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NOMOS, NARRATIVE, AND NEPHI: LEGAL INTERPRETATION IN THE BOOK OF MORMON

Nathan B. Oman*

ABSTRACT

The Book of Mormon helped launch one of America’s most successful religions, and millions around the world accept it as scripture. It is thus one of the more influential books to have been published in the United States. Ironically, precisely because of its role in the founding of Mormonism, the text of the Book of Mormon has often been ignored. Recently, however, the Book of Mormon has begun to attract the attention of scholars whose interest in the text goes beyond either religious devotion or the academic study of Mormonism. Rather, they look to the text as a literary creation of interest in its own right. This article brings this new approach into dialogue with the influential legal theory of Robert Cover. In so doing, it breaks new ground in the study of law and literature and shows how a close reading of the Book of Mormon text reveals a subtle debate about the nature of rule following that intersects with contemporary discussions in legal theory. These narratives illustrate an important feature of what we might call the phenomenology of legal experience, namely the way in which law carries within itself—rightly or wrongly—claims to transcendence.

KEYWORDS

Mormon Studies, Book of Mormon, Robert Cover, Jurisprudence, Law & Literature

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I. INTRODUCTION

In 1827, a young man named Joseph Smith began reporting to family and friends that an angel had visited him and revealed gold plates buried in a hill not far from his family's farm in Palmyra, New York.¹ Smith later claimed to have recovered the plates, which he said were covered with ancient writing, and he began dictating a "translation" of the text "by the gift and power of God" to a series of amanuenses. By 1830, the oft-interrupted task of dictation was complete. Smith showed the plates, which he had previously refused to show to anyone, to a select group of friends who signed an affidavit stating that "Joseph Smith . . . has shown unto us the plates of which hath been spoken, which hath the appearance of gold; and as many of the leaves as the said Smith has translated we did handle with our hands. . . ."² Shortly thereafter, Smith insisted, he returned the plates to the angel from whence they had come. Smith published his dictated text a short time later as the Book of Mormon. By April 1830 Smith had formally organized a church accepting the book as an additional volume of scripture to supplement the Bible, and converts began flocking to the new movement. Nearly two centuries later The Church of Jesus Christ of Latter-day Saints that Smith and his book founded claims just over 16.5 million official members.³

Since even before its publication, the text of the Book of Mormon has been a prisoner to the miraculous and outlandish story of its own origin. For Latter-day Saints, the Book of Mormon is primarily a sign. Until recently, they have been less concerned with the narrative or even theological content of the Book of Mormon than with its role in the founding myth of their religion.⁴ For them, the book is a miraculous link between ancient prophets and Joseph Smith as the modern prophet of God's latter-day work.⁵ For those outside the faith, of course, the stories of

¹ See RICHARD BUSHMAN, *JOSEPH SMITH: ROUGH STONE ROLLING* 57–83 (2005) (recounting the production of the Book of Mormon text).

² See *The Testimony of the Eight Witnesses in THE BOOK OF MORMON* (The Church of Jesus Christ of Latter-day Saints, 1981) (1830). The Book of Mormon has also been published since 1830 with a document entitled "The Testimony of Three Witnesses," an affidavit signed by three of Smith's close associates in which they report being shown the gold plates by an angel. See "Testimony of the Three Witnesses" *in id.*

³ See The Church of Jesus Christ of Latter-day Saints, Worldwide Statistics, <https://newsroom.churchofjesuschrist.org/facts-and-statistics> (visited June 15, 2020).

⁴ See generally Noel B. Reynolds, *The Coming Forth of the Book of Mormon in the Twentieth Century*, 38 *BYU STUD.* 7 (1999) (providing a content study of Mormon sermons and publications showing that prior to the 1980s the text of the Book of Mormon received relatively little attention among Latter-day Saints).

⁵ For example, in January, 1831, less than a year after the publication of the Book of Mormon, Joseph Smith's mother, Lucy Mack Smith, wrote a letter trying to convert her brother to the new faith:

By searching the prophecies contained in the old testament we find it there prophesied that God will set his hand the second time to recover his people in the house of Israel. he has now commenced this work. he hath sent forth a revelation in these last days, & this revelation is called the book of Mormon, it contains the fullness of the Gospel to the Gentiles, and is sent forth to show unto the remnant of the house of Israel what great things God hath done for their fathers; that they may know of the covenants of the Lord & that they are not cast off forever, and also of the convincing of both Jew and Gentile that Jesus is the Christ the Eternal God and manifests himself unto all nations.

golden plates, angelic visitors, and ancient prophets have a very different meaning. Nearly a year before the publication of the Book of Mormon, the *Wayne Sentinel*, one of Palmyra's local papers, insisted that "the whole matter is the result of gross imposition, and a grosser superstition."⁶ It is a way of treating the Book of Mormon that has not changed markedly in the almost two succeeding centuries. Thus in a 2006 *Slate* article, Jacob Weisberg adopted the same approach. Discussing why he would not vote for a Latter-day Saint, he wrote:

I wouldn't vote for someone who truly believed in the founding whoppers of Mormonism. The LDS church holds that Joseph Smith, directed by the angel Moroni, unearthed a book of golden plates buried in a hillside in Western New York in 1827. . . . Smith was able to dictate his "translations" of the Book of Mormon first by looking through diamond-encrusted decoder glasses and then by burying his face in a hat with a brown rock at the bottom of it. He was an obvious con man.⁷

Mirroring Latter-day Saint readings, such dismissive treatments also take the Book of Mormon primarily as a sign rather than a text. The content of the book is less important than the conclusions that one draws from the story of its origin.

The gravitational force of the book's origin story has also infected the discussion of the content of the text. Latter-day Saints have tended to treat the Book of Mormon as a trove of theological proof texts. The authority of the text as scripture has vouchsafed the value of these textual snippets for believers. Indeed, because Latter-day Saints ground the value of the text in the miraculous story of its production, they have generally not felt called upon to understand or evaluate the text on its own terms. For non-Mormons, a similar, if inverted, dynamic arises. Mark Twain, who seems to have actually read large chunks of the Book of Mormon, insisted that it was "chloroform in print."⁸ In his eyes the book consisted of little more than a chaotic pastiche of ideas and themes taken from the Bible and lacked any coherent form or message. Modern readers, including those sympathetic to Mormonism, have often come to similar conclusions.⁹ Even the hit Broadway

Lucy Smith to Solomon Mack, Jr., 6 Jan. 1831 *reprinted in* 1 EARLY MORMON DOCUMENTS 215 (Dan Vogel ed., 1996).

⁶ *Wayne Sentinel*, 26 Jun. 1829 *reprinted in* 2 EARLY MORMON DOCUMENTS 218–219 (Dan Vogel ed., 1998).

⁷ Jacob Weisberg, *Romney's Religion: A Mormon President? No Way*, SLATE, 20 Dec. 2006.

⁸ See MARK TWAIN, *ROUGHING IT* 127 (DSI Scanning 2001) (1886); Richard H. Cracroft, *Distorting Polygamy for Fun and Profit: Artemus Ward and Mark Twain Among the Mormons*, 14 BYU STUD. 272 (1974) (discussing Twain and the Latter-day Saints).

⁹ Literary critic Harold Bloom, despite his admiration for Joseph Smith's religion-making imagination, writes, "What is a contemporary non-Mormon, interested in American religion, to do with the Book of Mormon? I cannot recommend that the book be read either fully or closely, because it scarcely sustains such reading." HAROLD BLOOM, *THE AMERICAN RELIGION: THE EMERGENCE OF THE POST-CHRISTIAN NATION* 86 (1993); see also *id.* at 82. ("Whatever his lapses, Smith was an authentic religious genius, unique in our national history."). Like many other scholars, Bloom concludes that not only is the Book of Mormon not worth reading because of any intrinsic merit or interest that it might hold but that its text is not even particularly important for understanding

musical that took its name from the book contains virtually no content from the book itself, even as musical satire.

More recently, however, there has been a scholarly re-evaluation of the Book of Mormon. In the multi-volume Oxford History of the United States, Daniel Walker Howe claims:

The Book of Mormon should rank among the great achievements of American literature, but it has never been accorded the status it deserves, since Mormons deny Joseph Smith's authorship, and non-Mormons, dismissing the work as a fraud, have been more likely to ridicule it than to read it.¹⁰

A number of treatments of the text's literary structure and content have appeared in scholarly presses for an academic audience.¹¹ Other works have looked at the complicated reception history of the book.¹² The Book of Mormon has been examined in comparative works looking at other religious and scriptural traditions.¹³ Scholarly editions of the text have been produced.¹⁴ Even Mormon theological

Mormonism. *See id.* at 85 (“With the Book of Mormon, we arrive at the center of Joseph Smith’s prophetic mission, but hardly at any center of Mormonism, because of Smith’s extraordinary capacity for speculative development in the fourteen years that remained him after its publication.”). Bloom goes on to write, “[The Book of Mormon] has bravura, but beyond question it is wholly tendentious and frequently tedious.” *Id.* at 86. Bloom here follows the work of Mormon historians who have identified Smith’s main period of theological creativity with the so-called Nauvoo period from 1839 to 1844. *See generally* Thomas G. Alexander, *The Reconstruction of Mormon Doctrine: From Joseph Smith to Progressive Theology*, SUNSTONE, July-August 1980, 24. More recent work, however, throws into question the claim that Smith’s Nauvoo period theology represented a sharp and discontinuous break with his earlier teachings. *See generally* David L. Paulsen, *The Doctrine of Divine Embodiment: Restoration, Judeo-Christian, and Philosophical Perspectives*, 35 BYU STUD. 6 (1995) (“My reading of the evidence leads me to reject two propositions: [1] that the doctrine of divine embodiment was articulated for the first time in 1838, and [2] that prior to 1838 Latter-day Saints understood God to be an immaterial being.”).

