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Clark Memorandum: Spring 2023

J. Reuben Clark Law School

BYU Law School Alumni Association

J. Reuben Clark Law Society

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CLARK MEMORANDUM

J. Reuben Clark

Law School

Brigham Young

University

Spring 2023



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How should we think about the future of the Law School? Like all organizations, law schools must consider the balance of stability and change. BYU Law School has cultivated a penchant for experimentation, positioning us as a leader in legal education. If we want to retain the innovative culture of the Law School, we should be skeptical of detailed vision statements because we cannot see very far into the future. Instead, I offer a heuristic that has been useful to me in encouraging creative thinking: “What would a great law school do in our situation?”

Over my 15 years working at BYU Law School, I have often contemplated many iterations of this question. How would a great law school improve admissions? How would a great law school promote student employment? How would a great law school engage alumni? Evaluating the Law School’s needs through this lens has influenced our hiring of new assistant deans. It has affected our efforts to remodel the law building. It has changed how we fundraise. And most salient to our students, it has led to aspirational new ideas for Law School programs, including the Refugee and Immigration Initiative, the Academies Program, the Legal Technology Initiative, the Inspiring Leadership Initiative, the Washington Law Seminar, the Global Law Seminar, and the Global Business Law Program.

The many ways we have enriched our Law School community and enhanced student experience and training are reflected in the rankings of the Law School. This year we were once again named the no. 1 Best Value Law School by *preLaw* magazine, and last year we achieved our highest ranking ever of no. 23 in the *U.S. News & World Report* Best Law Schools list.

As we consider the future of the Law School, I hope our thinking will be animated by the following values: love of ideas, desire for influence, and loyalty to our mission.

FIRST: Great law schools value ideas.

Great law schools generate new ideas. At the core of BYU Law School resides a community of scholars who are driven by a passion for ideas. As legal scholars, we seek to understand and create enduring and influential scholarship about the role of law in society. We are ambitious for our ideas. We disseminate those ideas to students, policymakers, and other scholars in the hope that they will apply them to solve problems. Our community of scholars enhances every aspect of the Law School.

The administrators and staff of the Law School have an equal enthusiasm for new ideas, primarily aimed at improving the professional development of our students. The educational objectives of the Law School refer to our

“whole-building approach” to professional development, with which we seek to engage “every member of the BYU Law community in developing the professional competencies, character, and diversity of our students’ gifts.”¹

Creating new ideas is a form of worship. Doctrine and Covenants 4:2 proclaims, “O ye that embark in the service of God, see that ye serve him with all your heart, might, mind and strength, that ye may stand blameless before God at the last day.” We spread new ideas to the world in the hope that we can contribute to the building of the kingdom of God.

SECOND: Great law schools are influential.

Great law schools are engaged with the world. The J. Reuben Clark Law School held its first class in the Pardoe Drama Theatre of the Harris Fine Arts Center on August 27, 1973. Speakers included Marion G. Romney, second counselor in the First Presidency of the Church, and Dallin H. Oaks, then president of BYU. In that first class session, President Oaks told the founding faculty and charter class of the Law School, “We are privileged to participate in this great venture. It is our duty to make it great. He who builds anything unto the Lord must build in quality and flinch at no sacrifice toward that end.” He set the bar for “greatness” high, requiring eminence “in the eyes of legal educators, scholars, the judiciary, the legal profession, the business world, officials of local, state and federal government, and citizens at large.”²

Over the past six years, I have reflected repeatedly on this charge, and I have concluded that President Oaks was not encouraging the Law School to seek the honors of the world as ends in themselves but rather as means to gain influence. We want the members of our BYU Law community to be influential where important decisions are made, and many Latter-day Saint attorneys are exemplary in this regard. As doors of opportunity open to you, I hope you will continue to have the courage to step through and change the world for the better.

THIRD: Great law schools pursue important missions.

Great law schools are animated by a compelling mission. In the summer of 2020, I appointed a mission committee chaired by associate dean Michalyn Steele and comprising Law School faculty, staff, and students. I charged the committee to propose for approval by the faculty of the Law School “a new mission statement that articulates our core values, identifies our unique strengths, and directs our future development.”³ In short, I wanted the mission statement to answer the question, “Why does BYU Law School exist?” In answering this question, the committee engaged a broad representation of the Law School community and created a document that expresses a shared sense of meaning about the overall purposes and effects of our work. The Law School faculty unanimously approved the mission statement in 2021.

I invite you to read and ponder the [new mission statement](#), which is found on the Law School’s website. The Law School is part of a university whose mission is “to assist individuals in their quest for perfection and eternal life.”⁴ At the Law School, our starting point is to recognize “the inherent dignity and equality of each individual,” and we should work tirelessly to welcome “people from the full range of human experience.”⁵ The Law School should be a place where every member of the community brings their diverse gifts “that all may be profited thereby” (Doctrine and Covenants 46:12). By sharing our gifts, each of us contributes to the community, and from each other we learn, as the poet John Milton wrote, “to know God aright, and out of that knowledge to love him, to imitate him, to be like him.”⁶ This is the sort of Law School our new mission statement imagines—and if we can create this sort of Law School, our mission will be our comparative advantage.

D. GORDON SMITH



Dean, BYU Law School

NOTES

- 1 “Mission and Objectives,” BYU Law School, law.byu.edu/about/mission-and-objectives.
- 2 Dallin H. Oaks, untitled address delivered at the opening ceremony of the J. Reuben Clark Law School in Provo, Utah, on August 27, 1973; in *Addresses at the Ceremony Opening of the J. Reuben Clark Law School* (August 27, 1973): 5, 7.
- 3 D. Gordon Smith, “Dean’s Message,” *Clark Memorandum*, Fall 2021, 3.
- 4 Mission of Brigham Young University (November 4, 1981).
- 5 “Mission and Objectives.”
- 6 John Milton, “Of Education: To Master Samuel Hartlib,” in *The Prose Works of John Milton* (London: Henry G. Bohn, 1866), 98.





ust over a year ago, I was packing to set off to come to the US for a lengthy visit. The night before my flight though, a dear and now recently departed friend, Metropolitan Kallistos Ware, a very significant scholar of the Eastern Orthodox Church in Great Britain, phoned asking me to call on him. You don't say no to such an invitation! He gave me a command (and his blessing to enable me to strive to fulfill it): "Go," he said, "and really listen; go to understand; go to love and bring love." This command informs my outlook and actions to this day.

*This article is adapted from remarks delivered as
the keynote address at the 29th Annual International Law
and Religion Symposium on October 4, 2022.*

PHOTO ILLUSTRATION BY BRADLEY SLADE

FIDEI DEFENSOR

DEFENDING FAITH

to Enable Communities
of Reconciliation

BY REVEREND DR. ANDREW TEAL

*Chaplain, Fellow, and Lecturer
in Theology and Religion at
University of Oxford's Pembroke College*



THE RESPONSIBILITIES OF PEOPLE OF FAITH

The faith traditions many of us share can provide valuable context for our lives. In the grand scheme of things, each human soul has an inalienable dignity. We are known before being formed in the womb, and we are invited to assent to the will of divine love in our mortal journey. Through the trauma of birth, we come into a variety of contexts in order that we may, in Archbishop Kallistos's words, really listen, really understand, and learn to love.

We spend a lot of time in our lives planning individually, plotting for our personal careers and our personal flourishing. But we soon learn that all of that is but preparation for a more profound calling and responsibility to each other and to our world. Often it is trauma rather than virtue itself that prompts us to recognize this greater vocation of serving others and inspires the virtue to pursue it. Failure and pain can be paths to truth. Life and death call us out if we are people of faith or principle.

And we—people of faith or principle—are many. That is perhaps why *Lumen Gentium*, the Dogmatic Constitution on the Church at Vatican II, for example, describes the Church as all practicing Catholics, all baptized people, and all people of good will. Now, some people may think, “I’m a good Hindu” or “I’m a good Jew”—“I don’t want to be an anonymous Catholic.” But that is not exactly what the Vatican Constitution is trying to say; the Vatican Constitution is saying, “You’re all part of this project and, more significantly, we’re all part of one another.” Such an openness aims to be inclusive and reinforces the intuition of people of many faiths that God is interested in forming and restoring souls and in shaping our civic international life. The structures, communities, and processes of our world really matter to God, and for these to function as He intends, freedom, truth, and religion are pivotal and foundational.

AN UNCOMFORTABLE EPIPHANY

We have all been prompted to consider what the role of religion is in redeeming injustice in the world. When we began our conference on Sunday, we heard some examples of terrible injustice described very eloquently by Daniel Philpott and Nury Turkel. I think we were all left rather traumatized together as we stood in solidarity with them at that presentation and felt the urgency that these injustices must be stopped now. There is a process of setting right ancient wrongs, and we are invited into that mission in this conference.

I am reminded of the one time I met Desmond Tutu. To my surprise, he commented that it was much easier to be a Christian and to distinguish right from wrong in the context of apartheid in South Africa. You could see injustice and cruelty and know these were wrong. He wasn’t saying everything was lovely in apartheid or in oppression. Far from it. But in that context, one could look and discern what was right and what was not. Desmond Tutu thought he’d faced his biggest task in calling injustice out and being an international figure. But he had an even bigger challenge ahead with his involvement in South Africa’s transition from apartheid.

The next phase in South Africa’s history first brought the election of Nelson Mandela and a new and important agenda focused on redemption and understanding. It got much harder, Desmond Tutu said. The Truth and Reconciliation Commission met with tears, fears, tremblings, and hopes—and resilient faith often bursting into song. Amid the despair and horror, this redemptive journey was necessary in order to build a new justice. It took energy and renewed commitment every day. Sustaining peace is not cheap. But as my friend Jeffrey R. Holland said to me, if you think that is expensive, just look at the alternative.

There are many examples of abuse of leadership, such as when monarchy veers to absolutism or elected leaders drift towards tyranny. We know well that these abuses drastically compromise religious and other freedoms. Whilst it is a great honor to have been with you since Saturday, reflecting with you on the role of religion in peacebuilding and peace-maintaining, it has not been

*Archbishop
Desmond Tutu
calls out the
injustices of
apartheid in
South Africa on
April 9, 1981.*



GALLO IMAGES VIA GETTY IMAGES / RAND DAILY MAIL / P. OOSTHUYSEN

an entirely comfortable epiphany. We've witnessed some very raw wounds and have heard about the real and current dangers many representatives' nations and communities face. There is no immediate cure for this pain. But sharing one another's pain is an imperative prompt for us to reach together for the energy to sustain the wild hope of human flourishing for our whole human family—not merely for ourselves or for our friends or for our nations or for those who think the way we do, but for all of humanity.

DEFENDER OF THE FAITH

I'm going to present the model of governance and peacebuilding of an extraordinary leader, Queen Elizabeth II, who spent 70 years trying to understand and redeem centuries of human trauma in her nation. This trauma included wounds of expansion across centuries: from the colonies to the empire and then to the commonwealth, with all the exploitation and violence that went with that journey, including the continuing issues of competing nationalisms on the island of Ireland. "Britannia ruling the waves" was no unmitigated glory.

Queen Elizabeth didn't begin her rule with her eyes closed; she went into it with a promise of faithfulness. At her coronation in June 1953, she gave her allegiance to God before getting allegiance from anyone else. She had the vision to remain humble enough to be filled and replenished by the grace of God daily in order to face the changes and chances of the countries she governed. In crowning her, the Archbishop of Canterbury put the ring of "kingly dignity" upon her finger with the words, "As you are this day consecrated to be our Head and Prince, so may you continue steadfastly as the Defender of Christ's Religion."¹

Queen Elizabeth's many titles included "Defender of the Faith." What does this mean? In considering this question, I want to look at the US dollar. It contains the words "In God We Trust," which I know is provocative to some people in the United States at the moment. You might think that because we have different currency in Britain, it's not quite the same. It is the same. On a pound coin, you'll see the name of our late Queen, "Elizabeth II," then "DG Reg" (Dei Gratia Regina) and "FD" (Fidei Defensor), which translates to "by the grace of God, Queen, Defender of the Faith." So, on British money you also have a reference to God and to the grace of God and even to the role of the Crown as "Defender of the Faith."

