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"Out of Zion Shall Go Forth the Law"

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Religion and the State

> Then went the Pharisees, and took counsel how they might entangle him in his talk. And they sent out unto him their disciples with the Herodians, saying . . . Tell us therefore, What thinkest thou? Is it lawful to give tribute unto Caesar, or not? But Jesus perceived their wickedness, and said, Why tempt ye me, ye hypocrites? Shew unto me the tribute money. And they brought unto him a penny. And he saith unto them, Whose is this image and superscription? They say unto him, Caesar's. Then saith he unto them, Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's. (Matthew 22:15–21)

Christ's answer to the Pharisees and the Herodians frames one of the major questions of political and legal theory: what is the proper relationship between religion and the state? Perhaps because he perceived the hypocrisy and insincerity of his interlocutors, Christ did not offer a complete answer to the question. The state and reli-

Review of Edwin B. Firmage and Richard C. Mangrum. *Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-day Saints, 1830–1900.* Urbana: University of Illinois Press, 1988. xvii + 430 pp., with index and bibliography. $27.50.

gion both have legitimate spheres, but beyond taxes and currency, Christ's answer does not inform us how far the intersection between those two spheres extends or if they intersect at all. The restoration has offered some fascinating and sometimes radical answers to this question.

In 1842, Joseph Smith declared, "We believe in being subject to kings, presidents, rulers, and magistrates, in obeying, honoring, and sustaining the law" (Article of Faith 12). However, alongside this avowal of religious submissiveness to secular authority, the Prophet also laid out a radical program of "the literal gathering of Israel" and a prediction "that Zion (the New Jerusalem) will be built upon the American continent" (Article of Faith 10).[1] He also affirmed an expansive notion of religious liberty. "We claim the privilege of worshiping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what they may" (Article of Faith 11). Thus from the beginning the church has had an ambiguous relationship with the state. It affirms loyalty and obedience but insists on the right of the Saints to pursue the peculiar vision of Zion dictated by revelation. The refusal of Mormons to yield ultimate obedience to the norms of others and the dictates of the state has brought them into frequent conflict with the law. The story of these encounters and the Mormon attempt to create gospel-based alternatives to the secular courts makes for one of the most fascinating chapters in church history. At the same time, the account contains powerful insights into the nature of law and the state, and their relationship to religion. In *Zion in the Courts,* Firmage and Mangrum tackle this story. Although their work is not without limitations, it lays out for the first time a comprehensive look at the nineteenth-century legal experience of the Latter-day Saints. The result is an impressive piece of scholarship full of possibilities for later students.

1. The original text of the Wentworth Letter, from which the Articles of Faith are taken, reads "That Zion will be built upon this continent." The wording was slightly clarified in the canonized text. See "Appendix 12: The Wentworth Letter," in *The Encyclopedia of Mormonism,* 4:1754.

Much of the freshness of this volume comes from the fact that neither Firmage nor Mangrum is a historian by training. Both are law professors. Mangrum studied law at the University of Utah, Oxford, and Harvard and currently teaches at Creighton Law School, where he specializes in jurisprudence and church-state issues. Firmage is the Samuel D. Thurmond Professor of Law at the Univer-sity of Utah, teaching international and constitutional law. He received his education at Brigham Young University and the University of Chicago. Thus both authors are grounded in the law rather than traditional historiography, and the results can be seen in their work.

Zion in the Courts is divided into three main sections. The first section chronicles the years from 1830 to 1844. The second section deals with the massive legal battle the church fought with the federal government over the practice of plural marriage. The final portion focuses on the system of ecclesiastical courts that sought to serve all Mormon judicial needs in the nineteenth century. All of these themes have been treated by other authors.[2] The innovation of Firmage and Mangrum is their close attention to legal detail and (in the case of ecclesiastical courts) the sheer breadth of their study. They explain legal actions in great detail (see pp.-120–24),[3] examine the full impact of judicial decisions (see pp.-185–94),[4] and look into the role of ecclesiastical courts on issues ranging from definitions of adultery under polygamy (see pp.-357–58) to fishing rights on Utah Lake (see p. 285). Although the wealth of detail can be overwhelming at times, on the whole the authors avoid useless pedantry and pointless cataloging of legal minutiae. Instead, one is left with a sense of precisely how the restoration has interacted with, challenged, and been challenged

Society), 137–40 (the trial of Joseph Smith in Missouri), and 193–98 (legal issues in Nauvoo). See also Leonard J. Arrington, *Great Basin Kingdom* (Salt Lake City: University of Utah Press, 1993), 353–79, which discusses the federal "Raid" on polygamy. See also Raymond T. Swenson, "Resolution of Civil Disputes by Mormon Ecclesiastical Courts," *Utah Law Review* 1978/3 (1978): 573–95.

