

## BYU FOUNDER'S DAY SPEECH

August 25, 2011

~~I thank Jim Gordon for his generous introduction. I want to apologize to him, Cheryl Preston, and Scott Cameron; I have decided not to use their research to talk about the founding of the law school. Carl Hawkins' book adequately covers what I might have had to say.~~

I should know better than to try and speak in a substantive way rather than in pleasing platitudes and ~~eticheschlichés~~ at a dinner and reunion affair. I ~~should~~ probably ~~should~~ follow Lucy's oft-offered advice that I might as well save my breath to cool my tea. Perhaps I should ~~also~~ add a comment by Clarence Darrow. When asked if he ever got in trouble because he was misunderstood, he replied, "Of course—but a lot less than if I had been understood."

However, my commission was to share my thoughts. They do not run on platitudinal wheels. When speaking of my thoughts, I am put in mind of a Tumbuka proverb which translated says, "Even if you are so poor that you are reduced to eating pumpkin seeds, you should always share some with a neighbor."

And, of course, I do not speak for the Court. ~~And~~ This is not about specific case-related stuff but only about you as lawyers ~~and~~ as a leavening lump in the greater society.

My first thought was to talk about selfishness and greed. I planned to start with an encounter with my brother, Quinn, on campus. When I asked him what he was doing there, he replied in Diogenes fashion, "I'm looking for the Widow's Mite building." I decided to spare you from that in part because my point might have been misunderstood as a fund-raising pitch or some political ~~agendagenda~~—both of which are off limits for a sitting judge. It is enough to say that getting rich so you can put up seed money in exchange for having a building named after you does not comport with that account and the account of the rich young man who ~~didn't~~ did not

Field Code Changed

**Comment [J1]:** Note: I replaced every instance of a double space between sentences with a single space between sentences.

**Comment [J2]:** This introduction paragraph seems unnecessary to retain for inclusion in the article since it makes reference to events/people that happened at the event. I suggest removing it.

**Comment [J3]:** Switching these words helps with sentence flow.

**Comment [J4]:** Combine these paragraphs.

**Comment [J5]:** Looking through previous issues of the Memorandum, it looks like you follow standard usage of colons and commas when dealing with dialogue, so this needs to be changed to a comma rather than a colon.

**Comment [J6]:** The Chicago Manual of Style states: "Commonly known or readily verifiable facts, proverbs, and other familiar expressions can be stated without quotation or attribution unless the wording is taken directly from another source." So, this doesn't need to be in quotations, especially because, looking on the Internet, this isn't an exact word-for-word quotation of this proverb.

**Comment [J7]:** Don't start two sentences in a row with the same word.

**Comment [J8]:** Change to "subject matter" to increase professional tone.

**Comment [J9]:** This is the name of a Greek philosopher, but the reference isn't working given that the audience may not be familiar with ancient Greek philosophers.

drink tea, coffee, or alcohol and paid his tithe and attended church regularly. I recommend you re-read those two accounts.

Although it is tangentially related to my theme, I decided to spare you from my thoughts about whether anger is an appropriate response in a variety of situations.

What I have settled on is a long-standing concern about our national addiction to a punitive approach to problem solving. I am embarrassed by the fact that we lead the world in per capita prison population—our rate is 745 prisoners per 100,000 members of the population. Our nearest competitors are Rwanda and the Russian Federation. Even they are well below us. Other industrialized nations such as Canada, Australia, Greece, France, England, Germany, and Japan have less than one-seventh our per capita prison population, and some of them are pretty nice countries to live in. In our Circuit, approximately 55% of our cases have to do with the Criminal Justice System; the other Circuits are comparable. ~~You ought to look up the costs.~~

And yet, we seem to be more crime ridden, fearful, and insecure than our competitors in the industrialized world. I cannot help but wonder if our cultural bent for punitive solutions is not one of the misguided contributors to misbehavior. Perhaps it has caused us to neglect more effective ways of dealing with otherwise disapproved behavior. Sometimes it seems to me that we are more interested in expressing our disapproval than in reducing the problems.