"Defender of the Faith" is a title originally given by a pope to a Catholic king who became a Protestant and took the title with him. I think this is one of the reasons why the Catholic Church doesn't make saints until they're well and truly dead—in case they go the way of Henry VIII. But the British constitution is not codified. It's personal. It's embedded in a person: the monarch, the Crown. The responsibility for ensuring and safeguarding constitutional freedoms is rooted in the person who embodies the nation. So before her coronation Queen Elizabeth asked people of all faiths to pray for her and assured them that she would protect their liberty in society. The Queen understood that people of faith deserve the protection of the State, and in connection with her Diamond Jubilee in 2012 she delivered an address at Lambeth Palace in which she commanded, as Supreme Governor of the Church of England, that it was a task of the Church of England to protect and promote religious liberty in her realm.² She played her card. She would, indeed, defend the faith.

Queen Elizabeth interpreted her oath to "defend the faith" broadly. For example, she presided over the prohibition of hate speech. Hate speech isn't a problem specific to Britain. When I first attended the general conference of The Church of Jesus Christ of Latter-day Saints about four or five years ago, I was quite surprised that there were people outside the Conference Center dressed up as Satan and other things shouting abuse at my new Latter-day Saint friends. Upon encountering this crowd again on this visit, I decided to tell them that the Saints are nice people. As I approached, one of them yelled, and I'm sure it was the same person as last time: "You're all going to hell today, Saints! And *you*"—pointing to me in my clerical attire—"you're worse than them all!" And I thought: "Thank you, I have made it."

In the United Kingdom, some of the things he was shouting at people would have been illegal because religion is a protected characteristic. You cannot be discriminated against



in any way (and this includes hate speech) because of your race, your religion, or many other things, and the Queen made sure that religion remains a particularly protected characteristic. And so if you're an American in England and you think Brits are discriminating against you because you're American, they're breaking the law. Proving it might be rather difficult, but we cannot legally demean other people created in the image of the God we share.

The Queen's speeches over the last decade of her life were marked by much more explicitly faith-based content. Charles III, our new king, also has profound religious influence from the Orthodox faith of his father, born Prince Philip of Greece and Denmark—and, indeed, for many decades, King Charles III has promoted interfaith commitments in Britain. We may well see him really embracing his role as “Defender of the Faith.”



A RELIGIOUS REAWAKENING

If you watched the funeral of Her Majesty, you might think that Britain is a rather religious country. But there are shocking census figures from the years 2011 to 2021 reflecting a 13.1 percent decline (to 46.2 percent) in stated affiliation with Christianity.³ In 2021 that was 27.5 million Brits who identified themselves as Christian out of a total of 56 million people who chose to answer the religion question in Britain, where our sovereign is both head of state and head of the state's Christian church, the Church of England.

An equally notable change is in the category indicating affiliation with “no religion,” which went up to 37.2 percent (22.2 million people) in the 2021 census, continuing the trend between 2001 and 2011, when the number of people reporting “no religion” rose from 14.8 percent (7.7 million people) to 25.2 percent (14.1 million).⁴ This is concerning if you are a theist or are practicing religion of any sort. Of course, the census doesn't capture religious affiliation with the same precision as The Church of Jesus Christ of Latter-day Saints does, with its scrupulous membership records. Rather, the affiliation reflects whether a Brit, upon waking up in the morning and filling out the census, decides, “I feel like a Buddhist,” or any other religion, or no religion at all. And yet, notwithstanding this imprecision, there does seem to be a trend away from religious affiliation. A detailed 2018 British Social Attitudes survey on religion reported 52 percent of the population in Britain affiliating with “no religion.”⁵

But something happened when the Queen died: the whole nation went into shock. And while you might say that you can't really deduce actual increased interest in religion from the numbers of people who were carried along with the tide of this major unrepeatable event in most of our lives, the death of the Queen does seem to have revealed a deep religious pulse in the United Kingdom. The Queen's death encouraged the discussion of the God in which she believed. The Queen's God was not just any old God, not just a tribal deity for the English or the Welsh or the Scots, but the God of all the world.

There seems to be something peculiar happening in the sense of a religious uplift in the United Kingdom. On Sunday, when I return to my duties as university chaplain, I'll see whether people are coming to chapel and whether the recent renewal of attendance at chapel continues. But it was the case when I left last week that, in Oxford colleges at least, there had been significantly increased interest in the life of the chapel and in questions of faith and spiritual exploration. So although our national statistics are discouraging, our very recent experience is quite encouraging.

*The funeral
cortege for Queen
Elizabeth II
passes through
Horse Guards in
London following
her funeral at
Westminster
Abbey on
September 19,
2022.*

LAUREN HURLEY / NO 10 DOWNING STREET / UK GOVERNMENT / FLICKR

IMPROVING OUR IMPERFECT WORLD


The privilege of our being at this conference reminds us not to be naïve enough to think that by the end of this day we will have solved all our issues or even healed the wounds we have seen borne by fellow delegates' experiences. Yet there is meaning in our being here. And virtue—even intended virtue—brings life and light to places where indulgence and moral collapse have brought fog.

We have seen that the role of religion in peacemaking does provoke hope amid despair. This doesn't mean that everything will be okay now, but it also doesn't simply abdicate to a view that there can be little improvement to our world and that we can only hope for pie in the sky when we die. President Russell M. Nelson reminded us of this at the general conference session we witnessed on Sunday when he urged us to “find true rest—meaning relief and peace—even amid [our] most vexing problems.”⁶

We need the urgency which speakers at this symposium have set before us. We have heard convincing pleas that religion isn't a final luxury or icing on the cake but rather the very foundation of stability and peace. We have heard that freedom is the tender daughter of Mother Truth, and we have spoken less about freedom *from*—that adolescent resistance to another's authority so that we can do what we like—but rather freedom *to*: to serve, to listen, to labor, and to love.

Today, on St. Francis of Assisi's day, a new book by Pope Francis has been published in English: *A Wound Full of Hope: Remembering Those Who Have Gone Before Us*. Followers of some faith traditions here will regularly pray for those whom we count as dead, through requiems or through temple ordinances. The mission and responsibility of people of faith to each other extends beyond the veil to bind us to our dead. We are not called to avenge the dead nor to forget them. We are called to build peace for the living and the dead.

But the pain and loss from the tragedies we see can fuel retribution and spiral into ongoing violence, causing us to see others as enemies with whom we do not want to have a relationship. Our vigilance is the antidote to the temptation of vigilantism. Our faith traditions offer us no escape from the ultimate destiny of being in relationship with those whom we may demonize, distrust, and hate. The prophetic crying out, that necessary first step in resolving injustice now, is indispensable in the building of peace and requires our commitment to justice for the living and for those yet to come. Prophetic warnings prompt our commitment to redemption, restoration, and sustained vigilance.

Thank you for modeling these principles through your commitment both out in the world and here together. This conference has bid us to learn a new humility together, and I'm grateful for the friendships and connections that I've made with so many of you who embody the gifts of grace, commitment, forgiveness, and joy and who have a tireless commitment to searching for peace and reconciliation. May God take our meager offerings and feed and heal the world through them. 

NOTES

- 1 *The Music with the Form and Order of the Service to be Performed at the Coronation of Her Most Excellent Majesty Queen Elizabeth II* (London: Novello, 1953), 68.
- 2 See Queen Elizabeth II, “A Speech by the Queen at Lambeth Palace, 2012,” address given at the Diamond Jubilee, February 15, 2012, royal.uk/queens-speech-lambeth-palace-15-february-2012.
- 3 “Religion, England and Wales: Census 2021,” Office for National Statistics, UK Statistics Authority, November 29, 2022, ons.gov.uk/peoplepopulationandcommunity/culturalidentity/religion/bulletins/religionenglandandwales/census2021.
- 4 “Religion, England and Wales: Census 2021.”
- 5 David Voas and Steve Bruce, “Religion,” in *British Social Attitudes: The 36th Report*, John Curtice et al. (eds.), London: The National Centre for Social Research, 2019, bsa.natcen.ac.uk/latest-report/british-social-attitudes-36/full-report.aspx.
- 6 Russell M. Nelson, “Overcome the World and Find Rest,” *Liahona*, November 2022.



CONSCIENCE,

PEACEBUILDING,

AND FAITH-BASED

LAW SCHOOLS

M

y remarks tonight reflect a conversation Professor Rob Daines and I had with one of our Stanford colleagues years ago regarding our roles as law professors who also claim to be faculty of faith. According to our colleague, Rob and I were wasting our positions as professors of law.

Our colleague, who is a self-proclaimed agnostic, insisted that if we were true followers of Christ, we would drop everything, including our appointments as law professors, to do whatever we could to ensure that he would be converted and would not suffer an eternity in hell. Rob and I both responded (correctly, I think) that God calls each of us to fulfill particular roles in His plan and within His kingdom. Our lives are to serve as witnesses of God's glory, power, and love. But without God's omniscience, we cannot always know precisely how our efforts and our work advance His plan and His kingdom.

BY G. MARCUS COLE

Dean of Notre Dame Law School

ILLUSTRATIONS BY
GÉRARD DUBOIS

Still, our colleague made me think: What makes me different as a law professor of faith from any other law professor? What exactly do my faith and the values that stem from it do for my students, my colleagues, my university, and the world?

Today I want to talk about conscience, peacebuilding, and faith-based law schools. I want to address the future and the role of faith-based law schools in shaping it.

I believe that we are at a critical inflection point in our society and in our world, and this moment calls for leadership. I also believe that faith-based law schools, in particular Notre Dame and BYU, must be the source of that leadership. Furthermore, I believe that the future of our country and our world depends upon our leadership, and

the future will look very different depending upon whether we step up to meet this challenge and responsibility.

I am going to do the following three things:

First, I want to remind us all of what is happening throughout our country in higher education, specifically in law schools, with respect to freedom of speech and academic freedom. Most of the developments are not good, and the elite institutions to which we all might once have looked for leadership have abandoned that role and have abdicated their authority. This is particularly and sadly true in the context of law schools, where engaging with opposing ideas is at the core of what we are supposed to be training students to do.

Second, I want to describe what is happening at faith-based law schools in general

and what we are doing at Notre Dame. We are witnessing and nurturing a type of revival among young people who are demanding more and better from law school communities. Students want meaningful law practices, not just lucrative ones. We are witnessing a resurgence of confidence from alumni and donors who had lost faith in the ability of higher educational institutions to meet the challenges of our society and its culture. And we are seeing a movement from others around the world who are seeking leadership to fill the void in higher education and, indeed, in the broader American culture.

Third and finally, I want to suggest some possibilities of what the future might hold if faith-based law schools step up to the challenges before us.



What is happening in higher education and legal education today?

We have all read the headlines and the horror stories.

We have all witnessed near-riots and actual riots break out on college campuses across the nation when speakers have been invited by student groups or educators. Some of these riots have resulted in both bodily injury and property damage. The sad truth is that they have become commonplace and too numerous to count.

These incidents have become so commonplace, in fact, that we have developed a name for them: “cancel culture.” Cancel culture has run amok on our college campuses, turning places that were once bastions of spirited and respectful debate and the exchange of opposing concepts in the marketplace of ideas into repressive gulags, where only groupthink and conformity are deemed acceptable. Cancel culture has turned even the most elite colleges and universities in the United States into little more than credential mills, where students hope to escape with a diploma if they are able to keep their thoughts to themselves.

What is perhaps most disturbing, I think, is that what was once dismissible as the rude and uncivil behavior of poorly raised children has spilled over into graduate and professional schools—and especially law schools. We have seen speakers at some of our nation’s most elite law schools shouted down before they could begin speaking or before their audiences had an opportunity to hear what they had to say. We have seen invitations withdrawn before events could take place, and we have seen disrespectful and even violent protests break out before a controversial word could be uttered.

We saw law students at one of the nation’s most prestigious law schools protest a law professor for representing convicted sex offender Harvey Weinstein. Although the professor was able to retain his faculty position, the university in question removed him from a residential staff appointment in an effort to placate the protesting students.

In 2019, at another elite law school, we saw the acting director of the US Department of Homeland Security, who was scheduled to give a keynote address on immigration law, shouted down by student protestors before he could even begin his speech. His speech had to be canceled.