¹⁰ DANIEL HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848 at 314 (2007).

¹¹ *See generally* GRANT HARDY, UNDERSTANDING THE BOOK OF MORMON: A READER’S GUIDE (2010); TERRY GIVENS, THE BOOK OF MORMON: A VERY SHORT INTRODUCTION (2009).

¹² *See generally* AMERICANIST APPROACHES TO THE BOOK OF MORMON, (Elizabeth A. Fenton & Jared Hickman eds., 2019); PAUL C. GUTJAHN, THE BOOK OF MORMON: A BIOGRAPHY (2012); TERRY GIVENS, BY THE HAND OF MORMON: THE AMERICAN SCRIPTURE THAT LAUNCHED A NEW WORLD RELIGION (2003).

¹³ *See generally* JAD HATEM, POSTPONING HEAVEN: THE THREE NEPHITES, THE BODHISATVA, AND THE MAHDI (Jonathon Penny trans., 2015).

¹⁴ *See generally* THE BOOK OF MORMON: THE EARLIEST TEXT (Royal Skousen ed., 2009) (an effort to reconstruct in so far as possible the earliest, pre-publication version of the Book of Mormon based Skousen’s multi-volume critical edition of the Book of Mormon text); THE BOOK OF MORMON (Laurie F. Maffly-Kipp ed., 2008) (1830) (a Penguin Classics edition of the text prepared for religious studies students); THE BOOK OF MORMON: A READER’S EDITION (Grant Hardy ed., 2003) (1830) (an edition of the text designed to be read as a literary creation rather than a devotional volume, including a critical apparatus).

writings have been marked by increasingly sophisticated engagement with the text of the Book of Mormon.¹⁵ All of this work is marked by a turning away from the traditional discussions of the book centered on polemics about its origins or its place in the biography of Joseph Smith and the movement he created. Rather, the most recent generation of scholarly work has focused on the Book of Mormon text itself, looking at its meaning, structure, and possible connections with discussions and debates beyond Mormonism.

This article contributes to this latest generation of scholarship by offering a close reading of some of the earliest narratives in the book from a legal perspective and bringing them into dialogue with contemporary legal theory.¹⁶ I examine the Book of Mormon as a legal text, arguing that these narratives embody a surprisingly nuanced debate about the nature of legal interpretation. One of the central themes in the opening narratives in the book is the conflict between the character of Nephi and his brothers. Nephi, the narrator in this part of the text, structures his story around a series of confrontations with his older brothers, Laman and Lemuel, and one of his main rhetorical agendas is to justify himself and his father against their attacks. In large part, this conflict is ultimately about what it means to follow the law. From it emerge two quite different conceptions of the function and meaning of rules. For Laman and Lemuel following the law is a matter of the formal content of rules and conforming one's conduct to that formal content. For Nephi, in contrast, law is embedded within a much broader narrative that provides the law with meaning and importance. To follow the law is less a matter of the formal content of rules than of enacting in one's own life those narratives.

This divide between law as formal rules and law as narrative mirrors the discussion within contemporary legal theory between traditional positivist accounts of law and the jurisgenerative theory of Robert Cover.¹⁷ According to Cover, one

¹⁵ See, e.g., JOSEPH M. SPENCER, *AN OTHER TESTAMENT: ON TYPOLOGY* (2nd ed. 2016); *AN EXPERIMENT ON THE WORD: READING ALMA 32* (Adam Miller ed., 2014); *READING NEPHI READING ISAIAH: READING 2 NEPHI 26-27*, (Joseph M. Spencer & Jenny Webb eds., 2011); *A DREAM, A ROCK, AND A PILLAR OF FIRE: READING 1 NEPHI 1* (Adam S. Miller ed., 2017); *CHRIST AND ANTICHRIST: READING JACOB 7* (Adam S. Miller & Joseph M. Spencer eds., 2018); *A PREPARATORY REDEMPTION: READING ALMA 12-13* (Matthew Bowman & Rosemary Demos eds., 2018).

¹⁶ The earliest appearance of the Book of Mormon in legal scholarship appears to have been in 1898. See James Williams, *The Law of the Book of Mormon*, 24 *LAW MAG. REV.* 138 (1898). The most comprehensive treatment of legal narratives in the book is JOHN W. WELCH, *THE LEGAL CASES IN THE BOOK OF MORMON* (2011).

¹⁷ See Robert M. Cover, *The Supreme Court, 1982 Term—Forward: Nomos and Narrative*, 97 *HARV. LAW REV.* 4 (1983); Robert M. Cover, *Violence and the Word*, 95 *YALE LAW J.* 1601 (1986). There is an extensive literature on Cover's thought. See, e.g., Aviam Soifer, *Covered Bridges*, 17 *YALE J. L. HUM.* 55 (2005); Samuel J. Levine, *Halacha and Aggada: Translating Roberts Cover's Nomos and Narrative*, 1998 *UTAH L. REV.* 465 (1998); Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover*, 17 *YALE J. L. HUM.* 17 (2005); Suzanne Last Stone, *Rabbinic Legal Magic: A New Look at Honi's Circle as the Construction of Law's Space*, 17 *YALE J. L. HUM.* 97 (2005); Robert A. Burt, *Robert Cover's Passion*, 17 *YALE J. L. HUM.* 1 (2005); Perry Dane, *The Public, the Private, and the Sacred: Variations on a Theme of "Nomos and Narrative,"* 8 *CARDOZO STUD. LAW LIT.* 15 (1996); Robert C. Post, *Who's Afraid of Jurispathic Courts: Violence and Public Reason in Nomos and Narrative*, 17 *YALE J. LAW HUM.* 9 (2005); Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to*

of the important functions of law is its role in the creation of the narratives that undergird the normative structures (nomos) of communities. Taking Jewish law as his model, Cover points toward the possibility of a world in which law's connection to violence can be secondary to its role as an engine of social meaning. Within this framework, Nephi is offering a jurisgenerative vision of law following. However, the Book of Mormon breaks with Cover's formulation by also gesturing toward the inadequacy of legal interpretation as a nomos sustaining activity. In the Book of Mormon narrative, it is only when interpretation is coupled with the imprimatur of supernatural intervention that a new nomos is created. Contemporary legal theories cannot, of course, look to the supernatural in grounding the law as an engine of nomos creation. However, the story of Nephi does point toward the inadequacy of founding the normative power of law purely on its interpretive fecundity. In so doing, my reading of the Book of Mormon offers both an example of Cover's approach and a critique of it.

This article proceeds as follows. Part II provides an account of the debate over the nature of following the law in the Book of Mormon, showing through a close reading of the story of Nephi's confrontation with his brothers their contrasting approaches to legal authority. Part III shows how Laman and Lemuel's approach to rule following fits within one of the main streams of analytic jurisprudence but how within that framework Nephi's response to their claims is largely incomprehensible. Part IV shows how Nephi's approach does make sense within Robert Cover's approach to law even as his story challenges Cover's central claim about how interpretation becomes law. Part V concludes.

II. THE DEBATE OVER RULE FOLLOWING IN THE BOOK OF MORMON

The Book of Mormon opens with the story of Lehi and his family. Lehi is living in Jerusalem in the decade just before the Babylonians destroy the city in 587 B.C.E. He has a vision of a pillar of fire in which he learns that unless the city repents it will be destroyed.¹⁸ The people of Jerusalem reject his message, seek his life, and Lehi flees with his family into the desert.¹⁹ For many years they wander in the wilderness,

the Jewish Legal Model in Contemporary American Legal Theory, 106 HARV. LAW REV. 813 (1993); Suzanne Last Stone, *Judaism and Postmodernism Law and Hermeneutics in Rabbinic Jurisprudence: A Maimonidean Perspective*, 14 CARDOZO LAW REV. 1681 (1992); Suzanne Last Stone, *Justice, Mercy, and Gender in Rabbinic Thought*, 8 CARDOZO STUD. LAW LIT. 139 (1996).

¹⁸ See 1 Nephi 1:6-13. The Book of Mormon has a structure similar to the Bible, with a number of internal "books," which are then divided into chapters and verses for ease of references. All references are to the chapter and verses of the 1981 edition of the Book of Mormon published by the Church of Jesus Christ of Latter-day Saints. The Book of Mormon has a complicated textual history, with a number of variant readings based on pre-publication manuscripts and post-publication editing of the text by Joseph Smith for later editions published in his lifetime. See generally THE BOOK OF MORMON, *supra* note 15. All quotations to the text in this article are from the 1981 edition, which represents a modern amalgamation of the versions of the text Smith produced between 1828 and 1844.