Of course, the Courts have nothing to do with setting the policy. We do not initiate prosecutions, and even the trial courts are closely constrained in the decisions about sentencing.

I do not and should not make any specific proposals about what, if anything, we as a country should do about this embarrassment.

**Comment [J10]:** These paragraphs don't seem necessary because all they discuss is things he was thinking about discussing in his article, but then didn't. It is unnecessary to tell the audience everything he isn't going to be discussing.

**Comment [J11]:** If you will be removing the above paragraphs, all you would have to do is insert here "What I have settled on speaking about is. . ." and it would transition just fine.

**Comment [J12]:** A semicolon would be more appropriate since it's more formal, so you would want to change all em dashes to semicolons for consistency.

**Comment [J13]:** You need to specify who the numbers represent.

**Comment [J14]:** Incorrect usage of a semicolon because it doesn't separate two independent clauses.

**Comment [J15]:** Circuit is only capitalized when used with a specific circuit number.

**Comment [J16]:** From what I could tell in my research online, criminal justice system is not capitalized.

**Comment [J17]:** This comment seems unnecessary, more like an aside, and so it might be better to remove it.

**Comment [J18]:** Combine paragraphs.

**Comment [J19]:** Combine.

I only make some suggestions about ways of thinking about problem solving. I recently read a thought-provoking comment by William Patry which caught the spirit of my own thoughts.

**Comment [J20]:** Combine.

He said:

If we want effective laws, we can't have that if it's based upon an alleged moral case. For politicians or lawmakers to act in an effective way, they have to act like economists. You have to investigate the real world consequences of what you're doing and decide whether those laws, if enacted, do the thing you want them to do.

I offer you only two thought pieces about ways of thinking about this matter. One is what I call "before" and one is about "after."

To follow my point, you need to know that, in my view, a rule is only a rule if it has a sanction for departure from the standard.

**Comment [J21]:** Combine.

My first anecdotal account is about "before." When I became a Peace Corps ~~D~~director in Malawi, Africa, my predecessor had rules to spare. He reportedly had a staff member assigned to patrol that mud-hut country looking for violators. Morale was low; we were in trouble with the host government; and volunteers were distracted from their charitable missions by constant complaints about trivial matters.

**Comment [J22]:** You don't capitalize "director" since, as a job title, it does not come directly before or after a person's name and it is not part of the Peace Corps.

**Comment [J23]:** A colon better introduces the issue, plus this is an instance of a comma splice.

I closed everything down and had them all gather at an old lake-side hotel where they spent the first meeting berating me and my staff for every imaginable default. Some of my staff wanted to retaliate or at least make a defensive show. In the evening, I went for a walk along the beach to think through whether I should just close down the program and send us all back to the United States.

**Comment [J24]:** Specify who "them" is: the government? Townspeople?

As I walked along, I saw a group ahead gathered around a small fire. Someone spotted me and said: "Shh shh, here he comes." Someone else said: "Oh H ~~\_\_\_\_\_~~! Let him hear it." I knelt and listened for a while. When the berating ended and a pause seemed to beckon me to respond, I

**Comment [J25]:** Use a 2-em dash to represent a missing word or part of a word.

made a critical decision on the spot. I did not reveal the source of what came to me because it would have discredited my message in their eyes. It was, of course, Joseph Smith when he said the way he governed such an admirable community as Nauvoo was to teach the people correct principles and let them govern themselves.

I reminded ~~them~~ the group of the visionary mission they had signed up for and that many of them had lost their way in chaffing at the rules and enforcement. I said, “From here on out, there are no rules.” That is, I would, of course, talk to them about how they ought to behave themselves, but there would be no sanctions.

