

2009

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## Repository Citation

Oman, Nathan B., "Preaching to the Court House and Judging in the Temple" (2009). *Faculty Publications*. 81.  
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# Preaching to the Court House and Judging in the Temple

*Nathan B. Oman\**

On the evening of September 9, 1831, two men arrived in the small county seat of Jacksonville, Illinois. It was court day, and “there were a great many country people in the village.”<sup>1</sup> Some no doubt had come to settle disputes before the state’s travelling judiciary. Illinois law required that all members of the state supreme court hold a circuit court in each county seat at least twice a year.<sup>2</sup> In their wake came the lawyers who “rode circuit” with the judges, picking up clients at the local tavern<sup>3</sup> and hurriedly conferring with them before rising to make their arguments about this man’s failure

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\* Assistant Professor, William & Mary Law School. I thank Sam Brown, Richard Bushman, Dave Douglas, Kathleen Flake, Phillip Goff, Risa Goluboff, Sally Gordon, Collin Mangrum, Linda Przybyszewski, Paul Reeve, Val Ricks, Gordon Smith, Allison Tirres, Bill Van Alstyne, Jack Welch, Jed Woodworth, and Vicky Woeste for comments and help with earlier drafts. I owe great debts to Elder Marlin K. Jensen, Historian and Recorder for the LDS Church, who allowed me access to church court records, and to independent scholar Ardis Parshall for sharing her encyclopedic knowledge of Utah history. I presented earlier versions of this paper at the ABF/Chicago-Kent Legal History Colloquium, The 2007 Annual Meeting of the American Society for Legal History, The 2008 Annual Meeting of the Mormon History Association, William & Mary Law School, University of Richmond Law School, and Brigham Young University and benefited from feedback in all these places. The Maxwell Institute for Religious Studies at BYU provided financial support. Megan Kaufmann, Richard Thomas, and Kristen Clardy provided excellent research assistance. As always, I thank Heather.

1. The Manuscripts of William E. McLellin (1831–36), Journal I, July 18, 1831–November 20, 1831, 29–60, in *THE JOURNALS OF WILLIAM E. MCLELLIN, 1831–1836*, at 39 (Jan Shippy & John W. Welch eds., 1994). Cf. CARL R. LOUNSBURY, *THE COURTHOUSES OF EARLY VIRGINIA: AN ARCHITECTURAL HISTORY* 3 (2005) (“Court day in early Virginia transformed many small crossroad villages into bustling rural forums. For one, two, or three days of each month, hundreds of inhabitants set out from their farms . . . [to] the center of the county at a clearing commonly called the courthouse grounds.”).

2. See 1 FREDERIC B. CROSSLEY, *COURTS AND LAWYERS OF ILLINOIS* 162–68 (1916) (discussing the convoluted, on-again-off-again history of circuit courts in Illinois prior to 1830).

3. HENRY C. WHITNEY, *LIFE ON THE CIRCUIT WITH LINCOLN* 41 (Lawbook Exchange, Ltd. 2000) (1892) (“[O]ur offices were ambulatory, being located now on the sunny side of a Court House, then under the shade of a friendly tree, and, anon, on the edge of a sidewalk.”).

to pay on a note or the damage done by that man's wandering cow.<sup>4</sup> Others came to watch the spectacle of the court. This September evening, however, afforded the citizens of Morgan County a different kind of performance. The first of the two men was a school teacher turned preacher named William McLellin; his companion was Hyrum Smith, brother of the Mormon prophet Joseph Smith Jr.<sup>5</sup> McLellin recorded:

[A]s soon as they found out who we were, they gathered around us; we separated and talked with them about two hours. I cut some of them so close with the truth that a ruffian fellow rolled up his sleeves and swore that he could give it to me but a gentleman prevented him and took him away.<sup>6</sup>

The two Mormon elders made an appointment to "preach next day in the Court house."<sup>7</sup> At the designated time, a "numerous concourse of people" gathered, and McLellin recorded his trepidation at having "to ascend the judges bench, and face Judges, Lawyers Doctors Priests and people," but he added, "I arose with confidence in Elijah's God and gave them a brief history of the book of Mormon."<sup>8</sup>

Five years later, a larger group of Mormon elders gathered in Kirtland, Ohio, then headquarters of the Mormon Church. They made their way to the recently completed Kirtland Temple, which sat on a bluff overlooking the Chagrin River flowing toward Lake Erie a few miles to the north. The building differed markedly in its religious significance from the New England churches that it architecturally resembled. Anxious to avoid anything that smacked of "Popery," the Puritans had insisted that their meeting houses were just that: places to meet without any special sanctification.<sup>9</sup> The

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4. See John A. Lupton, *A. Lincoln, Esquire: The Evolution of a Lawyer*, in A. LINCOLN, ESQUIRE: A SHREWD, SOPHISTICATED LAWYER IN HIS TIME 18, 21 (Allen D. Spiegel ed., 2002) ("Antebellum Illinois was a litigious society. . . . Legal issues included assault and battery, bankruptcy, contract disputes, debt, divorce, medical malpractice, mortgage foreclosure, personal injury, slander, and trespass.").

5. See John W. Welch, *The Acts of the Apostle William McLellin*, in MCLELLIN, *supra* note 1, at 13–26 (giving biographical information on McLellin and his companion).

6. The Manuscripts of William E. McLellin, in MCLELLIN, *supra* note 1, at 39.

7. *Id.*

8. *Id.*

9. See James P. Walsh, *Holy Time and Sacred Space in Puritan New England*, 32 AM. Q. 79 (1980) (discussing Puritan attitudes toward their meeting houses); see also Kevin M. Sweeney, *Meetinghouses, Town Houses, and Churches: Changing Perceptions of Sacred and Secular*

Mormon edifice, in contrast, had been dedicated in an elaborate set of ceremonies that identified it with Old Testament temples, their priestly ceremonies, and inner sanctuaries.<sup>10</sup> In the dedicatory prayer, Joseph Smith implored God that the temple “may be sanctified and consecrated to be holy, and that thy holy presence may be continually in this house; and that all people who shall enter upon the threshold of the Lord’s house may feel thy power and feel constrained to acknowledge that thou hast sanctified it, and that it is thy house, a place of thy holiness.”<sup>11</sup> Hence the Mormon elders who made their way to the temple on March 29, 1837, were not simply “going to meeting.” Rather, they were entering the sanctified center of their religious community.<sup>12</sup> Yet despite the geographic and symbolic distance between them and the judges, lawyers, and village rowdies of Morgan County, the Kirtland elders were also essentially a judicial gathering. After opening with prayer, they turned to the case of *Cahoon v. Green*. Elder Cahoon charged Elder Green “1st for Disturbing the Sining Scoll several times 2nd for Swearing and calling the Complainant a liar. . . .”<sup>13</sup> Green denied the charge of disturbing the peace, but admitted to the swearing and slander. After considering and rejecting Green’s defense that Cahoon was, in fact, a liar, the assembled elders voted to withdraw their fellowship from him.<sup>14</sup>

The juxtaposition of Mormon elders preaching in the court house and adjudicating in the temple illustrates the fluidity of the boundaries between law and religion in nineteenth-century America.

*Space in Southern New England, 1720–1850*, 28 WINTERTHUR PORTFOLIO 59 (1993) (discussing the shift in attitudes towards churches in the eighteenth and nineteenth centuries).

10. See generally Taylor Petrey, *Christian Temple Builders and the Latter-day Saints*, in *ARCHIVE OF RESTORATION CULTURE: SUMMER FELLOWS’ PAPERS 2000–2002*, at 139 (Richard Lyman Bushman ed., 2005).

11. THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS § 109:12–13 (1989 ed.) [hereinafter DOCTRINE & COVENANTS]. The Doctrine and Covenants consists of written revelations and teachings by Joseph Smith and a handful of other Mormon prophets. It has been formally canonized by the Mormon Church and is accepted by Mormons as scripture on par with the *Bible* and the *Book of Mormon*. It is divided into “sections” which are then divided into “verses” in a manner similar to modern Bibles. All references are to the section number and verse number.

12. Cf. MIRCEA ELIADE, *THE SACRED AND THE PROFANE: THE NATURE OF RELIGION* 20–68 (1957) (discussing the role and function of sacred space).

13. KIRTLAND ELDERS’ QUORUM RECORD 1836–1841, at 25 (Lyndon W. Cook & Milton V. Backman, Jr. eds., 1985).

14. *Id.* at 25–26.

During the colonial period and the nineteenth century, numerous religious groups sought to opt out of the secular legal system, moving civil litigation between co-religionists into the hands of the church.<sup>15</sup> No group was entirely successful in doing so, but some—particularly the Quakers and the Mormons—were able to forge ecclesiastical courts<sup>16</sup> that proved remarkably robust over long periods of time. Their stories have been told as paeans to alternative dispute resolution.<sup>17</sup> Believers, so the explanations go, wished to avoid the expense of formal litigation and turned to religious fora as convenient alternatives to the courts. There is, of course, some truth to this view. Yet McLellin's injection of religion into the civic ritual of court day, preaching from the bench to the judges, lawyers, litigants, and spectators, and the relocation of adjudication to the symbolic heart of their religion by the Kirtland elders problematizes any attempt to reduce religious tribunals to simply another player in

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15. See generally JEROLD AUERBACH, *JUSTICE WITHOUT LAW?* 19–47 (1983) (discussing the resolution of civil disputes in religious fora).

16. Not all ecclesiastical tribunals called themselves “courts,” and I use the term advisedly, as in some circumstances the border between adjudication and other activities such as simple exhortation was porous. Martin Shapiro has argued that the essence of courts as an institution lies in a tripartite structure in which there is a dispute between an accuser and accused that is decided by some neutral third party. MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 1 (1984) (“The root concept employed here is a simple one of conflict structured in triads. Cutting quite across cultural lines, it appears that whenever two persons come into conflict that they cannot themselves solve, one solution appealing to common sense is to call upon a third for assistance in achieving a resolution.”). I mainly follow Shapiro, although I also refer to essentially inquisitorial institutions as courts even though they may lack his tripartite structure.

17. See, e.g., AUERBACH, *supra* note 15, at 19–47 (lauding ecclesiastical courts as attractive alternatives to the civil court system); George S. Odiorne, *Arbitration and Mediation Among Early Quakers*, 9 *ARB. J.* 161–66 (1954) (lauding the Quakers’ system of ecclesiastical adjudication as an early example of alternative dispute resolution). Cf. WILLIAM M. OFFUTT, JR., OF “GOOD LAWS” AND “GOOD MEN”: LAW AND SOCIETY IN THE DELAWARE VALLEY, 1680–1710, at 147 (1995) (referring to “panegyrics composed of anecdotal evidence on alternative, community-based dispute resolution systems”). For discussions of the Mormon ecclesiastical court system in the nineteenth century, see EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, *ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830–1900*, at 263–370 (1988) (providing a detailed summary of the functioning of Mormon ecclesiastical courts from 1846 to 1900); MARK P. LEONE, *ROOTS OF MODERN MORMONISM* 111–48 (1979) (discussing ecclesiastical courts among Mormon settlers in nineteenth-century Arizona); C. Paul Dredge, *Dispute Settlement in the Mormon Community: The Operation of Ecclesiastical Courts in Utah*, in 4 *ACCESS TO JUSTICE: THE ANTHROPOLOGICAL PERSPECTIVE: PATTERNS OF CONFLICT MANAGEMENT: ESSAYS IN THE ETHNOGRAPHY OF LAW* 191 (Klaus-Friedrich Koch ed., 1979) (discussing ecclesiastical courts in early Utah); and Raymond T. Swenson, *Resolution of Civil Disputes by Mormon Ecclesiastical Courts*, 1978 *UTAH L. REV.* 573 (1978).

the perpetual quest for low-cost dispute resolution. Rather, the move to bring litigation within the fold of the church played out against a much richer context of civic and religious symbols and institutions, a fact powerfully illustrated by the Mormon experience.

The story of the rise and fall of the jurisdiction of Mormon courts over ordinary civil disputes provides us with a number of insights into the interaction between law and religion in nineteenth-century America. It dramatically illustrates the fluidity of the boundaries between law and religion early in the century and the hardening of those boundaries by its end. The Mormon courts initially arose in a context in which the professional bar had yet to establish a monopoly over adjudication.<sup>18</sup> Rather, churches felt confident in their ability to create a “legal” apparatus of judges and lawsuits.<sup>19</sup> By century’s end, however, the increasing complexity of the legal environment pushed the Mormon courts out of the business of resolving civil disputes, hardening the boundaries around the legal profession’s claimed monopoly over adjudication.<sup>20</sup> Equally important for the decline of the Mormon courts was the fact that allegiance to the common-law courts became a prerequisite of assimilation into the American mainstream. While hostility to the secular courts had been a hallmark of a major stream of American Protestantism during the colonial period and the first decades of the Republic, by the end of the nineteenth century, Mormons’ rejection of those courts marked them off as dangerous outsiders.<sup>21</sup> Part of the price of their acceptance into the national mainstream was the abandonment of legal distinctiveness. The story of the Mormon courts also illustrates the importance of law for the development of religious beliefs and practices. Nineteenth-century Mormons expended an enormous amount of theological and institutional energy on legal issues. Other scholars have documented the “public law” side of this story, showing how the federal government’s effort to eradicate Mormon polygamy was central to Mormon experience in the last half of the nineteenth century and ultimately forced a

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18. See Dredge, *supra* note 17, at 193–97. See generally FIRMAGE & MANGRUM, *supra* note 17, at 25–58 (describing generally the rise of the Mormon court system).

19. Dredge, *supra* note 17, at 193, 198.

20. See *id.* at 198.

21. See *id.* (“Church leaders condemned courts and litigation . . .”).

revolution in Mormon beliefs and practices.<sup>22</sup> The rise and fall of the Mormon court system, however, shows that private law—subjects like contract, tort, and property—could exercise no less of a power over the religious imagination.