¹⁹ See 1 Nephi 2:1-4.

suffering various difficulties, until they arrive at the seashore, a land they name Bountiful.²⁰ God directs them to build a ship, which they do, finally voyaging to a new promised land that the Lord has prepared for them.²¹ The story's arc of exile, exodus, and arrival, however, is ultimately tragic rather than triumphal. From the beginning, conflict between Lehi's sons divides the family. His younger son, Nephi, believes Lehi, receives his own revelations from God, and embraces the family's exodus and search for a new promised land.²² In contrast, Nephi's older brothers, Laman and Lemuel, are never fully persuaded of their father's prophetic bona fides. They insist that he has been led astray by "the foolish imaginations of his heart,"²³ constantly complaining that they have been forced to leave their comfortable life in Jerusalem for nothing. The conflict between Nephi and his brothers flares up repeatedly and violently in the desert. Upon arriving in their promised land, the family splits into warring tribes of Nephites and Lamanites.²⁴

This opening portion of the Book of Mormon, which following the biblical convention is divided into "books" named 1 Nephi and 2 Nephi, is written in the first person. The narrator is Nephi, and we learn that he is composing his record many decades after the fact with a full knowledge of how conflict with his brothers will mature into permanent enmity and warfare.²⁵ The narrative is didactic rather than objective, and among the narrator's other agendas, Nephi is at pains to justify himself and his father against the accusations of his brothers. The action of the narrative consists of a series of incidents in which Nephi confronts the complaining and faithless Laman and Lemuel.²⁶ The tension and violence escalates, reaching a climax when God commands that the family build a ship to travel to their new promised land.²⁷ Surprisingly, at the heart of the conflict between Nephi and his brothers is what we can fairly characterize as a legal dispute. Their argument is ultimately in large part about what it means to follow the law. From it emerge two quite different conceptions of the function and meaning of rules. To see how this is so, however, requires careful attention to the book's narrative structure and in particular its extensive use of biblical allusion.

A. STRATEGIES OF BIBLICAL ALLUSION IN THE BOOK OF MORMON

Even the most casual reader of the Book of Mormon will notice its heavy dependence on the Bible. It is written in self-consciously archaic language that deliberately apes the Jacobean idiom of the King James Version. The characters within the narrative are aware of the biblical texts, and at various points they quote large portions of the King James Version nearly verbatim.²⁸ God, prophecy, prayer, visions, dreams,

²⁰ See 1 Nephi 17:4-5.

²¹ See 1 Nephi 17:8, 18:22-23.

²² See 1 Nephi 17:14-15.

²³ See 1 Nephi 2:11.

²⁴ See 2 Nephi 5:34.

²⁵ See 1 Nephi 9:4.

²⁶ See 2 Nephi 1:24-26.

²⁷ See 1 Nephi 17:8.

²⁸ See generally JOSEPH M. SPENCER, *THE VISION OF ALL: TWENTY-FIVE LECTURES ON ISAIAH IN NEPHI'S RECORD* (2016) (discussing the use of Isaiah in the Book of Mormon); READING NEPHI READING ISAIAH, *supra* note 16 (same).

revelations, exodus, sin, redemption, promised lands, chosen people, holy records, apocalyptic expectations, and a host of other biblical themes and elements appear repeatedly. For many readers the intertextuality between the Book of Mormon and the Bible reveals the former as a clumsy copy of the latter.²⁹ On this view the Book of Mormon's use of biblical themes represents little more than random copying as Joseph Smith composed the narrative at breakneck speed in 1829. The problem with this approach to the text, however, is that presenting the Book of Mormon as an essentially mindless pastiche of biblical tidbits tends to foreclose the kind of careful attention to the text that reveals the underlying structure, complexity, and subtlety of its narrative.

Readers of the Bible face a similar interpretive choice. Certain narratives in the book clearly copy the basic structure of earlier narratives. Source critics provide us with an appreciation of the complex textual history of the Bible.³⁰ Such repetitions can thus be seen as simply the narrative seams left by earlier copying and redacting. As modern narrative critics such as Robert Alter and Meir Sternberg have pointed out, however, the danger of source criticism is its tendency to cast the final biblical text as a rather artless jumble of earlier sources.³¹ What can be missed is the care and artistry employed by the final redactors. Hence, for example, Robert Alter argues that repetitions of certain narrative structures are deliberate allusions by reference to which the reader is supposed let the earlier narrative determine her response to the later narrative.³² By making deliberate choices about how to structure the similarities and differences in the narratives, the author of the final biblical text adds layers of meaning and commentary through the Bible's own self-allusions.

A similar approach can be taken to the intertextuality of the Bible and the Book of Mormon. Rather than seeing the latter's reliance on the former as evidence of plagiarism, it is more fruitful to examine quotations and the borrowing of biblical themes and narrative structures as a part of a strategy of allusion by Book of Mormon narrators that serves often complex purposes.³³ For example, early on in the Book of Mormon story, Lehi sends his sons back to Jerusalem to obtain sacred records from a wicked man named Laban.³⁴ When they try to purchase the records, Laban beats Nephi and his brothers, steals their property, and drives them into the

²⁹ As one early 19th-century critic of the Latter-day Saints put it, "this book is bespangled from beginning to end not only with thoughts of sacred writers, but with copious verbal extracts from King James' translation." Grant Hardy, *The Book of Mormon and the Bible*, in AMERICANIST APPROACHES TO THE BOOK OF MORMON 115 (Elizabeth A. Fenton & Jared Hickman eds., 2019) (quoting Jonathan Turner, *Mormonism in All Ages* (1842)).

³⁰ See, e.g., RICHARD ELLIOTT FRIEDMAN, WHO WROTE THE BIBLE? (1987) (providing an introduction to source criticism of the Hebrew bible).

³¹ See generally ROBERT ALTER, THE ART OF BIBLICAL NARRATIVE (2d ed. 2011); MEIR STERNBERG, THE POETICS OF BIBLICAL NARRATIVE: IDEOLOGICAL LITERATURE AND THE DRAMA OF READING (1987).

³² See ALTER, *supra* note 31, at 55–78 (discussing type-scene narratives).

³³ Readers of the Book of Mormon often miss this point. Devout Latter-day Saints regard the book as an ancient text rather than a production of Joseph Smith. They are thus often uncomfortable directly addressing the text's obvious reliance on the 17th-century King James Version. Non-Mormon readers immediately note the text's reliance on the KJV but tend to see that reliance as crude rather than subtle.

³⁴ See 1 Nephi 3:4.

desert.³⁵ Nephi's older brothers, Laman and Lemuel, wish to abandon their quest for the records, and Nephi exhorts them by explicitly invoking the example of the biblical exodus:

Therefore let us go up; let us be strong like unto Moses; for he truly spake unto the waters of the Red Sea and they divided hither and thither, and our fathers came through out of captivity, on dry ground, and the armies of Pharaoh did follow and were drowned in the waters of the Red Sea.³⁶

At this explicit level, Nephi comes across as a cocksure little brother confident that he is going to re-enact the exodus story at its dramatic climax, with himself cast as Moses miraculously defeating the armies of Pharaoh.

The narrative structure, however, also contains a darker allusion to Moses, one at odds with the cocksure Nephi's invocation of triumph on the shores of the Red Sea. Nephi returns to Jerusalem and there comes upon the drunken Laban.³⁷ The story continues, "I was constrained by the Spirit that I should kill Laban; but I said in my heart: Never at any time have I shed the blood of man."³⁸ In the passage that follows Nephi argues with the Spirit until he is finally persuaded of the necessity of killing Laban. In contrast to the blithely self-confident character who invokes Moses parting the Red Sea at the beginning of the story, the Nephi who kills Laban is tortured by what he sees as the dreadful necessity of murder.³⁹

Nephi's killing of Laban is also a reference to Moses. The narrative marks Nephi's first action in the story. Thus Nephi is introduced, as is Moses in the Bible, with a morally ambiguous homicide. The second chapter of Exodus recounts how Moses killed an Egyptian overseer he saw beating an Israelite slave. He hid the body in the sand, but when Pharaoh discovered the killing, Moses was forced to flee into the desert.⁴⁰ Like Nephi's confrontation with Laban, the killing of the overseer marks Moses's first action in the biblical narrative. The murder seems motivated by indignation at the overseer's unjust cruelty toward the Israelite slave, yet still Moses must conceal the killing and flee its consequences.⁴¹ Likewise, Nephi kills Laban, who he says "had sought to take away my own life"⁴² and had stolen all Lehi's property.⁴³ Yet Nephi shrinks from the act, fears that the killing will be discovered, and like Moses, flees into the desert.⁴⁴

³⁵ See 1 Nephi 3:25.

³⁶ See 1 Nephi 4:2.

³⁷ See 1 Nephi 4:7-8.

³⁸ 1 Nephi 4:10.

³⁹ Others have argued that the murder of Laban is narratively structured in such a way as to highlight Nephi's reconsideration of his original understanding of God's commands in at the opening of the Laban narrative. See JOSEPH M. SPENCER, *1ST NEPHI: A BRIEF THEOLOGICAL INTRODUCTION* 66-81 (2020) (discussing the Laban narrative in 1 Nephi).
⁴⁰ See Exodus 2:11-15.

⁴¹ See Exodus 2:11-15.