3. A detailed account of Joseph Smith's bankruptcy.

4. An analysis of the reduced evidentiary standards used against polygamists.

5. See Steven H. Gifis, *Law Dictionary,* 4th ed. (Hauppauge, New York: Barron's Educational Series, 1996), s.v. "Habeas Corpus."

by law and the state. The result is a rare feat in Mormon historical writing: Firmage and Mangrum provide a genuinely new approach to previously treated events without resorting to violent revisionism. In this review, I will summarize the basic content of Firmage and Mangrum's book, touching on what I see as some of the more interesting issues. Then I will offer a framework in which both the limitations and possibilities of this book can be understood.

Legal Experiences in the Early Church

Much of the early legal experience of the church revolved around lawsuits against the Prophet and his associates. Firmage and Mangrum lay out the early money-digging trial of Joseph Smith along with the initial attempts in New York to silence him using the law against disorderly persons (see pp. 48–50). Unfortunately, the paucity of reliable sources for these early suits means that the treatment is necessarily truncated. The legal experience in Ohio included litigation surrounding the failure of the Kirtland Safety Society (see pp. 54–58). In a harbinger of more ominous things to come in Missouri, Joseph Smith also sued leaders of anti-Mormon mobs for assault. Unlike in Missouri, however, "the Saints generally received fair treatment in the Ohio courts" (p.-54).

While "in Ohio, at least, the Saints were willing to present their complaints before the gentile courts" (p. 52), the violence of Missouri's mobs and the connivance of her public officials dramatically shifted Mormon attitudes. By the time the Saints were driven to Illinois, they had already suffered nearly a decade of illegal, semilegal, and legal persecution. Mobs had destroyed Mormon property and dreams in Missouri, Mormon leaders had been hounded with both legitimate and vexatious lawsuits, and appeals to state and national authorities had fallen largely on deaf ears. Firmage and Mangrum sum up the position of the Saints at the time:

> The disheartening Missouri episode created a resolve among Mormons to rely no longer on "gentile" government to protect their civil rights. Instead the Mormons turned in-

> ward, forging a society that combined democratic and theocratic elements of government that would provide for substantial autonomy, insularity, and self-sufficiency. In search of those objectives, the Saints developed Nauvoo into a sanctuary arguably untouchable by state law. (p. 83)

An essential element of this autonomous sanctuary was the ability to halt and evaluate outside legal processes. The method used by church and civic leaders was the writ of *habeas corpus*.

Habeas corpus is a Latin phrase literally meaning "produce the body." It is a particular kind of writ or order issued by a court to a government official who is holding someone prisoner. The writ demands that the official bring his prisoner before the court (i.e., "produce the body") and show legal cause for his incarceration. It thus provides judicial review of executive action, insuring that a prisoner can challenge the government's action in court. Traditionally, *habeas corpus* has been known as "the Great Writ" because it formed the basis for a government of law rather than caprice.[5]

Under the Nauvoo charter, the municipal court, which consisted of prominent church leaders, had the right to issue writs of *habeas corpus,* and "this provision of the charter logically became the foremost weapon in the Mormons' protectionist arsenal" (p.-93). Firmage and Mangrum point out that most city charters of the time contained identical *habeas corpus* provisions, belying the claims of some that Mormons expressly lobbied for the writ in order to completely exclude outside law from Nauvoo (see p. 93). Nevertheless, they chronicle the imaginative use that Mormon lawyers made of the writ in protecting the Saints—and Joseph Smith in particular—from gentile law.

The central legal problem for the Saints was that Joseph Smith was technically a fugitive from justice (see p. 77). He had been charged and imprisoned in Missouri on grounds of treason, murder, and robbery. Despite his incarceration in Liberty Jail, Joseph had

6. Ellipsis points in original.

7. *Lochner v. New York,* 198 U.S. 45 at 53 (1905).

never been formally tried for any of these offenses. Thus he was subject to extradition and trial in Missouri, a trial that most Mormons believed would lead to his murder. The precariousness of the Prophet's legal position increased after Missouri officials blamed him for the attempted assassination of Lilburn Boggs (see p.-95). Beginning in September of 1840, state officials from Missouri began a series of attempts to arrest Joseph. At first he simply dodged the arresting officers, but after the governor of Illinois intervened to ensure Joseph's arrest, his lawyers sought a legal way of defeating the extradition (see p. 94).

Their first success with *habeas corpus* came before gentile Judge Stephen A. Douglas, who ruled that the writ for Joseph's arrest was technically invalid (see p. 94). Thereafter, the Nauvoo municipal court used its power to issue writs of *habeas corpus* each time Joseph was arrested. In addition, the city council took action to increase the scope and breadth of the writ's reach. First, they insisted that the Nauvoo municipal court had the power to examine all arrests, even those not carried out by municipal officials. Second, the council passed a law dramatically expanding the depth of local inquiry under *habeas corpus*.

