its interest lies more in power than in the individual, some of you might be challenged and even persecuted because the written words of your scriptures still contain the doctrines for which your forbears were persecuted.

I hope I've bedeviled you enough. I hope that you'll be troubled by this proposition because there is this problem: The time that the Bill of Rights is needed most is in times of hysteria, which is when we are most likely to offend it most egregiously. I cite the abuses of the McCarthy era. I cite the present-day hysteria over the illegal drugs that are used in our society. We are so hysterical that we are willing to insist that the Constitution yield rather than examining whether

Bill of Rights has any chance of ameliorating unconstitutional hysteria (since we're entitled to be hysterical as Americans as long as we don't do it in violation of the Constitution) is if generously enforcing it becomes a habit of mind and emotion for our principal opinion makers.

I made my talk personal to those here today so that in your humble moments you might say, "Oh boy, are we in trouble." You are the opinion makers who should be busy embedding these principles in the habits of our enforcement institutions, in our private dialogues, and in our political exchanges. If you and enough people do, there is a modest chance that the next time hysteria breaks out, and you're the object of that hysteria, the courts—the institutions that give life to the Constitution when it's needed in a practical situation—will be amenable to making it a living document rather than an icon. I leave you now with my proposition: when the power of government is invoked against individuals in a way that arguably implicates a right enumerated in the Bill of Rights, we should instinctively be inclined to give the Bill of Rights a broad and generous application.

P O R T R A I T S

Photography by John Snyder

JAMES H. BACKMAN

RUNNING A NEW RACE

*A*fter 19 years of teaching property law, Professor James H. Backman recently changed direction. Since October he has been working exclusively to design, supervise, and promote student externships, including a new program called LawHelp. And though Professor Backman has always enjoyed teaching property law, he says of his new position, "I don't think there's ever been anything that's caught my fancy quite so much. It's been a thrilling experience for me. We've come up with a very worthwhile set of projects."

LawHelp is a pro bono partnership between the Law School, the Central Utah

Bar Association, and Utah Legal Services—Provo Office. Attorneys from the Central Utah Bar Association and Utah Legal Services participate by supervising BYU law students in each of four LawHelp projects: the Tuesday Night Bar, the Domestic Relations Project, the Volunteer Immigration Project (VIP), and the Mediation Project (see "Students, Alumni Team Up," p. 29).

Professor Backman became involved with clinical work in 1990, when he was appointed a member of the Utah Legal Services board of directors. In 1991 he served on a faculty task force appointed to study how the Law School could get its students and alumni involved in community service. One of the committee's recommendations was that a full-time faculty member be appointed to create pro bono opportunities for Law School students. Jim got the job.

"The Tuesday Night Bar is such a real, dynamic operation," he says of the largest LawHelp project "It reminds me of the emergency room—the hub of hospital activity, where doctors and nurses and patients and family all mingle together to talk about what's going on. It's such a practical, learn-by-experience program."

Jim likes to think that his assignment as director of LawHelp comes at an appropriate point in his career. Speaking of his 1991–92 Professor of the Year Award, Professor Backman smilingly says, "I've graduated now. I can move on to other things." Seriously, though, it was partly last year's class that inspired him to seek new approaches to teaching—approaches that the LawHelp projects fulfill. Last year's class had 37 percent women; before the largest percentage of women had been 27 percent. With so many women and many minorities, Professor Backman says class interaction was markedly different. "There was such a public interest evident in the class, such a service orientation, such a commitment. It was much more activist than I had seen before, less interested in making money. It's not just the women and minorities who have that attitude. It has spread throughout."

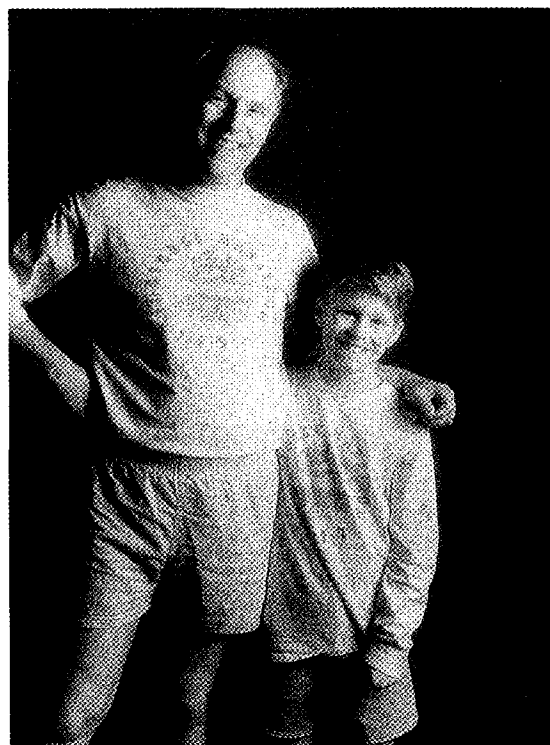
"LawHelp is so satisfying," remarks Jim, "because it makes sense. Think of doctors. What would doctors be if their only training were in the classroom? And yet law schools, until our time, had hardly started any clinical programs."

"Our program's community-based structure gives it an advantage over the small in-house clinics at other law schools. But it fits us. We have a very service-based community, but within a structure. Once the structure becomes available, everyone is willing to step forward. This attitude has provided us with enough professors and attorneys to potentially give the experience to every student. At other law schools, manpower limits pro bono opportunities to a small handful of students per semester."

Jim feels strongly about LawHelp's value for clients. "Though many matters we handle seem insignificant, for the clients this is the first time they've had anyone able to even listen. The results aren't terribly dramatic, but some of the cases are meaningful for those who have finally been able to get out of a very bad home or marriage. They haven't done it before because they haven't

known the first place to start. Finally they've reached the end and come in to find help."

"In one immigration case a Cambodian was threatened with deportation. The student assigned to him really had to work hard because the client was so uncommunicative. He didn't have English skills enough to help much, and he didn't seem to understand our systems. The student, surprisingly, won the case, and the fellow was able to stay. That kind of result is really satisfying."



Professor Backman and his wife, Carolyn, *James H. Backman and his son Joe* have five sons and one daughter. One son just returned from the Czechoslovakia Prague Mission, and another is currently serving in Dresden, Germany.