⁴² 1 Nephi 4:11.

⁴³ See John W. Welch, *Legal Perspectives on the Slaying of Laban*, 1 J. BOOK MORMON STUD. 119 (1992) (arguing that the slaying of Laban should be read against the background of biblical rules governing theft and robbery).

⁴⁴ See 1 Nephi 4:36, 38.

The narrative provides an ironic commentary on Nephi's glib call to his brothers to be like Moses. Nephi-as-narrator is in dialogue with the character of Nephi in the narrative. He is like Moses, yes, but not in the way that the character thinks. The irony of Nephi's glib identification with Moses emphasizes the real difficulty and moral anguish involved in actually following the Mosaic example. Far from being a mindless pastiche of biblical elements, the killing of Laban reveals how the Book of Mormon's allusions to the Bible are deliberately structured in ways that deepen the meaning of the book's narrative, adding layers of implicit commentary on the actions recounted by the narrator.

B. THE CONFLICT BETWEEN NEPHI AND HIS BROTHERS

Careful attention to the use of explicit and implicit biblical allusion reveals the structure of the legal argument between Nephi and his older brothers. The key conflict comes in what is 1 Nephi chapter 17 in the modern edition of the Book of Mormon. The current structure of chapters and verses, however, is not native to the Book of Mormon text. Rather, it was adopted in an 1879 printing for ease of reference.⁴⁵ As a result, the narrative breaks signaled by the original seven chapters of 1 Nephi have been lost.⁴⁶ In the 1830 edition of the Book of Mormon, what is today chapter 17 came more or less in the middle of what was Chapter V.⁴⁷ The previous chapters close out the account of events in Jerusalem and its environs. Chapter V in the original text tells of the family's travels in the wilderness to a temporary stopping place at the seashore called Bountiful and from there across the sea to the new promised land.⁴⁸ The arc of the original Chapter V thus tells of the exodus of the Lehites from Jerusalem. Admittedly, they went into the wilderness as early as the original Chapter I, but prior to original Chapter V the narrative still centers on Jerusalem, with the brothers returning to get the records from Laban and then debating over their significance and the significance of Lehi's resulting

⁴⁵ This edition was prepared by Orson Pratt, a senior member of the Church's governing Quorum of Twelve Apostles and an influential Mormon intellectual. He created the system of chapters and verses that continue to be used in modern editions of the Book of Mormon. See Paul Gutjahr, *Orson Pratt's Enduring Influence on The Book of Mormon, in AMERICANIST APPROACHES TO THE BOOK OF MORMON* 95 (Elizabeth A. Fenton & Jared Hickman eds., 2019) (discussing the structure and lasting influence of the 1879 edition).

⁴⁶ According to the convention in Book of Mormon scholarship, chapter numbers in the original text are given using Roman numerals and are always capitalized while chapter numbers in the modern edition are given using Arabic numerals and are not capitalized. The original edition of the Book of Mormon contained no verse numbers. The original chapters of 1 Nephi and their corresponding chapter and verses in the modern edition of the Book of Mormon were: Chapter I (1 Nephi 1-5, telling the story of leaving Jerusalem and recovering the plates of brass); Chapter II (1 Nephi 6-9, telling the story of Lehi's Dream and Nephi's response); Chapter III (1 Nephi 10-14, telling the story of Nephi's Vision); Chapter IV (1 Nephi 15, telling the story of Nephi's argument with his brothers over the meaning of the visions); Chapter V (1 Nephi 16-1 Nephi 19:21, telling the story of traveling in the wilderness, building a ship, and traveling to the new promised land); Chapter VI (1 Nephi 19:22-21, containing Nephi's extensive quotations from Isaiah); Chapter VII (1 Nephi 22, containing Nephi's interpretation of the quoted Isaiah passages).

⁴⁷ See 1 Nephi 16-1 Nephi 19:21 (the text contained in original Chapter V).

⁴⁸ See 1 Nephi 16-1 Nephi 19:21.

prophetic dreams.⁴⁹ Thus the original Chapter V is the heart of the exodus narrative in 1 Nephi, the story of God's chosen people crossing the wilderness to their new promised land.

Chapter 17 in the current edition begins with the compressed account of 8 years of wandering in the wilderness, the entry into the land Bountiful, and God's command to Nephi to build a ship. The text says:

And it came to pass that after I, Nephi, had been in the land of Bountiful for the space of many days, the voice of the Lord came unto me, saying: Arise, and get thee into the mountain. And it came to pass that I arose and went up into the mountain, and cried unto the Lord. And it came to pass that the Lord spake unto me, saying: Thou shalt construct a ship, after the manner which I shall show thee, that I may carry thy people across these waters. And I said: Lord, whither shall I go that I may find ore to molten that I may make tools to construct the ship after the manner which thou hast shown unto me? And it came to pass that the Lord told me whither I should go to find ore, that I might make tools.⁵⁰

Like Moses in Exodus, God calls Nephi to the top of a mountain where he gives instructions on leading a chosen people to the promised land.⁵¹ Like Moses, upon hearing God's command, Nephi is incredulous. Moses's response to the Lord on the mountain was "Who am I, that I should go unto Pharaoh, and that I should bring forth the children of Israel out of Egypt?"⁵² Nephi asks "Whither shall I go that I may find ore to molten?"⁵³ As with Moses on the mount, God answers his servant's questions, and the servant then sets forth to obey the divine command.

After Nephi begins work on the ship, Laman and Lemuel taunt him, and when Nephi sorrows at the "hardness of their hearts,"⁵⁴ they say:

We knew that ye could not construct a ship, for we knew that ye were lacking in judgment; wherefore, thou canst not accomplish so great a work. And thou are like our father, led away by the foolish imaginations of his heart; yea, he hath led us out of the land of Jerusalem, and we have wandered in the wilderness for these many years; and our women have toiled being big with child; and they have born children in the wilderness and suffered all things, save it were death; and it would have been better that they had died before they came out of Jerusalem than to have suffered these afflictions.⁵⁵

⁴⁹ See 1 Nephi 1-1 Nephi 15 (the text contained in original Chapter I, Chapter II, Chapter III, and Chapter IV).

⁵⁰ 1 Nephi 17:7-10.

⁵¹ Compare Exodus 3.

⁵² Exodus 3:11. In all quotations from the Bible, I use the King James Version. Whatever its limitations as a translation, it clearly influences the language of the Book of Mormon, whose biblical allusions must be understood against the background of the KJV's language.

⁵³ 1 Nephi 17:10.

⁵⁴ 1 Nephi 17:19.

⁵⁵ 1 Nephi 17:19-20.

Tellingly, this passage seems to retell the story with which Nephi as narrator began chapter 17.⁵⁶ In contrast to their interpretation, however, Nephi presented the journey in the wilderness and the endurance of “our women” in providential terms of God’s mercy.⁵⁷ In Laman and Lemuel’s interpretation, “it would have been better they had died.”⁵⁸

The narrator invites the reader to interpret this passage against the background of Exodus. God’s chosen people are led by revelation out of a wicked country and travel to the promised land. Their way is blocked, however, by a body of water that they are called to miraculously cross. In Exodus the body of water is the Red Sea, while in Nephi 17 it is “Irreantum, which, being interpreted, is many waters.”⁵⁹ That being the case, the lament of Nephi’s brothers also seems to echo the lament of the Children of Israel on the shores of the Red Sea. The Exodus story reads:

And they said unto Moses, because there were no graves in Egypt, hast thou taken us away to die in the wilderness? Wherefore hast thou dealt thus with us, to carry us forth out of Egypt? Is not this the word that we did tell thee in Egypt, saying, Let us alone, that we may serve the Egyptians? For it had been better for us to serve the Egyptians, than that we should die in the wilderness.⁶⁰

Both Nephi’s brothers and the Children of Israel are enmeshed in a narrative irony. They both believe that they know how the story is going, but both are mistaken.

As Moses explains to the Israelites on the shores of the Red Sea:

Fear ye not, stand still, and see the salvation of the Lord, which he will shew to you today: for the Egyptians whom ye have seen to day, ye shall see them again no more for ever. The Lord shall fight for you, and ye shall hold your peace.⁶¹

Likewise, Nephi will offer his own rebuke to his brother’s accusations that he is a fool who cannot build a ship or cross the waters.

And I said unto them: If God had commanded me to do all things I could do them. If he should command me that I should say unto this water, be thou earth, it should be earth; and if I should say it, it would be done. And now if the Lord has such great power, and has wrought so many miracles

⁵⁶ Compare 1 Nephi 17:1–4.

⁵⁷ Grant Hardy has noted the paucity of references to women in the Book of Mormon, arguing that readers should be particularly attentive to situations, such as chapter 17, where the narrator makes repeated references to women. Such references, he argues, are more likely to mark deliberately structured narrative elements because of their rarity. See HARDY, *supra* note 11 at 18.

⁵⁸ 1 Nephi 17:2–3.

⁵⁹ 1 Nephi 17:5.

⁶⁰ Exodus 14:11–12

⁶¹ Exodus 14:13–14.

among the children of men, how is it that he cannot instruct me, that I should build a ship?⁶²

Notice how Nephi's rebuke explicitly harks back to Moses before the Red Sea—"If he should command me that I should say unto this water, be thou earth, it should be earth"—reinforcing the sense that Laman and Lemuel don't really understand the story that they are inhabiting, the story of Moses and the exodus from Egypt.