> It allowed the municipal court to look into the procedural correctness and legality of any writ of process, foreign or local, and also (if the court concluded that the writ of process was procedurally valid) to "then proceed and fully hear the merits of the case, upon which said arrest was made, upon such evidence as may be produced and sworn before said court." If upon investigation the municipal court concluded that the writ of process has been issued "through private pique, malicious intent, or religious .-.-. persecution, falsehood or representation," then the court could quash the writ. (pp. 97–98)[6]

This law gave Nauvoo the power not only to see if an arrest was procedurally valid, but also to decide on its underlying worth and

8. The Supreme Court first dealt with the free-exercise clause in *Permoli v.*

justice. In effect, the Saints were claiming the right to exclude the operation of what they perceived as unjust laws from their community. Mangrum and Firmage devote some time to a discussion of the law's validity. Although they conclude that it may well have exceeded traditional notions of *habeas corpus,* they do acknowledge the existence of a precedent at the time for expanded use of the writ (see p. 99). However, despite any legal merit inherent in the Mormons' position, the authors argue that their use of *habeas corpus* contributed to the public outcry that led to Joseph's murder at Carthage (see p. 113).

Beyond the Mormon quest for immediate protection from legal harassment by enemies, Firmage and Mangrum also delve into how efforts to live the law of consecration fared before the bar of secular courts. In many ways the lawsuits arising out of Mormon attempts at communal economic activity are philosophically much more significant than the high-stakes, *habeas corpus* maneuvering in Nauvoo. The actions in Nauvoo were ultimately ad hoc attempts to protect Joseph from extradition to Missouri. While they had potentially life-or-death outcomes, the crisis conditions under which they were adopted were less directly tied to theology or fundamental issues of legal theory. That was not so in the law of consecration cases. Classical liberal theorists have traditionally exalted the role of legally enforceable contracts as one of the hallmarks of freedom. The ability of autonomous individuals to forge binding agreements supposedly allows them to create their own voluntary business arrangements. For a brief period around the turn of the century, the Supreme Court even extended constitutional protection to economic agreements, declaring that "the general right [of a citizen] to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."[7] Despite this latent respect for contract in American thought and jurisprudence, the church was unable to make the law of consecration legally palatable to "gentile" judges.

During the first fourteen years of the church's existence, the Saints obeyed a series of revelations calling for communal economic

Municipality No. 1. 44 U.S. 589 (1845). The case dealt with a municipal ordinance that, for

arrangements. Firmage and Mangrum go into the details of how members formally deeded property to the church and received their stewardships in return. They summarize the legal results of the law of consecration thus:

> Basic theological principles lay behind this law: possessions belonged to the Lord; and spiritual commitment required the individual to give priority to the Kingdom of God over materialistic desires. But implementing these ideals in a legally enforceable arrangement proved more problematic; the law would not accommodate Zion. (pp. 61–62)

Legal problems arose in three ways. First, wealthy members who had "cold feet" about consecration would sue the church for the return of their property. The secular law, unwilling to recognize the legitimacy of the church's claim to consecrated property, would side with the disgruntled members. At the other end of the economic spectrum, there were those members who wished to apostatize from the church and take their stewardships with them. In these cases, secular authorities would again side against the church. Finally, the church wished to retain an interest in any stewardship so that it could adjust the size of individual grants to accommodate new members or special circumstances. However, the secular law was wedded to a more traditional concept of property and once again refused to uphold the church's position (see pp. 61–63).

Plural Marriage and the Law

The fiercest legal opposition to the church, however, had to wait until the Saints emigrated to Utah and the Mountain West. After the church publicly announced the practice of polygamy in 1852, the church became the target of increasingly harsh legislation from the federal government. Beginning with the Republican platform of 1856—which declared polygamy, along with slavery, to be one of "the twin relics of barbarism"—national opinion began to galvanize against the church (see p. 129). In 1862 the first of a long series of laws was passed to punish Mormon polygamists (see p. 131).

The story of the federal government's persecution of Mormons

between 1862 and 1890 is one of the great legal dramas of United States history. It pitted the combined displeasure of the entire country against a small but tenacious minority. The lengths to which the federal government went in attacking the church illustrate the extent to which legal and constitutional protections can prove inadequate. Ironically, most members of the church today are unaware that at one point in time, the annihilation of the Church of Jesus Christ of Latter-day Saints was a stated policy goal of the federal government. Unlike the haphazard but violent mobs in Missouri and Illinois, the antipolygamy crusades prior to 1890 represented a deliberate decision of the United States government made by presidents, congresses, and the Supreme Court. The Saints challenged these actions in federal court, forcing the Supreme Court to issue a string of decisions that—for better or for worse—laid the basic structure of religious liberty jurisprudence in America.

The problem began with polygamy. The church accepted it as a divinely inspired institution. The federal government insisted that it was an immoral and degrading practice that had to be eradicated. However, the Civil War and its aftermath engaged the attention of the nation for the first few years after the passage of the first antipolygamy law, and it remained a dead letter. The Saints assumed that the law violated their first amendment right to the free exercise of religion, and the federal government did not press the matter.

