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after day. Wives will never experience the loneliness of financial responsibility or the heaviness of juggling several major roles alone.

Also, does the sealing ceremony—the ultimate bonding ritual—that accompanies temple marriage both create and hinder intimacy? It may help provide continuity for the couple. But it may hinder because it focuses on the structure of the bond and not the nature of the bond between two particular people. And the bond, once formed, is not seen as negotiable thereafter, becoming as much the tie that binds as the tie that bonds.

Among Church members in general the emphasis on loving and serving may cause us to view those we love as objects. We must service others by doing to or for them instead of doing with them: saying kind things, sacrificing our needs, never saying anything bad. Even though a good deal of practical skill is needed to build loving relationships, an overemphasis on "how to" robs personal interchanges of spontaneity and creativity. Another problem in the Church is that only parts of the process of being intimate are taught. The motivations to love, the practices of giving, and the rewards of love are repeated themes in every context of Church life. What is left out is how to manage conflict and crisis in relationships. To maintain love and closeness takes more than just doing good things. The conflict generated in any relationship (no way to avoid it!) must be dealt with for that relationship to continue generating loving and caring feelings. Unfortunately, one of the best conflict management techniques available—the argument—is repeatedly denounced as wrong. I believe that most people fight because they are trying to clear away negative feelings about differences and restore positive ones. Acknowledging that disagreements can be positive (relationships are generally in more serious trouble if the people involved do not openly disagree) may actually help resolve conflict. The focus should be on how to disagree and still maintain goodwill, how to build caring feelings after an argument. Sweeping the carpet clear rather than sweeping the dirt under the rug makes for a more ordered, pleasant house.

Although there are probably others, the last major roadblock I think may inhibit closeness is our need to be perfect. On our list of things we must do perfectly is an item called "perfect families" or at least "perfect relationships." But that item is only a mirage. Still we scurry around looking

for our just reward, doing those things that can be eternally recorded on high. I believe that this view of relationships—people as vehicles to righteousness—hurts us. We look at our deeds of goodness and gentleness rather than examining our feelings of caring and loving. Relationships do need work, but they also need less frenzy and more relaxation. Paradoxically, spending more time playing, relaxing, fantasizing with each other spurs creativity and creates closeness. Time is freely given to each other because we are worthwhile however we are rather than because we must become something in order to become worthwhile.

As it stands now, Mormons may be in

a double bind regarding intimacy: "come closer, yet stay farther away." But our resolution to the paradox is not to do more but just to be and enjoy in all its richness what we have now to celebrate with each other.

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## Law of the Land

### JUDGE CALLISTER AND THE ERA Jay Bybee

Perhaps no issue since the early days of the civil rights movement has spawned as much controversy as the Equal Rights Amendment. Whether or not the amendment is ratified by June 30, the debate over its interpretation will keep legal scholars, politicians, and others entertained for years. But while the debate has understandably centered around the substance of the amendment and such emotionally charged issues as the draft, homosexual marriages, and coed bathrooms, at least one peripheral issue of interest has arisen out of the litigation

over the ratification process: In light of the position taken by the LDS church on ERA, must a judge who is active in the Church disqualify himself from sitting on a case involving the amendment?

In May 1979, Idaho and Arizona and various legislators from those states filed suit in U.S. District Court in Idaho, asking that the court declare first, that Idaho's rescision of its prior ratification was effective and second, that Congress's extension of the deadline for ratification was ineffective.<sup>1</sup> The Idaho legislature ratified ERA in 1972, the first year that states could ratify, but voted to rescind its ratification in 1977.<sup>2</sup> The case, per custom in the District Court in Idaho (as in most federal district courts), was assigned by lot and set down before Judge Marion J. Callister.

Judge Callister, appointed to the bench in 1976 after a career as a practitioner, judge, and U.S. Attorney, is a member of the Church and at the time was serving as a Regional Representative.