Jim also enjoys running. For the past two years he has run the St. George marathon with his youngest son Joe, who was 10 years old the first time and 11 the second, when he finished half an hour before his dad. This year Joe is going to try to get some of his older brothers to run, too.

W. COLE DURHAM, JR.

THE PHILOSOPHICAL LIFE

Professor W Cole Durham, Jr is a philosopher at heart. An undergraduate philosophy major, he says of his law career, "My students have long noticed that I've simply taken a devious route to exploring philosophical issues. And in the deepest sense I do see my work as exploring critical legal issues from a philosophical perspective. I think applying a philosophical standpoint gives depth to any discipline."



W Cole Durham, Jr

As a member of the International Academy for Freedom of Religion and Belief, Professor Durham recently participated in an intensive two-day set of meetings with Russian scholars to discuss religious liberty issues. The academy is a group of religious liberty experts from many countries. In response to a memorandum on a pending Russian draft law on religious liberty that Professor Durham helped write, the academy was invited to consult with the Expert and Consultative Council to the Committee on Freedom of Conscience, Religion, Mercy, and Charity of the Russian Parliament. A Russian parliamentary committee parallels U.S.

Congress legislative committees; the Expert and Consultative Council was created last November as an official advisory body to the Committee on Freedom of Conscience, Religion, Mercy, and Charity. It has representatives from many religious groups and also academic and other experts on religious affairs. Professor Durham's team had scholars from Italy, Spain, Germany, and the United States, and from a variety of religious denominations and academic backgrounds.

In Russia Professor Durham and the academy examined international human rights norms in the religious liberty area as they apply to legislation in a country like Russia. Professor Durham reports that in general in the world there is great consensus that there should be strong protections for religious liberty.

The academy talked to Russians about practical problems they are facing and provided them with information on how other countries deal with those problems while maintaining consistency with international human rights norms. Another of the academy's goals is to establish strong connections with Russian religious liberty experts. It also hopes to help move legislation toward a more protective stance for religious minorities. The conference focused on practical issues such as religion in education and how to set up the corporations or the legal entities through which churches conduct their affairs.

Cole has also been advising regimes in East Central Europe on not-for-profit-corporation law.

Last summer he and BYU Professor John Welch helped organize a team to advise Bulgarian foundations on the subject. Obviously, he says, this interest relates to his work in Russia.

In addition, for the past two summers Professor Durham has been involved in a program carried out in Budapest under the auspices of Columbia University called Raising Rights Consciousness. In this program Cole and other legal experts train young legal professionals from Eastern Bloc countries in a curriculum designed to give them an intensive immersion in western theoretical approaches to law. "In many ways," says Cole,

“it is much more jurisprudential than many technical training programs” The program immerses its participants in something like the American law school experience—not because there is anything defective about civilian training, but because, according to Professor Durham, civilians often do not sense the depth and power of the theory in the common law world “Civilians tend to think of common lawyers as pragmatic problem solvers that are not necessarily theoretically and philosophically sophisticated about the issues involved, which is certainly a far cry from reality,” says Cole

Professor Durham’s favorite part of his Eastern European experience is the life-changing effect of Western programs on participants he has taught “The Raising Rights Consciousness program really had a deep impact on the way people thought about law. It was very impressive working with participants So often when we talk to our BYU students they have many interests and concerns, but their primary objective is preparing to get hired by a law firm In East Central Europe, by contrast, students are concerned about making a new world”

When Professor Durham is not helping former communist countries establish new orders, he is busy working on a few other projects on the home front As a board member of the Church/State Center at DePaul University, he has been working on a major treatise on legal structures that churches can use to organize their affairs in the United States Cole is also the principal draftsman of the proposed religious liberty amendment to the Utah constitution In addition, Cole and several other authors are finalizing a contract for a casebook on comparative constitutional law

Cole’s “outside” interests are teaching gospel doctrine in his home ward, playing with computer toys, skiing (along with Nordic Tracking, if he’s feeling especially ambitious), and doing extracurricular projects with fellow law professors. For instance, Cole has been involved with Professor Larry Farmer in developing automated jury instructions for the federal and many state systems “That’s clearly a domestic law project,” says Cole,

“but it has been very interesting” Obviously, Cole has an incurable love for books—of any kind—to which any casual visitor to his book-crammed office can attest

Cole and his wife, Louise, have four children Their oldest son is serving a mission in Austria, one of the places he visited with his dad in 1990 after the Berlin wall came down Their second child is also providing Cole with some exciting experiences, as he helps her learn to drive. Louise teaches English at Timpview High School

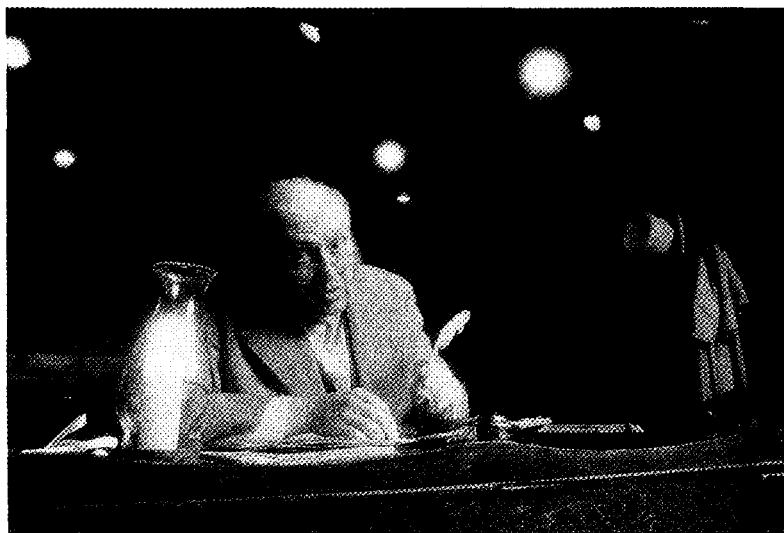
RICHARD G. WILKINS

NOT A SCROOGE

*I*t’s not my business [to help those who are worse off than myself],” says Ebenezer Scrooge of Dickens’ *A Christmas Carol* “It’s enough for a man to understand his own business, and not to interfere with other people’s Mine occupies me constantly” Professor Richard G Wilkins, who has played Scrooge in Hale Center Theater’s Christmas production for the past eight years, disagrees with these sentiments. Although teaching classes, arguing abortion policy, and serving on a federal reading committee take much of his time, he strongly believes in “showing love and concern for our fellow travelers here on earth”

For the past three years Professor Wilkins’ main work has centered on abortion policy,

*Richard G Wilkins
as Scrooge*



though not of his own choosing, he says In 1982, while Richard was working for the Justice Department, the United States filed with the Supreme Court the first brief urging a retreat from *Roe v. Wade*. According to Professor Wilkins, only two people in the Justice Department were then willing to write that brief: himself and Rex Lee. The two collaborated in writing the brief in *Akron v. Akron Center for Reproductive Health*. Later Richard helped Professor Lynn Wardle write an amicus brief in *Webster v. Reproductive Health Services*.