However, after the war, federal officials began to step up their efforts to punish polygamists. In 1874, Congress passed the Poland Act, which eliminated some procedural obstacles to convicting polygamists. The law signaled a change in federal policy. The government was discarding the live-and-let-live attitude that had prevailed during the Civil War and Reconstruction years in favor of a vigorous attack on polygamy. The church decided to test the matter. The test case, *Reynolds v. United States,* was a landmark case because for the first time the Supreme Court directly interpreted the meaning of the free-exercise clause of the first amendment.[8] Firmage and Mangrum do an admirable job in explaining the two written decisions in this case,

health reasons, forbade open-casket funerals except in the city mortuary. Since this law effectively outlawed Roman Catholic requiem masses, Permoli challenged it, claiming that

but their treatment is not without faults. Unfortunately, Mangrum and Firmage rely almost exclusively on the court records to reconstruct these events (see pp.-151–56). The absence of other outside sources—such as diaries and letters by the participants—leaves considerable doubt as to the nature of the out-of-court maneuvering. Reynolds was the secretary to the First Presidency and also a polygamist. The church seems to have struck a deal with federal prosecutors in order to test the constitutionality of the antipolygamy laws (see p. 151). Reynolds apparently provided evidence to convict himself with the understanding that prosecutors would not seek a stiff sentence. When the federal officers pushed for a long prison sentence anyway, Reynolds vigorously fought the case (see p. 151).

The Supreme Court's decision opened the floodgates of federal persecution. The Court held that the Poland Act was constitutional, notwithstanding Reynolds's objections. Chief Justice Waite stated:

> Congress was deprived [by the free-exercise clause] of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.[9]

The court thus announced a narrow view of the free exercise of religion by creating a dichotomy between belief and action that protected only belief. In so doing, the justices harked back to the cramped religious theory of Thomas Jefferson (see p. 154).[10] Jefferson saw the right to free exercise as being a very limited concept that protected only belief. He had argued that "the legislative powers of government reach actions . . . and not opinions."[11] Unfortunately, in Jefferson's

it violated his right to free exercise of his religion. However, prior to the passage of the fourteenth amendment after the Civil War, the Bill of Rights applied only to federal actions. Thus, in *Permoli* the Court disposed of the free-exercise claim by pointing out that it couldn't be applied to a city ordinance. Since the polygamy law challenged in *Reynolds* was a federal law applied to the territories, it avoided the issue of the states' relationship to the Bill of Rights.

9. 98 U.S. at 164 (1878).

10. Cf. ibid.

11. Thomas Jefferson, *Writings,* ed. Merrill D. Peterson (New York: Library of America, 1984), 510.

view only belief enjoyed constitutional protection. In practical terms, the decision gave the government virtually unlimited power to criminalize any behavior it found objectionable. Mormon polygamists discovered that the first amendment would not protect them, and Reynolds went to prison (see p. 156).

After the *Reynolds* case settled the major constitutional question, prosecution against polygamists accelerated. There were two basic obstacles to government victory in polygamy cases. The first was the problem of Mormon control of the courts. The Utah Territorial legislature had granted broad jurisdiction to local probate courts that traditionally dealt only with cases involving wills and were staffed almost exclusively with Mormon judges. Since these courts had the ability to issue writs of *habeas corpus* and try criminal cases, they could effectively frustrate any polygamy prosecution. Congress responded by dismantling the local court system in 1874 (see p. 141). All criminal cases were thrown into the federal courts, which were firmly in the control of non-Mormons. More important, in 1882, Congress excluded all Mormons from jury duty. When a member of the church challenged this law as unconstitutional, the Court upheld Congress's action in *Clawson v. United States* (see pp. 227–29).[12]

The second barrier to convicting polygamists was the nature of the offense itself. The crime of "bigamy" consisted of being married to two or more persons simultaneously. The law required proof of a marriage ceremony to convict. Mormon marriages, conducted in temples or endowment houses, were almost impossible to prove. Congress reacted by creating a new offense: "unlawful cohabitation." The proof of this offense did not require evidence of an actual marriage ceremony (see p. 161). But what it did require was very unclear. Mormon attorneys argued that the threshold should be proof of sexual intercourse (see p. 169). However, this would have imposed the same kind of evidentiary problems as bigamy. The courts refused to accept this interpretation with the result "that proving the offense

12. See 114 U.S. 477 (1885).

13. See 136 U.S. 1 (1890).

14. Mircea Eliade, *Images and Symbols: Studies in Religious Symbolism,* trans. Philip

[of cohabitation] became ridiculously easy for federal prosecutors" (p. 174). Any contact between a man and his wives became evidence of cohabitation. Thus Mormon men who attempted to obey the law after the *Reynolds* decision by ceasing to live with their plural families would still be prosecuted if they provided financial support to them (see p.-175).