Laman and Lemuel offer their own gloss on Moses in verse 22 and in so doing model a particular type of scriptural and legal interpretation. They say:

And we know that the people who were in the land of Jerusalem were a righteous people; for they kept the statutes and judgments of the Lord, and all his commandments, according to the law of Moses; wherefore, we know that they are a righteous people; and our father hath judged them, and hath led us away because we would hearken unto his words; yea, and our brother is like him.⁶³

There is a great deal that is going on in this sentence. It begins with an assertion that the people in Jerusalem were righteous. If this is true, of course, the entire journey through the desert has been pointless. The claim is justified by an appeal to Moses, but unlike the narrative references made by Nephi, the appeal is an explicitly legal one. The people of Jerusalem were righteous because they "kept the statutes and judgments of the Lord . . . according to the law of Moses."⁶⁴

Whereas Lehi claimed that the people of Jerusalem were unrighteous because of a revelation from a pillar of fire, Laman and Lemuel come to the opposite conclusion on the basis of legal analysis.⁶⁵ Their response is rooted in a conclusion based on the formal application of rules. Note also the way that they understand Lehi's rebuke to the people at Jerusalem as a legal act—"he has judged them"⁶⁶—one that he has performed badly. Indeed, whereas in Nephi's narrative, Lehi's preaching is evidence of his divine calling, Laman and Lemuel understand the preaching—"his words"—very differently.⁶⁷ For them the preaching, far from being prophetic or divine, was a purely rhetorical or sophistic exercise. It was an illegitimate way of getting power that is implicitly contrasted to the legitimacy of the "statutes and judgments of the Lord."⁶⁸

Where Nephi locates Moses in the experience of his family's exodus, Laman and Lemuel locate Moses in the correct application of rules. "Statutes and judgments" dominate stories of preaching and fleeing the wrath that is to come. Nephi's response to his brothers directly attacks their understanding of Moses's significance. Where they see Moses as a law-giver whose "statutes and judgments"

⁶² 1 Nephi 17:50-51.

⁶³ 1 Nephi 17:22.

⁶⁴ 1 Nephi 17:22.

⁶⁵ See 1 Nephi 1:6 (a pillar of fire appears to Lehi); compare Exodus 13:21-22 (the Children of Israel are guided through the desert by a pillar of clouds by day and a pillar of fire by night).

⁶⁶ 1 Nephi 17:22.

⁶⁷ Compare 1 Nephi 1 (Nephi's account of his father's preaching).

⁶⁸ 1 Nephi 17:22.

provide a determinate and juridical criterion of righteousness, Nephi insists on the primacy of Moses as the hero of a story of exodus and desert redemption.

And it came to pass that I, Nephi, spake unto them, saying: Do ye believe that our fathers, who were children of Israel, would have been led away out of the hands of the Egyptians if they had not hearkened unto the words of the Lord?⁶⁹

Notice the way in which Nephi directly attacks his brother's criticism of Lehi's words as a means to illegitimate power. It was only by hearkening to the "words of the Lord" (not his "statutes and judgments") that the Children of Israel were redeemed. He then proceeds to recapitulate the story of the original exodus in a way that parallels the journey of the Lehite group out of Jerusalem. First, he says:

Now ye know that Moses was commanded of the Lord to do that great work; and ye know that by his word the waters of the Red Sea were divided hither and thither, and they passed through on dry ground.⁷⁰

This miraculous crossing of a water can be seen as a reference to the situation of Nephi before Irreantum, the great waters that he will pass through the miracle of God's revealed plan to build a ship. Next, Nephi invokes the story of the Children of Israel being fed by manna from heaven and the water that sprang forth when Moses struck the rock.⁷¹ This also seems to be a reference to the experience of the Lehiters. Immediately prior to the story of Nephi's attempts to build the ship, we have the story of how the family was threatened with starvation when Nephi broke his bow and the miraculous manner in which he was able to find food through the intervention of God.⁷²

Nephi ends his recounting of the story of the exodus with the story of the invasion of Canaan.

And after they had crossed the river Jordan he did make them mighty unto the driving out of the children of the land, yea, unto the scattering them to destruction. And now, do ye suppose that the children of this land, who were in the land of promise, who were driven out by our fathers, do ye suppose that they were righteous? Behold, I say unto you Nay.⁷³

Notice that here Nephi is offering a counter criterion for judging the righteousness of a people. Where Laman and Lemuel look to the legal criteria of keeping "statutes and judgments," Nephi appeals to a violent, historical event. We can read this appeal to the invasion of Canaan against the background of Lehi's prophecies in Jerusalem. Lehi's "words," far from being an attempt to lead people into the desert and get power over them, actually consisted of an effort to save them from

⁶⁹ 1 Nephi 17:23.

⁷⁰ 2 Nephi 17:26.

⁷¹ See 1 Nephi 17:28-29; compare Exodus 16-17 (the story of God's miraculous care of the children of Israel in the desert).

⁷² See 1 Nephi 16:18-31.

⁷³ 1 Nephi 17:32-33.

imminent military catastrophe. Nephi reads the story of Moses as ultimately judging righteousness in terms of geopolitical events.⁷⁴ This reading is reinforced by the fact that Nephi-as-narrator knows that after Lehi and his family left, Jerusalem was—like the Canaanites—destroyed by invaders—in this case the Babylonians—because of its wickedness.⁷⁵

C. TWO APPROACHES TO LEGAL INTERPRETATION

At its heart, the story in chapter 17 is about two dueling ways of understanding how one follows authoritative texts, how one follows the law. Laman and Lemuel offer a legal reading whereby scriptures provide rules that are then used to judge righteousness. Nephi, on the other hand, constructs his entire narrative around a competing view of scripture. On this view, scripture’s normative power comes from the recapitulation of its stories in the lives of those that accept its authority. It orders the lives of those subject to its authority not through a set of juridical rules but rather through a set of narratives that transform existence from a mere sequence of events into the incarnation of God’s working in the world.

Some readers may be skeptical of my claim that Nephi-as-narrator and his brothers are engaged in a legal debate. The text, however, supports such a legal framing. We are told that the records recovered from Laban that played such a prominent role in the early portion of the narrative contain, “the five books of Moses,”⁷⁶ and when Nephi recounts his internal dialogue justifying the murder of Laban he explicitly conceptualizes the records as a legal text. “I also thought,” he says, “that they [*i.e.* his descendants] could not keep the commandments of the Lord according to the law of Moses, save they should have the law.”⁷⁷ We thus cannot read Nephi as rejecting the authority of “the law” (tellingly, this is his term for the records), and the accusations of false judgment leveled by Laman and Lemuel in chapter 17 must be answered. If we don’t read Nephi as offering a response to the legal claims of his brothers in chapter 17, then their central accusation is left unanswered, which seems an implausible reading given the clear self-justificatory agenda of Nephi-as-narrator. Nephi answers their charges by appropriating the narrative of Moses and exodus for himself and his father. Furthermore, this is presented as a fully adequate response to his brother’s accusations of legal malfeasance. Later in the story, Nephi explains that in reading “things ... which were written in the books of Moses I did liken all scriptures unto us, that it

⁷⁴ It should go without saying that Nephi’s argument here is morally problematic, suggesting as it does that human war and violence reveal God’s judgements on human beings as opposed to seeing war and violence as forms of human wickedness. Nephi as narrator is unconcerned with these objections, although later Book of Mormon narrators take a critical stance toward linking military events to judgments of wickedness or righteousness. See Nathan B. Oman, *Standing Betwixt Them and Justice: War and Atonement in the Book of Mormon*, in *GOD HIMSELF WILL COME DOWN: READING MOSIAH 15* (Joseph M. Spencer & Andrew Smith eds., forthcoming) (discussing war in the Book of Mormon and the idea of discerning God’s judgments in geopolitical events).

⁷⁵ See 2 Nephi 1:4.

⁷⁶ 1 Nephi 4:11.

⁷⁷ 1 Nephi 4:15.

might be for our profit and learning.”⁷⁸ In short, recapitulating in his life the story of the scriptures seems to be how Nephi seeks to “keep the commandments of the Lord according to the law of Moses.”⁷⁹

There is one final bit of evidence that Nephi is offering a legal hermeneutic. Much later in the Book of Mormon, after Nephi has been replaced as narrator by another character, we are given a glimpse of the law among his descendants:

Now there was no law against a man’s belief; for it was strictly contrary to the commands of God that there should be a law which should bring men on to unequal grounds. For thus saith the scripture: Choose ye this day, whom ye will serve.⁸⁰

This is the only place in the Book of Mormon where a legal rule is explicitly derived from a biblical text. The scripture in this case is Joshua 24:15.⁸¹ Strikingly, Joshua 24 is also a legal text. It presents the so-called Shechem Covenant, in which Moses’s successor, Joshua, gathers the Children of Israel together at the end of his life and gives to them the choice of following God or choosing instead the gods of the Canaanites or the Egyptians.⁸² The formal juridical content of Shechem covenant is given in verses 19-21, where it reads:

And Joshua said unto the people. Ye cannot serve the Lord: for he is an holy God; he is a jealous God; he will not forgive your transgressions nor your sins. If ye forsake the Lord, and serve strange gods, then he will turn and do you hurt, and consume you, after that he hath done you good. And the people said unto Joshua, Nay; but we will serve the Lord.⁸³

It would thus be entirely natural to read the Shechem Covenant as embodying the opposite rule as that given in the Book of Mormon. Far from proclaiming that there is “no law against a man’s belief,” the Shechem Covenant suggests that those who forsake God will be severely punished. One can, however, derive the Book of Mormon rule from the narrative content of Joshua 24. In effect, the Nephite rule puts the law follower in the position of Joshua and the Children of Israel, faced with the choice that they were given at Shechem, namely the choice to serve the Lord or “the gods which your fathers served that were on the other side of the flood, or

⁷⁸ 1 Nephi 19:23.