In August 1979, the Department of Justice moved for Judge Callister to disqualify himself from hearing the case. In October 1979, the motion was denied.<sup>3</sup> Following this first decision on disqualification, the National Organization of Women (NOW) attempted to enter the suit as a defendant but was denied that status. When that decision was reversed by the Ninth Circuit Court of Appeals in September 1980, NOW refiled the motion for dismissal of the judge. Because the motion—as originally filed by the Department of Justice—had been heard, the court was not obligated to hear the NOW motion but agreed to consider it. In a lengthy opinion filed in February 1981, the judge again refused to disqualify himself.<sup>4</sup>

Although this article deals with the disqualification motion it is important first to understand what the ERA case was and was not. The suit requested declaratory relief—a statement on what the law is. This was not a jury or a bench trial so the court was not asked to make any findings of fact. While findings of fact can be

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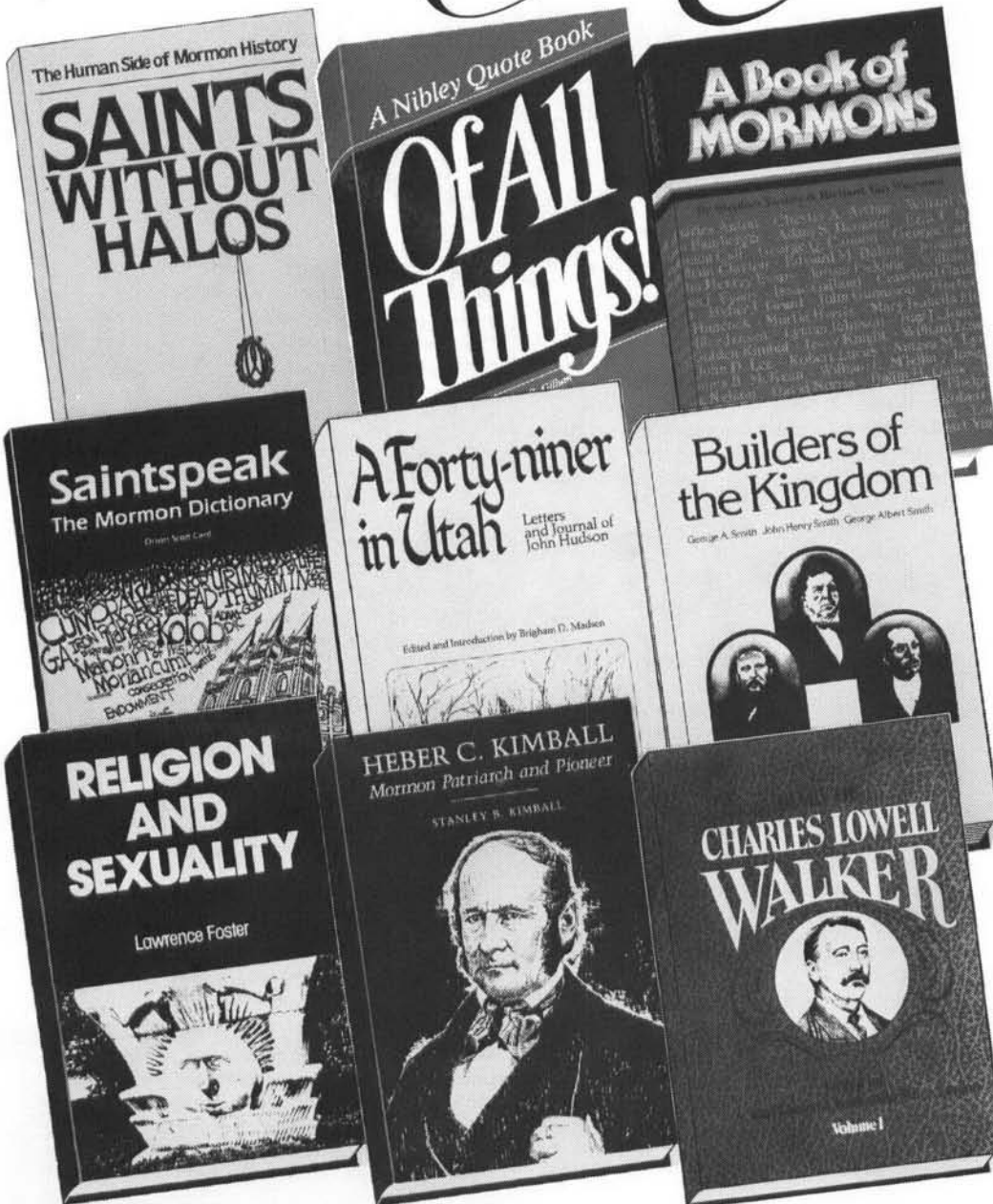
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overturned by an appellate court only if they are "clearly erroneous," an interpretation of the law can be reversed simply on the grounds that it was "erroneous." This was also not a case in which the court was asked to fashion an imaginative remedy or otherwise exercise discretionary powers. The ERA case offered two simple, straightforward legal questions for the court to answer: Once Congress has established a time for ratification and the proposed amendment is not ratified, may Congress extend the time? Does a state have an absolute right to rescind a vote for ratification if done before the proposed amendment is ratified? The motion to disqualify would not prevent these questions from being answered, it would merely delay the process until the case could be transferred to another judge. A motion for disqualification is a rare request. Judges will often recuse themselves when they recognize they have a conflict, but it is not commonplace (although proper) for a party to move that the judge recuse himself.