Finally, the story told here challenges the standard narrative within Mormon history concerning the rise of the church court system and the anti-legalism of nineteenth-century Latter-day Saints. In their extensive study of civil disputes in Mormon ecclesiastical courts, Professors Richard Collin Mangrum and Edwin Firmage explain the genesis and rise of Mormon courts entirely in terms of the internal imperatives of Mormon theology and communitarianism.<sup>23</sup> They write, “After they migrated to the deserts of the Great Basin, the Saints pursued their radical theory of Zion as an alternative to the social experiment of pluralistic America. A critical part of this effort was the establishment and maintenance of their own court system.”<sup>24</sup> This narrative, however, unduly emphasizes the uniqueness of the Mormon experience and fails to acknowledge the important continuities between the Mormon court system and the experience of discipline-oriented Protestant churches. Accordingly, this Article emphasizes the way in which the emergence of the Mormon court system must be seen within the broader context of American and even Atlantic religious history. Only by examining the Mormon courts in this broader context can we see the way in which they both continued and sharply departed from earlier ecclesiastical practices. Mangrum and Firmage, likewise, rightly emphasize the anti-lawyer rhetoric of nineteenth-century Mormon leaders but fail to appreciate the way in which Mormon attorneys resisted their designation as social parasites.<sup>25</sup> In contrast, this Article shows how Latter-day Saint lawyers crafted their own legitimating religious narratives, insisting that “true lawyers” could work harmoniously within Mormon norms. In time, church leaders

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22. See generally SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* (2002); Elizabeth Harmer-Dionne, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy as a Case Study Negating the Belief-Action Distinction*, 50 STAN. L. REV. 1295 (1998); Douglas H. Parker, *Victory in Defeat—Polygamy and the Mormon Legal Encounter with the Federal Government*, 12 CARDOZO L. REV. 805 (1991).

23. FIRMAGE & MANGRUM, *supra* note 17, at 1–2.

24. *Id.* at 261.

25. *Id.* at 16–18, 271–74.

adopted this self-conception of Mormon attorneys in place of their earlier blanket denunciations of the legal profession, and it provided an important rhetorical bridge between the extensive jurisdiction of church courts in the nineteenth century and their abandonment at the beginning of the twentieth century.

The remainder of this Article will proceed as follows: Part I will trace the origins of the Mormon court system, locating it within the intellectual and theological context of early America. Part II will discuss the effort to move civil litigation between Mormons into the ecclesiastical courts. Finally, Part III will discuss the transformation of Mormon adjudication, tracing the ultimate abandonment of church-based litigation.

### I. THE RISE OF THE MORMON JUDICIARY: 1526–1886

The Mormon court system emerged from the much older tradition of ecclesiastical discipline among the English Protestants who settled North America. Under English law, ecclesiastical courts were integrated into the judicial machinery of the state. Certain kinds of issues—mainly dealing with family law and certain aspects of probate—lay exclusively within the jurisdiction of the courts of the Church of England.<sup>26</sup> These courts enforced their decisions by excommunicating recalcitrant parties, and excommunication would then carry certain civil penalties.<sup>27</sup> The Church of England, however, made comparatively little effort to police the spiritual or moral purity of church members.<sup>28</sup> The assumption was that attempts to enforce ecclesiastical purity through church discipline were unnecessary. Indeed those who called for more aggressive church discipline were labeled “Donatists” (after an early Christian sect condemned by Augustine for their insistence on ecclesiastical purity) and treated as

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26. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 114 (2d ed. 1979) (“The jurisdiction [of ecclesiastical courts] over marriage, divorce and probate lasted until 1857. After 1857 the jurisdiction has been confined to Church matters, such as faculties to alter or sell consecrated property and disciplinary proceedings against clergy.”).

27. According to William Blackstone:

[W]ith us by the common law an excommunicated person is disabled to do any act, that is required to be done by one that is *probus et legalis homo*. He cannot serve upon juries, cannot be a witness in any court, and, . . . cannot bring an action, either real or personal, to recover lands or money due to him.

3 WILLIAM BLACKSTONE, COMMENTARIES \*102.

28. See *id.*



dangerous heretics.<sup>29</sup> Accordingly, the sanctions of church courts were reserved for the ordinary legal cases falling within their jurisdiction. Virginia and other colonies where Anglicanism was the dominant religion continued this easy-going attitude toward church discipline.<sup>30</sup> Since they did not have bishops of their own, these American churches came under the jurisdiction of the Bishop of London. The geographic distance from ecclesiastical courts made it all but impossible for them to exercise even ordinary functions, thus strengthening the tendency to ignore problems of religious impurity.<sup>31</sup> Nor does this judicial neglect by the Church of England seem to have bothered Virginians very much.<sup>32</sup> For example, when the Reverend James Blair, founder of The College of William and Mary, tried to create local ecclesiastical courts to discipline “all cursers Swearers and blasphemers, all whoremongers fornicators and Adulterers, all drunkards ranters and profaners of the Lords day,” his proposal was treated with horror by the planter elite and quickly squashed.<sup>33</sup>

The English Protestants who founded the colonies to the north, however, rejected the lax attitude of Anglicanism toward church discipline.<sup>34</sup> The roots of their dissatisfaction lay in a radical wing of the German Reformation: the Anabaptists.<sup>35</sup> In the sixteenth century, the Anabaptists were most notable for their rejection of infant baptism and the apocalyptic theocracy of the city of Munster, which was bloodily suppressed by the local Catholic bishop in

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29. See EDMUND S. MORGAN, *VISIBLE SAINTS: THE HISTORY OF A PURITAN IDEA* 2–4 (1963).

30. See STEPHEN BOTEIN, *EARLY AMERICAN LAW AND SOCIETY* 19–21 (Borzoi Books 1983).

31. See *id.* at 19 (“[C]olonies south of New England . . . failed to replicate the Anglican ecclesiastical system . . . . The Church of England did not help matters along by trying to govern colonial religious institutions out of the bishopric of London instead of creating a diocese in the New World.”).

32. *Id.* at 19–20.

33. See *id.* at 20. Cf. Joseph C. Robert, *Excommunication, Virginia Style*, 40 S. ATLANTIC Q. 243, 251 (1941) (noting that the discipline of Virginia’s Anglican churches was known only for its laxity).

34. See Kenneth R. Davis, *No Discipline, No Church: An Anabaptist Contribution to the Reformed Tradition*, 13 THE SIXTEENTH CENTURY J. 43 (1982).

35. See generally *id.* (discussing the Anabaptists’ influence on reforming trends of the day).

1535.<sup>36</sup> The Anabaptists, however, also insisted that discipline was the mark of a true church.<sup>37</sup> In particular, they focused on the eighteenth chapter of Matthew in which Christ commands, "If your brother sins against you . . . tell it to the church; and if he refuses to listen even to the church, let him be to you as a Gentile and a tax collector."<sup>38</sup> Adult baptism, insisted one Anabaptist pamphleteer in 1526, would be "no better than infant baptism had been if fraternal admonition and excommunication did not go along with it."<sup>39</sup> In Geneva, John Calvin regarded the Anabaptists as one of his chief theological rivals, but he nevertheless imbibed their emphasis on church discipline from an early teacher with strong Anabaptist connections.<sup>40</sup> (Calvin also married an Anabaptist widow.<sup>41</sup>) He wrote, "as the saving doctrine of Christ is the soul of the church, so does discipline serve as its sinews."<sup>42</sup> He did, however, try to distinguish himself from "Donatists and Anabaptists" who "in an impious schism separated themselves from Christ's flock" and "under the pretense of their zeal . . . subvert whatever edification there is."<sup>43</sup> With the English break from Rome, Calvinist and Anabaptist ideas made their way across the Channel. Among the Puritan criticisms of the Anglican settlement was their insistence that "every church should exclude and expel the wicked."<sup>44</sup>

Like their Anglican cousins to the south, the Puritans of New England dispensed with the courts of the Church of England, moving matters of traditional ecclesiastical jurisdiction entirely into

36. See GEORGE HUNTSTON WILLIAMS, *THE RADICAL REFORMATION* 362–86 (1962) (recounting the brief and violent history of the Munster theocracy). Some historians of Mormonism have drawn parallels between the radical Anabaptists and the early Mormons. See, e.g., D. Michael Quinn, *Socio-religious Radicalism of the Mormon Church: A Parallel to the Anabaptists*, in *NEW VIEWS OF MORMON HISTORY: A COLLECTION OF ESSAYS IN HONOR OF LEONARD J. ARRINGTON* 363 (Davis Bitton & Maureen Ursenbach Beecher eds., 1987).

37. See Davis, *supra* note 34, at 45.

38. *Matthew* 18:15–17 (RSV). See Davis, *supra* note 34, at 45. The Anabaptists also relied on the parable of the wheat and the tares contained in *Matthew* 13. They insisted that the parable applied only to the world and not the church, which could not include both believers and unbelievers. *Id.* at 44.

39. Davis, *supra* note 34, at 47.

40. *Id.* at 56–57.

41. See PATRICK COLLINSON, *THE REFORMATION* 91 (2003).

42. JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* 1230 (John T. McNeill ed., Ford Lewis Battles trans., Westminster John Knox Press 1960) (1559).

43. *Id.* at 1239.

44. MORGAN, *supra* note 29, at 12.

the secular courts.<sup>45</sup> Their early insistence on the purity of the church, however, meant that Puritans kept alive ecclesiastical discipline, excommunicating church members who failed to live godly lives.<sup>46</sup> The practice of formal church discipline among Puritans, however, was ultimately limited. Early Puritan theology required that church members demonstrate that they had been predestined to salvation, an exacting spiritual requirement that few congregants met.<sup>47</sup> Accordingly, few of the people in Puritan pews were actually members of the church and therefore subject to its discipline.<sup>48</sup> The so-called Halfway Covenant, a form of partial church membership, eventually relaxed the prerequisites for church membership, increasing the number of congregants potentially subject to discipline.<sup>49</sup> However, the Halfway Covenant itself seems to have dampened the fervor for ecclesiastical purity and with it the widespread practice of church trials and excommunication.<sup>50</sup>

The same could not be said of the churches that sprouted among dissenters from Puritan orthodoxy and other dissenting English Protestants. Despite Calvinist antipathy toward Anabaptism, its ideas and adherents found their way to New England in the first years of settlement. English Separatists in Holland had come into contact with Anabaptists in the Low Countries during the 1610s and 1620s, and in 1638, Roger Williams established an early Baptist

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45. See EDMUND S. MORGAN, *THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP* 95–96 (Oscar Handli ed., 1958) (“Though the ministers enjoyed a powerful influence over their congregations, the shadow of Rome still lay heavily on the Puritans. None of them wanted a ‘theocracy’ in the sense of government by the clergy. Indeed, of all the governments in the Western world at the time, that of early Massachusetts gave the clergy least authority.”). The relationship between ecclesiastical and secular courts in Puritan Massachusetts was complicated. Although ecclesiastical courts had limited de jure authority, secular courts punished offenses such as blasphemy, and on some issues—such as sumptuary regulation—secular tribunals only stepped in when the church courts failed to deal with such issues “at home.” See generally GEORGE LEE HASKIN, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN* 87–93 (1960).

46. See David C. Brown, *The Keys of the Kingdom: Excommunication in Colonial Massachusetts*, 67 *NEW ENG. Q.* 531, 540–47 (1994).

47. See MORGAN, *supra* note 29, at 64–112 (describing the development of church membership among New England Puritans).

48. See MORGAN, *supra* note 29, at 107–09 (discussing the varied reactions of settlers to the newly imposed requirements of church membership).

49. See generally MORGAN, *supra* note 29, at 113–38 (discussing the history of the Halfway Covenant).

50. Indeed, by the end of the seventeenth century, Puritan congregations largely ceased to excommunicate their members. See Brown, *supra* note 46, at 556–57.

congregation in Rhode Island that drew on this Separatist tradition.<sup>51</sup> From these beginnings, American Baptists spread around the fringes of New England, and in the 1690s, Baptists from New England formed the first Baptist congregation in the southern colonies at Charleston, South Carolina.<sup>52</sup> While divided in their allegiance to Calvinist theology (some Baptists followed the Dutch theologian Jacob Arminius, who rejected predestination), Baptists retained the early Anabaptist conviction in the need to maintain the purity of the church, and prior to the later part of the nineteenth century, Baptist congregations aggressively disciplined their members. Before 1840, eight percent of white male Baptists may have “passed under the church’s rod of discipline” each year.<sup>53</sup>

The Quakers provide another instance of a well-developed church judiciary emerging from the Radical Reformation. Quakerism came out of the radical fringes of British Protestantism during the religious and political upheavals that accompanied the English Civil War.<sup>54</sup> After decades of intermittent persecution in England, the Quaker philanthropist William Penn established the colony of Pennsylvania as a refuge for the Friends, as Quakers called themselves. Like the radical New Englanders to their north, Quaker congregations in America aggressively disciplined their members.<sup>55</sup> The basic ecclesiastical unit was the so-called “Monthly Meeting,” which would inquire into the actions of members and could formally withdraw fellowship from those who did not live up to the standards of the Society.<sup>56</sup> Several monthly meetings were collected into so-called “Quarterly Meetings” and “Yearly Meetings,” which exercised appellate jurisdiction as well as promulgated rules to govern church discipline.<sup>57</sup> In many ways, Quaker discipline was aggressive even by the standards of discipline-oriented churches. For example, in

51. See BILL J. LEONARD, *BAPTISTS IN AMERICA* 8–9, 13–14 (2005).

52. See *id.* at 13–14.

53. GREGORY A. WILLS, *DEMOCRATIC RELIGION: FREEDOM, AUTHORITY, AND CHURCH DISCIPLINE IN THE BAPTIST SOUTH, 1785–1900*, at 54 (1997).

54. See CHRISTOPHER HILL, *THE WORLD TURNED UPSIDE DOWN: RADICAL IDEAS DURING THE ENGLISH REVOLUTION 186–207* (1972) (discussing the origins of Ranters and Quakers).

55. See Jack Donald Marietta, *Ecclesiastical Discipline in the Society of Friends, 1682–1776*, at 4–5 (1968) (unpublished Ph.D. dissertation, Stanford University) (on file with the author).

56. *Id.* at 1–2.