Even more fascinating, the courts created evidentiary rules that in practice destroyed the presumption of innocence in cohabitation proceedings. For evidentiary purposes, a man was presumed to cohabit with his legal (i.e., first) wife (see p. 186). However, in a case where a subsequent wife had children but the first wife did not, a man trying to avoid prosecution would often live with his children. The presumption of cohabitation with his legal wife put the man in the position of having to prove that he was innocent of the charge. Finally, the courts so diluted the amount of evidence necessary to establish cohabitation that a man could be convicted entirely on the basis of reputation without any corroborating evidence at all (see pp. 189–90).

The decisive federal attack came in 1887 with the Edmunds-Tucker Act. No longer content to prosecute polygamists, this act aimed at nothing less than the destruction of the church as an institution (see p. 257). The territorial law that gave the church its legal existence was revoked, and all church property in excess of $50,000 was to be confiscated by the government (see p. 201). Federal marshals and prosecutors moved in. The federal government seized huge amounts of church property, including Temple Square. The church tried to protect its assets by creating dummy corporations or deeding property to loyal church members. These attempts proved partially successful, but the government continued to relentlessly locate and seize church property. In a case whose name seemed to summarize the era, *The Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States,*[13] the Supreme Court upheld the Edmunds-Tucker Act, giving the government the final go-ahead to completely dismantle the church (see p. 257).

In the face of this relentless pressure and the almost certain an-

Mairet (London: Harvill, 1991), 28–29.

nihilation of the church, President Wilford Woodruff received a revelation authorizing the discontinuation of plural marriage. The First Presidency issued the Manifesto in the October conference of 1890. With the retreat from polygamy, the federal government relented and eventually returned most of the church's property (see p. 259). Firmage and Mangrum summarize the era by saying:

> In the battle of wills between the church and the federal government, the government was victorious. It suppressed polygamy and crippled the church's political, social, and economic power in the territory [of Utah]. Faced with a choice between a principled commitment to polygamy and survival as an organization, the church chose to survive. (p. 259)

Church Courts in the Nineteenth Century

The final section of the book deals with the ecclesiastical court system the church established in Utah. Unlike present-day church disciplinary councils, nineteenth-century church courts served as the primary forum for all civil disputes between the Saints. Thus, in addition to deciding on traditional moral issues such as adultery or apostasy, church courts also resolved contract disputes, property battles, and a host of other legal questions. While this section lacks some of the narrative appeal of the first two-thirds of the book, in many ways it is the most fascinating and potentially most important part of the work.

Firmage and Mangrum's basic thesis is that the church court system reflected a distinctively gospel-centered alternative to secular courts. While traditional legal forums emphasized atomic individualism, personal rights, and legal formality, the church courts placed far greater value on the concepts of community, charity, and substantive justice embodied in the restoration's concept of Zion. Motivated by a desire to build up the kingdom of God on earth, the Saints voluntarily submitted to religious authority (see p. 261). The result was that for several decades, Mormonism operated what constituted an autonomous legal structure independent of state institutions and coercion.

Firmage and Mangrum marshal an impressive array of data in

defense of their argument. Ordinarily, records of church courts are kept confidential. Firmage and Mangrum gained special access to these materials, but only on the condition that the names of parties to the disputes be kept secret. Thus, with a few exceptions, all of the characters in the last section of the book are referred to only by their initials. One drawback of this system is that Firmage and Mangrum could not deepen their research with other primary sources such as letters or diaries. In order to preserve confidentiality, they confine themselves almost exclusively to the disfellowshipment files in the Church Archives. However, because of their willingness to work within this constraint, they provide an impressive wealth of information on the details of how church courts actually functioned.

What they reveal is an independent Mormon legal system. In the harsh environment of the Great Basin, the Saints were only able to survive through cooperative efforts directed by priesthood authority. This required, among other things, notions of water and land rights at serious odds with secular law. The Saints responded by simply creating their own system of water law (see p. 314) and real estate law (see p. 293). Priesthood authorities resolved the inevitable disputes that arose. The church was perfectly willing to tell members that they had to pay damages and take other remedial action when they violated the norms laid down by the church, even in cases where the secular law required a different result (see p.-265).

This legal independence was not confined to water and real estate. Priesthood authorities adjudicated cases involving everything from assault to bankruptcy. The aim was to provide the Saints a way of resolving all of their disputes without "suing . . . before the ungodly" (p. 263). Despite their willingness to impose real monetary judgments, church leaders were far more likely than their secular counterparts to temper their decisions with a concern for mercy and neighborliness. Time and again, Firmage and Mangrum record cases where church courts sought to accommodate both parties to a dispute rather than impose a winner-takes-all solution. Likewise, church courts refused to allow cases to turn on legal technicalities. Instead, they sought to get to the central issues without a slavish devotion to procedural niceties (see pp. 274–75).