The law states that "Any . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."<sup>5</sup> The statute goes on to state that the judge shall *also* disqualify himself when he has a personal bias or prejudice; where he has had some connection with the controversy while in private practice or while he served in the government; where he has a fiduciary or financial interest in the outcome of the proceeding; or where a spouse or relative is a party, an attorney, a material witness, or has a material interest in the outcome.

Judge Callister did not fall within any of the enumerated categories. As a practicing attorney he had not represented either of the parties, he had no relation to either party, and he had no financial interest in the outcome. NOW's motion was thus directed to the nebulous phrase "in any proceeding in which his impartiality might reasonably be questioned" and was based in particular on Judge Callister's position as a Regional Representative. The challenge was not that Callister had animosity towards NOW or the Department of Justice but that he had a fixed belief on the merits of the case as a result of the Church's position.<sup>6</sup>

The allegation of bias was little more than innuendo as the Department of Justice and NOW could not point to any statement or action respecting ERA by Judge Callister; nor did they cite a single example of where the Church had sought to exert influence over judicial officers. In his first

opinion in *Idaho v. Freeman*, Judge Callister gave a short but patriotic reply to the Department of Justice:

Alongside the churches, and co-existing with them, is the government of the United States and of the various states, which governments have the right and the obligation to make laws governing the relationships of its citizens. The citizens, in turn, are obliged to obey those laws and sustain the government which protects their constitutional and statutory rights. I recognize the sense of a dual citizenship in the church and in the Nation, with obligations running to each, but I sense no conflict in these obligations. I know of no man who agrees with every law that has been enacted by the Congress of the United States, and yet as citizens we recognize the obligation to obey and sustain those laws unless and until they can be changed by the lawful political process. The right to change the law belongs to Congress, not to the courts. It is frequently the lot of judges to uphold the validity of laws with which they personally disagree. They have been trained to do so.