57. *Id.*

addition to traditional concerns such as lying, swearing, or sexual impropriety, Quakers were subject to discipline for traveling without first informing their local "Meeting" or for failing to attend Quaker services while visiting a different region.<sup>58</sup>

Scholars have long argued that the origins of Mormonism lie in New England.<sup>59</sup> Although the Church of Christ (later rechristened the Church of Jesus Christ of Latter-day Saints and referred to since its inception as the Mormon Church) was organized in upstate New York in April, 1830, its founder, Joseph Smith Jr., was born in Vermont of old New England stock.<sup>60</sup> Perhaps more importantly, many of the earliest converts to the new faith in western New York and Ohio were displaced New Englanders whose family roots lay in the "radical fringe" of Connecticut, Rhode Island, New Hampshire, and Vermont, precisely the regions where Anabaptist and Quaker influence were the strongest.<sup>61</sup> Likewise, Joseph Smith found early followers in Ohio and the upper reaches of the Susquehanna River, regions peopled largely by settlers from Quaker Pennsylvania.<sup>62</sup>

58. *See id.* at 12–13.

59. *See* David Brion Davis, *The New England Origins of Mormonism*, 26 NEW ENG. Q. 147 (1953). Writing in the shadow of Perry Miller's magisterial works on Puritan thought, Davis conceptualized Mormonism as a populist—and somewhat silly—attempt to recapture Puritanism in the nineteenth century. *See id.* at 158 ("Mormonism can be seen as the extreme result of the evils of literal-mindedness. . . . This anachronistic residue of seventeenth-century New England just did not understand the meaning of individualism."); *cf.* Charles L. Cohen, *The Post-Puritan Paradigm of Early American Religious History*, 54 WM. & MARY Q. 695, 701 (1997) ("Miller conceived of Puritanism as a fixed intellectual configuration . . . and he diagnosed alterations in sentiment, doctrine, rhetoric, or practice as degeneration from this initial scheme. Declension theory's explanatory force derives from its deducing Puritanism as an *a priori* unity from which every departure must necessarily signify decay.").

60. *See* RICHARD LYMAN BUSHMAN, JOSEPH SMITH: ROUGH STONE ROLLING 8–29 (2005) (discussing the New England background of Joseph Smith Jr.'s family).

61. This theory of early Mormon demography was first advanced by John Brooke in 1994. *See* JOHN L. BROOKE, *THE REFINER'S FIRE: THE MAKING OF MORMON COSMOLOGY, 1644–1844*, at 59–88 (1994). Since then, Brooke's demographic thesis has been significantly supported by a much more comprehensive study by Val D. Rust. *See* VAL D. RUST, *RADICAL ORIGINS: EARLY MORMON CONVERTS AND THEIR COLONIAL ANCESTORS* (2004). For a sympathetic critique of Brooke's interpretation of early Mormonism, *see* JAN SHIPPS, *Thoughts About the Academic Community's Response to John Brooke's Refiner's Fire*, in *SOJOURNER IN THE PROMISED LAND: FORTY YEARS AMONG THE MORMONS* 204 (2000).

62. *See* BUSHMAN, *supra* note 60, at 52–53 (discussing the genesis of the Colesville branch); *see also* LEONARD J. ARRINGTON, *FROM QUAKER TO LATTER-DAY SAINT* 31 (1976) (noting that in its early years Ohio took "half of her non-native increase from Pennsylvania"); WHITNEY R. CROSS, *THE BURNED-OVER DISTRICT: THE SOCIAL AND INTELLECTUAL HISTORY OF ENTHUSIASTIC RELIGION IN WESTERN NEW YORK, 1800–1850*, at 4 (1950)

These early converts carried their forbearers' emphasis on church discipline into the new movement. The earliest rules for the government of the church were contained in the "Articles of the Church of Christ" composed in late 1829.<sup>63</sup> The "Articles" endorsed the baptism of adult believers and insisted on the importance of disciplining recalcitrant members.<sup>64</sup> "Therefore if ye know that a man is unworthy," the Articles stated, "if he repenteth not he shall not be numbered among my people that he may not destroy my people."<sup>65</sup> A few months later, the newly organized church adopted an expanded "Articles and Covenants." This document directed that "[a]ny member of the church of Christ transgressing, or being overtaken in a fault, shall be dealt with as the scriptures direct . . . [a]nd also, if any have been expelled from the church . . . their names may be blotted out of the general church record of names."<sup>66</sup>

The emphasis on ecclesiastical purity and church discipline meant that adjudication emerged almost immediately as an important facet of Mormon religious experience. The earliest judicial procedures used by the Latter-day Saints, however, cannot be found in the quasi-constitutional "Articles and Covenants." Rather, the Mormons simply adopted procedures used by other discipline-oriented churches. Prior to any formal action, teachers "labored" with refractory members, urging them to confess their transgressions without formal disciplinary action.<sup>67</sup> If this did not work, then the

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(noting that in western New York, where Mormonism was founded, "a reasonably large proportion of folk came up the Susquehanna from Pennsylvania").

63. See Scott H. Faulring, *An Examination of the 1829 "Articles of the Church of Christ" in Relation to Section 20 of the Doctrine and Covenants*, *BYU STUD.*, Winter 2004, at 57. The full text of the "Articles of the Church of Christ" is reproduced in Faulring's article.

64. See *id.* at 77 ("Now therefore whosoever repenteth and humbleth himself before me [that is, Jesus Christ] and desireth to be baptized in my name shall ye baptize them.") (quoting the Transcript of the 1829 Articles of the Church of Christ) (brackets not in original).

65. *Id.* at 78.

66. DOCTRINE & COVENANTS § 20:80, 83.

67. For example, the business of an 1834 meeting of teachers in Kirtland consisted entirely of appointing brethren to labor with particular members: "[T]he conference then appointed brothers John Taylor and Benjamin Johnson to labor with Orva Cartwright for making use of tobacco, also brother Joseph Ceehum (?) was appointed to labor with both Bates & wife also brothers G. Johnson & A.C. Graves was appointed to labor with the widow Shaw." Teachers Quorum Minutes, Dec. 1834–Dec. 1845, Church Archives, The Family and Church History Department of the Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah. See also FAR WEST RECORD: MINUTES OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830–1844, at 38 (Donald Q. Cannon & Lyndon W. Cook eds., 1983)

erring brother or sister would be brought before the local "conference" for trial.<sup>68</sup> These proceedings were presided over by a "moderator" who was elected for the meeting.<sup>69</sup> The moderator was a familiar character from both Protestant churches and New England town meetings, and his purpose was less to act as a judge than to run the meeting. Generally, the moderator among Protestants was the minister, but with an entirely lay clergy, the office seems to have rotated from meeting to meeting among the Mormons.<sup>70</sup> There were no formal evidentiary or procedural rules. Rather, evidence was presented by the parties in the case.<sup>71</sup> The assembled members would then vote on the verdict.<sup>72</sup> The congregational basis and the vocabulary used by these earliest Mormon courts were very similar to meetings of Baptists or Quakers.<sup>73</sup>

While this early pattern of church discipline was retained throughout the nineteenth century by Latter-day Saints in Europe and the British Isles,<sup>74</sup> the Mormon judiciary rapidly began diverging from its Protestant antecedents in ways that reflected the religious radicalism of Mormonism. Joseph Smith had founded his church on the claim that God had chosen him to "restore" the Christian gospel

[hereinafter FAR WEST RECORD] (a conference voted two elders to mediate between two quarrelling members).

68. See, e.g., FAR WEST RECORD, *supra* note 67, at 15 ("Ezra being absent . . . Cowdery be dispatched . . . [to] bring him before this conference immediately.").

69. See, e.g., *id.* at 27 ("Br Sidney Rigdon appointed moderator.").

70. See, e.g., *id.* at 26–31 (Between November 1, 1831, and November 13, 1831, there were six conference meetings in Kirtland all with different moderators.). However, the role of moderator seems to have attached fairly quickly to particular priesthood officers. See, e.g., *id.* at 65 ("The Bishop Edward Partridge was acknowledged to be at the head of the Church of Zion at present consequently will be our Moderator in councils or conferences by virtue of his office.").

71. See, e.g., *id.* at 15 ("After hearing the relations of all the parties, the conference requested them to withdraw while they should investigate the testimony & pass their decision.").

72. See, e.g., *id.* at 12 ("Upon testimony satisfactory to this conference it was voted that Ezra Booth be silenced from preaching as an Elder in this Church.").

73. Presbyterian tribunals were different, however, for they accorded the minister greater power and restricted adjudication to a council of elders chosen by a vote of the congregation. See GLENN C. ALTSCHULER & JAN M. SALTZGABER, REVIVALISM, SOCIAL CONSCIENCE, AND COMMUNITY IN THE BURNED-OVER DISTRICT: THE TRIAL OF RHODA BEMENT 151 (1983).

74. See Richard L. Jensen, *Church Councils and Governance*, in MORMONS IN EARLY VICTORIAN BRITAIN 179 (Richard L. Jensen & Malcolm R. Thorp eds., 1989). The first Mormon missionaries arrived in England in 1837, and the new religion garnered tens of thousands of converts in Great Britain and Scandinavia over the following decades.

in its original purity.<sup>75</sup> Hence, in some sense, Mormonism was simply an extreme manifestation of the basic Protestant anxiety about the corruption of the Christian church.<sup>76</sup> In other respects, however, the new movement broke radically with the Protestant tradition from which it emerged. First, Smith insisted that he was not a reformer but rather a prophet on the biblical model who received knowledge directly from angelic visitors and waking theophanies.<sup>77</sup> On this basis, Smith claimed the right to add additional scripture to the biblical canon, which he did first with the *Book of Mormon* and subsequently in a series of written “revelations” given in response to specific questions or problems.<sup>78</sup> Second, Smith rejected the notion of a priesthood of believers, insisting instead that authentic ecclesiastical authority could come only by the “laying on of hands” by those who could trace their authority through an unbroken chain of ordination back to Christ, authority that Smith claimed to have received from visiting angels.<sup>79</sup> Both of these claims marked Mormonism as a heretical sect in the eyes of American Protestantism, and both of them contributed to the unique elaboration of the Mormon judiciary.

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75. See generally JAN SHIPPS, *MORMONISM: THE STORY OF A NEW RELIGIOUS TRADITION* 67–85 (1985) (discussing Mormon restorationism).

76. See *id.* at 68 (“[U]nless the radical character of the Mormon restoration is taken into account, and unless careful attention is paid to the particular way in which Mormonism was shaped and transformed by the actual practical experience of the community of belief, Mormonism can all too readily be misunderstood as a little more than an elaborate idiosyncratic strain of the nineteenth-century search for primitive Christianity.”).

77. To contemporary ears, Smith’s repeated claims to visions and revelations sound startling and unique, marking him off to modern Mormons as a miraculous figure and many non-Mormons as a transparent fraud. See Jan Shipps, *The Prophet Puzzle: Suggestions Leading Toward a More Comprehensive Interpretation of Joseph Smith*, 1 J. MORMON HIST. at 3 (1974) (discussing the problem of the prophet-fraud dichotomy in the context of Joseph Smith and early Mormonism). However, while Joseph Smith was certainly recognized as a religious radical and accused of being an imposter in his own lifetime, he nevertheless operated in a religious milieu in which claims to visions and visiting angels were frequent, indeed commonplace. See Richard Bushman, *The Visionary World of Joseph Smith*, BYU STUD., Spring 1997–98, at 183 (discussing the role that stories of visions and angels played in the religious economy of Jacksonian America).

78. Many of these revelations were subsequently collected and published in the *Doctrine and Covenants*, both within Joseph Smith’s lifetime and in subsequent editions of the *Doctrine and Covenants* produced after his death.

79. See DOCTRINE & COVENANTS § 13 (Joseph Smith’s account of the restoration of priesthood authority by an angel). See generally GREGORY A. PRINCE, *POWER FROM ON HIGH: THE DEVELOPMENT OF MORMON PRIESTHOOD* (1995) (discussing the theological and institutional development of the Mormon idea of priesthood).



Smith's position as prophet and conduit of priesthood authority centralized a great deal of ecclesiastical power in his hands. Equally, if not more important, however, was the way in which Smith dispersed prophetic and priestly authority. He insisted that everyone had the right to receive personal revelation from God, and essentially all Latter-day Saint males were given the priesthood. He also set up a slew of independent councils that were to receive revelation and direct affairs within their appointed areas.<sup>80</sup> The result was the widespread dispersal of authority away from Joseph Smith. As one biographer has observed, "Joseph's presence was not required to make [the councils] work. Instead of councils relying on him to give the last word, they met, deliberated, and made policy decisions in his absence."<sup>81</sup> Much of the work done by these councils was adjudicative, either inquiring into the worthiness of individual Mormons accused of sin or settling disputes between Mormons.<sup>82</sup> As a result, Mormon ideas of personal revelation and priesthood authority became intertwined with the emerging Mormon judiciary, which was divided into various specialized councils as opposed to the earlier congregational procedures.

These special councils began developing early in the history of the new movement. In 1831 Joseph Smith made Edward Partridge a "bishop."<sup>83</sup> Thereafter, other men were ordained to the same office. Initially, the bishops were associated only with the "temporal affairs of the church," namely the emerging experiments with communal economics among Mormons in Ohio and Missouri.<sup>84</sup> The bishop also, however, became a judicial officer. For example, an 1835 revelation stated that he was "to be a judge in Israel . . . to sit in judgment upon transgressors upon testimony as it shall be laid before him according to the laws."<sup>85</sup> In addition, as Smith elaborated

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80. Richard Lyman Bushman, *The Theology of Councils, in* REVELATION, REASON, AND FAITH: ESSAYS IN HONOR OF TRUMAN G. MADSEN 433, 439–41 (Donald W. Parry et al. eds., 2002).

81. *Id.* at 433, 440; *see also id.* at 443 ("In bringing conciliar government into being, Joseph not only distributed authority to the councils, but he dispensed the divine gift of revelation as well.").

82. *Id.* at 440–41.

83. *See* BUSHMAN, *supra* note 60, at 254.

84. *See* LEONARD J. ARRINGTON, GREAT BASIN KINGDOM: AN ECONOMIC HISTORY OF THE LATTER-DAY SAINTS 1830–1900, at 6–17 (1958) [hereinafter ARRINGTON, GREAT BASIN KINGDOM] (discussing early Mormon communitarianism and the role of bishops).