And earlier in 2022, we saw student-edited law journals force the withdrawal of invited articles by professors whose conclusions they deemed to be unacceptable. To their credit,

*This address
was delivered at
BYU Law School's
Founders Day on
August 24, 2022.*



What do faith-based law schools contribute to our society and culture?

Well, I am happy to report that the robust exchange of opposing viewpoints has continued at Notre Dame Law School, and it is my sincere hope that this will always be the case. It could be that there is something fundamentally different about the students who choose Notre Dame for law school. I would like to think that there is something fundamentally different about Notre Dame Law School that causes our students to want to study law at Notre Dame.

It is not that maintaining this free dialogue was a foregone conclusion at Notre Dame. Upon my arrival at Notre Dame from Stanford in the fall of 2019, I quickly learned that we had two high-profile events scheduled. The first was a panel on “Bipartisanship in Washington,” with Senators Chris Coons of Delaware, Jeff Flake of Arizona, and Joe Donnelly of Indiana. I began receiving hate mail regarding this event protesting, “How could you provide a platform to the enemies of our president?” and “Since when has Notre Dame Law School become a campaign stump for the Democrats?”

Exactly two weeks later, I got even more hate mail on the eve of a speech to be given by the attorney general of the United States, William Barr. The hate mail and protests became so profuse that I decided to issue a statement articulating our policy on free speech. It read:

The attorney general of the United States will be speaking here at Notre Dame Law School this Friday, October 11, and there appears to be a need to clarify the policy regarding speakers at the Law School.

From time to time, speakers will be invited by the Law School, faculty, student groups, or organizations affiliated with the University of Notre Dame to speak at the Law School. Sometimes those speakers are government officials responsible for controversial policies. Sometimes they are people who are known to espouse controversial points of view. As long as they are here at Notre Dame Law School, they are free to say whatever is on their mind within the bounds of law.

many legal academics across the country and across the political and ideological spectrum decried this outrageous attack on academic freedom. Many of these academics voluntarily withdrew their articles from the law review in question in solidarity with the professors whose articles were deemed unacceptable.

We also saw the suspension of an academic program administrator for tweeting an unpopular opinion about the then-undetermined potential nominee for the seat of retiring US Supreme Court Justice Stephen Breyer. When students at the school learned of the tweet, they erupted in a firestorm of protest, resulting in a four-month suspension and investigation of the offending administrator. While the suspension was lifted and the administrator was cleared after classes ended, the message to students was clear: You have the power to silence those with whom you disagree, and you can suppress disagreeable ideas with force.

More recently, the dean of another top-10 law school asked his university to impose a major sanction on a senior, tenured law professor for expressing “intentional and incessant racist, sexist, xenophobic, and homophobic” views.

Just last month, US Supreme Court Justice Clarence Thomas announced that he will not be teaching students at George Washington University Law School after students at the school protested his longstanding engagement there.

To be clear, I am not defending any particular views, especially racist, sexist, and homophobic views or any other expressions of hate. As an African American man, how could I? But that is not what is at issue. What is at issue is that those with legitimate but unpopular thoughts or ideas are being targeted and silenced.

To me, what is most shocking about these incidents is that they are taking place in law schools, of all places. If there are any places where we ought to be training students to challenge opposing ideas with other, better ideas, it is in law schools. Students are supposed to be learning how to argue, not just on behalf of the causes and clients that they believe in but also on behalf of those that they do not. In fact, we all do this in our moot court programs by having students argue cases “on brief” and “off brief.” How else can students and lawyers learn the strengths and weaknesses on both sides of any issue?



THE MESSAGE
WAS CLEAR: YOU
POWER TO
WITH WHOM YOU

Freedom of speech matters. As Frederick Douglass once said, “To suppress free speech is a double wrong. It violates the rights of the hearer as well as those of the speaker.”

Just as speakers are free to speak, protesters are free to protest. They must do so in a place and manner that respects the rights of speakers to speak and listeners to listen and that is consistent with the educational mission of the Law School. Student groups and other organizations which hold contrary points of view have every right to schedule their own programs with their own speakers, and these speakers’ rights will be protected in just the same way.

Notre Dame Law School will neither endorse nor condemn invited speakers. An institution of higher education must be a place where controversial ideas and points of view are expressed, heard, and discussed.

Notre Dame Law School is just such a place.

I am happy to report that after that statement, we held the event. Attorney General Barr gave his speech without incident.

We have since had other controversial speakers, including four visits by justices of the Supreme Court of the United States. And while we have many on our campus who vehemently disagree with some of the speakers who appear, they nevertheless show them dignity and respect.

If you ask me why we are able to maintain some level of civility and discourse at Notre Dame Law School when it seems impossible on other campuses, I can only tell you what I believe. I don’t have scientific evidence that I am right, but I believe that we are able to do what others cannot because we are a faith-based institution with a community bound together by a core set of values.

TO STUDENTS
HAVE THE
SILENCE THOSE
DISAGREE.

Don't misunderstand me; we are not all Catholic. In fact, we are one of the most religiously diverse communities in higher education. Our students come from all faiths, and many from none at all. They come from all across the United States and from around the world. They come from rural and urban environments and from rich and poor communities and families. What they all have in common is their choice to study law in a place committed to the Catholic mission—*catholic* with a big and a small *c*. We have Orthodox Jews alongside Muslims and atheists mixed in with Catholics and other Christians of all kinds. They chose us and we chose them.

On the first day of school each fall, I give a welcome address to the incoming students. Each year, I tell them what it means to be a Notre Dame lawyer, what we at Notre Dame call “a different kind of lawyer.” I give them

examples of Notre Dame Law School graduates from the past and how they dedicated their lives to make a difference for others.

I then tell them what I think makes a Notre Dame lawyer “a different kind of lawyer.” I tell them that whatever we do, whether it is public interest law or corporate law, transactional work or trial work, for large organizations or for individuals, all Notre Dame lawyers have one thing in common: they are dedicated to serving others in a way that lets others experience the loving, creative power of God in their lives.

I also tell them that this education is not for them. This education is for those individuals and communities that they are going out into the world to serve. And accordingly, the people that they are going out into the world to serve do not care if they happen to be offended by something someone here—a classmate, an instructor, or an invited speaker—says. Their future clients have real problems. Discrimination. Racism. Job losses. Plant closings. Bankruptcies. They cannot care about whether something offends you.

Furthermore, because your future clients have real problems, you cannot wait until you are out in the world to confront what they must confront, including racist ideas, discrimination, crimes, and vulgarities of every type. There are no “trigger warnings” in law school. You must face the ugly things of this world because those whom you are called to serve will face them. And I tell students that ideas—including offensive and unpleasant ones—are what we deal with as lawyers. A law student who is afraid of ideas is like a medical student who is afraid of the sight of blood.

Furthermore, the hallmark of a Notre Dame lawyer is to treat others with dignity and respect, even if we disagree vehemently with or are offended by what they have to say. Our law students must remember that they are no longer undergraduates. They are not even in graduate school. They are in professional school, and it is here where they begin to shape their own professional reputation. I tell them that their classmates will remember them and will be an important and essential part of their professional networks long after law school. They will also remember how you treat them. If you are to be a Notre Dame lawyer, you are to treat your classmates with dignity and respect, even if you disagree with them. You are to treat them as if each one of them is made in the image and likeness of God. Because guess what? They are.

Ultimately, how we treat others is not about them; it is about us, who we are, and the purpose for our lives. If we claim to be disciples of Jesus Christ, we must treat others as Christ would want us to treat them. How do we know what that is? Jesus Himself told us in Matthew 25:35–36:

For I was hungry and you gave me food, I was thirsty and you gave me drink, [an immigrant] and you welcomed me, naked and you clothed me, ill and you cared for me, in prison and you visited me. [New American Bible (Revised Edition)]

Jesus commended such actions in verse 23: “Well done, my good and faithful servant. . . . Come, share your master’s joy.”

As I say to students at Notre Dame Law School, we are striving every day to be a Matthew 25 law school. That’s what it means to be a Notre Dame lawyer, “a different kind of lawyer.”

Could I have said all of this to students when I was on the faculty at Stanford Law School? I often wonder whether I could have. At Notre Dame, I know that I can. And it has an effect. It helps to provide a structured environment where students are free to be themselves without fear of mistreatment or ostracism. It builds cooperation across huge divides and creates strange bedfellows. Our Black Law Students Association, for example, formed a Black legal history reading group with the Notre Dame Law School Federalist Society. One student society composed of Catholic law students put on events with our LGBT Law Forum. Don’t get me wrong; yes, they disagree, but they don’t cancel each other. They treat each other as though they were created in the image and likeness of God.

3

How can we fulfill our mission to shape a better future for our country and the world we are called to serve?

Well, that brings me to the point of my remarks, namely, the future and faith-based law schools. I think that what we have created at Notre Dame is special not because I am special or because our faculty or students are special but because at our faith-based institution, we can all be called upon to see what is special in each other. And we act like it.

If there is anything this world needs right now, it is more Notre Dames and BYUs. And I am not the only one who sees that. The fact that someone saw the need for the creation of Ave Maria School of Law and the University of St. Thomas School of Law—not one but two distinctively Catholic law schools—suggests that the founders of Ave Maria and St. Thomas saw something going on in our society. Ave Maria and St. Thomas are not the products of crazy entrepreneurial zeal run amok. Like Hillsdale College for undergraduate education, they are the result of a clear yet sobering look at what is happening to “the university” in our culture.

**“TO SUPPRESS
IS A DOUBLE WRONG.
RIGHTS OF THE
WELL AS THOSE OF**



The very idea of “the university” is collapsing all around us.

Two years ago, Yale philosophy professor Nicholas Wolterstorff published a monograph, *Religion in the University*, with a devastating critique of the ways in which faith has become illegitimate in the modern university. Wolterstorff suggests that faith and religious experience are as legitimate a source of inquiry as ethnicity, gender, or other widely accepted identities.

I would go further. I would suggest that what Ave Maria, St. Thomas, Notre Dame, and BYU law schools all recognize is that a true university must be faithful to a core set of values. It must be bound together by more than, say, “excellence,” because if it is not, then one set of hidden beliefs becomes a secret code by which all competing ideas are silenced.

Brigham Young University’s J. Reuben Clark Law School and Notre Dame Law School are in a unique position of being able to host true, important dialogues that simply cannot happen on most other campuses, including most other “Catholic” campuses. The mob scenes at Middlebury College, Yale Law School, Harvard Law School, University of Pennsylvania Carey Law School, and

Georgetown Law present more than just cause for alarm. They are a window into what could be our future.

But that future has yet to be determined. We can change it. By we, I mean faith-based law schools like BYU and Notre Dame.

What exactly is the threat, and what should we do about it?

The biggest threat to American society right now is the use of law to impose contested views upon each of us. The most vulnerable people are people of faith and the poor who rely upon us for care and services. That is why I founded Notre Dame Law School’s Religious Liberty Initiative and why I am passionate about partnering with those who share the same concerns about the threats to religious freedom.

Let me give you an example of the threats to Americans of all faiths and to those who do not affiliate with any faith. As we all know, Title IX of the Civil Rights Act prohibits discrimination on the basis of sex in any federally funded program or institution. Title IX has been an important cornerstone of American antidiscrimination law for 50 years and is to be credited with many advancements for American women and with the levels of excellence that they, in turn, have pushed the rest of American society to achieve.

In June 2022, the US Department of Education released proposed new regulations with regard to the enforcement of Title IX on college and university campuses across the nation. One of the provisions buried deep in the regulations categorizes a failure to use appropriate pronouns as discrimination on the basis of sex. This means that if a member of a campus community articulates preferred pronouns, others must use them or potentially be found in violation of Title IX.

Now, as a Christian, as a Catholic, and as the dean of Notre Dame Law School, I have made it clear to everyone and anyone who knows me that I will not countenance mistreatment of or discrimination against the LGBTQ members of our community. As I said earlier, each gay, lesbian, or transgender member of our community is created in the image and likeness of God. I will not stay silent in the face of bigotry against them.

But I hold my freedom of speech as one of the most precious gifts of God and as one of the cornerstones of our democracy. The words I use are my own, as a matter of my conscience. The pronouns I use for you are my own. You can ask me to use your preferred pronouns, and in an effort to show you dignity and respect, I will try to honor your request. But you cannot force me to extend you that courtesy. And I would expect that you would respect my right of free speech as much as you want me to honor your choice of pronouns.