⁷⁹ 1 Nephi 4:15.

⁸⁰ Alma 30:7-8.

⁸¹ The verse reads, “And if it seem evil unto you to serve the Lord, choose you this day whom ye will serve; whether the gods which your fathers served that were on the other side of the flood, or the gods of the Amorites, in whose land ye dwell: but as for me and my house, we will serve the Lord.”

⁸² This is the only passage in the Hebrew Bible where the children of Israel are given such an explicit choice to serve Yahweh or other gods. See Michael David Coogan, *Joshua*, in THE NEW JEROME BIBLICAL COMMENTARY 110, 130 (Raymond E. Brown et al. eds. 1990) (“[M]ost remarkably, Israel is given a choice not to worship Yahweh.”). This is sufficiently odd that Robert Alter suggests that the choice is meant sarcastically. See 2 ROBERT ALTER, THE HEBREW BIBLE: A TRANSLATION AND COMMENTARY 72 n.15 (2019).

⁸³ Joshua 24:18-19.

the gods of the Amorites.”⁸⁴ This is, of course, precisely the interpretive approach taken by Nephi in 1 Nephi 17, but in the later narrative it appears quite explicitly as a legal hermeneutic.

III. LAMAN, LEMUEL, AND LEGAL POSITIVISM

The nature of rules and rule following has long been at the center of the philosophy of law. John Austin launched the modern debates on the topic by offering an account of rules based on the ideas of threats and punishment.⁸⁵ On his theory, a rule of law is a standing threat from a sovereign that under certain conditions he or she will mete out punishments to offenders. Austin’s theory launched legal positivism by divorcing the structure of legal rules from moral norms, but it has now been rejected by virtually all positivists. As H.L.A Hart pointed out, Austin’s approach to rules faces a number of difficulties.⁸⁶ Chief among these is that it fails to account for the law from an internal perspective. The good-faith rule follower makes a distinction between obeying a rule and reacting to the threats of the highwayman. Laws, Hart in effect argued, have a kind of normativity.⁸⁷ The normativity cannot be identified with moral obligations, but it cannot be reduced to the prudential avoidance of threatened sanctions.

The modern discussion of rule following has blossomed beyond the debate between Hart and Austin. Lon Fuller famously argued that governing through rules imposed certain minimal moral requirements on rulers.⁸⁸ One cannot subject human behavior to the governance of rules—Fuller’s definition of law—without certain adverbial constraints on official action such as prospectively, generality, and the like.⁸⁹ More recently Frederick Schauer has developed a complex theory about the internal structure of rules.⁹⁰ Every rule, he argues, contains an implicit claim about the world. Consider the rule “No vehicles in the park.” Such a rule rests on the judgment that it is dangerous to have vehicles in the park. In particular cases one might question this judgment. Perhaps driving a moped through the empty park at midnight presents no dangers. However, if one is following the rule such individual judgments are irrelevant. Rather one acts in accordance with the rule’s empirical judgment as to the dangerousness of vehicles in the park regardless of one’s own assessment of the fact of the matter. Schauer calls this process of deference to the implicit judgment embedded in a rule “empirical entrenchment.”⁹¹ The purpose of such entrenchment, or at any rate its effect, is to allocate decision making power between rule authors and rule followers. To obey a rule is to renounce personal judgments in favor of the authority of the rule.

⁸⁴ Joshua 24:15.

⁸⁵ See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 1-25 (H.L.A. Hart ed., 1998) (1832) (“Lecture I” setting forth Austin’s theory on the relationship between rules and threats).

⁸⁶ See H.L.A. HART, *THE CONCEPT OF LAW* 18–26 (2d ed. 1994) (setting forth Hart’s criticism of Austin).

⁸⁷ See *id.* at 89–91. (discussing the internal point of view of the law).

⁸⁸ See generally LON L FULLER, *THE MORALITY OF LAW* (1969).

⁸⁹ See *id.* at 34-94 (setting out “The Morality That Makes Law Possible”).

⁹⁰ See generally FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991).

⁹¹ See *id.* at 47–53. (arguing the rules should be understood as entrenched generalizations).

Schauer's model of rules and obedience to them roughly captures Laman and Lemuel's approach to following the law. They see the righteousness of the people of Jerusalem in terms of rule following, of keeping the "statutes and judgments of the Lord." Notice that in identifying rules with God they emphasize the self-abdication involved in their allegiance to the rules. In contrast, they claim that Lehi – rather than God – has judged the people, putting Lehi's agency in the foreground. The primary function of the "statutes and judgments of the Lord" is to allocate power vertically. The emphasis is on control. The rule controls the rule follower by prohibiting certain acts. To use Schauer's language, it also controls rule appliers through the exclusionary force of empirical entrenchment. It is tempting, to read Nephi's approach as condemning this approach as mistaken. Yet in the opening chapter of the Book of Mormon, Lehi condemns the people of Jerusalem for their "abominations"⁹² and he "testified [note the legal term] of their wickedness and their abominations."⁹³ In other words, taken on its own terms, Laman and Lemuel's legal claim is false. The people at Jerusalem were not a "a righteous people" and they had not "kept the statutes and judgments of the Lord."⁹⁴ Tellingly, Nephi's narrative makes this abundantly clear.

However, Nephi's broader approach to following the law is largely incomprehensible within this framework of rule and rule following. When Nephi structures his narrative so as to draw comparisons to the story of Exodus with him and his father cast as Moses, he is making a point about following the law of Moses. He is providing a response to the accusations of unfaithfulness to the law leveled by his brothers. However, this response, with its emphasis on narrative and recapitulation, cannot fit within the framework of rule following that has developed from the contemporary debates in legal positivism and analytic jurisprudence. His approach to following the law requires a broader framework to be comprehensible.

IV. NEPHI'S NOMOS AND THE LIMITS OF NARRATIVE

The legal theory of Robert Cover provides such a framework. Cover's approach to law places the meaning-making power of narrative at the center of our conception of law. In contrast to the dominant strains of contemporary legal philosophy, Cover relegates the process of formally applying and enforcing rules to a secondary and disfavored position in legal thought. His theory thus makes sense of the move that Nephi makes of placing the intertwining of life and narrative at the center of his response to his brothers' legal polemic. However, where Cover sees the subjective commitment to narrative at the center of law's authority, Nephi's story suggests commitment cannot ground law, which is always experienced as something in excess of subjective commitment, something that partakes of the structure of transcendence.

⁹² 1 Nephi 1:13.

⁹³ 1 Nephi 1:19.

⁹⁴ 1 Nephi 17:22.

A. ROBERT COVER'S THEORY OF LAW

In his celebrated *Harvard Law Review* Forward, “Nomos and Narrative,” Robert Cover offered a jurisprudence that placed the creation of shared meaning at the center of his conception of law.⁹⁵ According to Cover, “We inhabit a *nomos* – a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void.”⁹⁶ For Cover a *nomos* arises out of narrative. He imagines a process of decentralized myth making within largely autonomous communities pursuing a constant process of internal story telling.

The intelligibility of normative behavior inheres in the communal character of the narratives that provide the context of that behavior. Any person who lived an entirely idiosyncratic normative life would be quite mad. The part that you or I choose to play may be singular, but the fact that we can locate it in a common “script” renders it “sane” – a warrant that we share the same *nomos*.⁹⁷

This process creates and maintains a normative universe independent of the official machinery of the state.⁹⁸ In the face of legal positivism, which since Austin has identified law with the state, Cover insists that the *nomos* created by this decentralized extra-judicial narrative making is law. He calls the process of *nomos* creation jurisgenesis.

The dominant model for jurisgenesis within Cover’s theory is Jewish law.⁹⁹ The appeal of halakhah for Cover lies in its interpretive fecundity. The sages of the Talmud and the rabbis who have debated, expanded, and interpreted them over the intervening centuries were all engaged in a self-consciously legal project but one that operates without the support of a state and frequently in spite of it.¹⁰⁰ In the halakhah, Cover saw a model for law in which the creation of meaning was prioritized over the needs of brute social control. Rather, it provided a model of what he called the “paideic” use of law, namely as a resource for the creation of a *nomos*. Building on the insight of the 16th-century rabbi Joseph Caro, Cover writes:

Caro’s commentary and the pahrismis that are its subject suggest two corresponding ideal-typical patterns for commingling corpus, discourse, and interpersonal commitment to form a *nomos*. The first such pattern, which according to Caro is world-creating, I shall call “paideic,” because the term suggests: (1) a common body of precept and narrative, (2) a common and personal way of being educated into this corpus, and (3) a sense of direction or growth that is constituted as the individual and his community work out the implications of their law.¹⁰¹

⁹⁵ See generally Cover, *supra* note 17.