85. DOCTRINE & COVENANTS § 107:72.

various priesthood offices—deacons, teachers, priests, elders, seventies, and high priests—the men in a given area holding each office gathered in quasi-fraternal organizations called “priesthood quorums.”<sup>86</sup> Each of these quorums was presided over by a president, and the quorum as a body had limited judicial authority. Although it could not excommunicate an erring brother, it could formally withdraw the fellowship of the quorum, and adjudication emerged as one of their main activities.<sup>87</sup>

Smith also established a series of superior councils that eventually gelled into a two-tiered appellate structure for the church judiciary. In 1832, he announced a revelation creating a body called “the First Presidency” consisting of himself and two counselors, which would acquire final appellate jurisdiction in the church.<sup>88</sup> In 1834, Smith further refined the Mormon judiciary by creating a body known as “the High Council,” a group of twelve high priests presided over by a president, which was to settle “important difficulties which might arise in the church, which could not be settled by the church or the bishop’s council to the satisfaction of the parties.”<sup>89</sup> A year later, Smith underlined the centrality of discipline and adjudication to the emerging ecclesiastical structure by announcing a revelation creating a special procedure for excommunicating the President of the Church (Smith himself) should it become necessary, that “none shall be exempted from the justice and the laws of God, that all things may be done in order and in solemnity before him, according to truth and righteousness.”<sup>90</sup>

86. See generally DOCTRINE & COVENANTS § 20:38–67, 107 (outlining the responsibilities of the quorums).

87. See *Proceedings Before the Committee on Privileges and Elections of the United States Senate in the Matter of the Protests Against the Right of Hon. Reed Smoot, a Senator from the State of Utah, to Hold His Seat*, S. Doc. No. 486, 59th Cong., 1st Sess. (1906), at 3:23 [hereinafter *Smoot Hearings*] (testimony by James E. Talmage stating that “[a]fter proper trial any quorum may disfellowship one of its members”). See generally KIRTLAND ELDERS’ QUORUM RECORD 1836–1841 (Lyndon W. Cook & Milton V. Backman, Jr. eds., 1985) (recording numerous disciplinary actions by the Kirtland Elders’ Quorum).

88. See generally DOCTRINE & COVENANTS § 81.

89. DOCTRINE & COVENANTS § 102:2.

90. DOCTRINE & COVENANTS § 107:84. The sometimes fluid nature of the Mormon judiciary is illustrated by the disagreements over the years about precisely how the procedure for excommunicating the President of the Church should work. At a meeting of the Twelve Apostles and the First Presidency on December 24, 1902, Apostle Rudger Clawson recorded:

Elder Smoot [that is, Reed Smoot] said that there was a diversity of opinion in Utah Stake as to who would sit in judgment if the President of the church were placed on

However, while the refinement of the Mormon judiciary pushed adjudication away from the earlier congregational model into specialized tribunals, the possibility of trial by a general vote of the membership remained. Joseph Smith taught that “[w]hen there is no Bishop, [those subject to discipline] are to be tried by the voice of the Church.”<sup>91</sup> Similarly, extraordinary cases could be decided by a general vote of the church even when other tribunals were functioning. For example, in 1886 Joseph Q. Cannon, then a counselor to the Presiding Bishop of the Church, was excommunicated for adultery by vote of “the public congregation in the Big Tabernacle.”<sup>92</sup>

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trial. Some claimed that it would be the right of the Presiding Bishopric to try him. Elder Smoot said he did not coincide with this view. The matter might be considered inappropriate for discussion, but he thought the council ought to be agreed as touching this question. Elder Smoot said that the revelation which directed that in case the President of the High Priesthood should [be] put upon trial, the Presiding Bishop associated with twelve high priests should constitute the trial court, was given before the church was fully organized and before the Twelve had been chosen. Pres. Smith [that is, Joseph F. Smith] suggested that the matter be taken under advisement for one week, which was done.

A MINISTRY OF MEETINGS: THE APOSTOLIC DIARIES OF RUDGER CLAWSON 525–26 (Stan Larson ed., 1993) (second brackets in original). Clawson did not record the outcome of the special committee. However, in 1904, Joseph F. Smith, a nephew of Joseph Smith, Jr. and then President of the Church, testified before the U.S. Senate as part of the controversy surrounding the seating of Mormon Senator Reed Smoot. Responding to questions by the Senators, he stated that he could be tried for his membership before his local bishop’s court like any other member, with appeal lying to his stake president, and from thence to a special council. *See Smoot Hearings*, *supra* note 87, at 1:352. In an influential work on church government published a few decades later, however, Mormon apostle John A. Widtsoe described a special procedure based on the 1835 revelation to Joseph Smith, Jr. *See JOHN A. WIDTSOE, PRIESTHOOD AND CHURCH GOVERNMENT* 217 (1939).

91. PRINCE, *supra* note 79, at 198 (citation omitted).

92. AN APOSTLE’S RECORD: THE JOURNALS OF ABRAHAM H. CANNON 85–86 (Dennis B. Horne, ed. 2004). In his 1904 testimony before the Senate, James E. Talmage also suggested that a vote of the general conference of the church also constituted a method of extraordinary appeal:

An appeal would lie from the first presidency to the assembled quorums of the priesthood; that is to say, the church as a body is the supreme court before which the cases involving church [sic].

The assembled quorums or organizations of the priesthood may be said to be in session at every general conference of the church. But, of course, in the same assembly with the quorums of the priesthood standing and church rights may be tried.

*Smoot Hearings*, *supra* note 87, at 3:21 (testimony of James E. Talmage); *see also* T.B.H. STENHOUSE, *THE ROCKY MOUNTAIN SAINTS* 564–66 (1873) (“[T]here is also an appeal to the ‘quorum’ of the ‘First Presidency,’ and from that, if desired, to the Church collectively in General Conference.”).

The proliferating councils eventually settled into a single integrated judicial structure. In 1838, after years of intermittent violence, the Mormons were driven out of Missouri and settled in Illinois along the banks of the Mississippi river where they founded the City of Nauvoo. Eventually a bishop was assigned to each of Nauvoo's municipal wards, mainly to look after the needs of the poor and to provide a bishop's court for local members. These bishops were under the direction of the President of the Nauvoo Stake of Zion and his High Council. This High Council had appellate jurisdiction over decisions by the bishop's courts and local priesthood quorums, as well as original jurisdiction in difficult cases.<sup>93</sup> Other areas of concentrated Mormon settlement were organized into other "stakes" with a similar judicial structure.<sup>94</sup> In some cases, the High Council had a president who was different than the president of the stake.<sup>95</sup> For much of the nineteenth century, there were also "traveling bishops" who operated independent of particular wards or congregations.<sup>96</sup> The First Presidency then exercised appellate jurisdiction over all of the various High Councils. In addition, certain councils, such as the Presiding Bishopric, retained jurisdiction independent of stake organizations.<sup>97</sup> With minor refinements, this three-tiered structure of bishops' courts, High Councils, and the First Presidency has survived in the Mormon Church to the present day.<sup>98</sup>

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93. See generally William G. Hartley, *Nauvoo Stake, Priesthood Quorums, and the Church's First Wards*, BYU STUD., Spring 1991 (illustrating examples of High Council appellate jurisdiction in Nauvoo).

94. A Mormon "stake" is an ecclesiastical structure consisting of several congregations—called "wards"—and is roughly equivalent to a Roman Catholic diocese.

95. See William G. Hartley, *Brigham Young and Priesthood Work at the General and Local Levels*, in LION OF THE LORD: ESSAYS ON THE LIFE & SERVICE OF BRIGHAM YOUNG 338, 358 (Susan Easton Black & Larry C. Porter eds., 1995).

96. See *id.*

97. The office of "Presiding Bishopric" is independent of the office of an ordinary bishop. After the Nauvoo period, bishops emerged as essentially congregational leaders, although local ecclesiastical structures remained quite fluid into the late 1870s. However, Joseph Smith published a revelation in 1841 creating an office of Presiding Bishop, who was to oversee the temporal affairs of the Church at a general level. See DOCTRINE & COVENANTS § 124:20–21, 141; see also Hartley, *supra* note 95, at 356–58 (discussing the evolution of the office of Presiding Bishopric).

98. For many years there was a fourth level in the appellate structure: the Salt Lake Stake was considered "the center Stake of Zion" and the Salt Lake High Council had appellate jurisdiction over other High Councils, which placed it in a position between the ordinary High Councils and the First Presidency. See Hartley, *supra* note 95, at 359.

Unlike the Protestant structures from which it emerged, the mature Mormon judiciary was more than simply a congregationally based method of policing ecclesiastical purity. It was a single, institutionally integrated system that was ideologically related to key aspects of Mormon theology. In February, 1834, the Kirtland High Council met and “[Brother] Joseph . . . said he would show the order of councils in ancient days . . . as shown him by vision the law by which to govern the Council of the Church of Christ.”<sup>99</sup> Smith went on to explain that “Jerusalem was the seat of the Church Council in ancient days” and that the procedures he was instituting were those that had been used by the apostle Peter, who “was appointed to this office by the voice of the Savior.”<sup>100</sup> In reaching their decisions, the council was to “speak precisely according to the evidence and according to the teaching of the Spirit of the Lord.”<sup>101</sup> Likewise, “in cases of difficulty respecting doctrine or principles if there is not a sufficiency written to make clear to the mind of the council, the president may inquire and obtain the mind of the Lord by Revelation.”<sup>102</sup> The institutional structure of Mormon courts was thus central to the theological narrative of pristine Christianity and authentic priestly authority restored in the latter days. Likewise, the process of decision making in Mormon courts explicitly rested on claims to continuing and immediate revelation from God. In short, Mormon courts became a key location in which Latter-day Saints experienced the divine and enacted the theological narratives that structured their religious beliefs. When the Kirtland Elders Quorum chose the Temple as the location to hear the case of *Cahoon v. Green* they were giving concrete expression to this central religious role of adjudication.

## II. SUING BEFORE THE UNGODLY AND SUING BEFORE THE CHURCH

A suspicion of secular courts and preference for church tribunals emerged within the first generation of Christianity. In his first letter

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99. Kirtland High Council Minutes (Dec. 1834–Nov. 1837), Church Archives, The Family and Church History Department of the Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah.

100. *Id.*

101. *Id.*

102. *Id.*

to the Corinthians, Paul rebuked the early Christians for their litigiousness, noting with horror that “brother goes to law against brother, and that before unbelievers.”<sup>103</sup> He asked rhetorically, “When one of you has a grievance against a brother, does he dare to go to law before the unrighteous instead of the saints?”<sup>104</sup> These passages from the New Testament captured the imagination of discipline-minded churches. The emphasis of these churches on ecclesiastical purity meant that adjudication was already an important part of their religious experience. Equipped with the institutional machinery and social practices to manage lawsuits between members, they combined Paul’s attack on litigation with a deep-seated suspicion of the common-law courts. The result was a series of attempts to create religious alternatives to the civil courts, of which the Mormon judiciary became an exemplar.

The Puritans made some attempts to resolve civil litigation in church courts. For example, in 1635 the First Church of Boston excommunicated one of its members “for extortion, deceit [sic], and lying, in and about Iron Worke which he made for one Mr. Jacob.”<sup>105</sup> In the end, however, Puritan churches did not become heavily involved in resolving civil cases for the same reasons that their church discipline as a whole was less vigorous than other sects. Early Puritan congregations were made up mainly of non-members and the theological accommodation marked by the Halfway Covenant dampened the practice of church adjudication.<sup>106</sup> Congregationalist churches, however, did provide arbitrators from time to time,<sup>107</sup> and as late as the 1840s Presbyterian churches, which merged with the Congregationalists under the 1801 Plan of Union, “frequently viewed questionable business practices, even if technically legal, as breaches of discipline.”<sup>108</sup> Baptists were even more aggressive in using their disciplinary machinery to resolve civil disputes:

Rules prohibited quarreling, litigation between fellow members without church consent, the evasion of just debts, especially by

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103. 1 *Corinthians* 6:6 (RSV).

104. 1 *Corinthians* 6:1 (RSV).

105. HASKIN, *supra* note 45, at 90.

106. See MORGAN, *supra* note 29, at 2–4.

107. See, e.g., THE ADAMS PAPERS: THE LEGAL PAPERS OF JOHN ADAMS 20–21 (L. Kinvin & Hiller B. Zobel eds., 1968) (discussing a dispute over timber submitted to arbitration before a church committee).

108. ALTSCHULER & SALTZGABER, *supra* note 73, at 155.

taking advantage of the statute of limitations in order to circumvent legal collection. An important function of the church was to serve as a jury in the settlement of difficulties among its members . . . .<sup>109</sup>

The Quakers initially absented themselves from the English legal system because their literal interpretation of Christ's injunction, "swear not,"<sup>110</sup> meant that they refused to take the oaths that formed a necessary part of common-law procedure.<sup>111</sup> The result was a turn away from the secular courts and toward what the Quakers called "The Gospel Order," a comprehensive system for resolving intra-Quaker disputes without litigation.<sup>112</sup> For example rules adopted by the New England Yearly Meeting in 1697 stated that "when any friend or friends shall hear of any . . . difference betwixt any friends . . . they [shall] forthwith speak to and tenderly advise, the persons between whom the differences is, to make a speedy end thereof."<sup>113</sup> If friendly persuasion did not work, the rules called for ad hoc arbitrators. "[T]hey should each choose an equal number of different, impartial and judicious friends, to hear and speedily determine the same; and that they do bind themselves to stand to their award and determination."<sup>114</sup> The Gospel Order, however, placed onerous sanctions on any Quaker who instituted a civil lawsuit against another "friend" without submitting the dispute to arbitration: "[I]f any person professing truth with us, shall . . . sue . . . at law, any other of our members, before he hath proceeded in the methods herein before recommended . . . then he be disowned by the meeting."<sup>115</sup>

Any Quaker thus disciplined could appeal to the quarterly and yearly meetings.<sup>116</sup> Although there is reason to suppose that intra-Quaker litigation was considerably more common than the "Gospel

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109. Robert, *supra* note 33, at 248 (describing church discipline among eighteenth- and nineteenth-century Baptists).

110. *Matthew* 5:34 (KJV).

111. OFFUTT, *supra* note 17, at 147.

112. *Id.* See also Odiorne, *supra* note 17, at 161 (describing arbitration proceedings among the Quakers).

113. SOCIETY OF FRIENDS NEW ENGLAND YEARLY MEETING, RULES OF DISCIPLINE OF THE YEARLY MEETING HELD ON RHODE ISLAND FOR NEW ENGLAND 3-4 (1849).