After these activities Professor Wilkins was prepared for his next assignment: special counsel to Governor Bangerter on abortion policy. After Professor Wilkins advised Governor Bangerter on proposed abortion legislation that he felt had serious legal difficulties, Governor Andrus of Idaho asked his opinion on similar Idaho legislation. When Richard concluded that Idaho's legislation also had potential legal problems, Andrus vetoed the legislation, claiming that Professor Wilkins had advised him to do so.

Following Andrus' veto, Professor Wilkins felt a backlash from people in the right-to-life community who could not understand how he could claim to be pro-life and not support all pro-life legislation. Because he had not advised Andrus to veto the legislation, but merely that it had potential legal problems, Richard decided to set out his thoughts on the issue. He enlisted the help of Richard Sherlock, a medical ethicist, and Steven Clark, a specialist in high-risk fetal medicine, to review all Supreme Court abortion jurisprudence, project where the Court was likely to go, and formulate suggestions for legislative action that would work legally and medically.

The 1991 *BYU Law Review* article entitled, "Mediating the Polar Extremes: A Guide to Post-*Webster* Abortion Policy," was the result. The article made various proposals for legislative action designed to protect unborn life while still according appropriate deference to a woman's liberty interests. Following the suggestions outlined in the article, the Utah legislature enacted what Professor Wilkins calls a "rather liberal" statute, essentially codifying the American Law Institute's Model Penal Code abortion regulations. Last year Richard helped defend the statute against litigation brought by the American Civil Liberties Union. Although the Supreme Court somewhat unexpectedly reaffirmed *Roe*

v. Wade in its recent decision in *Casey v. Planned Parenthood of Eastern Pennsylvania*, Richard believes that the Utah statute may yet pass scrutiny under *Casey*'s "undue burden" test.

In addition to helping with abortion litigation, Professor Wilkins serves on one of two reading committees under the ABA standing committee on the federal judiciary. Richard's committee of scholars is headed by Rex Lee; the other committee consists of practicing lawyers. Professor Wilkins' committee reads all judicial opinions and other materials written by Supreme Court nominees—not for political content—but to determine whether they have the intellectual capacity, legal rigor, judicial temperament, and writing ability to sit on the Supreme Court. Professor Wilkins has served on this committee for three years—during Justices Souter's and Thomas' nominations.

The reading committee takes a lot of time. Last summer Professor Wilkins spent four weeks writing his own report and helping President Lee prepare the committee's report. Richard feels that the most interesting thing about the Souter and Thomas nominations was that so little about the candidates could be discovered from their writings, while past nominees had been much more prolific. Professor Wilkins believes the obvious choice of relatively obscure candidates is a sad reflection on how politicized the appointment process has become. He will probably serve on the reading committee for another four to six years.

Recently Professor Wilkins finished a statistical survey (previously conducted by Professor Robert Riggs) of Supreme Court voting patterns. He has also written a short article discussing why moderate abortion regulations (like the Utah statute) should be held constitutional under the Supreme Court's recent decision in *Casey*.

Richard's interest in community theater is longstanding. Including his experience as Scrooge, over the years he has done more than 15 shows. Salt Lake's annual large-scale production of *A Christmas Carol* usually has about 40 sold-out performances. Serving as a bishop in the Orem Canyon View Fourth Ward also helps Richard maintain balance with his other responsibilities. He calls the assignment a "wonderful but sobering experience," and enjoys the chance it gives him to fulfill Jacob Marley's admonition to "walk abroad among [one's] fellow-men."

**STUDENTS, ALUMNI
TEAM UP ON PRO
BONO WORK**

Serving together in a wide range of new "umbrella structure" pro bono programs, second- and third-year students and volunteer attorneys are making a difference in the lives of many, offering free legal advice to persons who can't afford it. Professor James H. Backman reports that local attorneys have been extremely receptive to the Law School's programs because so many are service-oriented citizens, within a structure. Once the structure becomes available, everyone is willing to step forward.

In 1992 a task force was appointed to research how Law School students and alumni could become more involved with the community. The committee made two recommendations. The first was that all first-year students be required to take a Public Interest Law class, initially taught by Professors Kevin Worthen and Frederick Gedicks. The second was that a full-time faculty member, Professor Jim Backman, be appointed to coordinate "externships"—student opportunities for practical pro bono experience.

The Public Interest Law course focuses on landlord/tenant disputes, social security and disability concerns, child support collection, and consumer access problems. The course also highlights problems poor clients face getting legal services and encourages pro bono work.

"This class is required of every student—a major shift

in the Law School's perspective," says Backman, since similar "enrichment" courses in the past were offered but not required. "We feel that students exposed to pro bono concerns early in their law training will be more likely to give pro bono service."

Another result of the public interest task force has been Professor Backman's creation of several externship opportunities called LawHelp. The four LawHelp programs—the Domestic Relations Project, the Volunteer Immigration Project, the Tuesday Night Bar, and the Mediation Project—provide an ideal solution to the Law School's need for public service. LawHelp not only assists many local citizens but it also provides pro bono opportunities for students and alumni.

Domestic Relations Project

In the Domestic Relations Project each of approximately 15 students is matched with a volunteer attorney to take on Utah Legal Services cases that normally would be turned away because of lack of resources. Students see cases from original client interviews through depositions and final paperwork. Student preparation includes special training in the divorce process, the court system, and learning how to use software that produces the various documents needed.