The church teaches that its members have a responsibility to seek the enactment of laws which are just and which protect the morality and freedom of the citizens of the land. However, the church has never taught either that it has any place influencing judges in their interpretation of the laws, or that a judge's religious beliefs take precedence over his sworn duty to uphold the Constitution and laws of the United States. There is a crucial distinction between legislative chambers, where everyone (including churches and religious groups) may express their opinions and lobby for the passage or defeat of a particular piece of legislation, and judicial chambers, where any attempt to bring pressure to bear on judges or to lobby for a particular decision would be totally improper. As a judge, I have no obligation to the church to interpret the law in any manner other than that which is required under the Constitution and the oath which I have taken.<sup>7</sup>

Shortly after this decision, Sonia Johnson was excommunicated and the efforts of various groups of Church members to defeat ERA came to light, so the NOW motion was better fueled than that of the Department of Justice. The court listed among NOW's allegations: "It is presumed that [Regional Representative Callister] faithfully carried out all of his duties including carrying forth the Church's opposition to the ERA," and "The Church considers its position on the ERA to be of the utmost importance and those who back ERA are subject to sanctions, including excommunication, as is evidenced by proceedings taken against the leader of the group 'Mormons for ERA.'" <sup>8</sup> Judge Callister denied that his duties included opposing ERA and dismissed the second claim as irrelevant, although in a footnote he stated that

"Ms. Johnson was not excommunicated because of her belief in the ERA nor because she has actively supported it."<sup>9</sup> He then stated that at no time as a Regional Representative was he ever "required or requested to promote the Church's position on the ERA,"<sup>10</sup> and concluded:

While it is true that due process guarantees a party the right to an impartial forum, this should not be read as giving a party the judge of their choice. . . . Only when a disinterested observer, knowing all the facts, would determine that a judge's appearance of impartiality could reasonably be questioned, should a judge disqualify himself under section 455(a). . . .

The circumstances of this case do not permit a reasonable disinterested observer, knowing all the facts, to decide that the Court's appearance of impartiality might reasonably be questioned.<sup>11</sup>

Without concrete facts to back up the motion, the Department of Justice and NOW were left to creating vague suspicions about Callister's predilections which would obscure any decision he would render. Thus the entire disqualification process was probably a no-win situation for Callister—and would have been for almost any LDS judge.<sup>12</sup> Had Judge Callister disqualified himself after the motions of the Department of Justice or NOW, it would have been a tacit admission that an LDS judge holding a position in the Church might have a conflict-of-interest between his responsibilities to the Church and his sworn responsibility to uphold the constitution and the law. Such a decision—especially if made on the judge's own motion—might have had little precedential value but clearly would have had substantial political and psychological value. By proceeding with the case Callister could only vindicate himself in the eyes of NOW by deciding in favor of the congressional extension and against Idaho's rescission and even then anti-ERA forces most surely would have claimed that he had bent over backward to show that he was not biased. A decision against NOW would only confirm their claims that as a judge he was carrying out Church policy.<sup>13</sup>

Callister's decision raises interesting policy issues. If, on the one hand, it is better to avoid even a remote possibility of challenge to a judge's disinterestedness, a judge still should not have to recuse himself on the grounds that his impartiality has been challenged and we do not want controversial judges. The very challenge would make the judge

controversial and the act of challenging would then become a substitute for a substantive challenge to the impartiality of the judge. Here the substance of the amendment, that on which the Church had taken a stand, was not even at issue—it may have been at stake, but it was not at issue.

In a large sense, perhaps Callister's decision not to recuse himself protects the integrity of the judicial system. Preserving the integrity of the system requires not only that judges be free from biases which would prevent them from making an impartial decision but also requires that parties not have free reign to compel the disqualification of judges on merest pretext. We presume that our judges are disinterested and place a heavy burden on the challenging party to prove the bias of the judge. By requiring concrete reasons for disqualification, the system attempts to keep the parties from shopping for a judge they think is favorably disposed towards their claim. For this reason the motion for disqualification is not a trivial matter, and while reasonable people may disagree over what is reasonable, the malleability of the language of the disqualification statute should not be a substitute for some showing of bias. Lawmaking is

inevitably line-drawing, and Judge Callister made an unpopular decision in an unpopular case; but under the circumstances I believe it was a correct one.