⁹⁶ *Id.* at 4.

⁹⁷ *Id.* at 10.

⁹⁸ See *id.* at 11.

⁹⁹ See *id.* at 12.

¹⁰⁰ See generally CHAIM SAIMAN, HALAKHAH: THE RABBINIC IDEA OF LAW (2018).

¹⁰¹ Cover, *supra* note 17 at 12–13.

The second “ideal-typical pattern” that Cover identifies for the law is what he calls “the imperial mode.”¹⁰² In its imperial mode, law does not create a new *nomos* but rather seeks to maintain an already existing normative world through the process of cutting back new “*paedeic*” uses of law. It was an ideal that led Cover to an almost unrelentingly negative view of contemporary legal interpretation and adjudication. Indeed, in Cover’s theory the activity of government courts is almost wholly destructive. Cover famously claimed:

Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that this one is law and destroy or try to destroy the rest.¹⁰³

For Cover adjudication is destructive in two ways. First, adjudication always involves choosing between rival legal interpretations. The judge faces litigants with a dispute. She must decide the case and in deciding the case, one or both of the litigants’ interpretations of the law will be declared wrong, in effect killed and banished from the official legal community. Second, the decisions of judges are always tied to the violence of the state. As Cover evocatively wrote, “Legal interpretation takes place on a field of pain and death.”¹⁰⁴ The law always contemplates violently ripping into someone’s life and redirecting it in a way to which that person objects and does not choose or desire. This may be justified, but it is, in Cover’s opinion, always violent and destructive in some way.

The final key concept in Cover’s theory of law is commitment. There must be something that differentiates mere storytelling and interpretation from law. This is important because Cover is making the strong claim that world-creating mythmaking is an important element of the law.

To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the “is” and the “ought,” but the “is,” the “ought,” and the “what might be.” Narrative so integrates these domains. Narratives are models through which we study and experience transformations that result when a given simplified state of affairs is made to pace through the force field of a similarly simplified set of norms.¹⁰⁵

However, for these narratives to have the dignity of law they must do more than speculate about some possible utopian future. “[L]egal interpretation cannot be valid if no one is prepared to live by it.”¹⁰⁶ He goes on to write, “The transformation of interpretation into legal meaning begins when someone accepts the demands of interpretation and, through the personal act of commitment, affirms the position

¹⁰² *Id.* at 14.

¹⁰³ *Id.* at 53.

¹⁰⁴ Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601 (1986).

¹⁰⁵ Cover, *Nomos and Narrative*, *supra* note 17 at 10.

¹⁰⁶ *Id.* at 44.

taken.”¹⁰⁷ Cover thus offers a vision of the law that is centered on the power of narrative coupled with personal commitment to create a normative world that gives rules their meaning and power. The formal process of enforcement, which has been at the center of our thinking about law since at least Austin, is given the secondary and potentially destructive role of merely maintaining the *nomos* created by law in its paideic guise.

Nephi’s approach to legal interpretation bears a striking resemblance to Cover’s theory of jurisgenesis. Given what is ultimately their common origin in the reading of the Bible, this is unsurprising. Laman and Lemuel ostensibly seek to follow the law, the “statutes and judgments of God.” They see those judgments only in terms of control and as ultimately, to use Cover’s term, jurispathic. In effect, they wish to invoke legal rules in order to negate the new systems of meaning promulgated by Lehi and Nephi, systems of meaning that have upended the family’s life. Nephi’s approach to legal interpretation, in contrast, gives rise to a new *nomos*. By recapitulating the story of Exodus, Lehi and his family are following “the law of Moses” but in doing so they literally create a new nation in a new promised land. The Book of Mormon is thus faithful to Cover’s injunction that “We ought to stop circumscribing the *nomos*; we ought to invite new worlds.”¹⁰⁸ Nephi offers up a model of following the law of Moses that is far more open to new worlds than that proposed by Laman and Lemuel. Where they reduce the law to the narrow question of whether Lehi has correctly judged the people of Jerusalem according to “the statutes and judgments of the Lord,” Nephi’s narrative recapitulation of the story of the law creates a new chosen people, a new exodus, and a new promised land. This seems to be precisely the kind of *nomos*-creating interpretive fecundity that Cover celebrates.

In Cover’s theory, Nephi’s narrative would rise to the level of law because he “accepts the demands of interpretation” through “the personal act of commitment.” Indeed, Nephi literally inscribes his new interpretation of the law on his life and the life of his family. He is not spinning merely discursive narratives and interpretations. Rather, the story of his family is written, to use the words of the colophon with which he introduces his narrative, in “their sufferings and afflictions in the wilderness.”¹⁰⁹ Legal interpretation for Nephi also takes place on a field of pain and death, but it is not the pain and death meted out by the bureaucratized violence of the state lamented by Cover. Rather it is the pain and death of a story written on one’s life, a life that cannot be recovered once it has been wagered on an interpretation of God’s law. However while Nephi’s story fits within Cover’s approach to law, it also challenges the primacy Cover accords to commitment as the mechanism by which interpretation becomes law.

¹⁰⁷ *Id.* at 45.

¹⁰⁸ *Id.* at 68.

¹⁰⁹ See 1 Nephi 1:1. The text of chapters and verses in 1 Nephi is preceded by a lengthy colophon summarizing the content of the book. Unlike the chapter headings in the current edition of the Book of Mormon, which were added in 1981 as a reference aid, this colophon is part of the original Book of Mormon text. See generally Thomas W. Mackay, *Mormon as Editor: A Study of Colophons, Headers, and Source Indicators*, 2 J. BOOK MORMON STUD. 90 (1993); John A. Tvedtnes, *Colophons in the Book of Mormon*, in REEXPLORING THE BOOK OF MORMON: A DECADE OF NEW RESEARCH 13 (John W. Welch ed., 1992).

B. LAW BEYOND NARRATIVE

What seems to be missing from Cover's account of *nomos* is any role for the transcendent, for something beyond ourselves that presses in and makes demands. On his account of *jurisgenesis*, it is the process of narrative coupled with commitment that transforms interpretation into legal meaning. This is ultimately a highly subjective notion of how a *nomos* is founded. On his account the only outside force that interrupts the process of narrative and commitment is the imperial force of adjudication and violence. Cover's invocation of commitment – with its echoes of a self-creating existentialist morality, albeit one embedded within a communal discourse – is striking precisely because the examples of *jurisgenesis* on which he draws involve mainly insular religious communities.¹¹⁰ These communities see themselves as called by God rather as founding themselves through narrative and commitment.¹¹¹

Consider the famous Talmudic story of the Oven of Akhnai, a narrative that would seem to provide the quintessential example of Cover's ideal of *jurisgenesis*. The story begins with a dispute between Rabbi Eliezer and the other rabbis over the ritual status of a certain kind of stove.¹¹² Rabbi Eliezer defends the purity of the stove, but the other rabbis are unpersuaded. He then appeals to a series of miracles in favor of his interpretation. At his word, a tree uproots itself and moves across the land. "A carob tree is no argument," respond the rabbis.¹¹³ The water of a brook then reverses direction. "A stream is no argument," they respond.¹¹⁴ Rabbi Eliezer says, "If the law accords with my opinion, let the walls of this House of Study demonstrate it!" and the walls begin to bend.¹¹⁵ Rabbi Joshua, however, rebukes the building. "If the Sages debate among themselves on a point of *halakha*, what has this to do with you?" he says.¹¹⁶ Finally, Rabbi Eliezer appeals to heaven and a voice cries out from above, "Why do you challenge Rabbi Eliezer, for the *halakha* accords with him in all matters!"¹¹⁷ Rabbi Joshua, however, remains unmoved. "It [*i.e.* the Torah] is not in Heaven," he says.¹¹⁸ We then learn that God laughs and says, "My children have outvoted Me, my children have outvoted Me!"¹¹⁹ The story is fascinating, suggesting as it does the primacy of individual interpretation and judgment over even the claims of divine authority. Cover's theory of law offers up something like this hope. He seems to imagine the *halakhic* tradition detached from claims to divine authority, a model in which a pluralistic process of *jurisgenesis* can proceed *ad infinitum*.

Whatever the attractions of such a vision, however, it is doubtful that the Oven of Akhnai story points toward such a process. The story responds to the condition

¹¹⁰ See, e.g., Cover, *supra* note 17 at 26-35.

¹¹¹ See *id.*

¹¹² The story is contained in Babylonian Talmud in the Second Tractate Bava Metzi'a 59a. See THE TALMUD: A SELECTION 469–472 (Norman Solomon tran., 2009).

¹¹³ *Id.* at 469.

¹¹⁴ *Id.* at 469.

¹¹⁵ *Id.* at 469.

¹¹⁶ *Id.* at 470.

¹¹⁷ *Id.* at 470.

¹¹⁸ *Id.* at 470.