The Domestic Relations Project was developed in association with two Law School alumni: Thomas W. Seiler '77, president of the Central Utah Bar Asso-

ciation, and Susan Griffith '87, head of Utah Legal Services.

Volunteer Immigration Project (VIP)

Students involved in the Volunteer Immigration Project work with attorneys to represent clients in family unification matters, deportation hearings, and amnesty and asylum problems under the U.S. Immigration and Naturalization Service. Most of the students involved in this project are either foreign born or are second-generation immigrants. For this reason they are eager to help people having problems similar to those either they or their parents have had.

Students participating in VIP have prepared for the experience by taking a course in immigration law. Every other Wednesday night the students meet with clients and attorneys for intake interviews. At these sessions students gather information, help clients with paperwork, and offer limited legal advice. Clients come from the Utah County Latino Council, BYU International Office, the Catholic Church, the UVCC counseling program, and the international LDS branches on campus. German T. Flores, the Hispanic student assistant for VIP, highly recommends the program, saying, "Those served by VIP now have an opportunity to be a part of the American dream, which before they could not do, simply because they could not afford to hire an immigration attorney."

Tuesday Night Bar

The Tuesday Night Bar is the largest and most comprehensive LawHelp program. Participating students meet with clients and attorneys every Tuesday Night to see a variety of cases, mostly civil but some involving shoplifting, assault, debt collection, and partnership agreements. The program also handles a wide range of divorce and child support cases. While other students observe from behind one-way glass, participating students conduct interviews and an attorney observes. After the student gathers information he or she asks the observing attorney for a recommendation. When the interview is over, the attorney and student review the case and the student is given an evaluation on conducting future interviews.

Students participate in the Tuesday Night Bar as part of Professor Larry Farmer's Legal Interviewing and Counseling course. Before the program was organized students in this class practiced their skills with each other in mock interview situations.

Mediation Project

The Mediation Project offers clients an alternative to courtroom litigation, serving clients in small claims courts, the BYU Off-Campus Housing Office, and Provo's Family Court Mediation Office, which handles all Provo divorce cases involving dispute over child support or child custody. Students in small claims courts are introduced by the judge as the session opens. The judge

presents them as mediators and gives the clients the opportunity to have their case mediated instead of heard by the judge. Almost always one or two people go with the students and their assigned attorney assistants.

Students in this project have completed a special eight-hour training program and have taken or are enrolled in Gerry Williams's Alternative Dispute Resolution class.

By working in one of the four LawHelp programs, students have the advantage of learning by experience. They have the opportunity to work directly under the supervision of a volunteer attorney in live client settings. They have experiences in interviewing, investigating, deciding on strategy, drafting documents, researching, preparing for trial, and (in the case of third-year students) representing clients in trials and administrative hearings under the state's third-year practice rule.

Student reports indicate satisfaction with the educational benefit of externship experiences. Students feel they are learning by doing, having the opportunity of applying classroom theory in real practice settings.

Most students believe they have better learning experiences in an externship than they have in paid summer clerkships. Because they are not concerned about paying students for their time, the attorneys are more willing to have them participate in all phases of office practice. Students also report they feel greater responsibility to the cases they work on because they generally have a greater

chance to participate directly with the client.

Not all the Law School's public programs have been started by the administration. Students are becoming more involved in public interest projects as well. For instance, this semester students have been involved in BYU's Public Interest Society, Women's Law Forum, and Student Bar Association.

The Public Interest Society seeks to persuade attorneys to donate time to public service and coordinates volunteer legal services. The society recently held its second annual scholarship auction. The money raised will go to help law students who choose to do summer work in public service organizations, such as government agencies, nonprofit organizations, and legal aid societies. Fundraisers are held to make it possible for students to take these jobs. This year the local community donated \$12,000 in merchandise for the auction, which yielded more than \$5,000 in scholarship funds. In addition, the J. Reuben Clark Public Interest Law Society's national sponsor promised to meet the local chapter's funds. Therefore, because the auction netted \$5,000, the Public Interest Society will be able to offer \$10,000 in scholarships.

The BYU Women's Law Forum has also made efforts to benefit the community. In February, the forum sponsored a variety show benefit to aid the Women and Children in Crisis Center in Provo. Approximately \$1,000 was raised to purchase sweat

suits for rape victims. When the forum became aware that rape victims are required to leave their clothing at the hospital for evidence and go home in a hospital gown or blanket, the group wanted to make this return a little less humiliating for the victims. Drawing on a program already in place in Salt Lake City and run by the Young Lawyer's section of the Utah Bar, the forum hopes to make this an annual event.

The Student Bar Association sponsored the Rex Lee Run for Cancer Research in April. This year's committee expanded the usual race preparations, beginning with coordination with the United Way and the American Cancer Society. The committee solicited sponsors, hosted benefit luncheons, arranged media coverage, designed attractive T-shirts, and introduced new baseball caps. The result was an impressive turnout of 120 runners. The run generated \$1,300, all of which will go to the American Cancer Society.

TWENTY YEARS AND TAKING OFF

August 27, 1993, marks the 20th anniversary of the opening of the J. Reuben Clark Law School for instruction, and plans are underway for a celebration.

"This celebration is for and about people," said Dean Reese Hansen. "We'll remember not only the Law School's historical events but also the 2,700 remarkable alumni who have studied here. We'll remember the friendships formed, the

knowledge gained, and experiences shared during this fabulous first 20 years."

During the 1993-94 academic year many events that have become the fabric of student's lives will be sponsored: the Woody Deem Trial Advocacy Competition, Homecoming with the briefcase brigade, the Law School fireside with Elder Dallin H. Oaks, the annual Bill of Rights Symposium and Dinner, Student Bar Association pizza parties, the faculty roast, the student untalent show, the first year moot court oral arguments, the second year moot court final arguments with President Rex E. Lee sitting as Chief Justice, the spring formal, the Government and Politics Symposium, and graduation.

There will also be a series of special anniversary events, including a founder's day luncheon, a reunion of the Board of Visitors, Malcolm Wilkey's two week stay as a faculty member in residence, a visit from Justice Kennedy of the United States Supreme Court, and a swearing-in ceremony May 23, 1994, before the U.S. Supreme Court with other activities following.