Mormon courts also dealt with distinctively Mormon issues that

couldn't find a hearing in secular court. The church courts handled divorce proceedings involving plural families and the consequent custody agreements, alimony payments, and child support in cases where the parties had no standing in secular courts (see p. 332). The concept of eternal marriage created some interesting cases. Firmage and Mangrum record cases of wives seeking to divorce deceased husbands so that they might be resealed to someone else. Some of these cases became very complicated:

> In an 1878 case HP, who was married civilly to TP, requested that she be sealed to WD because her husband "treated her poorly and was not in good standing with the Church." WD consented to the sealing, provided that HP would stay with her husband during his life. When TP died, HP requested that WD either furnish her a home or agree to a cancellation of the sealing so that she could be sealed to yet another party, JS, who insisted on the sealing as a condition for providing her with basic necessities. WD responded: "I am not in circumstances financially to comply with her request, but would have felt glad to have done it if it had been in my power, and if she feels desirous to be sealed to Brother [JS] under these circumstances if it can be done to be unsealed I am willing to relinquish my claim" (p. 332).

Church courts insisted on their authority to reconsider and revise civil decisions involving church members. "Suing before the ungodly" was deemed to be un-Christian-like conduct worthy of dis-fellowshipment (see p. 264). Generally, the procedure was for the defendant in a civil suit to complain of the un-Christian-like conduct of the plaintiff to his bishop. The bishop would then convene a church court to consider the matter. The court would consider the entire dispute and craft a final judgment. Oftentimes, the church court would actually side with the plaintiff in the civil suit, ordering the defendant to pay damages. However, in these cases the plaintiff would generally have to pay the defendant's legal costs to atone for his un-Christian-like conduct (see p. 266). Provided that both parties chose to abide by the judgment, the case would be closed (unless either side appealed). If either party refused to abide by the decision, however, he

would be disfellowshipped from the church (see p. 320).

This brings us to the question of enforcement. For a brief period of time during the desperate days at Winter Quarters, church courts meted out "coercive sanctions" (p. 288). However, apart from this exception, participation in church courts was voluntary. They did not have the ability to seize property or physically coerce participants. Rather, they relied exclusively on their ability to disfellowship members, with its associated spiritual and social consequences (see p. 288). In the few cases where nonmembers submitted their disputes to church courts, the courts required posting a bond that was forfeit if the parties did not abide by the decision (see p. 282). Thus Mormons were able to operate an autonomous legal system bereft of the kind of institutionalized violence demanded by classical liberal theory.

History and Religion

Zion in the Courts avoids the temptation to explain Mormon legal experience in purely secular terms. The religious historian Mircea Eliade, writing about the general state of the history of religion, observed that:

> We wanted at all costs to present an *objective* history of religions, but we failed to bear in mind that what we were christening *objectivity* followed the fashion of thinking in our times. . . . Desirous to achieve by all means the prestige of a "science", the history of religions has passed through all the crises of the modern scientific mind, one after another. Historians of religions have been successively—and some of them have not ceased to be—positivists, empiricists, rationalists or historicists. And what is more, none of the fashions which in succession have dominated this study of ours, not one of the global systems put forward in explanation of the religious phenomenon, has been the work of a historian of religions; they have all derived from hypotheses advanced by eminent linguists, anthropologists, sociologists or ethnologists, and have been accepted in their turn by everyone, including the historians of religions! . . .

> . . . In short we have neglected this essential fact: that in the title of the "history of religions" the accent ought not to be upon the word *history,* but upon the word *religions*. For although there are numerous ways of practising *history*—from the history of technics to that of human thought—there is only one way of approaching *religion*—namely, to deal with the religious facts.[14]

Mormon history presents the same temptation to disregard that which is distinctly Mormon in the search for "objective" explanations. Fortunately, Firmage and Mangrum, to the extent that they offer explanations, are unabashedly theological in their arguments.

The opening chapter of the book, entitled "Zion and the State," makes the doctrinal concept of Zion the main vehicle of explanation. The Saints, they argue, were seeking to establish an independent community based on obedience to God's commands (see p. ix). When that vision of Zion threatened secular authority and norms, the federal government reacted with massive persecution. Ultimately, the church, faced with the real threat of complete destruction, was allowed to relent on certain commitments (i.e., plural marriage and other distinctive practices). The church court system was likewise an outgrowth of this commitment to build an autonomous city of God. In their introduction, Firmage and Mangrum argue "as long as the Mormons held themselves responsible for building Zion, the church courts flourished, despite secular alternatives, much longer than any materialistic historical model would have predicted" (p. xvii). They also note the doctrinal continuity into the present. "For the Mormon today," they point out, "Zion is not dead, even though many of the institutions of nineteenth-century Mormonism are gone or have been modified beyond recognition" (p. 371).