¹¹⁹ *Id.* at 470.

of Jewish law in the generations after the destruction of the Second Temple.¹²⁰ Having lost the centralizing authority that existed prior to the Diaspora, the rabbis were looking for a mechanism to keep Judaism from fragmenting into a chaos of sectarian interpretive communities. The solution was not to embrace the joy of anarchic interpretation. Rather, it was to adopt a juridical rule in which the majority interpretation of the rabbis on a point of law was granted authority against contrary interpretations.¹²¹ This is what happened between Rabbi Eliezer and the rival rabbis in the Oven of Akhnai story. Rabbi Eliezer was trying to justify his minority interpretation in the face of the majority. The Talmud ends the story by saying “On that day they brought all the things Rabbi Eliezer had declared pure and burnt them, then voted to place him under ban.”¹²² Far from celebrating individual interpretation or hermeneutic pluralism, the Oven of Akhnai is about subjecting interpretation to a non-interpretive rule of social control. To be sure, the story acknowledges the costs of this approach. After his excommunication, the grief of Rabbi Eliezer is titanic.¹²³ On Cover’s view, one would be forced to see the ban against Rabbi Eliezer as a simple exercise of the jurispathic function by the other rabbis. However, something else is going on here as well.

In a sensitive essay on Cover’s jurisprudence, Suzanne Last Stone argues that ultimately Jewish law cannot provide the counter narrative to modern jurisprudence for which Cover was searching.¹²⁴ He wished to frame law as independent of the violence of authority or the teleological search for some objective truth of the matter regarding legal texts. In its place, he hoped for a world in which legal interpretation—and especially constitutional interpretation—was an endlessly open system of plural meanings. The halakhah, Stone argues, is far more teleological than Cover’s relentless prioritizing of jurisgenesis requires. She insists that:

[Cover and his disciples] should be cautious not to derive too many lessons from the counter-text of Jewish law. For, in the final analysis, Jewish law is not only a legal system; it is the life work of a religious community. The Constitution, on the other hand, is a political document. It may even be a *nomos*, in the Maimonidean sense of the term. But it will not be Torah.¹²⁵

There are similar limits on the model of jurisgenesis in the Book of Mormon. Nephi offers up a way of following the Law of Moses that is far more open to new worlds than that proposed by Laman and Lemuel. Where they reduce the law to the narrow

¹²⁰ See 1 MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* 41-46 (1994) (discussing the periodization of Jewish legal history).

¹²¹ See *id.* at 245-247 (discussing how halakhic authority serves to limit sectarian schism); see also *id.* at 260-264 (discussing the Oven of Ahknai and halakhic authority).

¹²² THE TALMUD, *supra* note 110 at 470.

¹²³ The Babylonian Talmud says upon hearing of the ban:

Thereupon Eliezer himself rent his garments, removed his shoes, slipped from his seat and sat upon the ground. His eyes filled with tears, and as they did so the world suffered; olives, wheat and barley all lost a third, and some say that even the dough that women were kneading spoiled.

Id. at 471.

¹²⁴ See Stone, *supra* note 17.

¹²⁵ *Id.* at 894

question of whether Lehi has correctly judged the people of Jerusalem according to “the statutes and judgments of the Lord,” Nephi’s narrative recapitulation of the story of the law creates a new chosen people, a new exodus, and a new promised land. This seems to be precisely the kind of *nomos*-creating interpretive fecundity that Cover celebrates. However, Nephi’s confrontation with his brothers ultimately presents the Oven of Akhnai in reverse. He does not seek to refute Laman and Lemuel’s claim regarding “the statutes and judgments of the Lord” with arguments about the facts of the case, the scope of the rules, or even the spirit that animates them. Rather, the disagreement with his brothers turns violent. Nephi recounts how “they were angry with me, and were desirous to throw me into the depths of the sea.”¹²⁶ His response to their violence is not argument but an appeal to the authority of supernatural intervention on his behalf. He says:

In the name of the Almighty God, I command you that ye touch me not, for I am filled with the power of God, even unto the consuming of my flesh; and whoso shall lay his hands upon me shall wither even as a dried reed; and he shall be as naught before the power of God, for God shall smite him.¹²⁷

It would be unfair to equate the morally serious Rabbi Joshua in the Oven of Akhnai narrative with the murderous Laman and Lemuel in the Book of Mormon. It is striking, however, that the Book of Mormon narrative vouchsafes Nephi’s interpretation not through commitment or the jurispatic function of courts but through the literal presence of God’s power. The Book of Mormon thus shares with the Oven of Akhnai a teleological concern with the preservation of community and the proliferation of interpretations. Where the *aggadah* in the Talmud points toward the principle of majority interpretation, however, the Book of Mormon accepts the authority of miraculously wandering trees, brooks turned upstream, bending walls, voices from heaven, and a younger brother smiting his faithless siblings with the power of God. In the end, Nephi’s jurisprudence cultivates the interpretive fecundity of the law, but it also testifies to the inadequacy of mere commitment standing alone to found a community.

The climax of Nephi’s story also points towards something more than simply “the imperial mode.” It is a claim to law that rests on an eruption into the world of some transcendent authority. When Rabbi Joshua says that the Torah is not in heaven, he is making a similar claim. He is saying that the authority of the rabbi’s interpretive project is dependent on the divine blessing placed on their activity when God committed the Torah to their care. In this, his claim is actually quite similar to the claim put forward by Nephi to ground his authority on miraculous power. Both appeal beyond interpretation and subjective commitment.

This claim can be made more precisely. From an “internal point of view,” to borrow a phrase from H.L.A. Hart, law is founded on transcendence rather than commitment. As I have written elsewhere:

¹²⁶ 1 Nephi 17:48.

¹²⁷ 1 Nephi 17:48.

Law provides a kind of sacred space for secular societies. It guides and controls actions. It coerces. It may be justified or not justified. But it does more than this. It maintains the constant experience of something pressing in on us from beyond, a claim to authority that displaces our individual judgments. It creates an order, a *nomos* in Cover's terms, but not because it provides a place for our constant self-creation (although it may do this). Rather in claiming authority it points us back to the experience of transcendence, which seems to be a hunger that cannot be satiated even when we vociferously insist that our laws are not Torah and do not come from God.¹²⁸

This is true even in our disenchanting world.¹²⁹ Law still functions within practical reasoning as a form of authority. When a lawyer is advising a client on what to do, the law purports to act as an exclusionary reason. In other words, it presses in on our normative deliberations and demands that we set aside our own all-things-considered judgments and abnegate ourselves before its superior claims.¹³⁰ To be sure, this claim to authority is suspect and in many cases it will be pernicious. My point is about the phenomenology of law not the legitimacy of its substantive claims. This is a claim about how we experience law, not a suggestion that human laws are divine or should be treated as such. However, as a necessary element of legal experience it must be grappled with by any jurisprudence perhaps especially one such as Cover's that purports to explain how mere interpretation can become law. The necessity of some transcendent element beyond interpretation or commitment is the ultimate burden of Nephi's account of law.

V. CONCLUSION

The Book of Mormon had a scandalous birth. It came into the world surrounded by stories of angels and miracles along with accusations of fraud and humbug. Too often it has been unable to escape the allure of its origin story. However, the text of the book reveals itself as far more subtle and complex than the polemics of belief and disbelief would suggest. It repays close reading. In the stories of conflict between Nephi and his brothers that open the book, we have an argument about rule following that implicates basic questions of how we think about law. Strikingly, Nephi's account of law following in terms of narrative re-enactment makes little sense within the traditional categories of analytical jurisprudence but fits well within Robert Cover's theory of jurisgenesis. The climax of Nephi's story,

¹²⁸ Nathan B. Oman, *Temple, Talmud, and Sacrament: Some Christian Thoughts on Halakhah*, 64 VILLANOVA L. REV. 743–56, 756 (2019).

¹²⁹ The image of the disenchanting world was first offered by Max Weber as a description of a society dominated by desacralized formal bureaucracies. See generally MAX WEBER, *THE VOCATION LECTURES* (David Owen ed., 2004). (As several writers have pointed out, however, the disenchantment has by no means been as total as Weber prophesized. See generally Yishai Blank, *The Reenchantment of Law*, 96 CORNELL L. REV. 633–670 (2011); Richard Jenkins, *Disenchantment, Enchantment and Re-Enchantment: Max Weber at the Millennium*, 1 MAX WEBER STUD. 11 (2000).

¹³⁰ See JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 21–25 (2d ed. 2009) (arguing that law presents itself as a kind of exclusionary reason).

however, challenges Cover's account of how interpretation becomes law. Where Cover pointed toward the priority of commitment to narratives, Nephi points toward the direct intervention of the transcendent in narratives. This is a dramatic claim about the structure of legal experience. Law claims to come from beyond us. It is not something that we subjectively create through our commitment. Indeed, part of what makes it such a fruitful site for the myth-making valorized by Cover is precisely the fact that it comes at us from a higher authority rather than arising from our subjective commitment. In religious legal systems the divine provides the source of legal transcendence. This point is illustrated in different ways by both the Book of Mormon and the story of the Oven of Aknai. If Nephi's account of how interpretation and transcendence interact to create a *nomos* is correct, then Cover's account of legal interpretation must locate the source of legal authority outside of the process of interpretation and commitment. We must grapple with the way in which legal authority erupts into our lives from some place beyond subjective commitment.