"We look forward to renewed association with many alumni, society members, and friends this next year," said Hansen, "and we invite them to join us." In August 1993, look for a calendar detailing all the 20-Year Celebration events sponsored by the Law School, the Law School Alumni Association, and the chapters of the J. Reuben Clark Law Society.



Law School Moot Court team, from left to right, Glenn Rowley, Christine Drage, Daniel Packard, and Randy Spencer

LAW STUDENTS WIN REGIONAL TOURNAMENT

Four BYU Law Students traveled to Tempe, Arizona February 5-6 and brought home the title of Regional Champions of the Jessup International Moot Court Competition. Assisted by their faculty advisor and coach, Professor Stephen L. Wood, the team made BYU history by advancing to the International Competition in Washington, D.C., for the first time.

In this prestigious moot court tournament, the students argued the merits of an international law case to three-judge panels simulating the International Court of Justice at The Hague

Team members Christine Drage, Daniel Packard, Randy Spencer, and Glenn Rowley, were jubilant at the announcement during award ceremonies, February 6, in Tempe. "When the tournament sponsor announced the winner, we just couldn't believe it. We all worked very hard, but the competition was very strong. We had hoped to win, but hardly dared expect it," said team member Glenn Rowley, who also brought home the "Best Oralist" award.

Having defeated some top law students from California, Arizona, and New Mexico, the BYU team advanced to the International Competition in Washington, D.C., March

27 through April 3, where it competed against regional and national championship teams from all over the world.

The team continued its winning ways in Washington, D.C. by defeating the national teams from Hong Kong and South Africa during the first two preliminary rounds. However, the team was eventually eliminated by losses to last year's runner-up, Singapore, and Georgetown University.

Despite the losses, the team did not come home empty-handed. The team was rated 22 in an international field of 56. During award ceremonies at the conclusion of the tournament, Glenn Rowley from

the Brigham Young University team was recognized as the seventh best oralist in a field of 280.

Dean Reese Hansen said this is the first time BYU Law School has advanced to international competition. He praised team members Christine Drage, Daniel Packard, Randy Spencer, and Glenn Rowley for their able representation of the school as well as themselves. "BYU has always done well in Moot Court Competitions, and this year's team has built on the success of past years," said Dean Hansen. For example, last year, Gary Challburg, Brian Gunderson and Dan Lounsbury received the award for the best brief in the Irving R. Kaufman Memorial Securities Competition at Fordham University in New York.

Also last year, Craig Aramaki, Thomas Low, and David Williams won best brief and advanced to the final oral round of The Harold H. Greene and Joyce Hens Green National Security Moot Court Competition sponsored by George Washington University Law School. Dean Hansen feels that this tradition of excellence in national and international competitions establishes a valuable reputation among the Law School's peers.

ALUMNI TRAVEL TO RUSSIA

Scott G. Crowley '88 and H. Wayne Gardner '87 recently returned from a trip to St. Petersburg and Moscow, Russia. While in St. Petersburg the two Law School alumni addressed a



Chief Judge Ed Zendejas '91, Omaha Indian Tribal Court, and Tribal Court Public Defender Chris Robinson '91

conference on intellectual property protection. In Moscow they represented Virginia companies interested in business with Russia.

Crowley, a member of Richmond, Virginia's Taylor, Hazen & Kauffman law firm, is general counsel for the Russian-American Exchange Foundation. An affiliate of Virginia Commonwealth University, the nonprofit foundation organizes cultural and academic exchanges between VCU and St. Petersburg State University. Last October Crowley and Gardner attended the second annual conference between the Russian-American Exchange Foundation and the St. Petersburg Regional Foundation on Scientific and Technological Development, the Exchange Foundation's sister organization associated with St. Petersburg State University. The conference discussed new Russian laws on patents, trademarks, copy-

rights, trade secrets, and methods of converting intellectual property into profits.

On the business end of their trip, Crowley and Gardner represented Virginia businesses interested in trading American automobiles, security/alarm systems, agricultural commodities and equipment, medical supplies, food and food processing equipment, cranes, and timber. Since his return, Crowley has established joint ventures to operate Chrysler dealerships in Lithuania and Siberia. Other joint business ventures are in the works.

Besides establishing many business relationships, these exchanges also fostered some "extracurricular" developments. For instance, as a result of the team's agricultural marketing, Crowley is now discussing with various research institutions the possibility of sending a team of researchers to Russia to train farm businesses.

Another side effect is that while in Russia Crowley and Gardner developed a relationship with the managers of the Hermitage Museum. One of the largest and finest museums in the world, this edifice houses an enormous collection of works by such masters as da Vinci, Raphael, Caravaggio, Rembrandt, Rubens, Poussin, El Greco, Monet, Renoir, Cezanne, van Gogh, Gauguin, and Picasso. Crowley hopes his relationship with the museum managers will lead to opportunities to help preserve the museum's works from the rather careless protection they now receive. He also hopes to be able to introduce some of them to other European and American countries, as most of them have never appeared outside of Russia. In addition, Crowley discussed the possibility of the museum lending an exhibit to the new BYU Museum of Art.

Since their return Crowley and Gardner have

also helped bring an LDS college student from St. Petersburg to study at BYU.

**ZENDEJAS, ROBINSON
WORK WITH
TRIBAL COURT**

Ed Zendejas '91 is the first law-trained Omaha to sit as chief judge of the Omaha Indian Tribal Court. He has been serving for more than one year.

Ed was originally viewed as an outsider since he is Mormon, was not born on the reservation, and has a hispanic surname. Now that tribal members know his mother is full Omaha, he is finding greater acceptance in his role as judge.

To ensure good representation of tribal members, Ed was influential in the hiring of Chris Robinson '91 as public defender for the Tribal Court. Now the former classmates share daily driving chores between Omaha, Nebraska, and Macy, Nebraska—85 miles each way.

CLASS NOTES

J. Michael Bailey '86
Michael is a shareholder with the Salt Lake City, Utah, firm of Parsons, Behle & Latimer. His practice concentrates on environmental and natural resource litigation and general commercial and tort litigation. He and his wife, Jacqueline, are the proud parents of Clare Jacqueline, born March 27, 1992.