#### Footnotes

1. The Senate voted to extend the deadline from March 22, 1979, to June 30, 1982, by a vote of 60 to 36 while the vote in the House was 233 to 189. In this suit it was contended that even if Congress had the power to extend the deadline for ratification, Congress must have done so by a 2/3 majority.

2. Also voting to rescind were Nebraska (1973), Tennessee (1974), Kentucky (1978), and South Dakota (1979). Kentucky's attempt at rescission is complicated by the fact that the Lt. Governor, in the Governor's absence from the state, vetoed the legislature's vote to rescind.

3. *Idaho v. Freeman*, 478 F. Supp. 33 (D. Idaho 1979). In a lengthy article, Jake Garn and Lincoln Oliphant have defended the Callister decision. "Disqualification of Federal Judges Under 28 U.S.C. § 455(a): Some Observations On And Objections To An Attempt By The United States Department of Justice To Disqualify A Judge On The Basis Of His Religion And Church Position," 4 *Harv. J.L. & Pub. Pol'y* 1 (1981).

4. *Idaho v. Freeman*, 507 Supp. 706 (D. Idaho 1981).

5. 28 U.S.C. § 455 (a).

6. Most of the attention in the case focused on the First Presidency's statement on ERA. Also mentioned was the statement in

the *Ensign* that "Our concern over the Equal Rights Amendment now has been deepened by what appears to be tampering with and an abuse of the process of amending the Constitution."

7. 478 F. Supp. at 36-37.

8. 507 F. Supp. at 729-30.

9. *Id.* at 730 n. 32.

10. *Id.* at 733.

11. *Id.*

12. NOW stated that it was Callister's position in the Church, not his membership it objected to. 507 F. Supp. at 731. This is questionable, however, since by the time NOW filed the motion Callister had been released. We can only speculate as to the position that would have been taken by the Department of Justice and NOW if Callister had been a stake president, bishop, Sunday School teacher, or home teacher.

13. It is interesting to note that in the recent case involving released time for seminary students, the suit was heard by a non-LDS judge from Wyoming, Judge Clarence Brimmer. The opinion does not reveal why neither of Utah's judges heard the case. *Lanner v. Wimmer*, 463 F. Supp. 867 (D. Utah 1978). On appeal to the Tenth Circuit Court of Appeals, Judge Monroe MacKay, the only LDS judge on the Tenth Circuit, not only sat on the three-judge panel but authored the court's decision. *Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981).

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# Give and Take

BEHIND AN EDITOR'S DESK  
Susan Staker Oman

I've been surprised by the view from behind an editor's desk. For three years now, I've watched people come and go in our office. The telephone rings; newspapers, magazines, and clippings arrive from all over the country; correspondence fills the "in" basket; and manuscripts pile up in the file cabinet near my typewriter. Contemporary Mormonism, I've discovered, is a complicated labyrinth—unexpected rooms, almost forgotten passageways, and well-kept public spaces—not the simple church I remember from my childhood in southeastern Idaho.

The editor's vantage is a critical nexus in that maze. We see the diverse ways people are dealing with this complex, sometimes perplexing, church. For people do much more than transfer information when they write. Their rhetoric, their style also reveals much about their world views and their habits of dealing with conflict and change. Mormons, of course, are shamelessly prolific writers—personal journals, family histories, sacrament meeting talks, fireside chats, poems, and stories. Predictably most of that output is bad: "she came to realize fiction" and over-simplified, sentimental prose. Our Mormon penchant for seeing good and evil clearly delineated is thus reflected in our rhetoric.

There are those who attempt to deal with the nuances and difficulties of Mormon life, and from them I expected more. Stamped in my memory is the first day I took my red pencil to the manuscript of an idolized professor from my student days and discovered, to my horror, that he didn't write well. And that experience has been repeated over and over again. Even those who should know better rarely avoid the unfortunate characteristics of much "scholarly" writing: jargon, the passive voice, abstract language, hyperqualification. The results are bland and impenetrable. But here again our collective idiosyncrasies reveal themselves in the ways we write poorly. Perhaps Mormons embrace these scholarly failings too eagerly. How many write to obscure rather than illuminate points? Consider our inordinate affection for the historical analogy,

for example. Such devices and many more protect the author and his thesis behind wall after wall of carefully constructed defenses.