114. *Id.*

115. *Id.* at 5-6.

116. *Id.* at 1 (setting forth the procedures in appeals).

Order” would suggest,<sup>117</sup> one nineteenth-century author insisted that “[c]ases, where property is concerned to the amount of many thousands, are determined” according to the Gospel Order.<sup>118</sup>

The earliest recorded case of a civil dispute in a Mormon tribunal was an action for debt, resolved by an Indiana conference in December 1831. The minutes of the meeting record that “Brs. George Heartley & Oliver Walker then withdrew to settle the difficulty between themselves but could not agree[.] Therefore decided that two should be appointed by the Moderator.”<sup>119</sup> After an attempt at mediation failed, the parties “agreed to abide the decision of John & Thomas who concluded that Oliver Walker pay George Heartly which was his just due.”<sup>120</sup> The decision of the arbitrators “was laid before the Conference,” and it was only with “much cavilling” that the losing party was persuaded “to stand or hold fast to his agreement.”<sup>121</sup> In the end, however, “they came together as brothers and disciples & all matters were settled & buried.”<sup>122</sup>

Mormon courts soon moved from arbitration for two willing parties to direct jurisdiction over a case. A strikingly high proportion of these earliest complaints were for defamation of one kind or another. For example, in December 1833 Joseph Smith heard a complaint against a

Bro. Ezekiel Rider . . . who had said many hard things against Bro. Whitney, the Bishop of the Church—he said that Bro. Whitney was not fit for a Bishop and that he treated the Brethren who came into the store with disrespect that he was overbearing and fair would walk on the necks of the Brethren &c.<sup>123</sup>

In the Quaker context, it has been theorized that the heavy preponderance of defamation cases in the ecclesiastical docket

117. See OFFUTT, *supra* note 17, at 174–81 (providing a demographic analysis of litigation in the Delaware valley suggesting widespread intra-Quaker lawsuits).

118. THOMAS CLARKSON, A PORTRAITURE OF QUAKERISM: TAKEN FROM A VIEW OF THE EDUCATION AND DISCIPLINE, SOCIAL MANNERS, CIVIL AND POLITICAL ECONOMY, RELIGIOUS PRINCIPLES, AND CHARACTER OF THE SOCIETY OF FRIENDS 70 (1806).

119. FAR WEST RECORD, *supra* note 67, at 38.

120. *Id.*

121. *Id.*

122. *Id.* Interestingly, this earliest foray of Mormon tribunals into arbitration does not seem to have been entirely successful. Cannon and Cook write, “Although the problem was considered ‘buried’ at this conference, it surfaced again and was a matter of business in Kirtland in December 1834.” *Id.* at 38 n.4.

123. Kirtland High Council Minutes, *supra* note 99.



reflects procedural advantages offered by church courts. A plaintiff bringing such an action in a secular court risked a defendant who "attempt[ed] to prove the truth of the alleged defamatory statement, broadcasting to the court day crowd further attacks on the plaintiff's reputation."<sup>124</sup> While nineteenth-century Mormon courts were not entirely private affairs, they could offer a less glaringly public rehearsal of the original insults. In addition, early Mormons operated in an often violent frontier "culture of honor" that "bred deep loyalties to friends and family while instilling a fierce urge to avenge insults."<sup>125</sup> Church courts provided a way of managing the conflict this culture created by transforming insults from a private *causus belli* into ecclesiastical litigation.

During the 1830s, church courts heard increasing numbers of cases involving civil claims such as actions for debt, but the "secular" issues in these disputes were frequently tied up in religious and political struggles of central importance to the church. For example, after Mormons were violently pushed out of Jackson County, Missouri, one Mormon lawyer found himself disciplined after agreeing to represent Jackson County non-Mormons trying to collect debts against fellow Mormons.<sup>126</sup> After the Mormons moved to Illinois, they dominated political and legal offices in Nauvoo. Joseph Smith was elected mayor and served as a judge, studying law for a time and boasting that "I am a lawyer; I am a big lawyer and comprehend heaven, earth and hell, to bring forth knowledge that shall cover up all lawyers, doctors and other big bodies."<sup>127</sup> He also, however, preached that "as long as I have a tongue to speak I will expose the iniquity of the Lawyers [sic] and wicked men."<sup>128</sup> Also, for the first time in Nauvoo, church courts began treating the mere filing of a civil lawsuit by one Mormon against another Mormon as a matter for discipline. Using a formula that would be repeated countless times in succeeding decades, in November 1842 a member

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124. OFFUTT, *supra* note 17, at 172.

125. BUSHMAN, *supra* note 60, at 295. Cf. DAVID HACKET FISCHER, *ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA* 765-71 (1989) (discussing honor and violence among backcountry settlers).

126. See FAR WEST RECORD, *supra* note 67, at 163.

127. TEACHINGS OF THE PROPHET JOSEPH SMITH 279 (Joseph Fielding Smith ed. 1967).

128. WORDS OF JOSEPH SMITH: THE CONTEMPORARY ACCOUNTS OF THE NAUVOO DISCOURSES OF THE PROPHET JOSEPH 324 (Andrew F. Ehat & Lyndon W. Cook eds., 1980).

filed a complaint with the Nauvoo High Council to “prefer a charge” for “instituting a suit at Law against me,” an action “derogatory to the character of a Christian.”<sup>129</sup>

These church councils became increasingly important as the Mormons were driven west in the 1840s. A mob murdered Joseph Smith in 1844, and the Mormons abandoned Nauvoo in 1846. Their final destination was the valley of the Great Salt Lake, but they first crossed Iowa to the banks of the Missouri River and founded a temporary settlement dubbed “Winter Quarters.” Brigham Young, Joseph Smith’s successor, established the “Municipal High Council” to govern the settlement. Formally identical to earlier High Councils, the Winter Quarter’s High Council exercised an extremely expansive jurisdiction, resolving all civil disputes and meting out criminal punishments.<sup>130</sup> When the vanguard of Mormons arrived in the Salt Lake Valley in 1847, they replicated this system. John Smith was made president of the Salt Lake Stake with a High Council that exercised both civil and criminal authority. The Mormons made an early bid for statehood, drafting a constitution modeled on that of Illinois and setting up a government for the provisional “State of Deseret” in 1849.<sup>131</sup> By early 1850, the courts of Deseret took over from the Salt Lake High Council. Hence from 1846 until 1850, Mormons lived under High Councils that had full civil and criminal power.

Congress rejected the State of Deseret and organized the Territory of Utah as part of the Compromise of 1850, providing the legal context in which the Mormon courts operated for more than four decades.<sup>132</sup> The Territorial Legislature was locally elected and dominated by Mormons.<sup>133</sup> The Territorial Supreme Court, in contrast, was staffed with non-Mormon federal appointees, as was

129. Nauvoo Stake High Council Court Papers (1839–44), n.1, Church Archives, (available at The Family and Church History Department of the Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah).

130. See Edward L. Kimball & Kenneth W. Godfrey, *Law and Order in Winter Quarters*, J. MORMON HIST., Spring 2006, at 180–81 (discussing the legislative, executive, and judicial powers of the Winter Quarter’s High Council).

131. See generally PETER CRAWLEY, THE CONSTITUTION OF THE STATE OF DESERET (1982); DALE MORGAN, THE STATE OF DESERET 7–29 (1987) (discussing the manner in which the Mormons formed the State of Deseret and appealed for statehood).

132. See generally Eugene Campbell, *Governmental Beginnings*, in UTAH’S HISTORY 153 (Richard D. Poll et al. eds., 1978) (discussing the creation of Utah Territory).

133. See *id.* at 160–64.

the territorial executive after President James Buchanan replaced Brigham Young as Territorial Governor in 1857.<sup>134</sup> The treatment of civil cases by the High Councils, however, showed basic continuity throughout the period. Plaintiffs filed simple written complaints with the clerk of the bishop's court or High Council.<sup>135</sup> Clerks issued summons to the defendants.<sup>136</sup> Defendants who refused to appear risked disfellowshipment or excommunication for "contempt of the priesthood."<sup>137</sup> The parties presented evidence, and the council issued decisions.<sup>138</sup> Appeals could be taken to the High Council and the First Presidency, which both tried cases *de novo*.<sup>139</sup> A Mormon sued by another Mormon in a secular court could file a counter-complaint before a church court alleging "unChristian-like conduct."<sup>140</sup> The church court would then take jurisdiction over the entire dispute and resolve the underlying lawsuit on the merits.<sup>141</sup> Failure to carry the church judiciary's final decision into effect resulted in excommunication.<sup>142</sup>

As might be expected, losing parties were not always satisfied with the decisions of church courts. For example, in 1847 when one victorious plaintiff called at a defendant's house to claim property to which the high council had declared him entitled, the irate defendant responded, "The Council might go to hell and be damned[!]"<sup>143</sup> In another case, a diarist recorded that a losing party in a high council case "was dissatisfied with their judgment and told them that it was no better than robbery [sic]."<sup>144</sup> However, one non-Mormon observer

134. FIRMAGE & MANGRUM, *supra* note 17, at 142, 244.

135. *See generally id.* at 29–34 (discussing the organization of bishops' courts and High Councils).

136. *See id.* at 29–30 (discussing the process of issuing summons through clerks).

137. *See id.* at 289 (discussing sanctions for refusals to submit to the jurisdiction of church courts).

138. *See id.* at 283 (discussing evidentiary rules).

139. *See id.* at 285–87 (discussing appellate procedures).

140. *See id.* at 264–67 (discussing one representative dispute spanning both secular and church courts).

141. *Id.*

142. *See id.* at 287–88 (discussing sanctions for non-compliance with church court requirements).

143. THE OLD FORT: HISTORIC MORMON BASTION, THE PLYMOUTH ROCK OF THE WEST 82 (Nicholas Groesbeck Morgan, Sr. ed. 1964) (showing the reprinted minutes from the Great Salt Lake City High Council).

144. 2 ON THE MORMON FRONTIER: THE DIARY OF HOSEA STOUT 1844–1861, at 433 (Juanita Brooks ed. 1964) [hereinafter 2 ON THE MORMON FRONTIER].

insisted that “[i]n ninety-nine cases out of a hundred the parties are satisfied.”<sup>145</sup> Indeed, occasionally, “Gentiles,” as Mormons called non-Mormons, sued Mormons in church courts rather than secular fora. For example, in one case an influential bishop had run-up several thousand dollars of debt to a Gentile merchant. The merchant “brought suit against the bishop in [a church court] in preference to going to law.”<sup>146</sup> After a ninety-minute trial, the church court ruled that “the bishop should pay the full amount within twenty-eight days, or be suspended from his bishopric.”<sup>147</sup> The merchant was satisfied with the decision and offered to pay court costs “which [was] declined, for suits in this court were without costs.”<sup>148</sup>

Although church courts referred to “the law of the Church” and “the law of the Lord,” it was unclear what rules—if any—they looked to in resolving cases. The basic procedures used by the high councils had been given by Joseph Smith in 1834 and remained quite stable. During the period of 1846 to 1850, high councils promulgated written rules to govern Mormon communities; however, they ceased to do so once the legislature began operating.<sup>149</sup> Even the treatment of these rules, however, reveals ambivalence toward formal legislation. For example, the Salt Lake High Council promulgated a law dealing with stray livestock that imposed substantial fines on the owners of the animals. The council subsequently determined that the rule was too harsh and left the bishops who applied it with too little discretion. Accordingly, the council repealed the rule; however, they “also . . . imposed a fine of 25 dollars on any one of the Council who divulged the same as they wished to let the force of the law do all the good possible after it was repealed.”<sup>150</sup>

One Mormon tried to explain the rules applied in church courts by saying “[t]he laws of the church are revelations. . . . No rule,

145. *Execution of the Laws in Utah [To accompany bill H.R.No. 1089.]*, H.R. REP. NO. 21, at 1 (1870) (testimony of Franklin Head, Feb. 28, 1870).

146. EDWARD W. TULLIDGE, *HISTORY OF SALT LAKE CITY: BIOGRAPHIES* 169 (1886).

147. *Id.* at 169–70.

148. *Id.* at 170.

149. *See, e.g.*, ORDINANCES PASSED BY THE LEGISLATIVE COUNCIL OF GREAT SALT LAKE CITY, AND ORDERED TO BE PRINTED (1849) (showing a collection of ordinances adopted by the Salt Lake High Council).

150. 2 ON THE MORMON FRONTIER, *supra* note 144, at 334–35.

however, is of binding effect until it has been adopted by the people to whom it applies.”<sup>151</sup> In reality, however, appeals to formally canonized revelations decided few cases. In 1870, a Gentile observed more accurately that bishop’s courts applied “a sort of wild equity, that is generally not far from just.”<sup>152</sup> Occasionally, to be sure, church courts looked to biblical rules, for example by requiring four-fold compensation for theft.<sup>153</sup> In one case a party appealed to “known and justly established usages of law and equity in civilized nations.”<sup>154</sup> In some instances church courts followed secular law,<sup>155</sup> but they did not hesitate to abandon it, for example by enforcing debts discharged in bankruptcy<sup>156</sup> or by forging a new system of water rights better suited to the arid Great Basin.<sup>157</sup> The upper reaches of the church’s hierarchy did attempt to create some uniformity. For example, in some instances Bishops or High Councils facing a difficult issue wrote the First Presidency, and the letters sent in reply evidence consistent positions on some points. The Church’s then official organ, *The Deseret News*, also printed articles occasionally, presumably penned by church leaders, instructing that certain rules be applied in particular situations. Finally, high church officials regularly traveled from stake to stake, preaching and instructing local leaders on, among other things, the proper way of conducting church courts and resolving disputes among the Latter-day Saints.<sup>158</sup> These meetings also provided

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151. 3 *Smoot Hearings*, *supra* note 87, at 20 (testimony of James E. Talmage).

152. *Execution of the Laws in Utah [To accompany bill H.R.No. 1089.]*, H.R. REP. NO. 21, at 1 (1870) (testimony of Franklin Head, Feb. 28, 1870).