To use law to punish me for the free exercise of my own speech is a violation of my right to free speech. And my refusal to relinquish my right to freedom of speech does not make me a bigot.

Furthermore, it is not enough for the courts or for the US Department of Education to assert that, as a religious institution, Notre Dame or BYU can claim a religious exemption from this new requirement. The violation is not one of my religious freedom (although it may be that too). No. The violation is of my constitutional freedom of speech. The use of a religious exemption to protect freedom of speech is unthinkable. It is the abdication of leadership.

I will not give up my right to free speech, and I will not use my right to religious freedom to claim a right to freedom of speech that belongs to all.

Conclusion

As faith-based law schools, we have a special responsibility to lead the fight against encroachments of all human rights. The truth is, we are in a privileged position to do so since we know that other law schools are not going to risk bucking the culture of the day. We also have the advantage of communities committed to the same shared values. And we can point to our faith and those same shared values in ways that secular institutions cannot.

At the end of the day, it is the secular institutions, including the most elite institutions in our society, that will be looking to us to lead the way to a future of freedom of speech, academic freedom, religious freedom, the pursuit of truth, and human flourishing. 

FREE SPEECH

IT VIOLATES THE

HEARER AS

THE SPEAKER.”



ELVIS WAS RIGHT

The Unavoidable Intersection Between Personal Values and a Fulfilling Practice of Law

BY JILL MARCHANT, '90

*Executive Vice President and Chief Legal
Officer of Hallmark and Recipient of
BYU Law's 2022 Alumni Achievement Award*

I've been practicing law for 32 years now, and I've learned a lot about how my personal values, including those based on religious conviction, impact my career. For almost 30 of those years, I have served as in-house counsel for large public and private companies, enjoying increasing levels of responsibility. My career journey has been one of self-imposed disruption and risk-taking as I've moved from one job to the next both to achieve my career goals and to find personal fulfillment. Misalignment of my personal values with institutional corporate values has driven some of my career moves on the path towards that fulfillment. I am fortunate that each move prepared me for what I would describe as my "dream job" today as chief legal officer of Hallmark.

ILLUSTRATIONS BY CHRIS GASH

Since graduating from BYU Law School in 1990, I have taken two bar exams, been a member of five state bars, and worked for four law firms (if you include three summer clerkships) and six companies. When I say “practice of law,” I am coming at it from the perspective of someone who has not only had a lot of practice but also as someone whose experience has been predominantly in-house, practicing in multiple industries, working under different leaders, and navigating different corporate cultures. That said, I believe my observations are relevant whether you practice in-house or whether you are in private practice, government, business, nonprofit, or education.

Defining and Refining Values

I hope the title for my remarks caught your attention: “Elvis Was Right: The Unavoidable Intersection Between Personal Values and a Fulfilling Practice of Law.” The following quote is attributed to Elvis Presley: “Values are like fingerprints. Nobody’s are the same, but you leave ’em all over everything you do.” I like this analogy for a couple of reasons.

To Elvis’s first point, even if we have shared values with family, members of our faith, or other communities with which we engage, the way our values—even shared values—impact what we think and do is personal to each of us. We each have a unique set of experiences and a unique combination of all the qualities and choices that make us who we are, including our gender, birth order, upbringing, education, faith, social interactions, and the like.

To Elvis’s second point, and where I will focus today, our values are left all over everything we do in that they are revealed, tested, and refined through our work. They can also be a guiding force in making professional choices that optimize career fulfillment and contribute to spiritual well-being and growth.

What are our values? I could spend all morning on this topic alone—and I won’t—but I will share that there are many resources that can help us define and refine our values, including religious practice and study, TED Talks, blogs, books, and assessments. You may think that because you can recite the Scout Law, the Young Women values, or the 13th Article of Faith, you know what your values are. But going beyond these to do some structured thinking around your own personal values is a good idea.

The “Align Your Values for the Right Career as a Lawyer” series offered by Lawyers Concerned for Lawyers, a nonprofit assistance program dedicated to helping with the personal and professional challenges of the legal profession, offers three valuable insights:

*These remarks
were delivered
as BYU Law’s
Honored
Alumni Lecture
on October
13, 2022.*



FIRST

“Your values tell your brain what is important, what you care about most, and how you should behave across a variety of situations. Whereas most people would agree that honesty, fairness, and respect for others are important values, there are differences in how people characterize, demonstrate, and prioritize these concepts.” We need to pursue our own personal value system and actively manage its impact on our actions.

SECOND

“Your values inform your identity—who you are, what you do, how you do it, and [what you’re passionate about]. When you have a lack of interest in something, you’ll want to explore whether it is due to your values and identity, a lack of training and skills, or relying too much on a skill [in your comfort zone that limits] your interest in something new.” Often we don’t prioritize learning new things because learning takes time or can make us uncomfortable; resistance to change is very human.

THIRD

“Your values are closely related to sources of motivation and energy. They are [often called] motivators [or] drive. However you label it, when you align your actions with your values, you’ll have more energy to act.”

Intelligence, Character, and Relationships

Latter-day Saint scholar, teacher, and lecturer (and some might add comedian) John Bytheway shared advice with teens some 30 years ago in remarks titled “Whose Values Do You Value?” (audiocassette, Deseret Book, 1993). In his comments—still relevant today—Bytheway pointed out that we can say we value something, but if we act in contradiction to those values, it begs the question “Is it really a value?” He explained that there are only three things we can take with us from this earth: our intelligence, our character, and our relationships. I believe these are the same three things we can take from a job (with the caveat that we might not necessarily be able to take client relationships if we’ve agreed not to). We can’t take the office furniture, the IP, the files, and so on.

As we think about these three things that we can take from life and from a job—intelligence, character, and relationships—as filters through which we can assess a career choice and its alignment with our values, we should ask ourselves these questions:

Is my job enhancing my intelligence? Am I growing intellectually?

Is my job enhancing my character? Have I become firmer in my values and stronger in what I stand for? Am I able to live my values at work? Do my values contribute to the effective performance of my work? As Bytheway said in his remarks, “Where does character come from? It comes from living your values.”

Is my job building lasting relationships that are healthy and beneficial, both personally and professionally? Am I respected and supported in living my values?

Whether you are on the precipice of making a career choice or just thinking ahead, questions about how an opportunity shapes your intelligence, character, and relationships are important questions to answer.

Our Fingerprints

To Elvis’s point about our fingerprints, I believe there are three things we leave behind as we move on from a job: our legacy, our reputation, and our work product.

Thinking about our legacy, that “mark” we leave behind: Did our accomplishments reflect our values? Did our organizational impact do the same? Would colleagues be able to describe our values when they tell the story of our time and impact there?

Thinking about our reputation: What did we become known for during our time in the assignment or role? If someone were to say, “While she was here, she had a reputation for being . . .,” what would those adjectives be and do those adjectives align with what we would say our values are?

Thinking about our work product: Did the way we communicated, organized, advocated, delivered results, and innovated reflect our values? Were we thorough, thoughtful, professional, and balanced? Did we facilitate business objectives or were we perceived as an obstacle?

My advice is this:

If you value candor, be frank.

If you value honesty, be truthful.

If you value trust, be trustworthy.

If you value respect, be respectful.

If you value praise and recognition, give credit where credit is due and be happy for others when they succeed.

If you value integrity, do the right thing when nobody is looking.

Examples of Misalignment

Against that backdrop, I will offer some practical examples of my own value-driven career choices to help contextualize these thoughts.

In my third year of law school, I had offers from two well-known regional law firms. As I grappled with whether to accept either offer, I felt unsettled; I was having that “stupor of thought” (Doctrine and Covenants 9:9). So I submitted my résumé for third year on-campus interviews. I was selected to interview with a large international law firm, and they had sent a female partner to conduct the interview. This was the first female attorney with whom I had ever had an interview. I liked her and I really liked what she had to say about the firm, particularly how progressive and inclusive it was and how many female partners and associates there were. Now this was before the internet, so I couldn’t just google the firm and get the inside scoop. But I asked lots of questions and read everything that was available.

Ultimately, I accepted a position with that firm. It was everything I’d hoped for. I was surrounded by female associates and partners who mentored and encouraged me. After I had my first child, I knew that my motherhood was valued and respected by the firm, and I returned from leave as a highly productive, committed, and loyal associate. This place aligned with my values, and I thrived there.

When I decided to leave the firm to pursue an in-house career, I was fortunate to land at a business unit of a Fortune 50 company in the Midwest where the general counsel spoke often about “doing the right thing” as an appropriate goal above and beyond complying with the law. One year, the entire legal team (more than 100 lawyers) heard a panel discussion among the company’s most senior business leaders at the corporate headquarters on the East Coast, and a very senior executive was asked about what he valued in an in-house lawyer. I will never forget what he said: “You’re my lawyer, not my priest; I may not care about what’s right—I need to know what’s legal.”

I remember being both shocked at this statement and grateful that in my business unit, under my general counsel’s direction, “the right thing” was a welcome part of the analysis and was openly encouraged as part of the discussion. Because I value the pursuit of legal solutions rooted in doing what’s right, this alignment with my values kept me at this company for a fulfilling 12 years.

To advance my career, I accepted a position with another company, where I reported to a female general counsel who was a role model and mentor to me and who to this day inspires me to ask, “WWBD?” (“What would Becky do?”), because I greatly admired her servant-leadership, judgment, compassion, and wisdom. But after a corporate merger, a new culture took hold. Lawyers were encouraged to monitor and report the work hours and work habits of the other lawyers and staff, and there were longer days, more working weekends, and a relentless push to cut support-staff resources. Recognition programs were curtailed, communication and transparency decreased, and time to gather and celebrate and to nurture camaraderie during the workday were frowned upon. Because I value trust, respect, transparency, and human connection, I found this new environment stressful, unpleasant, and unfulfilling. I would need to make a change.

Coincidentally, I was soon approached with my first general counsel opportunity, and I became laser-focused on landing it. This was both the next professional move I wanted to make and an opportunity to escape cultural misalignment with my values. The final round of interviews should’ve been my first clue that I would face another values misalignment. Several senior company executives and their spouses hosted a dinner interview at an expensive restaurant and the CEO showed up late, in a T-shirt and shorts that were stained with sweat and barbeque sauce, and smelling of beer. He kept interrupting, talking loudly, using profanity, and asking questions that I could not answer without revealing attorney-client confidences. I would later learn that this was a performance to “test” candidates to see if he could rattle them when he didn’t fit the expected mold of CEO and to assess whether the candidate would fit in with the company’s informal, irreverent, and unconventional culture. I honestly don’t know how I passed that test, but because I wanted this job so desperately,



*I believe there are
three things we leave behind
as we move on from a job:
our legacy,
our reputation, and
our work product.*

I didn't listen to the Spirit or my gut telling me I was headed for trouble.

In my new role as general counsel, I was encouraged to tailor my dress, language, and conduct to more closely reflect the culture of the company. I took a few small steps to that end—mostly dressing more casually and behaving less formally—but I knew this was not the point of the guidance. What would have made me fit in better with company culture were things that really didn't align with my values. But this was my “dream job,” so I stuck with it.

It was exhausting. I wore myself out trying to add value and enjoy my work in a corporate culture and value system (regardless of the stated values) that clearly did not align with my own. I learned the hard truth of what John Bytheway meant when he warned, “Happiness comes from being committed to a value system.” Exhaustion comes from trying to be successful working in a value system in conflict with your own. I felt constant pressure to conform while trying to apply my values to legal problems in this environment. My health, my happiness, and my important relationships were all suffering.

Notwithstanding this, I felt good about what I had accomplished in my nearly three years there. I had led some key legal outcomes, rebuilt a legal function that was now in turnkey condition for a successor, and formed lasting and valued relationships that I knew would endure—and have endured—my departure. But I was not happy; it was time to move on.

Refocusing on the Vital

I was fortunate at this point in my career to be able to step away and take a breath. I wish the same for anyone struggling with values misalignment in their career, but I recognize it is not always feasible for all. Although I was being recruited for several other opportunities, I knew they would take some time to mature into offers and commitments. I calculated that I had about six months to reevaluate, and I used this time to really and wholly revisit my values—and start writing them down. I focused on my physical, emotional, and spiritual health; I served in the temple; I volunteered for every

church activity and effort that was presented; and I nurtured my most important relationships—with my Savior, husband, children, and friends. This time was a gift in so many ways.