Daniel A. Barker '81
Daniel was appointed to the Superior Court of Arizona for Maricopa County in Mesa, Arizona, on January 1, 1992. He has a civil

calendar, although in Arizona assignments among calendars change at the direction of the presiding judge. Judge Barker reports that he has thoroughly enjoyed being on the bench

David R. Benard '90

After graduation David joined the law firm of King & King in Clearfield, Utah, where his practice includes the areas of corporate law, domestic law, criminal law, and estate planning. Before joining King & King, David worked as a sole practitioner in Ogden, Utah, and as director of Corporate Affairs for CompuMed, Inc., a Wyoming Corporation.

Matthew R. Bryan '90

Matthew has been appointed to a position with the World Intellectual Property Organization (WIPO), a specialized legal agency of the United Nations. He has been assigned to a post in Geneva, Switzerland, for at least a two-year term as a legal officer in the Patent Cooperation Treaty (PCT), which currently has 50 member nations. His main responsibilities will be to become conversant with the treaty, give seminars in Latin America about practice under the treaty and its advantages, and facilitate future ratification by Latin American countries. Matt recently completed his term as a law clerk on the United States Court of Appeals for the Federal Circuit in Washington, D.C., where he clerked for Judge Randall R. Rader and Senior Judge Marion T. Bennett.

Howard Chuntz '84

Howard was a member of a small Utah Mount Everest

expedition (five climbers, two Sherpa guides) that established a camp at the 25,000-foot level on the Tibet side of Mount Everest last fall. Howard was forced by illness to return to the United States before the final push to the summit. "The whole thing was just grand. Camp two was like being at the summit of McKinley and looking at 9,000 more feet of climbing."

Leshia Lee-Dixon '79

Leshia is currently serving as the secretary of the Young Lawyers' Section of the Utah State Bar. She practices with Legal Defenders in Salt Lake City, Utah.

Brett L. Foster '90

Formerly with the Phoenix, Arizona, firm of Teilborg, Sanders & Parks, Brett is now associated with the Salt Lake City, Utah, law office of Lynn G. Foster.

Ben H. Hadfield '81

Ben, the first judge appointed by Governor Leavitt, is judge of the First District Court, including Box Elder, Cache and Rich Counties. Before his appointment Ben was associated with Mann, Hadfield & Thorne.

Joel F. Hansen '78

In 1992 Joel ran for the Nevada State Legislature in Assembly District Three as an Independent American Party member. He decided to run because the Republican candidate favored legalized abortion, and Joel wanted to be sure there was a pro-life candidate in the race. Although he did not win the election, he received a significant portion of the votes in a

three-way race. Joel and his wife, Sharon, are the parents of four children, including Spencer Alexander, born in 1989. Their oldest son, Jonathan, is serving a mission in Argentina. Holly is a high school sophomore, and Gregory is a freshman.

Jack C. Helgesen '80

Jack, an Ogden, Utah, trial attorney, has been chosen president-elect of the 300-member Utah Trial Lawyers Association. A 1977 graduate of Weber State University, Jack is a founding partner of the firm Helgesen, Waterfall & Jones.

Mark Hendricks '79

Mark practices as an associate with the firm of Pillsbury, Madison & Sutro in Los Angeles, California, handling maritime and international business matters. He is currently doing research for articles on controlling litigation costs and managing outside counsel. Recently he formed a trading company that specializes in exporting used machinery and vehicles and medical, computer, and construction equipment to developing economies, which so far have included Nigeria, Ethiopia, and Mexico. In December 1991 Mark married the former Maren Hardy of Potomac, Maryland. Maren graduated from UCLA Law School in 1991 and is practicing at the Los Angeles office of the New York-based firm of Dewey Ballantine.

Gregory Hess '79

Gregory is an associate with the Salt Lake City, Utah, firm of Kimball, Parr, Waddoups, Brown & Gee.

He and his wife, Kim, had a daughter, Rebecca, on February 25, 1991.

Claralyn Martin Hill '90

Claralyn joined the Provo, Utah, law firm of Aldrich, Nelson, Weight & Esplin, where her practice includes domestic relations, estate planning, probate, and corporate law. Claralyn served as a clerk to the Honorable Norman H. Jackson at the Utah Court of Appeals before joining the firm.

Tamer Jergensen '88

Tamer recently completed her term as law clerk to the Honorable Grant L. Young and has become associated with the law firm of Beard, St. Clark, Peterson, Sullivan & Barber, chartered in Idaho Falls, Idaho.

William D. Marsh '79

Formerly with the Dallas, Texas, office of Jones, Day, Reavis & Progue, William has become associated with the Salt Lake City, Utah, office of Ballard, Spahr, Andrews & Ingersoll.

William H. Orton '80

Bill was elected in November to his second term in the United States House of Representatives, representing Utah's Third Legislative District.

Craig Russell Pett '85

Craig has been named a partner at the Atlanta, Georgia, law firm of Alston & Bird. A member of the Tax Department, he concentrates on ERISA, employee benefit law, non-qualified deferred compensation, stock option plans, executive compensation, and health and welfare plans.

Jeffery R. Price '79

Jeff has become associated with the Salt Lake City, Utah, firm of Walstad & Babcock. Jeff was formerly associated with the firm of McAllese, McGoldrick & Susanin in King of Prussia, Pennsylvania.

Korey D. Rasmussen '90

Formerly of Lathan & Watkins, Korey has joined the Salt Lake City, Utah, law firm of Anderson & Karrenburg.

Sidney M.B. Sandberg '84

Sid is currently serving as volunteer chair of the Southern Utah Division of the March of Dimes Birth Defects Foundation. Sid practices in Provo, Utah, in alternative dispute resolution, business law, partnership law, and real estate.

Douglas D. Smith '79

Doug practices franchise law in Portland, Oregon, an area where fewer than 1 percent of attorneys nationwide practice. Formerly a partner with the Portland firm of Lindsay, Hart, Neil & Weigler, Doug now splits his time between an of counsel position with a former rival firm—Fountain & Rhoades—and an office at his home in Tigard, Oregon. He anticipates construction of a three-story office addition with conference room facilities and a large office with a panoramic view of the Tualatin Valley. In his words, "I've kind of got the ultimate life-style."

P. Austin Vickers '79

Austin has become general counsel and vice president of Vitol International, a nutritional and skin-care products company in Chandler, Arizona.