Some chorused, “B. S.” I stated that, as a show of good faith, I was restoring the month’s pay and midterm leave I had docked to-from a certain volunteer present in the group, ~~the month’s pay and his midterm leave I had docked him~~ for the unauthorized usetaking of a Peace Corps vehicle ~~and that he wrecked it~~ while driving drunk. He endangered the life of his counterpart whom he was supposed to be training to be a medical aid. ~~(I wish I had the time to tell you what an outstanding person he has become.)~~

For a couple of months, a few seemed to be trying to testtesting me. But before long, we had a total turn-around. Some of my staff called a meeting to say how wonderful it was that of the nearly two hundred volunteers, we had only five miscreants. ~~(I can still remember their names.)~~ They-My staff wanted me to send ~~them~~ the miscreants home. It was clear to me they did not understand the essential element that had brought us to that happy point. They did not recognize that no system can produce zero tolerance—that the best possible system can only produce optimal results. If we now turned to sanctions for some, the key element of our success would be lost. This ruleless system had succeeded to the point where Washington told me we

**Comment [J26]:** Pronoun-antecedent disagreement. Need to reestablish who “them” is here.

**Comment [J27]:** This is just one way to reword this sentence for added clarity and flow.

**Comment [J28]:** I don’t think this aside is necessary for inclusion in the article.

**Comment [J29]:** Removing the “trying to” streamlines the sentence, though it does change the meaning a little.

**Comment [J30]:** Remove this aside.

**Comment [J31]:** Again, there is some pronoun confusion here that needs to be clarified.

**Comment [J32]:** This is the correct spelling.

were the only program in Africa not in trouble with the host country, ~~though this was probably an exaggeration. (Probably an exaggeration.)~~ They wanted me to expand the program, ~~but which~~ I declined. I also did not tell them our success was a product of our Ruleless Regime.

**Comment [J33]:** I think this stays capitalized since it's part of a title, but I'm not sure. I can't find any information about capitalizing periods of time like this.

That same approach has been followed in my judicial chambers for ~~33~~ thirty-three years. We get our work done timely and well ~~(if I do say so myself)~~. We run a ruleless shop—that is, one without sanctions. We do not work for the clock.

**Comment [J34]:** This aside is unnecessary.

My second anecdotal point is about “after.” The setting is South Africa. After all the depredations toward the black citizens under the leadership of Nelson Mandela, many of which ~~properly could properly~~ be described as crimes against humanity, ~~under the leadership of Nelson Mandela, who had suffered imprisonment for 27 years, they the South Africans~~ decided to forgo the retributive and punitive models. They instead established a truth and reconciliation commission. The basic format was that offenders who came before the commission, ~~and~~ candidly admitted their part in the persecution, and asked for forgiveness would be granted amnesty.

**Comment [J35]:** It seems like this needs some sort of sentence that leads into this since he mentioned that he was going to make two points quite a while ago.

**Comment [J36]:** Moving this word here makes the sentence flow better.

**Comment [J37]:** Moving this phrase clarifies the meaning of the sentence.

**Comment [J38]:** This detail seems relatively unimportant to the overall statement being made here. I feel it could be removed.

**Comment [J39]:** Again, the pronoun needs to be identified.

While Lucy and I were serving ~~her a~~ mission to South Africa in the 90s, one man confessed to and demonstrated the torture he had committed. One of his victims was a member of the commission. The vote to grant him amnesty was joined by his former victim.

**Comment [J40]:** He cannot be serving his wife's mission.

Among the formerly minority-ruled countries in Africa, and with a much more complicated problem of integration and reconciliation than the others, South Africa—so far as I can tell—is doing the best job of any of them and has the best prospect of succeeding.

**Comment [J41]:** This sentence is rather chunky, but grammatically sound, but breaking it up or rewording it somehow would be preferable.