153. In some cases, Mormon tribunals applied the biblical rules in unusual circumstances. John Nebeker described one such case decided in 1847 or 1848:

There was one case that created a great deal of fun. A certain man persisted in keeping a dog. Now a dog would eat pretty much of what, under the circumstances, could be eaten by the people and therefore all could not afford to keep dogs. This dog stole some biscuits from a man and the fellow borrowed a shot gun and shot the dog. The case was brought before me for arbitration, and I gave the man who had lost the biscuits the full benefit of the law, namely, allowed him four fold—or 16 biscuits, which kept the fellow a whole week.

John Nebeker, *Early Justice in Utah*, 3 UTAH HIST. Q. 87, 88–89 (1930).

154. FAR WEST RECORD, *supra* note 67, at 204.

155. FIRMAGE & MANGRUM, *supra* note 17, at 339–40.

156. *Id.* at 342–43.

157. *Id.* at 321.

158. See, e.g., AN APOSTLE’S RECORD: THE JOURNALS OF ABRAHAM H. CANNON, *supra* note 92, at 322 (recording sermons given to stake leaders on conduct of church courts by Apostle Francis M. Lyman and President George Q. Cannon).

opportunities to raise questions of substance and procedure with the visiting leaders.<sup>159</sup> Despite these mechanisms, however, the Mormons never came close to promulgating anything like a religious law code governing disputes in their courts.

This Mormon ambivalence toward substantive legislation was linked to Mormon theology. On this point, Mormonism can be usefully compared with Islam.<sup>160</sup> Both religions claim to be completions of the monotheistic tradition, and both were founded by prophets who offered the world new sacred texts. Islam, however, developed an elaborate jurisprudential theory, the *usul al-fiqh*, which sought to derive a comprehensive legal code from the Qur'an and the example (*sunna*) of the prophet Mohammed.<sup>161</sup> There was no comparable effort in Mormonism to derive detailed substantive rules from Mormon scripture or its founding prophet. Of course, it took Islam several centuries to develop a fully elaborated jurisprudence.<sup>162</sup> Hence, one might argue that Mormonism is still too young to invite useful jurisprudential comparison to Islam.

There are deeper differences at work, however, than simply age. Islam never developed a corporate identity similar to the Christian idea of a church. Rather, as one scholar has written, "every person, as such, with no exceptions, was summoned in his own person to obey the commands of God: there could be no intermediary, no group responsibility, no evasion of any sort from direct confrontation with the divine will."<sup>163</sup> Despite this radically individualistic view of human relation to the divine, however, the notion of a unified

159. See, e.g., sources discussed *supra* note 90.

160. The comparison was ubiquitous, if universally pejorative, in the nineteenth century. See generally Arnold H. Green, *Mormonism and Islam: From Polemics to Mutual Respect and Cooperation*, BYU STUD., Winter 2001, at 199, 200–09 (discussing the ways in which Mormonism and Islam were related to one another during the nineteenth and early twentieth centuries).

161. See generally NOEL J. COULSON, *A HISTORY OF ISLAMIC LAW* (1964). For a detailed account of Islamic legal reasoning, see WAEL B. HALLAQ, *A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNI USUL AL-FIQH* (1997).

162. The prophet Mohammed died in 632 A.D. See COULSON, *supra* note 161, at 22–23. The *usul al-fiqh*, however, is dated to a much later period. For example, Ahmad ibn Hanbal, the founder of the last of the great schools of classical Islamic jurisprudence died in 855 A.D. *Id.* at 71. See also MARSHALL G.S. HODGSON, *THE VENTURE OF ISLAM: CONSCIENCE AND HISTORY IN A WORLD CIVILIZATION, THE CLASSICAL AGE OF ISLAM 319* (1974) (providing a brief chronology of the development of the four schools of classical Islamic jurisprudence—Maliki, Hanifi, Shafi, and Hanbali—between 700 and 855 A.D.).

163. HODGSON, *supra* note 162, at 318.

community of the believers (*ummah*) remained a vital part of Islam. These seemingly incommensurable aspirations were mediated in part through the *usul al-fiqh*, which allowed a professional class of jurists to impose sufficient consistency to keep Islam's theological individualism from undermining the communal cohesion of the believers.<sup>164</sup>

Mormonism faced many of these same tensions. Like Islam it contains a radically individualistic conception of the human relationship to the divine, albeit on a very different metaphysical basis. Mormon scripture teaches that the human spirit is uncreated and co-eternal with God,<sup>165</sup> and that every individual is entitled to direct, personal revelation from God.<sup>166</sup> The potentially fragmenting consequences of such ideas emerged early in Mormon history. In response to one associate who had begun receiving revelations directed at the new church, Joseph Smith published a counter-revelation stating "no one shall be appointed to receive commandments and revelations in this church excepting my servant Joseph Smith, Jun., for he receiveth them even as Moses."<sup>167</sup> Over time, Smith created an ever more elaborate ecclesiastical structure—of which the church courts were a key part—and endowed it with enormous theological significance, ultimately identifying the church

164. To put the point in Weberian terms, the *usul al-fiqh* served to control and limit the charisma of members of the Islamic *ummah*. See generally HALLAQ, *supra* note 161, at 21–35 (introducing the *usul al-fiqh* as it relates to the different communities of Islam).

165. See DOCTRINE & COVENANTS § 93:29 ("Man was also in the beginning with God. Intelligence, or the light of truth, was not created or made, neither indeed can be."); see also TEACHINGS OF THE PROPHET JOSEPH SMITH, *supra* note 127, at 352 ("We say that God himself is a self-existent being. . . . Man does exist upon the same principles.").

166. In the Bible, the prophet Joel says:

And it shall come to pass afterward, that I will pour out my spirit on all flesh; your sons and your daughters shall prophesy, your old men shall dream dreams, and your young men shall see visions. Even upon the menservants and maidservants in those days, I will pour out my spirit.

*Joel* 2:28–29 (RSV). Joseph Smith insisted that the Mormon restoration was to be a fulfillment of this prophecy. See *Joseph Smith—History* 1:41, in *THE PEARL OF GREAT PRICE* (Church of Jesus Christ of Latter-day Saints, 1981 ed.) (1851). The *Pearl of Great Price* has been formally canonized by the Mormon Church, along with the *Bible*, the *Book of Mormon*, and the Doctrine and Covenants. See also DOCTRINE & COVENANTS § 1:19–20 ("The weak things of the world shall come forth and break down the mighty and strong ones . . . that every man might speak in the name of God the Lord, even the Savior of the world.").

167. DOCTRINE & COVENANTS § 28:2; see also BUSHMAN, *supra* note 60, at 120–22 (discussing the confrontation between Joseph Smith and Hiram Page giving rise to this revelation).

as a corporate body with the kingdom of God in “the dispensation of the fullness of times.”<sup>168</sup> Thus, in Mormonism the living prophet and the institutional church performed the function that the *usul al-fiqh* performed in Islam, protecting the religious community from the anarchic forces of its own individualistic theology. As Remi Brague has put it:

In Islam . . . the development of a more and more precise *sharia* that demanded more and more clearly a direct connection to the origins and become more and more incarnate in a class of jurists ended up rendering superfluous a caliph who claimed to unite in his person the political authority of the head of state and the religious authority of the successor to the Prophet.<sup>169</sup>

In contrast, Mormons felt no religious need to elaborate a clear body of substantive law. Indeed, to the extent that such a body of law would have placed the exegesis of sacred texts in competition with living prophets, or the church as an institution, it was anathema to Mormon theology. In contrast, the largely ad hoc approach that Mormon courts adopted—“a sort of wild equity”<sup>170</sup>—was both sufficient to the dispute resolution needs of frontier society and consonant with their own religious beliefs.

The Mormons struggled to create effective enforcement mechanisms for their church courts. Previous writers have tended to assume that, with the exception of the 1846–1850 interlude, the threat of excommunication was the only method by which the decisions of church courts could be enforced.<sup>171</sup> To be sure, in the context of closely knit Mormon communities excommunication carried a heavy cost, including social ostracism and even commercial

168. DOCTRINE & COVENANTS § 128:20–21. For an excellent discussion of the tension within Mormon culture between individualistic and corporate or authoritarian elements of Mormon theology, see TERRY L. GIVENS, *PEOPLE OF PARADOX: A HISTORY OF MORMON CULTURE* 3–19 (2007).

169. REMI BRAGUE, *THE LAW OF GOD: THE PHILOSOPHICAL HISTORY OF AN IDEA* 258 (Lydia G. Cochrane trans., 2006).

170. *Execution of the Laws in Utah [To accompany bill H.R.No. 1089.]*, H.R. REP. NO. 215, at 1 (1870) (testimony of Franklin Head, Feb. 28, 1870).

171. See, e.g., FIRMAGE & MANGRUM, *supra* note 17, at 287 (“The church court system relied on the voluntary submission of church members to its decision. While the state courts enforced decisions with fines, imprisonment, and even death, church courts could only disfellowship or excommunicate recalcitrant church members.”).



boycott.<sup>172</sup> This, however, is not the whole story. Prior to 1874, the church courts were only one part of a web of Mormon legal institutions and practices. Mormons dominated the Territorial Legislature, and they used their power to limit the authority of lawyers and the common law they represented. First, the Legislature very pointedly refused to pass a reception statute making the common law binding in the territory, instead commanding that “no laws nor parts of laws shall be read, argued, cited, or adopted in any court . . . except those enacted by the Governor and Legislative Assembly.”<sup>173</sup> They also abolished technical common-law pleadings.<sup>174</sup> Next, they struck at lawyers by stating that no person employing an attorney “shall be compelled by any process of law to pay the counsel so employed.”<sup>175</sup> The same law rejected the adversary system by requiring lawyers to “present all the facts in the case, whether they are calculated to make against his client or not.”<sup>176</sup>

In addition, the legislature created Mormon-dominated courts as an alternative to the Gentile-dominated Territorial Supreme Court and district courts. They did this in two ways. First, the congressional act creating Utah Territory gave to the legislature the power to create probate courts. Building on a practice common in

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172. See, e.g., Richard S. Van Wagoner & Mary C. Van Wagoner, *Orson Pratt, Jr.: Gifted Son of an Apostle and an Apostate*, DIALOGUE: J. MORMON THOUGHT, Spring 1988, at 84, 91 (mentioning the boycott of the business of an apostate Mormon in a remote southern Utah settlement); Ronald G. Watt, *Sailing “The Old Ship Zion”: The Life of George D. Watt*, BYU STUD., Fall 1977, at 48 (“In 1874, however, Watt lost his membership in the Church . . . . After his excommunication, old friends ignored him and his obscurity began.”).

173. Michael W. Homer, *The Judiciary and the Common Law in Utah Territory, 1850–61*, DIALOGUE: J. MORMON THOUGHT, Spring 1988, at 97, 102 (internal quotations omitted).

174. An Act Concerning the Judiciary, and for Judicial Purposes § 10, in ACTS, RESOLUTIONS, AND MEMORIALS PASSED BY THE FIRST ANNUAL AND SPECIAL SESSIONS OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF UTAH (1852) [hereinafter 1852 ACTS] (“Immaterial variances [sic], errors, or defects, may be disregarded . . .”). See generally Homer, *supra* note 173, at 97 (discussing the history of the common law in nineteenth-century Utah).

175. An Act for the Regulation of Attorneys § 2, in 1852 ACTS, *supra* note 174. In addition, the Territories homestead exemption preserved “the proper tools, instruments, or books of any farmer, mechanic, surveyor, physician, teacher, or professor.” An Act Concerning the Judiciary, and for Judicial Purposes § 22, in 1852 ACTS, *supra* note 174. The books of lawyers and attorneys may have been pointedly omitted.

176. An Act for the Regulation of Attorneys § 5, in 1852 ACTS, *supra* note 174. A lawyer failing to comply with this provision was to “be liable to all the penalty hereinbefore provided for, and the further penalty of not less than one dollar at the discretion of the court.” *Id.*

many western territories dissatisfied with carpet-bagging judges, the legislature gave these probate courts “power to exercise original jurisdiction both civil and criminal.”<sup>177</sup> The probate judges, in turn, were chosen by the legislature, and almost without exception they were Mormons.<sup>178</sup>

Second, the legislature adopted a series of laws apparently designed to make the decisions of church courts legally binding. They did this by taking an extremely liberal attitude toward arbitration. “By the consent of the Court and the parties, any person may be selected to act as Judge for the trial of any particular cause or question,” stated the territory’s first judiciary act.<sup>179</sup> Elsewhere, the law declared that “[a]ny matter involving litigation may be referred to arbitrators” chosen by either the parties or the court.<sup>180</sup> These arbitrators had extensive powers. A judge chosen by the parties, said the law, “shall possess all the powers of the District Judge in the case.”<sup>181</sup> Likewise, arbitrators had the “authority to subpoena witnesses, administer oaths, or affirmations, and issue process as the Court.”<sup>182</sup> Decisions of arbitrators were to be treated by clerks and marshals “in the same manner, as if the case had been prosecuted and decided in the usual manner.”<sup>183</sup> Most intriguingly, a special law

177. An Act in Relation to the Judiciary § 30, in 1852 ACTS, *supra* note 174; see EARL S. POMEROY, *THE TERRITORIES OF THE UNITED STATES, 1861–1890*, at 59–60 (1947). See also Jeffery Ogden Johnson, *Was Being a Probate Judge in Pioneer Utah a Church Calling?* 1 (May 2006) (unpublished paper presented at the 2006 Meeting of the Mormon History Association in Casper, Wyoming) (on file with author) (noting that other territories created locally staffed courts as a way of undermining the control of federally appointed judges).

178. See generally James B. Allen, *The Unusual Jurisdiction of County Probate Courts in the Territory of Utah*, 36 UTAH HIST. Q. 132 (1968) (exploring the Mormon church’s influence on civil affairs as a result of probate judges being elected by the legislature); Elizabeth D. Gee, *Justice for All or for the “Elect”? The Utah County Probate Court, 1855–72*, 48 UTAH HIST. Q. 129, 136 (1980) (noting that most of the judges presiding over the probate court also held high church offices); Johnson, *supra* note 177; Jay E. Powell, *Fairness in the Salt Lake County Probate Courts*, 38 UTAH HIST. Q. 256 (1970) (examining the impartiality of probate court in Salt Lake during its early years of operation); Jay Emerson Powell, *An Analysis of the Nature of the Salt Lake County Probate Court’s Role in Aggravating Anti-Mormon Sentiment, 1852–1855* (June 1968) (Honors Thesis, Department of History, University of Utah) (on file with Howard W. Hunter Law Library, Brigham Young University) [hereinafter Powell, *Anti-Mormon Sentiment*] (analyzing the operation of the Salt Lake County Probate court during those years).