I had learned much from my previous job about what was crucial for me in my role as a general counsel, especially that it was essential not only to contribute and be effective but also to be fulfilled. I knew that whatever choice I made next, the single most important factor for me would be values alignment. Now at the pinnacle of my career working for two iconic and admired brands, Hallmark and its subsidiary Crayola, I am fortunate to have complete values alignment. Among Hallmark's stated beliefs and values are the following:

- "Our products and services must enrich people's lives."
- "Creativity and quality—in our products, services, and all that we do—are essential to our success."
- "The people of Hallmark are our company's most valuable resource."
- "We value excellence in all we do."
- "We value high standards of ethics and integrity."
- "We value caring and responsible corporate citizenship . . . for each community in which we operate."

At Hallmark I serve as counsel to the board of directors and sit on the senior executive leadership team. I am often in the room where it happens, and I am grateful that these values are modeled at the very top and are the lens through which decisions are made. As I've helped to lead Hallmark in responding to a worldwide pandemic, social and racial injustice, political turmoil, acts of aggression against our democracy, and economic challenges, I have been incredibly proud of our actions and decisions reflecting these values. I am energized by the care we inject into the world and into our workforces as we demonstrate respect for individual choices on topics that can be divisive, as we encourage flexibility in how and where work is performed where we can, and as we provide resources for emotional and mental well-being.

In my time at Hallmark, I've learned that diversity and inclusion have been values at Hallmark since its founding more than 100 years ago. The company's founder and subsequent leaders hired and appointed women to serve as business leaders and board members before these were expectations of employees or shareholders. The company has supported employee resource groups and offered creative products and solutions for diverse communities for decades, and it has formed, led, and supported external organizations that advance diversity, equity, and inclusion. In recent years, Hallmark has been even more declarative about these long-standing values and has stated expectations that promote these values for all leaders and employees, including elevated intentional learning, advocacy, products, and content to serve all communities. Hallmark has emphasized these values in our approach to recruitment and development. It has been wonderful to have the support I need to advance diversity and inclusion in the legal profession by furthering these goals at Hallmark.

Actions Reveal Values

As I noted at the outset of my remarks, my experience with values alignment and misalignment are from the in-house perspective. I don't know if particular law firms have published or stated values or not. But they do have values. If you are pursuing a career at a firm or a company, do your homework so you know what the organization's real values are.

In any event, experience has taught me that stated values are just words. Values are reflected in action. As you ascend in an organization, it is important to examine whether the stated values apply at the top (because they start there) or if there are unspoken values that are steering decisions and strategies despite what's written down. In order to be real, an organization's values must start in the boardroom and the C-suite. If they aren't there, they aren't real. And what is modeled there is what will guide the organization. We've seen infamous examples of business failure and collapse because of the "values" at the top.

In this discussion of where we leave our fingerprints, it's vital to emphasize that values alignment in our work is not just about personal fulfillment. It's also about the opportunity to draw from institutional values to become better versions of ourselves in meaningful and impactful ways that help others. Here's a recent example from my own life.

Just a week ago, my husband and I were returning from a midday funeral we had attended to support a friend, and we had not eaten all day. We were famished. We stopped for a late lunch and were focused on our appetites. I confess that an earlier me might not have noticed the dirty and disheveled young man who was sitting behind a column in the diner to avoid the glare of the manager. I wonder if my earlier self, if I noticed him at all, might have been annoyed and simply ignored him when he quietly said, "Excuse me." But

Values might be
captured in words, but they
are revealed in actions.

every day at Hallmark—every single day—we talk about our purpose to put more care in the world.

“Can I help you with something?” I asked.

“Do you have some cash?” he replied.

“I’m sorry, but we don’t carry cash,” I answered—an absolutely true statement reflecting our total reliance on plastic money—but I asked him, “Are you hungry?”

He nodded.

What immediately came to my mind was this very simple idea that “this is an opportunity to put more care in the world.” And so I asked my husband to make arrangements with the stern-looking restaurant manager to purchase a meal for this stranger.

For I was an hungred, and ye gave me meat: I was thirsty, and ye gave me drink: I was a stranger, and ye took me in:

Naked, and ye clothed me: I was sick, and ye visited me: I was in prison, and ye came unto me.

Then shall the righteous answer him, saying, Lord, when saw we thee an hungred, and fed thee? or thirsty, and gave thee drink?

When saw we thee a stranger, and took thee in? or naked, and clothed thee?

Or when saw we thee sick, or in prison, and came unto thee?

And the King shall answer and say unto them, Verily I say unto you, Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me.


[Matthew 25:35–40]

Key Takeaways

After I listen to someone like me deliver remarks like these, I ask myself, “What’s the ‘so what’? What am I supposed to do with this information?” Here’s what I would like you to take away from my remarks. Working where the values are in alignment with your personal values is energizing and will bring you the most fulfillment. It’s exhausting to work where they are in conflict. Working where you can apply your values to your job will make you more effective, help you build the character and reputation you want (and which hopefully reflect your values), and allow you to leave a legacy you’ll be proud of. Take time to do some structured thinking about your values; at a minimum, write them down and see if you can articulate examples of how they show up in your life.

Remember that all you will take away when it’s all said and done is your intellect, your character, and your relationships. Make choices that nurture those things.

Values might be captured in words, but they are revealed in actions. With the power of all the tools available to you—the internet included—there is much you can learn about what an organization’s values are and if they align with yours. Be selfish, brave, and bold when it comes to your professional happiness and fulfillment by seeking out work environments where your fingerprints are welcome.

And finally, don’t just leave your fingerprints where you work. Leave them all over the place in ways that serve, help, and uplift others. Isn’t that what it’s really all about? 

The Future of the Establishment Clause

BYU generally, and the Law School specifically, have been key to planting the seeds for my views on the religion clauses of the First Amendment, which provide that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹ It was in this room 26 years ago—perhaps to the day—that Professor Richard Wilkins introduced me to the landmark Supreme Court case interpreting the Establishment Clause, *Lemon v. Kurtzman*,² in my first semester of law school. I am blessed to have had the opportunity to study constitutional law from the unique perspective that BYU Law offers. Nowhere else in the world can we learn constitutional law not just from a legal perspective, but we get to pressure test those views against eternal principles that we understand from the gospel of Jesus Christ.

Implications of *Kennedy v. Bremerton School District*

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BY JUDGE RYAN D. NELSON, '99

UNITED STATES COURT
OF APPEALS FOR
THE NINTH CIRCUIT

.....

ILLUSTRATIONS BY ANDRÉ DA LOBA



This article is
based on an
address delivered
to BYU Law's
Federalist Society
on November
18, 2022.

LINE UPON LINE

As a young man, I learned from the Lord that I would grow to “have the capacity to influence the writing of law.” It was a specific direction. But the full import of that direction came to me only over time. For several years, I did not fully appreciate the specifics of my journey to fulfilling it. A textualist even in my youth, I spent several years believing that I would not necessarily become a lawyer but a legislator. After all, the specific command about “the writing of law” seemed more consistent with an Article I responsibility than with an Article III responsibility. I have learned over the years that the Lord tends to reveal His plans for us “line upon line, precept upon precept.”³

And so when I came to BYU campus back in 1991 as a freshman, I did not have the specific intent of studying the law. But in 1994, President Rex E. Lee spoke at the welcome devotional at the Marriott Center and shared his personal reflections on how important law school had been for him and how it had impacted his life.⁴ President Lee’s comments hit me directly. I left the Marriott Center that afternoon with the conviction that law school would be my next step. And once that was clear to me, I was all in.

It was at BYU Law School that I recall first forming the desire to become a judge—and a federal circuit judge specifically. Twenty years later, I found myself nominated by the president of the United States to the current lifetime appointment that I hold today. That process was unsure at times. I am grateful for the spiritual impressions I had in my youth, confirmed and refined at this great institution, that reassured me that a higher power was ultimately guiding me through that process.

Some say that becoming a federal judge is like getting struck by lightning—but in a good way. You can stand in particular places to increase your chances, but ultimately the opportunity is beyond your control. Aspects of that analogy are true. Yet as President George Washington wisely noted, “The Liberties of America are the object of divine Protection.”⁵ And with the courts being “faithful guardians of the constitution,” an independent judiciary is “an indispensable ingredient” to the protection of liberty and “the citadel of the public justice.”⁶ As such, my path—and likely the paths of most of the other federal appellate judges in this country—was guided less by luck and more by a gracious Providence intent that America remains a fixed light of justice to the world. I am honored and humbled to play my small role in that process.

THE LEMON SPECTER

As I mentioned, I was first exposed to *Lemon v. Kurtzman* in this very room 26 years ago. I discussed the case with my study partners, Rich Benson and Alan Bell, and came to understand even back then that the legal foundation of the “*Lemon* test” was not necessarily constitutionally sound. I was guided in my thoughts by one of the greatest legal minds in the country: the late Supreme Court Justice Antonin Scalia.

Justice Scalia was as known for his lively writing as for his sharp mind and originalist method. He vividly criticized his colleagues’ legal reasoning as “argle-bargle,” “jiggery-pokery,” and “[p]ure applesauce.”⁷ But perhaps his most memorable critique was reserved for the Supreme Court’s Establishment Clause decision *Lemon v. Kurtzman*. *Lemon* set forth a three-part framework, called “the *Lemon* test,” to evaluate whether the purpose and effect

of a challenged government action are religious and to weigh the risk of government entanglement with religion. The Court later elaborated that the test’s “effects” prong looked to whether a “reasonable observer” would conclude that the action was an “endorsement” of religion.⁸

But the so-called *Lemon* test was often criticized as having no grounding in the clause’s traditional understanding and

During this time the *Lemon* ghoul
had increasingly devoured religious
expression in the public square.



KENNEDY AND THE DEMISE OF LEMON

Let's start with a review of the facts in *Kennedy*. In 2008, Joseph Kennedy began coaching football at Bremerton High School in Washington state. The football team already had a tradition of saying a prayer in the locker room before games. After games, when the teams were done shaking hands, Coach Kennedy took a knee on the 50-yard line and offered a quiet and short prayer of thanks to God. At first he prayed alone, but later some players asked if they could pray alongside him. Kennedy let them, telling them, "This is a free country."¹⁴ Much of the team eventually joined him. Sometimes Kennedy would incorporate a short motivational speech with religious content during this time of prayer. This continued for over seven years without complaint.