My great disappointment has been how frequently ~~, when I have given this account, many~~ friends and colleagues have responded with something other than admiration when I have given this account. A typical response has been, “How can they let them get away with that?—”

**Comment [J42]:** Moving this to the end of the sentence helps for sentence clarity and flow.

As an aside, I tell you of a brief experience ~~which that~~ may not prove too much but ~~it~~ is a success story in the setting of the LDS Church.

Jim Parkinson, a member of the charter class, and I were traveling in Southern Africa with a group of African-Americans from Mississippi. We were in Capetown on a Sunday and decided to go to church. The leader of the group and one other asked to join us. Given our history, I concede ~~that~~ I was a little nervous. I saw a number of old friends and visited happily with them. After the meeting, as we stood in the parking lot, Jim asked our leader what he thought. He said he was astonished. ~~He said that~~ He had attended church with many mixed-race congregations, but this was the first one that did not re-segregate when they sat down. He added that he thought we should do something about our music and our preachers. He used to sing in a black choir.

I do not know that it is a cause-and-effect result of the national policy of truth and reconciliation, but I like to think that policy contributed.

Now, don't leave here and tell people I proposed eliminating prisons or even that punishment is never appropriate. Of course there are some people we need to isolate from the rest of society. I have only suggested some ways of thinking about rules and punishment that might improve our outcomes. ~~Particularly~~ about prison as a general deterrent as opposed to a specific deterrent. I have long been persuaded that any plan whose objective is zero tolerance will automatically be less effective ~~—(and probably more expensive)—~~ than one whose objective is ~~OPTIMAL~~ *optimal*.

I do not pretend ~~these~~ these two examples are some panacea for ~~our~~ overpopulating our prisons or that they are appropriate in every situation. At most, they are examples of successful thinking against the grain. It would be my hope that you who are among the privileged, ~~;~~ you who have

**Comment [J43]:** Delete to avoid starting two sentences the same, and to avoid redundancy.

**Comment [J44]:** Combine to solve the problem of the sentence fragment.

**Comment [J45]:** Again, parenthesis don't seem very professional, and I feel that commas or dashes would be more appropriate here.

**Comment [J46]:** Italicizing a word is preferred over capitalizing a word when wanting to emphasize a word in academic writing.

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**Comment [J47]:** No need to use semicolons here since this is not a complex list with inside commas.

influence among the most influential, ~~and~~; you who have access to power, will do the creative thinking and courageous acting that will begin to ameliorate this national tragedy.

Finally, I leave you with this ~~I often use it~~:

When I became ~~c~~Chief of the ~~c~~Circuit, I promoted an investiture program. Judge Ed Dumbauld, an exceptional scholar and federal district judge from Uniontown, Pennsylvania, attended. We had become friends, and he sometimes shared with me some poems from the revival of Dutch letters in the late 1800s. He had a degree from Amsterdam University, and I spoke a little Afrikaans, which is derived from the Dutch.

At a dinner after the program, probably because he thought I either was or might become a little full of myself, he recited in English this Dutch poem with which I leave you:

What have you preserved from your frenzy?  
A lamp that flickers; an eye that weeps.

What is there from the storm, that you withstood?  
A mournful leaf, that has not yet found rest.

What has love done in your heart?  
It has made me understand the pain of the lonely.

What remains of all the glory that surrounded you?  
Nothing but a singing memory.

H. W. J. M. Keuls

**Comment [J48]:** I'm not sure if this is necessary, but I believe that rephrasing the sentence to avoid using a dash and a colon right next to each other would be appropriate.

**Comment [J49]:** Don't capitalize since it's not a specific job title of a specific circuit.

**Comment [J50]:** This is worded rather awkwardly, and I don't believe this comment is even necessary.

**Comment [J51]:** I double-checked this quotation for accuracy and it is word-for-word perfect. And the Chicago Manual suggests that, when quoting poetry, try to visually center it on the page, which I have done.

**Comment [J52]:** The Chicago Manual says that when initials are used in names, there should be a period and a space after each initial.