Allan O. Walsh '79

Al has become associated with the Salt Lake City, Utah, firm of McKay, Burton & Thurman. Al was formerly associated with Latham & Watkins and, more recently, with Allen, Matkins, Leck, Gamble & Mallory.

Mark S. Webber '86

Mark is currently serving as the president-elect of the Young Lawyers' Section of the Utah State Bar. He formerly served as the secretary/treasurer of that section. Recently Mark became a shareholder with the Salt Lake City, Utah, firm of Parsons, Behle & Latimer, where he practices primarily in real estate and commercial and personal injury litigation.

FACULTY UPDATE*David Dominguez*

Professor David Dominguez wants to reform law school teaching. Although one of the Law School's main purposes is to teach legal doctrine, he says, it is not enough for students to know only textbook principles; they must also apply them in a variety of ways. Dominguez feels students can best learn different application strategies by engaging people with opposing viewpoints. Opposing interaction, Dominguez explains, expands students' thinking about the law because they must listen to viewpoints they haven't thought about before. The better students understand how different people tick, the more successful they will be as lawyers.

Dominguez has been working hard with his col-

leagues to have this type of multicultural learning integrated into the syllabus. In the past, comments Dominguez, one could assume that he or she understood the cultural context for the law, but now there are far too many new forces for this to be true. Recently Dominguez submitted for publication an article that explains the teaching methods he has been experimenting with for the last four years. Part of the article suggests what professors' responsibilities ought to be, given the changing demographics of the legal profession.

In class Dominguez has put students into collaborative negotiation settings, where they can share ideas and comments. Out of class Dominguez promotes heavily the celebration of diversity. Dominguez explains that it is not a matter of being right or wrong, but a matter of life experiences. Lawyers must be sensitive to the cultural collisions that take place in the law and anticipate them before they become their clients' problems.

One of Dominguez's recently begun projects examines what foreigners living in Mexico are doing in terms of dispute resolution. Typically, these people cannot go to the Mexican judicial system and therefore must form different organizations. This stretches their problem-solving skills. Dominguez hopes that in the future this research can be applied to inner cities, since people there often have as little access to our justice system as the foreigners do to the Mexican system.

Also a member of the executive board on Minority Groups for the American Association of Law Schools, Dominguez is particularly interested in learning whether minority law professors are adopting innovative methods of teaching and if they are impressing on students that there are color and gender issues in the law.

J. Clifton Fleming

Professor Cliff Fleming, a specialist in income tax law, has published many books and articles in his field. Recently he coauthored a reference treatise entitled *Tax Aspects of Forming and Operating Closely Held Corporations*. Late last year Fleming published an article in the *Journal of Corporation Law* called "Altering U.S. Treaty Policy to Permit the Negotiating of Zero Withholding on Portfolio Dividends: An Invitation to Research." He also publishes an annual supplement to his 1984 treatise, *Tax Aspects of Buying and Selling Corporate Businesses*, for lawyers and accountants.

Pursuing another interest, Fleming has published a review essay in a social science journal called *Society* on Stephen Carter's *Reflections of an Affirmative Action Baby*. This essay, which is a nonpolitical defense of affirmative action programs in higher education, will appear in expanded form in an upcoming issue of the *Howard Law Journal*.

Last summer Fleming was appointed to a two-year term as chair of the American Bar Association's committee on teaching taxation, a service committee

that helps law professors in their teaching and research. He also lectures regularly at CLE meetings as a service to the bar.

James D. Gordon III

As a legal humorist, Professor James Gordon loves to poke fun at the law. But he also has several serious pursuits, including serving as vice chair of the faculty committee that drafted BYU's new academic freedom documents. These documents describe the principles of academic freedom and the substantive and procedural protections that apply to it. In Gordon's view, there are two facets of academic freedom: the freedom of the individual scholar to teach and research without interference, and the freedom of the academic institution to pursue its mission. While it is essential that BYU professors have individual academic freedom, says Gordon, it is also their responsibility not to seriously and adversely affect the university mission or the Church. The academic freedom documents are designed to protect both individual and institutional academic freedom and to mediate the competing claims when these two freedoms conflict. They also provide procedural protections for faculty members, including the right to a hearing before a committee of faculty peers.

Also a popular speaker, Gordon last year delivered the graduation address at the University of Oregon School of Law, a speech at the Iowa Law Review banquet on why the public hates lawyers, and a speech

on religious freedom at the annual meeting of the Association of American Law Schools in San Antonio, Texas.

Although some might consider law school and law practice to be solemn enterprises, Gordon good-naturedly disagrees. Recently he completed the manuscript for a book entitled *Law School Babylon*. The idea for the book was developed after the *Washington Post* printed excerpts from his article, "How Not to Succeed in Law School," 100 *Yale L.J.* 1679 (1991). The article attracted the attention of a literary agent, who encouraged Gordon to write an expansion of the article and who placed the book with HarperCollins Publishers. Like the article, *Law School Babylon* is a hilarious collection of "inside" observations that poke fun at law school and life as a lawyer. Gordon says that although he very much enjoyed writing the book, trying to be funny under a deadline was a unique experience. The book is scheduled for publication in September.

Recently Gordon also published a book review in the *Stanford Law Review* called "Cardozo's Baseball Card," 44 *Stan. L. Rev.* 899 (1992), that is a lighthearted evaluation of Richard Posner's book, *Cardozo: A Study in Reputation*. Another book review, published in the *Michigan Law Review* and titled "Oh No! A New Bluebook!," pokes fun at the 15th edition of the infamous *Bluebook*. Three more pieces, included in the 1992 BYU Law Review symposium issue on humor and the law, also fea-

ture Gordon's interest in legal humor.

Gordon's activities during the recent past have solidified his reputation as a legal humorist. For example, NBC affiliates across the country broadcasted a news story featuring Gordon dressed up as Elvis while teaching his legal writing class. Gordon encourages his students to make their legal writing lean and trim—more like the "younger, slimmer Elvis" than the "older, fatter" one. He believes that good writing, like Elvis, will never die.

John W. Welch

Legal materials in the Bible and Book of Mormon. The trials of Jesus, Abinadi, Alma, Amulek, Korihor, Nehor, and Seantum. A Nephite legal system based on an understanding of the law of Moses as it existed in the seventh century B.C. In addition to tax, corporate, and pension law, these are some of the many interesting projects keeping Professor Jack Welch on the go.