In September 2015, an opposing team's coach complimented the school district for allowing Kennedy to pray on the field. This was the first time the school district learned about Kennedy's prayers, and district administrators wrote a letter to Kennedy identifying his "problematic" practices. The district explained that Kennedy's free exercise rights "must yield so far as necessary to avoid school endorsement of religious activities."¹⁵ It then instructed that any religious activity Kennedy conducted must be "physically separate from any student activity" and that "such activity should either be non-demonstrative . . . if students [were] also engaged in religious conduct, or it should occur while students [were] not engaging in such conduct."¹⁶

Kennedy ended the pregame locker room prayer and removed the religious content from his postgame speech. Driving home after a game, however, Kennedy felt upset that he had "broken [his] commitment to God" by not offering his prayer, so he turned his car around and prayed on the field after everyone had left.¹⁷

The dispute soon gained the attention of the media. After the next game, a large group of players and coaches from the opposing team as well as members of the public rushed the field in a show of support for Kennedy. The district gave Kennedy an ultimatum that forbade him from engaging

as being infamously hard to apply.⁹ So the Supreme Court often ignored it. Yet the Court would, from time to time, invoke *Lemon* seemingly at random and with little justification. As a result, Justice Scalia memorably commented on one such invocation of *Lemon* by the Court: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening . . . little children and school attorneys[.]"¹⁰

I joined the Ninth Circuit 25 years after Justice Scalia's comments, and during this time the *Lemon* ghoul had increasingly devoured religious expression in the public square. In my first writing as a judge, I noted that recent Supreme Court cases provided "good reason to question whether, or at least to what extent, *Lemon* ha[d] been replaced."¹¹ Not long after, I dissented (with eight judges joining) from the denial of rehearing en banc in a First Amendment ministerial exception case, questioning "the continuing value of the legal test in *Lemon*" and noting that several current Supreme Court Justices had expressed doubts about its validity.¹²

I think that Justice Scalia would be happy to hear that the old ghoul appears to be back in the grave, and this time for good. Last term, the justice who filled the vacancy left by Justice Scalia—Justice Neil Gorsuch—authored *Kennedy v. Bremerton School District*, which strongly suggests that *Lemon* has finally been rejected.¹³ Today, I want to make a few observations about the effect of *Kennedy* on the Establishment Clause going forward.

in “any overt actions” that could “appea[r] to a reasonable observer to endorse . . . prayer . . . while he is on duty as a District-paid coach.”¹⁸ Still, Kennedy briefly prayed again on the 50-yard line at the next two games, and the district suspended him.¹⁹

Kennedy sued under section 1983, alleging violations of his First Amendment rights under the Free Exercise and Free Speech Clauses and under Title VII of the Civil Rights Act. The district court first denied his request for a preliminary injunction. The Ninth Circuit affirmed, and the Supreme Court denied cert. Four Justices, however, took the unusual step of issuing a statement regarding denial of cert; they emphasized that the underdeveloped record justified the denial but that the Ninth Circuit decision was “troubling” in its treatment of Kennedy’s rights.²⁰

The lower courts didn’t heed the warning. On remand, the district court granted summary judgment for the district, concluding that Kennedy’s postgame prayers were made in his capacity as a public employee and violated the Establishment Clause, which justified a restriction of Kennedy’s free speech and free exercise rights.²¹ The Ninth Circuit panel affirmed, claiming a reasonable observer would have perceived the district’s allowance of Kennedy’s prayers as an endorsement of religion.²²

The panel’s decision was called en banc by a judge on the Ninth Circuit, but the vote failed. Yet the Ninth Circuit still had much to say about the case, and the order denying rehearing included six separate statements. First, the author of the panel opinion wrote a concurrence to explain his decision, as did the two other panel judges. Four other judges—me included—wrote substantive dissents from the denial of rehearing en banc. In the end, there were 92 pages of opinions just addressing whether the case should have been reheard by a full en banc panel.²³

Kennedy filed another cert petition, but this time the Supreme Court took the case and reversed the Ninth Circuit by a vote of 6 to 3.²⁴ The Court began by evaluating Kennedy’s free speech and free exercise claims and explaining that those clauses work in tandem. The Free Exercise Clause protects religious exercise, which is often

communicative. And the Free Speech Clause protects expressive activity, which is often religious. Here, the Court concluded that both sets of rights had been burdened.

First, the Court held that there was no dispute that the district’s discipline was neither neutral nor generally applicable. The district admitted that it sought to restrict Kennedy’s actions because of their religious character. Nor were the district policies applied in an even-handed way. Other coaching staff were permitted to briefly engage in personal conduct, such as visiting friends or taking personal calls. Kennedy was disciplined only because his personal conduct was religious.

The district also burdened Kennedy’s free speech rights. Of course, the speech of government employees can be subject to government control if it is part of the employees’ official duties. But neither students nor teachers shed their freedom of speech at the schoolhouse gates, and so not everything teachers say or do in the workplace is subject to government control. If that were the case, a school could fire a Muslim teacher for wearing a headscarf in the classroom or prohibit a Christian staff member from praying quietly before lunch in the cafeteria. Here, Kennedy offered his prayers in his capacity as a private citizen at a time when he and other employees were free to engage in all manner of private speech. That Kennedy chose to use this time to pray did not transform his speech into government speech.

Having concluded that Kennedy’s free exercise and free speech rights were burdened, the Court looked to whether the district’s interest justified that burden. Typically, in considering each of these claims, a government entity must satisfy “strict scrutiny,” meaning that restrictions on protected rights must serve a compelling interest and be narrowly tailored

**The Free Exercise Clause protects
which is often communicative. And the Free
protects expressive activity,
Kennedy confirms that the Establishment
contradict the other clauses**

to that interest. There was some dispute about whether an easier-to-satisfy standard for government speech cases applied to Kennedy’s free speech claim. But the Court ultimately concluded that the district could not justify disciplining Kennedy’s private prayers under any standard.

The district claimed that Kennedy’s rights were necessarily burdened to avoid violating the Establishment Clause. But that argument hinged on an analysis flowing from Justice Scalia’s old ghoul, the *Lemon* test. The Court explained that it had “long ago abandoned *Lemon*.”²⁵ And in *Town of Greece v. Galloway*²⁶ and *American Legion v. American Humanist Association*,²⁷ the Court had explained that the Establishment Clause must be analyzed in a different way: by reference to historical practices and the clause’s original understanding. There was little doubt that Kennedy’s personal prayers did not constitute “establishment of religion” as that concept was historically understood.

In the end, *Lemon*’s replacement meant that Coach Kennedy won his free exercise and free speech claims. Kennedy’s fundamental rights were burdened, and the district could not justify those burdens based solely on a faulty Establishment Clause concern. Disciplining Kennedy for his private prayers was thus unlawful, and the Ninth Circuit was reversed.

LOOKING AHEAD

With that overview in mind, I offer a few observations about this case and its potential implications going forward.

Observation number one: The Court in *Kennedy* did not expressly overrule *Lemon* in its traditional manner. Rather, it announced that the Court had already “abandoned” the test—even though the Court had not formally overruled *Lemon*.

That’s not the usual way the Supreme Court rejects a precedent. Take the Court’s well-known decision from last term *Dobbs v. Jackson Women’s Health Organization*, which overruled *Roe v. Wade* and *Planned Parenthood v. Casey*.²⁸ The majority undertook a long analysis of the traditional *stare decisis* factors, evaluating those precedents’ correctness, their workability, and the ensuing reliance interests. That discussion concluded with a definitive announcement that “[w]e therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people.”²⁹

The Court in *Kennedy*, by contrast, reached its conclusion about *Lemon* after merely two paragraphs and a footnote. It didn’t mention *stare decisis*, and the Court declined to say the magic words: “*Lemon* is overruled.” Why not? I argued in my dissent from the denial of rehearing en banc that much of the work of overruling *Lemon* was already done in prior cases such as the 2019 *American Legion* decision.³⁰ In that case, a majority of Justices declined to apply the *Lemon* framework, and a plurality opinion discussed *Lemon*’s “shortcomings” at length

and noted the Court’s repeated choice not to apply it. But without an express overruling, lower courts like mine had an excuse to keep using the *Lemon* test.

Not so anymore. I suspect that *Lemon* has finally been put to rest. Justice Sonia Sotomayor’s dissent in *Kennedy* begrudgingly acknowledges that the majority opinion “overrules” *Lemon*. And while the overruling of *Lemon* is implicit, instruction from *Kennedy* is clear as day: evaluate the Establishment Clause based on history and original understanding. *Lemon*’s ahistorical framework simply cannot coexist with that admonition. And lower courts appear to have finally gotten the memo.

For example, when *Kennedy* was issued, the Eleventh Circuit was considering an Establishment Clause case. An atheist group sued after members of the city police participated in a prayer vigil for children injured in a shooting spree. The district court granted summary judgment to the plaintiffs under *Lemon*. But after *Kennedy*, the Eleventh Circuit vacated the judgment because “the Supreme Court has definitively decided that *Lemon* is dead,” and remanded the case with direction “to apply in the first instance the historical practices and understandings standard endorsed” in *Kennedy*.³¹ Though only time will tell, I predict that this analysis is likely correct.

Observation number two: *Kennedy* confirms that the Establishment Clause does not contradict the other clauses of the First Amendment. The district’s case turned on the faulty notion that Coach Kennedy’s free exercise and free speech rights conflicted with the district’s need to uphold the Establishment Clause.

To be fair, this notion of contradiction has been widely held. *Kennedy* was one of three cases from the last Supreme Court term in which the government argued that the Establishment Clause demanded a restriction of religious or speech rights. In *Shurtleff v. City*

of Boston, the city refused to fly a private organization’s flag over city hall because it featured a cross.³² And in *Carson v. Makin*, Maine barred religious schools from a state program that offered tuition reimbursement to private schools.³³ In each of those cases, however, the Establishment Clause arguments were rejected.

It should be clear now that the Establishment Clause does not offer an affirmative defense to other First Amendment claims. *Kennedy* states explicitly that “there is no conflict between the constitutional commands” of the First Amendment and thus they should not be viewed as warring with one another. The lack of conflict between these provisions shouldn’t be a surprise. The Establishment, Free Exercise, and Free Speech Clauses are in the same sentence in the same amendment. We would expect them to have compatible, not contradictory, purposes.

For example, as I explained in my dissent in *Kennedy*, both religion clauses protect religious liberty, but they do so from different directions.³⁴ The Free Exercise Clause forbids the government from prohibiting religious exercise. But it sets a floor, allowing room for Congress and the states to provide additional protections for religious exercise, such as federal and state Religious Freedom Restoration Act laws. The Establishment Clause, by contrast, sets more of a ceiling and is chiefly concerned with preventing interference with religious exercise. For example, James Madison, the First Amendment’s primary architect, explained that the clause was meant to prevent one or two religious sects from “obtain[ing] a pre-eminence” and “establish[ing] a religion to which *they would compel others to conform*.”³⁵

Thus, the two clauses work together to ensure the free exercise of religion. It makes no sense, then, for the Establishment Clause to be used to justify the infringement of a citizen’s free exercise rights. There is no conflict; there has merely been the appearance of conflict brought on by a misconstruction of the Establishment Clause, thanks in large part to *Lemon*. Now that the Court has rejected *Lemon*, however, courts and litigants should be disabused of the notion that these complementary provisions are in unavoidable tension.

religious exercise,
Speech Clause
which is often religious....
Clause does not
of the First Amendment.

Observation number three: *Kennedy* illustrates the Supreme Court’s ongoing project of realigning the Court’s constitutional doctrine with the document’s original public meaning. In my view, sticking to the Constitution’s original meaning is especially important in the context of the Establishment Clause.

For one, thus far, Establishment Clause jurisprudence has been plagued by inconsistency and manipulability. Several courts and commentators have noted that *Lemon* left courts to reach almost any result and that strikingly similar facts have yielded contradictory outcomes.³⁶ Originalism, by contrast, provides judges with a powerful check against injecting our own policy preferences into the Constitution.

Furthermore, an Establishment Clause rooted in history and original understanding will curb the modern inclination to banish religion from public life. Coach Kennedy was disciplined because his personal religious conduct was in the public view. Yet the position that religious beliefs and conduct cannot be legitimately carried into public is not neutrality towards religion—it is hostility towards religion.

The historical record shows that allowing religion in the public square was never understood to be a religious establishment. Quite the opposite. It is filled with instances of the various branches of the federal government acknowledging the important role of religion in American life. George Washington’s first official act as president gave “fervent supplications to that Almighty Being who rules over the Universe.”³⁷ Just days after approving the Establishment Clause as part of the Bill of Rights for submission to the states, Congress passed legislation providing for paid chaplains for the House and Senate.³⁸ Overtly religious practices in public settings did not violate the Establishment Clause when it was adopted and they likewise do not do so now.

And finally, observation number four: Courts clearly should no longer rely on *Lemon*. But the *Lemon* ghoul wandered about for 50 years, and the case was cited in more than 2,000 subsequent cases. Courts thus should be wary of reliance on the many cases that reflect *Lemon*’s wrongful framework or are otherwise at odds with history.



For example, in *Kennedy*, the original Ninth Circuit panel didn’t cite *Lemon*. Rather, it relied mainly on a Supreme Court decision from 2000, *Santa Fe Independent School District v. Doe*, which held that a student-led prayer before a high school football game violated the Establishment Clause because an objective observer would have concluded that the school was endorsing prayer.³⁹ I argued in dissent that *Santa Fe* shouldn’t apply. I warned that *Santa Fe*’s analysis was rooted in the *Lemon* framework, which the Supreme Court had already effectively killed. It made little sense to kill *Lemon* but keep its progeny.⁴⁰ Ultimately, the Supreme Court agreed and reversed our court.