179. An Act in Relation to the Judiciary § 11, in 1852 ACTS, *supra* note 174.

180. *Id.* § 45.

181. *Id.* § 11.

182. *Id.* § 45.

183. *Id.*

called for each county to “elect a council of twelve select men as referees, whose duty it shall be to decide all cases in litigation which may come before them by the mutual consent of the parties.”<sup>184</sup> This body of men sounds tantalizingly like a local High Council, which also consisted of twelve men.<sup>185</sup> In addition to the number chosen, the territorial act borrows language from one of Joseph Smith’s revelations on church courts, declaring that once the Referees make a decision it “shall be the end of all controversy in the matter.”<sup>186</sup> In a sermon denouncing litigation, Brigham Young explicitly associated the church courts with this territorial legal structure:

There is not a righteous person, in this community, who will have difficulties that cannot be settled by arbitrators, the Bishop’s Court, the High Council, or by the 12 Referees (as provided in Resolution No. 4, page 390 of Utah Laws), far better and more satisfactory than to contend with each other in law courts . . . .<sup>187</sup>

Under territorial law, however, the jurisdiction of such arbitrators was neither wholly voluntary nor were their decisions wholly hortatory. Rather, parties could be required by a court to submit to arbitration,<sup>188</sup> arbitrators exercised the procedural powers of secular judges,<sup>189</sup> and their decisions were legally binding.<sup>190</sup> Hence, to the extent that church courts acted as the arbitrators

184. Resolution in Relation to Election of Twelve Select Men, or Referees, *in* 1852 ACTS, *supra* note 174.

185. See Powell, Anti-Mormon Sentiment, *supra* note 178, at 28–29 (“There has been some speculation that the effect of this resolution may have been to give legal status to the decisions of local high councils, but there is not enough evidence concerning the selection or actions of these men to permit drawing any conclusions.”).

186. Resolution in Relation to Election of Twelve Select Men, or Referees, *in* 1852 ACTS, *supra* note 174. Cf. DOCTRINE & COVENANTS § 107:83 (“And their decision upon his head shall be an end of controversy concerning him.”).

187. Brigham Young, *Lawyers, and Those Who Practice Attending Law Courts, Rebuked—A Curse Pronounced upon All Who Love Litigation and Do Not Repent*, *in* 3 JOURNAL OF DISCOURSES 238 (George D. Watts et al. eds., 1856).

188. An Act Concerning the Judiciary, and for Judicial Purposes § 11, *in* 1852 ACTS, *supra* note 174.

189. See *id.* § 11 (a person chosen to decide a case “shall possess all the powers of the District Judge in the case”); *id.* § 45 (“[A]rbitrators have authority to subpoena witnesses, administer oaths, or affirmations, and issue process as the Court.”).

190. See *id.* § 45 (“And when they shall have made their decision, shall report the case . . . to the Clerk of the County in which the case has arisen . . . and it shall be the duty of the Clerk . . . [to] proceed in the same manner, as if the case had been prosecuted and decided in the usual manner.”); Resolution in Relation to Election of Twelve Select Men, or Referees, *in* 1852 ACTS, *supra* note 174.

under any of these laws, they exercised in theory a power substantially identical to that held by secular trial judges.

It is not at all clear, however, that this legal machinery ever functioned as intended. There are no reported cases invoking the provisions governing arbitration. Furthermore, ultimate control of the territorial judiciary lay in the hands of Gentile appointees who were often actively hostile to the Territorial Legislature. One of the earliest of these judges declared "that the Utah laws are founded in ignorance" and could thus be ignored,<sup>191</sup> insisting in one case that "[t]he law must be construed by men learned in the Law, and not by virtue of any Priesthood."<sup>192</sup> A later court declared that the Mormons had "tacitly agreed upon maxims and principles of the Common Law suited to their conditions," despite the explicit earlier territorial legislation to the contrary, which the court ignored.<sup>193</sup> Finally, in 1874, Congress passed an act abolishing the extensive jurisdiction of the probate courts as part of an effort to facilitate polygamy prosecutions by increasing Gentile control of the territorial judiciary.<sup>194</sup> In short, the courts disregarded the statutes passed by the Territorial Legislature, which were also met with congressional hostility.

It is difficult to gauge how successful the Mormons ultimately were at suppressing intra-Mormon litigation. In his annual message to the Legislature in 1850, then-Governor Young reported proudly that not a single lawsuit had been heard before the district courts of the territory.<sup>195</sup> The diary of Hosea Stout, a Mormon attorney active

191. Letter from Samuel W. Richards, member of the Utah Legislature, to his brother (Dec. 7, 1855), in EDWARD W. TULLIDGE, *HISTORY OF SALT LAKE CITY* 145 (1886).

192. *People v. Green*, 1 Utah 11, 15 (1876).

193. *First Nat'l Bank v. Kinner*, 1 Utah 100, 107 (1873) (holding that the Statute of Frauds had been tacitly accepted in Utah). Ironically, while the Territorial Supreme Court essentially ignored early territorial enactments attempting to exclude the common law, those territorial statutes have been invoked more recently by the Utah Supreme Court as aids in interpreting the Utah State Constitution. See *Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 1999 UT 18, ¶¶ 131–32, 974 P.2d 1194 (citing territorial statutes).

194. See *Poland Act*, Act of June 23, 1874, ch. 469, 18 Stat. 253 (1874). At about the same time, a case reached the Utah Territorial Supreme Court on the jurisdiction of the Utah probate courts. The justices ruled that the Territorial Legislature had exceeded its power under Utah's Organic Act by endowing the probate courts with unlimited subject-matter jurisdiction. See *Cast v. Cast*, 1 Utah 112, 119–20 (1873).

195. Homer, *supra* note 173, at 98.

in this period, however, records numerous lawsuits.<sup>196</sup> Unfortunately, virtually all of the records of civil cases by the Utah Territorial Courts were either lost or destroyed. Hence it is difficult to compile an accurate picture of civil litigation in Mormon country during the nineteenth century. Records of the Mormon-dominated probate courts do exist, and detailed studies of two of the most important of these courts reveal an ambiguous picture.<sup>197</sup> Analysis of the Utah County Probate Court shows that Gentiles were much more likely to institute civil litigation than were Mormons. Seventy-three percent of the plaintiffs were Gentiles, who never constituted more than seventeen percent of the population prior to 1874 when the jurisdiction of the probate courts was sharply limited.<sup>198</sup> On the other hand, of civil cases litigated to judgment, more than half involved Mormons suing other Mormons.<sup>199</sup> A study of the Salt Lake County Probate Court between 1852 and 1855 revealed that intra-Mormon litigation constituted thirty percent of all litigation involving Mormons.<sup>200</sup> It is possible, of course, that this intra-Mormon litigation only occurred after trying to unsuccessfully resolve the case in a church court, which would be in line with ecclesiastical procedure.<sup>201</sup> A more likely interpretation, however, is

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196. See 2 ON THE MORMON FRONTIER, *supra* note 144, at 363 (entry for Mar. 5, 1850: "Instituted a suit against Robt Porter & Peter Lish for trespassing [sic] on the property of Lewis Vasques"); *id.* at 364 (entry for Mar. 9, 1850: "... I also prosecuted another Suit H. S. Eldrege V.S Mr Long for killing an ox which did not belong to him"); *Id.* at 367 (entry for Apr. 22, 1850: "Attended a trial Dan Jones Vs E. Williams in matter of debt as council for Jones"); *Id.* at 370 (entry for May 30, 1850: "Attending to Legal business Sally Murdoc V.S. S. O Holmes in matter of debt"); *id.* at 378 (entry for Aug. 21, 1850: "Still engaged in Legal business Bullar vs Tolton in debt on part of Tolton").

197. See generally Gee, *supra* note 178 (examining the records of the Utah County Probate Court); Powell, Anti-Mormon Sentiment, *supra* note 178 (examining the records of the Salt Lake County Probate Court).

198. Gee, *supra* note 178, at 139.

199. See *id.* at 144 (showing that for the period studied, twenty-one cases involving Mormon plaintiffs and Mormon defendants were litigated to judgment, while only nineteen other civil cases received a final judgment on the merits).

200. See Powell, Anti-Mormon Sentiment, *supra* note 178, at 74 (showing twenty-five resident vs. resident cases out of a total of eighty-three cases involving residents); *id.* at 48 ("While residency and membership in the Mormon Church can be generally equated during this period, there were undoubtedly a few non-member residents. What the Utah emigration list yields is specifically Mormon emigration; so technically what we have is a Mormon/non-Mormon split.").

201. FIRMAGE & MANGRUM, *supra* note 17, at 267-71 (discussing procedures that allowed intra-Mormon litigation).

that while the church judiciary limited litigation among Latter-day Saints, it never came close to eliminating it.

In part, the Mormon attempt to opt out of civil litigation reflected dissatisfaction with the expense and contentiousness of common-law adjudication. For example, church president Wilford Woodruff wrote to one stake president in 1896 that “[h]eartburnings, bitterness, and ill-feeling invariably attend lawsuits, whichever way they terminate, and we are desirous to stop litigation among the members of the church.”<sup>202</sup> Likewise, one prolific critic of Brigham Young and Mormonism nevertheless insisted that “[t]he judicial department of the priesthood . . . has saved the brethren and sisters all the trouble and expense of lawsuits when differences have arisen among them.”<sup>203</sup> Another key concern was communal unity. The strenuous efforts of nineteenth-century Mormons were directed toward “the building up of Zion,” a vision of the godly society that was to be achieved by the Latter-day Saints in the here and now of Jacksonian Missouri and later the expanses of the Great Basin.<sup>204</sup> Central to the idea of Zion was the need for harmony and unity. “[I]f ye are not one,” God declares in the text of one of Joseph Smith’s revelations, “ye are not mine.”<sup>205</sup> The “heartburnings” of litigation were a threat to this unity, and the expansive jurisdiction of church courts sought—with uneven success to be sure—to maintain the communal harmony central to this vision of Zion. They also served to heighten the divide, so important for nineteenth-century

202. *Smoot Hearings*, *supra* note 87, at 17.

203. STENHOUSE, *supra* note 92, at 564. Likewise, J.H. Beadle, the editor of THE CORRINE REPORTER and an activist in anti-Mormon politics, testified before Congress:

Well, I will do our bishop—we call him “our bishop” in accordance with the universal custom—the credit to say that, where no special interests of his religion are involved, he generally does substantial justice. He knows nothing of law; but in ordinary cases, when not instructed by the “council,” he will use his best judgment, and generally do nearly right.

*Laws in Utah*, Additional Testimony, H.R. 21, at 10–11, Serial Set Vol. No. 1436, Session Vol. No. 1, 41st Cong. (2d Sess. 1870) (testimony of J.H. Beadle, Feb. 11, 1874). Note, from Beadle’s testimony it is difficult to tell if he is referring to the local bishop’s court or the local probate court of which the bishop was a judge.

204. See generally ARRINGTON, GREAT BASIN KINGDOM, *supra* note 84 (discussing the concept of Zion and its relationship to the communitarianism of Mormon economic experiments); see also LEONARD J. ARRINGTON, FERAMORZ Y. FOX & DEAN L. MAY, BUILDING THE CITY OF GOD: COMMUNITY & COOPERATION AMONG THE MORMONS (2d ed. 1992) (same).

205. DOCTRINE & COVENANTS § 38:27.

Mormons, between the Saints and “the World.” The secular courts represented the Babylon out of which the Latter-day Saints had been gathered, while the church courts were identified with the Zion to which they had fled.

The Mormon objection to “suing before the ungodly,” however, was also tied up with the spectacle of litigation. “Court day” was an important civic ritual in nineteenth-century America. Few towns had permanent magistrates above the level of justices of the peace, and more complicated cases were handled by circuit courts that met—usually twice a year—at county seats. These gatherings were major social, economic, and political events. During the colonial period, they served to enact social hierarchies, with genteel magistrates decked out in the regalia of royal authority.<sup>206</sup> In Massachusetts, for example, traveling justices were met at the county line by the sheriff, who would accompany them to the court house, where “[t]rumpets and drums or firearm volleys announced the justices’ arrival in town.”<sup>207</sup> After independence, court day continued to enact social hierarchies,<sup>208</sup> but it also developed into a rollicking democratic carnival.<sup>209</sup> Court sessions were accompanied by peddlers on the courthouse square hawking their wares, which generally included a generous amount of alcohol. Drunken fights were common. Indeed,

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206. See, e.g., RHYS ISAAC, *THE TRANSFORMATION OF VIRGINIA: 1740–1790*, at 88–94 (1982) (discussing court day in colonial Virginia); A.G. Roeber, *Authority, Law, and Custom: The Rituals of Court Day in Tidewater, Virginia, 1720 to 1750*, 37 WM. & MARY Q. 29 (1980) (same).

207. MARTHA J. McNAMARA, *FROM TAVERN TO COURTHOUSE: ARCHITECTURE & RITUAL IN AMERICAN LAW, 1658–1860*, at 12 (2004).

208. See, e.g., Ariela Julie Gross, *Pandora’s Box: Slavery, Character, and Southern Culture in the Courtroom, 1800–1860*, at 205–17 (1996) (unpublished Ph.D. dissertation, Stanford University) (on file with author) (discussing the role of the planter elite in court-day rituals in Natchez, Mississippi during the 1830s).