I understand why we do this. I can sympathize with writers who complain that I have made their language too clear. They would rather use the elaborate, though familiar, techniques of oblique criticism and discussion and thus speak only to an initiated audience of sympathetic friends. Few want to risk being perceived as contentious or unfaithful in a church which values loyalty and unanimity. Stale, lifeless prose is a small price to pay for defense. Still after wading through hundreds of careful, stolid manuscripts, I have come to applaud the simple word "I." I believe. I think. The personal voice is the rarest commodity in Mormon letters. It is risky. We learned that last spring when we naively included an editorial on history in the magazine. I say naively, because we decided to pick a relatively "safe" topic to begin with rather than an "explosive" one like the scholarship of Fawn Brodie—who had recently died. But we soon heard a chorus of caution: "Don't do that again. Editorials will be the end of the magazine."

We couldn't ignore that advice; neither were we ready to apologize forthwith for poor judgment. We remembered old LDS periodicals such as the *Woman's Exponent*, the *Relief Society Magazine*, and the *Instructor* with editorials by B.H. Roberts, Emmeline B. Wells and others. We considered the plucky new *Seventh East Press* at Brigham Young University and searched for other examples in Mormondom. We talked to the editors of non-Mormon religious periodicals we admired such as *Commonweal* and *The Christian Century* and found a kindred Seventh-day Adventist publication called *Spectrum*. We looked at any number of secular magazines and newsletters. We discovered that editorials are the rule in publishing. Most magazines or newspapers not only disseminate information but also take positions, advocate changes, express opinions.

An editorial seemed out of place in SUNSTONE, not because it was

intrinsically bad, but because it was exotic, unusual. Its singularity gave it more emphasis and thus more importance than we intended. We saw it as only the first of many we intend to write and print. For we believe that Mormonism needs more editorials, needs a tradition of responsible, thoughtful, sympathetic examination. As a people we must focus on those injustices and sadnesses and incongruities and paradoxes we too often happily overlook. No group or institution, least of all our own, should be exempted from such scrutiny. If there were more voices, the occasional shrill or misguided ones would be heard against the background of fair persistent conversation.

There is another, more personal reason for continuing our editorial column Give and Take. I was amused recently when reminded what unknown quantities the editors of SUNSTONE are. A new acquaintance described his idea of what Peggy Fletcher must be like—older, rich, grey-haired. A total miss. Readers have some right to know us better. When I read a book, for example, I appreciate the author who discloses his own biases and preconceptions. It helps me to put his work in context. If readers had a sense of our goals for the magazine and, to some extent, our personal opinions on contemporary issues, I think that would help them put the magazine in context. I'm convinced such knowledge would allay the fears of many and would support our contention that SUNSTONE is a responsible forum for a variety of opinions, that we need not agree with an idea to publish it in the magazine. Our loss of anonymity will hopefully foster a sense of community among us all.

We are much like you, as likely to be wrong-headed as wise. And as disinclined to call unnecessary attention to ourselves. That is why we encourage you to join us. Give and Take will continue to be a forum for editorial opinion (we would even invite occasional guest editorials from our readers). And with this issue of the magazine we also inaugurate a complimentary venture—a series of columns of opinion by a variety of Mormon, and non-Mormon, observers. One of our long-range editorial goals is to "encourage writing in the personal voice which unflinchingly examines an idea, emotion, or event." Looking from behind my editor's desk (where I still remain most comfortable), I might yet see a spirited, I hope argumentative, crowd of Mormons trying stubbornly and courageously to be understood—and putting those diverse sentiments on paper.