That’s not all. At least one district court has already noted that the formal

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abandonment of *Lemon* might cast doubt on the doctrine of “offended observer” standing,⁴¹ which was invented by lower courts in the wake of *Lemon* and its progeny.⁴² These courts had reasoned that, because the Establishment Clause was purportedly violated whenever a reasonable observer viewed some government action as an endorsement of religion, the observer’s offense was the sort of injury sufficient to provide standing to sue in federal court.

That standard, however, conflicts with the traditional test for Article III standing, which requires a concrete and particularized injury in fact. Indeed, the Supreme Court has held that the “observation of conduct with which one disagrees” is not a cognizable injury for purposes of Article III.⁴³ The only reason this doctrine exists, it seems, is because *Lemon*’s wrongful Establishment Clause test required it. But with *Lemon* now gone, courts of appeal may need to grapple with the continuing validity of “offended observer” standing.

This is not to say that every case that cited *Lemon* is bad law. When a holding or analysis captures the Establishment Clause’s historical bounds, there is no need to jettison that case. But where a case seems rooted only in *Lemon*’s purpose, effects, and entanglement framework, it should be treated as suspect and examined for whether it remains good law. To do otherwise risks allowing *Lemon* back out of its grave. cm

NOTES

- 1 U.S. Const. amend. I.
- 2 *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
- 3 2 *Nephi* 28:30.
- 4 Rex E. Lee, President of Brigham Young University, *Overcoming Discouragement*, BYU SPEECHES (Sept. 13, 1994), available at speeches.byu.edu/talks/rex-e-and-janet-g-lee/overcoming-discouragement-2.
- 5 20 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745–1799, at 95 (John C. Fitzpatrick, ed., U.S. Gov’t Printing Office 1931).
- 6 THE FEDERALIST NO. 78, at 403, 406 (Alexander Hamilton) (George W. Carey and James McClellan, eds., Liberty Fund 2001).
- 7 *United States v. Windsor*, 570 U.S. 744, 799 (2013) (Scalia, J., dissenting); *King v. Burwell*, 576 U.S. 473, 506–07 (2015) (Scalia, J., dissenting).
- 8 *County of Allegheny v. Am. C.L. Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 593, 620 (1989).
- 9 See, e.g., *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2097 (2019) (Thomas, J., concurring); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 768 n.3 (1995).
- 10 *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment).
- 11 *Freedom from Religion Found. v. Chino Valley Unified Sch. Dist.*, 910 F.3d 1297, 1306 (9th Cir. 2018) (R. Nelson, J., dissenting from denial of rehearing en banc) (citing *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014)).
- 12 *Biel v. St. James Sch.*, 926 F.3d 1238, 1250 n.8 (9th Cir. 2019) (R. Nelson, J., dissenting from denial of rehearing en banc).
- 13 *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427–28 (2022).
- 14 *Id.* at 2416.
- 15 *Id.* at 2417.
- 16 *Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 913 (9th Cir. 2021) (M. Smith, J., concurring in denial of rehearing en banc).
- 17 *Kennedy*, 142 S. Ct. at 2417 (alteration in original).
- 18 *Id.* at 2417.
- 19 *Id.* at 2418–19.
- 20 *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., concurring in denial of certiorari).
- 21 *Kennedy v. Bremerton Sch. Dist.*, 443 F. Supp. 3d 1223, 1228 (W.D. Wash. 2020).
- 22 *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1009–10 (9th Cir. 2021).
- 23 *Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910 (9th Cir. 2021).
- 24 *Kennedy*, 142 S. Ct. at 2407.
- 25 *Id.* at 2427.
- 26 *Town of Greece v. Galloway*, 572 U.S. 565, 575–577 (2014).
- 27 *Am. Legion v. Am. Humanist Assn.*, 139 S. Ct. 2067, 2081–82 (2019) (plurality opinion).
- 28 *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2261–78 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).
- 29 *Id.* at 2279.
- 30 *Kennedy*, 4 F.4th at 950 (R. Nelson, J., dissenting from denial of rehearing en banc).
- 31 *Rojas v. City of Ocala*, 40 F.4th 1347, 1351–52 (11th Cir. 2022).
- 32 *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1588 (2022).
- 33 *Carson v. Makin*, 142 S. Ct. 1987, 1993 (2022).
- 34 *Kennedy*, 4 F.4th at 950 (R. Nelson, J., dissenting from denial of rehearing en banc).
- 35 1 *Annals of Cong.* 730–731 (1789) (remarks of J. Madison) (emphasis added).
- 36 McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 119–20 (1992); see *Am. Legion v. Am. Humanist Assn.*, 139 S. Ct. at 2080–81 (2019) (plurality opinion) (collecting examples).
- 37 George Washington, First Inaugural Address (Apr. 30, 1789), available at founders.archives.gov/documents/Washington/05-02-02-0130-0003.
- 38 See *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984).
- 39 *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000).
- 40 *Kennedy*, 4 F.4th at 952 (R. Nelson, J., dissenting from denial of rehearing en banc).
- 41 *Napper v. Hankison*, No. 3:20-CV-764-BJB, 2022 WL 3008809, at *15 n.12 (W.D. Ky. July 28, 2022).
- 42 Justice Neil Gorsuch recently noted that “with the demise of *Lemon*’s reasonable observer test, ‘little excuse’ now remains ‘for the anomaly of offended observer standing.’” *City of Ocala, Florida v. Rojas*, No. 22-278, 2023 WL 235728 (Mem), at *3 (U.S. March 6, 2023) (Gorsuch, J., statement respecting the denial of certiorari) (quoting *Am. Legion*, 588 U.S. at __ (Gorsuch, J., concurring in judgment)).
- 43 *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982). Justice Clarence Thomas recently detailed why offended observer standing conflicts with *Valley Forge*. See *City of Ocala, Florida v. Rojas*, 2023 WL 235728, at *3–4 (Thomas, J., dissenting from the denial of certiorari).

practices
not violate the
Clause
adopted and
do so now.



HEALER



MEDIATOR



COUNSELOR



PEACEMAKER

Siete de los Atributos de Cristo

Original Artwork by Jorge Cocco at BYU Law School

REMARKS DELIVERED IN SPANISH BY JORGE COCCO / INTRODUCTION BY MAREN HENDRICKS

The J. Reuben Clark Law School recently unveiled a stunning new art installation: an original oil-on-canvas, seven-panel polyptych by renowned artist Jorge Cocco. The panels are displayed outside the Guy Anderson Moot Court Room and depict the seven roles of Jesus Christ identified in the Law School's mission statement, which reads in part:

BYU Law recognizes the inherent dignity and equality of each individual and welcomes people from the full range of human experience. We are committed to the teachings of Jesus Christ and honor His many roles, including healer, mediator, counselor, peacemaker,

advocate, lawgiver, and judge. In striving to emulate His example, we seek to be and develop people of integrity who combine faith and intellect in lifelong service to God and neighbor.

The polyptych by Cocco—who paints in a style he calls “sacrocubism” because of its sacred themes and cubist influence—was commissioned for the Law School building by alumnus Jared Sine ('07) and his wife, Ruth. A conversation began in Jared and Ruth's home when BYU Law dean Gordon Smith and others were visiting. As the group admired an original Cocco polyptych on the Sines' dining room wall, the discussion pivoted to an

exploration of the impact a similar, larger piece might have at the Law School. The Sines thereafter commissioned the artwork. Jared explained, “Our friendship with the Coccos and the chance to connect them with BYU Law has been a delight and a once-in-a-lifetime opportunity. Ruth and I couldn't be more pleased to give back to a place that has given so much to me, personally and professionally, and to our family.” Jared is the chief business affairs and legal officer at Match Group, which operates Match.com and Tinder.

Announcing the unveiling of the polyptych at the Law School, Dean Smith remarked, “We are elated to have Cocco's vibrant

and inspiring artwork on permanent and prominent display at the Law School. It is particularly gratifying that one of our graduates has enabled this powerful reminder to follow the Savior in ways that amplify the Law School's mission.” Jared echoed these sentiments, observing that the paintings communicate BYU Law's unique mission to teach the laws of men through the light of Christ.

A program on October 14, 2022, preceded the unveiling of Jorge Cocco's artwork and included remarks from Cocco, Dean Gordon Smith, and Jared and Ruth Sine. Cocco's eloquent words, delivered in Spanish and translated into English, are printed in full on pages 35–36.



ADVOCATE



LAWGIVER



JUDGE

[SPANISH REMARKS]

Esto me resulta mucho más difícil que pintar un cuadro. Es un honor muy grande el tener una obra aquí en esta institución. Y gracias a la gestión de Ruth y Jared Sine por la gestión que ellas han hecho para que mi arte pueda ser compartido en este ámbito.

El arte es una manera de comunicar al ser humano en todas las latitudes del globo terráqueo. Desde el principio de la humanidad se realizó arte. Pienso que el altar que tuvo que construir Adán para el primer acto ritual fue una obra de arte.

Conocemos a nuestros antepasados a través del arte. Todas las civilizaciones pasadas no han dejado otro registro más importante que su quehacer artístico. A través de la recuperación de estas obras, tal vez es el único testimonio de imaginarnos cómo eran ellos, cómo pensaban y cómo sentían. Y se supone que el arte era algo cotidiano para ellos; no solo estaba en sus rituales, sino en los objetos que utilizaban

diariamente: en su ropa, en sus danzas y en su pensamiento.

Los artistas necesitamos el apoyo. Pasado el tiempo, gracias a los grandes mecenas del Renacimiento, podemos conocer la obra de los grandes artistas que no hubieran podido realizarse sin el apoyo de la gente que estaba en los altos puestos de la sociedad. El avance de la civilización ha dejado un poquito al costado el consumo diario del arte. Pero a través de las instituciones que pueden apoyar el arte del artista contemporáneo, este puede expandirse a todo el entorno humano.

Es una oportunidad enorme cuando el trabajo de un artista llega a sus congéneres. Cuando un artista tiene la iniciativa y la inspiración de abrir un camino nuevo, diferente de lo vulgar y de lo cotidiano, se hace bastante difícil introducir su producción. Sobre todo, nuestra comunidad ha permanecido un tanto rezagada en acompañar la evolución del arte.

Es así que yo, haciendo arte con un estilo más contemporáneo, intenté romper esa brecha

e introducir un lenguaje más acorde a nuestra época. Para ello, aun teniendo la habilidad de pintar una imagen que se parezca a una fotografía, con gran cantidad de detalles, busqué la manera de pintar el otro lado de la vida material. Porque el espíritu trasciende a la materia.

Entonces, en mi trabajo, he eliminado muchísimas referencias a la imagen visual y palpable del ser humano y de nuestro entorno. Entonces, utilicé la forma mucho más plana, sin volumen, más geométrica y trato de realizar una obra que no cuente la anécdota, sino que transmita qué había detrás de esa anécdota. Porque en realidad, no sabemos cómo estaban las cosas en el Ministerio de Cristo. Pero sí podemos descubrir su mensaje.

Y podemos entrar a un segundo nivel, tercero o cuarto nivel, tal como fueron las parábolas. El lenguaje de Cristo tenía más o menos esa misma dirección. Por un lado estaba la anécdota. Para mucha gente, se quedó en ese cuentito, pero el mensaje estaba detrás de la anécdota.

Mi pintura, al evitar la anécdota, utiliza formas y colores para que ellos cuenten el mensaje espiritual. Porque por sí solo, una forma y un color produce un impacto que supera lo visual y toca nuestro espíritu, semejante al de la música. Dos o tres sonidos de una música de Bach puede hacernos llorar y no hay ninguna historia. Entonces, el grado de abstracción que hay en el arte que estoy desarrollando pretende conseguir un efecto semejante.

Agradezco que esta obra empiece a comunicarse por medio de las comisiones y de las publicaciones, porque, humildemente, me siento un eslabón más en la cadena de transmisión de conocimiento. Otras instituciones religiosas han captado rápidamente este propósito y, afortunadamente, tengo obras en edificios en la parte externa e interna de otras congregaciones cristianas, y también en innumerables publicaciones. Así que estamos todos embarcados en lo mismo y agradezco enormemente a la gente que está apoyando con comisiones y con oportunidades, para que este lenguaje un poco diferente a lo que estábamos acostumbrados pueda llegar a todos.