If *Zion in the Courts* has a weakness, it is the weakness that much of all historical writing shares. An old adage defines history as "one damn thing after another." Writing in reaction against what he saw

2. See James B. Allen and Glen M. Leonard, *The Story of the Latter-day Saints,* 2nd ed. (Salt Lake City: Deseret Book, 1992), 123 (lawsuits provoked by the Kirtland Safety

as disciplinary overreaching, the German historian Jacob Burckhardt laid out a very modest goal for historians. "We shall . . . make no attempt at system, nor lay any claim to 'historical principles.' On the contrary, we shall confine ourselves to observation."[15] However, most modern practitioners of history have greater ambitions. They wish to offer explanations as well as descriptions of events. For example, Leonard Arrington, who has been called "the patron of virtually all contemporary scholarship in the field of Mormon history,"[16] insisted that his *magnum opus* "*Great Basin Kingdom* represents an attempt to give meaning to an American experience that often has been obscured by sectarian controversy."[17] Thus most historians seek to do more than simply describe the past; they also wish to interpret it, show causes and effects, and attempt to portray "what really happened." This is the genre of literature into which *Zion in the Courts* falls.

There is nothing wrong with this approach in and of itself. Firmage and Mangrum have done an excellent job of compiling a massive amount of material. The bibliography alone, which fills thirteen pages, is a major resource for anyone interested in law and the restoration. As noted above, their explanations are interesting and avoid predictable pitfalls. However, at the risk of faulting the authors for not writing a book they did not set out to write, I think that *Zion in the Courts* suffers from an unwillingness to stray very far from a recitation of nineteenth-century facts. This may make it good history, but it ignores a host of important questions of legal and political theory.

"Mormon Studies" and "Mormon Perspectives"

In a larger sense, part of my disappointment with *Zion in the*

15. Jacob C. Burckhardt, *Reflections on History,* trans. M. D. Hottinger (Indianapolis, Ind.: Liberty Fund, 1979), 32.

16. Richard L. Bushman, *Joseph Smith and the Beginnings of Mormonism* (Chicago, Ill.: University of Illinois Press, 1984), vii.

17. Arrington, *Great Basin Kingdom,* xxii.

Courts stems from its basic approach to dealing with Mormonism. Mormon scholarship can flow in two paths that I would label as "Mormon studies" and "Mormon perspectives." "Mormon studies" views Mormonism as subject matter. The aim is to examine LDS experience, doctrine, or scripture from within the framework of some other discipline so that we can understand what is "really" going on. This type of scholarship can take many forms and can be either faith building or faith destroying.[18] Fawn Brodie's attempt to explain Joseph Smith by supposedly revealing his inner psychological experience is an early and notorious example of this kind of writing.[19] However, much as they might resent being placed in the same category as Brodie, the work of many faithful scholars fits into a similar pattern. For example, the recently published FARMS volume *Book of Mormon Authorship Revisited: The Evidence for Ancient Origins*[20] contains the work of philosophers, linguists, anthropologists, demographers, statisticians, military historians, and other scholars, all of whom use their intellectual training to examine the Book of Mor-mon from within the framework of their respective disciplines. Although the authors plainly acknowledge the apologetic value of their work,[21] they share with Brodie an approach that places Mormonism under the lens of an outside scholarly perspective. Thoughtful scholars freely acknowledge the limitations of this approach. For example, Noel Reynolds argues in the introduction to *Book of Mormon Authorship Revisited* that, despite the findings contained in that book, "science and logic can prove negative, but not positive, claims" about the Book of Mormon.[22]

Beyond its conceptual limitations, however, the "Mormon studies" approach also contains spiritual dangers. This is because it must

18. I should also, in all fairness, add that it is often neither. There is much of "Mormon studies" that inflicts no harm beyond boredom and does no good other than "adding to the record."

19. See Fawn M. Brodie, *No Man Knows My History: The Life of Joseph Smith, the Mormon Prophet*, 2nd ed. (New York: Vintage Books, 1995).

20. See Noel B. Reynolds, ed., *Book of Mormon Authorship Revisited: The Evidence for Ancient Origins* (Provo, Utah: FARMS, 1997).

21. See ibid., 3–4.

22. Ibid., 16.

grant, at least provisionally, intellectual authority to some system of thought beyond the gospel. Thus, a linguist studying the Book of Mormon must privilege the categories of his or her discipline in order to proceed. In most cases, this is innocuous because the categories of this or that discipline do not directly confront the gospel, and in any case the faithful scholar cedes ultimate intellectual fealty to the Lord and his revelations. However, it is naive to assume that any intellectual discipline's pursuit of knowledge is always neutral vis-à-vis the gospel. There can and will be conflicts between the truths of revelation and the assumptions of certain kinds of scholarly inquiry. Furthermore, there is the danger that use of scholarly tools—which requires the privileging of those tools—will breed habits of mind that reflexively privilege secular scholarship over the gospel. I must hasten to add that I am not attacking "Mormon studies" per se. Money may carry with it spiritual dangers (see Matthew 6:24), but that is no reason to not make a living or support one's family. Scholarly tools can do much to elucidate our understanding of things Mormon. The spadework of diligent researchers produces mounds of valuable and insightful material. I simply wish to point out the limitations—and possible dangers—of approaching Mor-monism purely as an *object* of study.