Recently Welch completed work on the five-volume *Encyclopedia of Mormonism*, a reference work published by Macmillan about LDS history, scripture, doctrine, and culture. Several other members of the law faculty also wrote articles for the encyclopedia, including Professors Backman, Davis, Durham, Farmer, Hansen, L. Hawkins, C. Hawkins, Kimball, Parker, Riggs, Whitman, and Williams. President Rex Lee and Bruce Hafen also contributed. Welch wrote several and edited many of the articles and was also in charge of

illustrations for the project that took over three years and some 780 authors to complete. The encyclopedia has already sold out of its first printing in the LDS market and has been very well received and positively reviewed in international library journals.

Currently Welch is serving as editor of *BYU Studies*, where he solicits and edits articles that bring Latter-day Saint perspectives to bear on a variety of academic topics. Along with his work on legal materials in the Book of Mormon, Welch is also now returning to several other "back burner" projects that had to be put on hold while he was working on the encyclopedia. These efforts include a single treatise on ancient Near Eastern law and the scriptures. He would also like to publish a comprehensive source book on all materials from Jewish and Roman law pertinent to the trial of Jesus.

An interesting law faculty committee Welch chairs is exploring ways to improve testing techniques, giving students more specific feedback about what they have done well and where they need to improve. The committee is also searching for better ways to communicate information about each student's abilities to potential employers. For example, a student could be graded in several different areas so that an employer could find those who are successful in specific areas useful to that employer. Also, this type of grading, according to Welch, will give teachers more meaningful feedback on how successfully they are teaching.

Dale A. Whitman

Professor Dale Whitman recently completed work on new editions of his real estate finance casebook, property hornbook, and real estate finance hornbook, which he coauthored with Professor Grant Nelson of UCLA. He also finished an article on mortgage prepayment, which was just published in the *UCLA Law Review*. The article focuses on two main issues.

The first is whether mortgage lenders should be permitted to "lock in" loans, absolutely prohibiting prepayment for some fixed period. Whitman argues that such lock-ins are economically inefficient and should not be enforced by the courts. A borrower who wishes to prepay should, of course, be required to cover all damages suffered by the lender because of the prepayment. Such damages typically occur because interest rates have fallen, so that the lender has to relend the funds at a lower yield. But if the borrower is willing to cover those damages, all loans should, in Whitman's view, be prepayable.

The second major issue discussed in the article is the enforceability of prepayment fees, which are often imposed by mortgage language. Whitman argues that such fee clauses should generally be enforceable, although they may occasionally produce recovery for lenders more than their actual damages. Prepayment fees are a form of liquidated damages, and Whitman argues that they are efficient and useful, since they allow the buyer to shift to the lender the risk of downward movements in interest rates.

Whitman observes that state courts nearly always uphold prepayment fees, but that several recent bankruptcy court decisions have scrutinized them much more carefully and have refused to enforce those considered unreasonable. However, Whitman argues that this distinction between state court and bankruptcy court results may be justified, since in bankruptcy the effect of enforcing an excessively large fee is not merely to penalize the borrower, but to deprive the borrower's other creditors of assets that should be distributed to them. Whitman also notes that it may be unjust to enforce excessive prepayment fees in cases of "involuntary" prepayment (such as fire insurance proceeds, eminent domain awards, and accelerations under due-on-sale clauses), if the lender has no business justification for the acceleration.

Besides his writing and teaching, Whitman serves on the Law School's committees on admissions, awards, and computers. He is also a member of the Accreditation Committee of the Association of American Law Schools and is a frequent member and chair of law school accreditation teams for the American Bar Association.

LETTERS*Confessions of an Ordinary Law School Graduate*

As a law student at JRCLS from 1976-1979, I quickly found out that I was very ordinary. "Performing" for Woody Deem made my knees shake and I'm sure I "pursed" my lips several times. Listening to Ed

Kimball discuss the rules of evidence made me wonder if there were any rules at all. Dallin Oaks caught me off guard in Trusts class, and I wished I had taken a "peremptory" that day. Yes, I had been the salutatorian of my high school graduating class and had breezed through undergraduate classes and graduated magna cum laude with a B.S. degree at BYU, but I soon discovered that in this law school experience, I was very ordinary.

In fact, I attribute my ability to "survive" the law school experience to a fellow survivor, Ron Mumford '79, and frequent breaks with him at the ping pong table. A recent visit disclosed that the old table is no longer there, and I wonder how current ordinary students survive. I also attribute my survival to "reality checks" administered by my wife and children during those three years.

Since graduation I have worked as an associate in a small firm in Oregon, as a JAG Officer in the U.S. Army, and now as the Sector Counsel for the U.S. Border Patrol in Yuma, Arizona. I have not written any books, handled any noteworthy cases, won any awards, or made a lot of money.

As I read about the accomplishments of many of my classmates, I am happy for them (and sometimes surprised) and proud to have been associated with them. But I sometimes feel a slight twinge of jealousy and unfulfillment.

Then I sit down and count my many blessings. My wife of 21 years is as sweet and beautiful as the day I married her. Our rela-

tionship has grown and been strengthened through difficult challenges. We are best friends and our love for each other grows daily. I have seven children, all with differing talents, hopes, and aspirations. We have fun together. I enjoy coming home from work to be with them. I have a good job that I enjoy. My salary is not the greatest, but it is adequate. I also enjoy my activity in church. These blessings, along with a knowledge that I have a Savior and that he loves me, help me to know that it is alright to be ordinary.

I do not regret going to law school and becoming a lawyer. I am thankful that I was able to attend and graduate from JRCLS. I treasure the experience and appreciate the knowledge gained and insight developed during those years. I have fond memories of my law school days. I'll never be rich and famous nor the subject of an article in the *Clark Memorandum* or *Brigham Young Magazine*. And though I may wince with jealousy at the accomplishments of my fellow classmates, I really am happy for them, but at the same time I am happy for myself and my ordinary life. In fact, I am so ordinary that I may be extraordinary.

—Scott M. Jefferies '79

The Clark Memorandum welcomes letters to the editor, articles, updates on job changes, etc. Send your materials to: Clark Memorandum, 342 JRCB, Provo, Utah, 84602