Siento una carga muy grande, porque no hay mañana que no me despierte con una catarata de imágenes. Agradezco tener la lucidez y la salud para poder realizarla. Contaba hace un ratito que me llaman a comer y a dormir. Pero estar delante de un caballete es lo que me mandaron a hacer desde la vida premortal. Este don me lo han prestado para que haga este trabajo, y debo hacerlo. Y agradezco la oportunidad de tener entre ustedes algunas obras de mi arte.

[ENGLISH TRANSLATION]

It turns out that public speaking is a lot more difficult for me than working on a painting. It's a great honor to have my artwork on display at BYU Law School. I am thankful for the generosity of Ruth and Jared Sine and for all they have done so that my art can be shared in this setting.

Art is a way of communicating to the human race in all corners of the earth, and art has

everyday thing for them not only in their rituals but also in the objects they used, in their clothes, in their dances, and in their thinking.

We artists need support. Thanks to the great patrons of the Renaissance, we can get to know the work of great artists—art which would not have come to be without the support of people who occupied the highest positions in society. The advance of civilization has

behind in driving the evolution of religious art.

By making religious art with a more contemporary style, I try to fill that gap and introduce a more appropriate language for our time. To do this, even though I have the ability to paint an image that looks like a photograph with a great amount of detail, I look for a way to paint the other side of physical life. Because spirit transcends matter.

one hand is the story, and for many people, it's all about that little story. But the message extends beyond the story.

By taking a more abstract approach, my painting uses shapes and colors to convey a spiritual message. Form and color have an impact that surpasses the visual and touches our spirit, similar to the impact of music. Two or three measures of a Bach piece can make us cry without a story. The degree of abstraction in the art I'm developing is intended to achieve a similar effect.

I am grateful that this piece will be shared through commissions and publications because, humbly, I feel like another link in the chain of the transmission of knowledge. Other religious institutions have also grasped my purpose, and I have been fortunate to create pieces that are installed both inside and outside of buildings belonging to other Christian congregations and are printed in many publications. We're all engaged in the same work, and thanks to the people who are supporting this endeavor with commissions and opportunities, this artistic language—which is a little different from what we're used to—can reach everyone.

As an artist, I feel a very big responsibility to create, because there's not a single morning that I don't wake up with a waterfall of images. I appreciate having the lucidity and health to be able to make my ideas a reality. I used to say that my calling was to eat and sleep. But being in front of an easel is what I have been called to do from the premortal life. A gift has been given to me to do this work, and I must do it. I am grateful for the opportunity to have my work here with you.



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been made since the beginning of humanity. I think that the altar Adam built for the first ritual act was a work of art.

We get to know our ancestors through art. Past civilizations have left no record more important than their artistic work. The recovery of ancient artworks has afforded us perhaps the only testimony that we have to imagine who our ancestors were, what they thought, and how they felt. We suppose that art was an

veered away slightly from the daily consumption of art. But through the institutions that support the work of contemporary artists, art can continue to reach all of humanity.

It is a huge opportunity when the work of an artist reaches like-minded people. When an artist has the initiative and inspiration to tread a new path, different from what is common and ordinary, it is quite difficult to be noticed. Above all, our artistic community has lagged

So in my work, I avoid realism and instead use a much flatter form—without volume, more geometric—and I try to come up with a piece that transmits what is behind the story. Because in reality, we do not know how things were during Christ's ministry. But we can discover His message.

In this way, I can depict a second, third, or fourth level of meaning, just like Christ's parables do. The words of Christ are multidimensional. On the

BYU Law's Refugee and Immigration Initiative

BY RACHEL EDWARDS



Patricia Zippi, 2L, has always been deeply affected by stories and images of immigrants and refugees, especially those of families torn apart. “Three of my husband’s grandparents came through Ellis Island,” Zippi says. “Like my husband’s grandmother who came to America alone, I’ve been to Ellis Island with a baby in my arms. The anxiety that I felt in that place as I thought of families being separated stamped itself on my mind.”

During the Syrian refugee crisis, a startling photograph had a similar impact on Zippi: “There was a particular photo showing the lifeless body of a three-year-old boy who was discovered washed up on a Turkish shore. He was one of 12 Syrian nationals who had drowned while attempting to reach the west. That photograph shocked me, and I wondered what I could do to help.”

Zippi, a talented quilter, founded QuiltBack, a nonprofit that enables quilters to monetize their skills in support of refugee relief. Active from 2016 to 2018, the organization raised more than \$40,000 for the Salt Lake City, Utah, arm of the International Rescue Committee and the American Refugee Committee, an organization dedicated to helping refugees, asylees, and other immigrants thrive in America. “Still, I wanted to do more,” Zippi says.

"I realized that if I was going to continue to make a difference in the lives of immigrants and refugees, I needed a lever. Law school was that lever."

BYU Law's Immigration and Refugee Initiative is one of the offerings that drew Zippi to the Law School. The initiative was created by Kif Augustine-Adams, Ivan Meitus Chair and Professor of Law, and D. Carolina Núñez, associate dean for research and academic affairs and Charles E. Jones Professor of Law. As students participate in the initiative and get involved in a variety of real-world settings, including live-client clinics, centers, and externships, they demonstrate the core values laid out in BYU Law's new mission statement, a portion of which reads,

BYU Law recognizes the inherent dignity and equality of each individual and welcomes people from the full range of human experience. . . . As a community, we aim to advance justice, mercy, liberty, opportunity, peace, and the rule of law.

Leveraging the Rule of Law

Augustine-Adams and Núñez took the first group of law students to the South Texas Family Residential Center in Dilley, Texas, to help prepare immigrants for a credible fear interview, which is a preliminary step in the process to gain asylum in the United States. "Our need to educate students coincided with a very basic and urgent human need on our southern border," Núñez says. "Classroom instruction is incredibly important, and it is the meat of a legal education. However, at some point you need to connect that discussion to real people. For our students, this experience did that.

We identified a discrete area of law in which students could gain expertise that would allow them to help a lot of people in a short amount of time."

Building on the success of the work done in Texas, the Refugee and Immigration Initiative has evolved to include other projects aimed at helping immigrants and refugees pursue access to the justice system. "We look for opportunities that are doable, that our students can actually accomplish within a semester," says Augustine-Adams. In 2021, after attending a training offered by Catholic Community Services of Utah (CCS) on Afghan asylum cases, she recognized a significant need for legal representation of Afghan nationals who had been granted parole in the United States.

Parole is a tool made possible by the Immigration and Nationality Act, allowing certain individuals to enter the US for a period of time when they might otherwise be ineligible to enter. Because parole is temporary, individuals seeking permanent residency status must seek asylum and often face long odds and high expense. "At that time, legal provisions specific to the parole process for Afghans required a time frame of 45 to 150 days," Augustine-Adams explains. "I thought this work was something that our students could help with."

During winter semester 2022, Augustine-Adams supervised a small group of law students in completing an asylum application for a case she received through CCS. "It was a compelling and heartbreaking story, as all the stories of refugee clients we have helped have been," she says. To be granted asylum in the US, applicants must prove a well-founded fear of persecution



based on religion, nationality, political opinion, or participation in a particular social group. In this case, the client was an evacuee who had been granted parole in the US.

Throughout the semester, each student took a different piece of the case and wrote an argument using facts from their research and details from the client's personal statement. Because it was dangerous for the client's family members in Afghanistan to give evidence, the students conducted research by identifying news reports and evaluations by nongovernmental organizations. Augustine-Adams then compiled these elements into the final letter brief for the application.

The client received a positive asylum decision in July 2022. "We were really happy," Augustine-Adams says. She credits support from donors, BYU Law, and BYU for making it possible for students who are interested in immigration work to be involved, irrespective of their financial situation: "This initiative attracts students with a variety of backgrounds and

Classroom
is incredibly
However, at
to connect that
people.
experience



Kif Augustine-Adams



D. Carolina Núñez

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discussion to real
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did that.

interests, some who are new to immigration and some who have taken coursework in immigration law. Many participants recognize this opportunity as a way of using their legal education to do good.”

Recognition and Responsibility

From the beginning, the goal of the Refugee and Immigration Initiative has been to involve students in the life-changing work of increasing access to the justice system and also to extend the mission of BYU Law. Augustine-Adams says, “At BYU Law, our commitment to our students and their legal education builds on the fundamental principle that ‘all are alike unto God’ (2 Nephi 26:33). The Refugee and Immigration Initiative allows students to enact that principle in their own lives through service to exceptionally vulnerable people and families.” Núñez echoes this sentiment, noting, “On a basic level, being willing to help somebody who is not your friend but rather a stranger recognizes the inherent dignity and equality of each individual. As lawyers, we

have some knowledge, some skill, that allows us to help our brothers and sisters flourish.”

Zippi is grateful for the experiences she is having at BYU Law, which are preparing her to make a meaningful impact on the lives of refugees. She is interested in alternative dispute resolution and immigration law, and in fall 2022 she took courses focused on conflict resolution. She hopes to use her law degree to promote systemic change through policy work. “Most people don’t know how difficult it is to be granted asylum,” she says. “In 2019 only 19 percent of those without legal representation and 33 percent of those with legal representation were granted asylum through defensive immigration court proceedings. I don’t think we fully understand the desperate situations these people come from. The refugees I’ve worked with have lives that are so different from my own, and it’s almost impossible to imagine surviving and being as functional as they are. These are incredibly strong people. We need these people and their strengths in our nation.”

Full Circle

BY MAREN HENDRICKS

One part artist and one part lawyer, Lucas Guerreiro brings a creative edge to the practice of law. Add to that his role as a whistleblower in Brazil and his commitment to justice, and he's made quite a splash in the LLM program at BYU Law.

Guerreiro was set on pursuing a career in art until his mission president suggested that law would be a good outlet for his energy and creativity. So Guerreiro earned his law degree from Universidade São Judas Tadeu in São Paulo, Brazil, but he never abandoned his love for the visual arts. While studying, he used his artistic talent to diagram and visualize complex legal principles. "Law school was really hard," he says, "and putting legal concepts into a visual medium helped me to blend a new legal vocabulary with my natural artistic language. Art was integral to my learning the law."

After earning his law degree and passing the difficult *concurso público* (civil service exam), Guerreiro started down a government career path that would entangle him in six years of litigation, inspire him to pursue an LLM degree, and bring him back full circle to the visual arts.

Guerreiro began work as a certified inspector for the Conselho Regional de Corretores de Imóveis (CRECI), an association responsible for regulating ethics and professionalism in

Brazil's real estate industry. Though he enjoyed the work, Guerreiro was disturbed by the irregularities and corruption he observed within the organization. "I filed 13 complaints with Brazil's Public Ministry of Labor, and as a result I was fired," he says. He filed a labor complaint alleging wrongful termination and initially lost the case, but he appealed and, ultimately, the Superior Labor Court of Brazil decided the case in his favor. By the end, the legal process had taken six years. Guerreiro recalls, "This was a difficult time in my life. However, I believe that when you are faithful to the law, justice will prevail."

He worked as a solo practitioner during this period, taking advantage of the flexibility in his life to come to the United States to hone his English language skills. Guerreiro jumped at the chance to pursue a degree in BYU Law's full-time two-semester LLM program, which allows foreign lawyers to study the US legal system. He resolved to use his degree to pursue justice in a way that would be meaningful for him.

The LLM program has been transformative for Guerreiro, and it has given him the opportunity to explore his artistic inclinations in a new context. He is now participating in a BYU Law clinic on visual graphics and law. The clinic is the perfect intersection for him: "I love mixing art with the law. This is what I'm



passionate about, and I'm grateful that I've been able to pursue both of these priorities here at BYU Law."

This art-law blend will allow Guerreiro to help others pursue justice when he returns to Brazil. He says, "In my country, many people don't know what their rights are or how to pursue legal action. Social media is the best way to reach the most people to educate them about this." Guerreiro would know. In 2018, he launched *Videira Verdadeira*

(*True Vine*), an independent YouTube channel in Portuguese promoting study of Latter-day Saint doctrine and principles, which has amassed a loyal following of over 40,000 subscribers. After he graduates with his LLM in April 2023, he plans to start a social media platform related to religious freedom. "In Brazil," he explains, "lawyers are often not focused on how they can use social media to provide greater access to the law. I want to change that."

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