"Mormon perspectives" takes a different approach to the relationship of the gospel and the life of the mind. Rather than using scholarly tools as a way of classifying and understanding Mormonism, this approach seeks to use Mormonism as a lens with which to examine, understand, and perhaps critique existing theories. In a sense, this is a much more daring approach. Given the vast range of seemingly trivial and uninteresting objects that scholars examine, offering up Mormonism as a potentially fruitful topic of study does not require a great deal of chutzpah. Obviously this is not always the case. The recent demand by Mormon scholars that the Book of Mormon be taken seriously as both an ancient record and a genuinely insightful text certainly pushes the envelope of the current intellectual climate. Nevertheless, the "Mormon perspectives" approach ultimately requires greater daring than the "Mormon studies" approach. One suggests a possibly fruitful subtopic of study. The other suggests that

the experience and doctrine of a relatively minor—by the world's standards—religion can seriously challenge and engage in the great dialogue of our civilization.

Mormonism remains—by the world's standards—a young religion. Whether the next chapter of the restoration will be a continuation of the current explosive growth or a winnowing of the wheat and the chaff remains to be seen. The church could well become "a new world faith" on the same scale as Islam or traditional Christianity, as some sociologists contend.[23] It could remain a relatively small dose of leaven and salt in a much larger sea of humanity. Regardless, the church is reaching the point where serious LDS students should awaken to the fact that Mormonism can offer more than an interesting topic of study. It can also challenge and reshape the categories by which that study proceeds. In the end, such an approach may prove much more valuable than the patient accumulation of further studies of Mormon topics. The philosopher Thomas Kuhn has pointed out that science has not in fact proceeded and progressed by the gradual accretion of further facts and knowledge. Rather, the most far-reaching scientific inquiries have been those which have challenged and shifted entire paradigms rather than simply adding more experiments within an existing framework.[24]

Clearly, not all Mormon writing and discussion falls neatly into a "Mormon studies" or "Mormon perspectives" category. Most Mormon writers do not think of themselves as providing either a "studies" or a "perspectives" approach. The work of competent scholars and students will contain a mixture of both. Mormonism can be studied as a topic even while it challenges the way that study proceeds. Nevertheless, the categories are useful in that they ask students to evaluate what the ambitions and implications of their work are.

Zion in the Courts could have been a much more ambitious work. Certainly it contains the possibility for more ambitious work.

23. Rodney Stark, "The Rise of a New World Faith," *Review of Religious Research* 26 (September 1984): 18–27.

24. See generally Thomas S. Kuhn, *The Structure of Scientific Revolutions,* 3rd ed. (Chicago: University of Chicago Press, 1996).

The book follows a "Mormon studies" approach. The legal experience of the Latter-day Saints is subject matter, and the authors do an admirable job of bringing their scholarly expertise to the examination of that subject. Yet Mormon legal experience can be more than grist for the disciplinary mill of legal history. It can also be a challenge to developed and developing theories of the law. *Zion in the Courts* uses the law to examine Mormonism. Its weakness is that it is timid about using Mormonism to examine the law. The material amassed by Firmage and Mangrum invites one to reexamine basic questions about the relationship of religion and law and of law and the state. How should the state react to religious communities that refuse to give final allegiance to secular authority? How far can or should the free exercise of religion be taken? Can law exist divorced from the state? If it can, what does the concept of law mean in these cases? These are important and basic questions in jurisprudence. If the nineteenth-century legal experience of the Latter-day Saints suggests anything, it is the possibility for the gospel to offer unique and challenging answers to these questions.

It is unlikely that we will ever have an official or even quasi-official Mormon legal theory. Most likely it is not even desirable to have one. Official Mormon doctrine will always remain under the control of the Lord and his prophets, and thus far their messages have focused on weightier topics. Still, it is not too much to hope that we might develop an autonomous Mormon legal and political theory. The goal need not be to use the gospel to find the "right" answers to questions of political philosophy or jurisprudence. Rather, it can be to use the gospel to challenge the questions and answers of the disciplines to find new and unique insights and formulations. Some writers have already begun to lay what could be the foundations of Mormon jurisprudence.[25] Harvard Law School currently has an institute devoted to the study of Islamic jurisprudence. A century or two hence—provided of course that God does not wrap up history earlier—might not

25. See, for example, R. Collin Mangrum, "Mormonism, Philosophical Liberalism, and the Constitution," *BYU Studies* 27/3 (1987): 119–37. See also Frederick Geddicks, "Towards an LDS Understanding of Church Autonomy," Report to the Second American/

students devote similar energy to understanding Mormon perspectives on the law? If they do, *Zion in the Courts* will be one of their seminal texts. We can only hope that there will be many others.

European Conference on Religious Freedom, University of Trier, Germany, 17 May 1999, available at www.netoriginals.com/oman/LDSpapers.html. See also Cole Durham and Nathan Oman, "A Mormon Theory of Church and State in the Twentieth Century," chapter in a book forthcoming from De Paul University.