209. See, e.g., *Life in the Backwoods: Scraps from the Note-Book of a Missouri Lawyer*, SPIRIT OF THE TIMES: A CHRONICLE OF THE TURF, AGRICULTURE, FIELD SPORTS, LITERATURE AND THE STAGE, Sept. 19, 1846, at 355, 356 (“A session of the Circuit Court not only draws together the parties litigant, their witnesses and friends, but a host of others, who attend out of curiosity, or for a frolic, or to trade horses, or to make up a scrub race, or to make a promised settlement; for ‘Court week’ is the time generally designated for a settlement of accounts.”); *Sketches of Life in Missouri*, SPIRIT OF THE TIMES: A CHRONICLE OF THE TURF, AGRICULTURE, FIELD SPORTS, LITERATURE AND THE STAGE, Feb. 29, 1840, at 614 (“The Circuit Court for the district had that day commenced its sittings, and the town, a neat little germ of a hamlet, was thronged with suitors, witnesses, lawyers, and the farmers from the surrounding country . . . [T]he busy ‘hum of preparation’ could be heard in every quarter of the town.”).

they were part of the appeal of court day, as one diarist complained in 1807 “a very Poor Court, no fighting or Gouging, very few Drunken people.”<sup>210</sup> One veteran lawyer described Illinois court days in the 1840s and 1850s, noting that “the local belles came in to see and be seen” and the work continued in the court house “from ‘early morn till dewy eve’” while ribaldry in the tavern continued “from dewy eve to early morn.”<sup>211</sup> George C. Cooke’s 1834 painting *Patrick Henry Arguing the Parson’s Case in the Hanover County Courthouse* anachronistically provides an image of the kind of communal drama associated with a nineteenth-century court day.<sup>212</sup> The lawyer stands in a small but packed courtroom. The spectators, who are intently focused on his oratory, crowd around a rough-hued bench where the lawyers sit. They spill out the open door into the square beyond. In the foreground a pair of children play in the courtroom with a hoop and stick, while in the background we see the sign for a tavern that waits to refresh the crowd of thirsty spectators. Indeed, there was a symbiotic relationship between courthouses and taverns. Many frontier courts sat in the public rooms of taverns in the absence of courthouses.<sup>213</sup> Likewise, in some cases taverns were purposefully established close to courthouses to service the people who gathered to watch the judges and lawyers.<sup>214</sup> In short,

[c]ourtroom trials . . . provided prime entertainment for the community. [C]ourtrooms were always crowded because the drama, tragedy, and comedy of real life occurred there. With judges and lawyers as the star actors, the courtroom substituted for theater, concert halls, and the opera. Spectators in the courtroom

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210. LOUNSBURY, *supra* note 1, at 8. See also DAVID HERBERT DONALD, LINCOLN 105–06 (1995) (discussing court day in antebellum Illinois and noting the abundance of whiskey, gambling, and fighting).

211. HENRY C. WHITNEY, LIFE ON THE CIRCUIT WITH LINCOLN 42 (Lawbook Exchange, Ltd. 2000) (1892).

212. The original is housed in the Virginia Historical Society. Most of the detail in the painting is anachronistic and “more in keeping with early nineteenth-century designs on the frontier.” LOUNSBURY, *supra* note 1, at 152.

213. See MCNAMARA, *supra* note 207, at 12.

214. See LOUNSBURY, *supra* note 1, at 9 (discussing courthouses “and important private buildings, especially the taverns, that grew up around them”).



expected a good show from the lawyers, the judges, the witnesses and the other participants.<sup>215</sup>

It was precisely this theatrical aspect of litigation, however, that concerned the Mormons.

On February 24, 1856, Brigham Young delivered a blistering sermon against lawyers and law courts.<sup>216</sup> He began his denunciation by describing the performance of a lawyer that he had observed the day before. “[H]e was so serious, so religious, so pious, and so honest, that he appealed to high heaven to witness his honesty before the jury,” said Young, but “[w]hen he had induced the jury to believe that he was honest, he stood there and misrepresented the merits of the case, for half an hour at a stretch, in regular lawyer style.”<sup>217</sup> Such conduct, he insisted, was particularly objectionable when done by Mormon lawyers at the instigation of Mormon clients. “Does the Lord love your conduct when you drag each other before the ungodly? . . . Do you think He has fellowship with your conduct in such things? No, you do not.”<sup>218</sup> However, while Young’s remarks were “severe upon the lawyers”<sup>219</sup> (and their clients), he spent the bulk of the sermon castigating the spectators at the trial.

It is a shame for men to be found loafing about in such places, where there is contention, and quarrelling, and every stratagem that can be used to deceive juries and witnesses, and lying before them with all the grace and sanctity of a Saint, pretending to be

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215. John A. Lupton, *A. Lincoln, Esquire: The Evolution of a Lawyer*, in A. LINCOLN, ESQUIRE: A SHREWD, SOPHISTICATED LAWYER IN HIS TIME 18, 18–19 (Allen D. Spiegel ed., 2002).

216. Young’s remarks came as the confrontation between local Mormons and Gentile federal appointees over control of the Territorial government heated up prior to President Buchanan’s decision to launch the so-called “Utah War.” See Dale D. Goble, *Theocracy vs. Diversity: Local vs. National in Territorial Utah*, in LAW IN THE WESTERN UNITED STATES 293, 296 (Gordon Morris Bakken ed., 2000) (noting that in the wake of Young’s remarks “[m]obs sacked the offices of non-Mormon lawyers; federally appointed judges were threatened”). While Goble is correct to locate Young’s remarks in the context of pre-Utah War tensions, the mob attack he refers to actually took place some ten months later in December 1856, after Justice George P. Stiles, an apostate Mormon appointed to the Territorial bench, sought to displace the Mormon Territorial Marshall with the non-Mormon U.S. Marshall, thus eroding Mormon influence on the judiciary. See NORMAN F. FURNESS, THE MORMON CONFLICT, 1850–1859 at 57–58 (1960) (discussing the confrontation between the Mormons and Justice Stiles).

217. Young, *supra* note 187, at 237.

218. *Id.* at 238–39.

219. *Id.*

one. Such a place is darker to me than midnight darkness.<sup>220</sup>

In part, he was appalled at the idleness of the spectators. Such men, he said, ought to be “raising grain, potatoes, and other articles of food, instead of following after courts and the nonsense, wickedness, and lying associated with them.”<sup>221</sup> It was not simply the waste of time, however, that attracted Young’s wrath. Rather, he thought that the spectacle itself was degrading. “Elders of Israel . . . throng to such a place, and that too when no spirit reigns there but the devil’s spirit . . . [Y]ou can get nothing from that den but the principles of hell.”<sup>222</sup> Even more colorfully, he called the show of litigation “[t]he fog, the froth, and spawn of hell, and they [that is, the spectators] feast upon it.”<sup>223</sup>

Young’s attack on litigation is reminiscent of puritanical sermons against the theater over the centuries.<sup>224</sup> While Young himself was not opposed to drama,<sup>225</sup> his attack on litigation shares with the religious denunciation of theaters a basic concern for the moral consequences of watching sin and wickedness as entertainment. In Young’s view, litigation was a battle of wits between amoral lawyers, an exciting spectacle but ultimately a degrading one. It was not simply the contentiousness of litigation or the dishonesty of the lawyers themselves that was objectionable. It was the moral impact on the community of placing such a spectacle at the center of civic life. Seen in these terms, the move to bring litigation within the church was a move to transform the public meaning of dispute resolution.

To be sure, prior to the arrival of the first Gentile appointees to the Utah Territorial bench, the Mormons had their own muted version of court day. In 1852, shortly after the Territory of Utah was organized, Zerubbabel Snow, a Mormon attorney who had been

220. *Id.* at 238.

221. *Id.* at 239.

222. *Id.* at 238.

223. *Id.* at 239.

224. See GIVENS, *supra* note 168, at 143–45 (discussing religious denunciations of the theater).

225. See *id.* at 145–49 (discussing Young’s support for the theater in pioneer Utah); Richard Cracroft, “Cows to Milk Instead of Novels to Read”: *Brigham Young, Novel Reading, and Kingdom Building*, *BYU STUD.*, Summer 2001, at 102, 112–13 (“It is pleasing and instructing to see certain characters personified upon the boards of a theatre . . . [that] is managed upon righteous principles.” (quoting Brigham Young)).

appointed Chief Justice of the new Territorial Supreme Court, rode circuit through the far-flung settlements inaugurating the first district courts. However, he did not enter town as the head of a judicial entourage with lawyers in tow. Rather, he came as a small part of a much larger party led by Brigham Young, who spoke to the citizens as Territorial Governor and—far more importantly from their point of view—preached to them as living prophet and leader of their church.<sup>226</sup> In this theo-political pageant Justice Snow was a decidedly small player.<sup>227</sup>

In place of the secular ritual of court day, the church courts offered their own set of public symbols. In at least some cases, adjudication was open to the public, and local newspapers sometimes even announced church trials in advance.<sup>228</sup> For example, during the 1850s, the Salt Lake High Council heard cases each Saturday in the Salt Lake Social Hall before large groups of spectators who were occasionally called upon to participate in the proceedings. Men in the audience might be asked to replace a high councilor who was absent or who recused himself from a particular case.<sup>229</sup> Likewise, in one 1859 case the minutes record, “The Persons present in the room were called upon and also unanimously sustained the decision about fifty persons present besides the authorities and council.”<sup>230</sup> While parties occasionally retained attorneys to represent them before a high council—particularly when resort to the church court was one move in protracted litigation spanning both secular and ecclesiastical tribunals—generally speaking lawyers were excluded from the

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226. See Journal of William Clayton (May 12, 1852), in *AN INTIMATE CHRONICLE: THE JOURNALS OF WILLIAM CLAYTON* 411–12 (George D. Smith ed., 1995) (recounting Justice Snow’s inaugurating circuit court sittings while touring the territory with Brigham Young); see also LEONARD J. ARRINGTON, *BRIGHAM YOUNG: AMERICAN MOSES* 306–10 (2d ed. 1991) (discussing Brigham Young’s tours through Utah Territory as Governor).

227. See DONALD, *supra* note 210, at 104–05 (describing a caravan of circuit-riding lawyers with the judge at their head).

228. Salt Lake High Council minutes report that in early cases when members were absent, “[t]he vacancies were filled from bystanders.” See, e.g., *THE OLD FORT*, *supra* note 143, at 76, 79; *Bountiful Briefs*, *DAVIS COUNTY CLIPPER*, Jan. 27, 1899, at 1 (“The Bishop’s court is trying the Smedley-Goodfellow case this week.”).

229. See *THE OLD FORT*, *supra* note 143, at 76, 79.

230. Ecclesiastical Court Cases Collection, Disfellowshipment Records, 1839–1965, CR 355, 2, 1858, n.2, Church Archives, The Family and Church History Department, The Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah (transcript in author’s possession).

proceedings.<sup>231</sup> In accordance with rules laid down by Joseph Smith, however, an equal number of high councilors were assigned to speak on either side of a case when the council deliberated.<sup>232</sup> The rule was less of a surrogate for representation than a device to ensure the appearance (and hopefully the reality) of even-handed deliberation. Likewise, the absence of technical rules of evidence was supposed to ensure that church courts could reach the truth of the matter.<sup>233</sup> In contrast, said Young, "juries are liable to be deceived."<sup>234</sup> Perhaps most dramatically, decisions by church courts frequently required erring parties to publicly confess their sins before their congregations and quarrelling members were often required to engage in acts of public reconciliation.<sup>235</sup> In short, ecclesiastical courts transformed adjudication from a spectacle of amoral attorneys engaged in a battle of wits into an essentially Christian drama of sin, confession, reconciliation, and public redemption, a fact not lost on contemporary observers. For example, one diarist recorded the deliberations in an 1843 case using the language of Christian atonement, noting "Hyrum plead for mercy, Joseph for Justice, [and] the Twelve decided according to testimony . . . ."<sup>236</sup> The goal,

231. 2 ON THE MORMON FRONTIER, *supra* note 144, at 366 (noting that Hosea Stout, an early Utah attorney, served as counsel to a victorious party in a suit before a bishop's court).

232. See Kirtland High Council Minutes, *supra* note 99; see also DOCTRINE & COVENANTS § 102:1-3, 5-6, 8-16, 22-30.

233. See FIRMAGE & MANGRUM, *supra* note 17, at 283 (discussing the treatment of evidence in Mormon courts).

234. Young, *supra* note 187, at 239.

235. See, e.g., FAR WEST RECORD, *supra* note 67, at 9 ("Confession of br. Ziba Peterson of his transgression which was satisfactory to the Church as approved by unanimous vote.").

236. Diary of Wilford Woodruff (May 27, 1843), in WAITING FOR WORLD'S END: THE DIARIES OF WILFORD WOODRUFF 58-59 (Susan Staker ed., 1993). Woodruff's language here tracks Mormon scripture's understanding of Jesus Christ's death as a reconciliation of both divine justice of sin and divine mercy toward the sinner:

[T]hat great and last sacrifice will be the Son of God, yea, infinite and eternal. And thus he shall bring salvation to all those who shall believe on his name; this being the intent of this last sacrifice, to bring about the bowels of mercy, which overpowereth justice, and bringeth about means unto men that they may have faith unto repentance. And thus mercy can satisfy the demands of justice, and encircles them in the arms of safety, while he that exercises no faith unto repentance is exposed to the whole law of the demands of justice . . . .

Alma 34:14-16 in THE BOOK OF MORMON (The Church of Jesus Christ of Latter-day Saints, 1981) (1830).

as the minutes of one early meeting put it, was for “[a]ll differences [to be] settled [and] hearts of all [to be] run together in love.”<sup>237</sup>

In nineteenth-century Mormon culture, the displacing of the civic spectacle of litigation with religious spectacle shows up in other ways. In many county seats in nineteenth-century America, the central public building around which the community was physically organized was the court house.<sup>238</sup> The physical location of the building reinforced the ritual primacy of adjudication of civic life. Indeed, in some towns the courthouse was the only public building, and religious services were held there.<sup>239</sup> In contrast, when the Mormons laid out their settlements in the Great Basin, they sought to impose a very different symbolic order on their civic landscape.<sup>240</sup> The central public building was not the courthouse, but rather the stake “tabernacle.” All roads in a town, for example, were numbered in relation to this religious building, which served as both meeting hall and administrative headquarters for the stake presidency and High Council.<sup>241</sup> The link to religious adjudication was not left implicit. For example, when the Tabernacle in Salt Lake City, in many ways the symbolic template for literally hundreds of Mormon villages, was dedicated in 1875, the prayer pled:

Bless the High Council of this and other stakes of Zion, may they be full of the spirit of wisdom, justice and judgment, and, under the inspiration of the Most High, be quick to discern the right,

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237. FAR WEST RECORD, *supra* note 67, at 45.

238. For example, one author described the villages of ante-bellum Illinois from which the Mormons emigrated in 1846: “The settlement almost invariably clustered around a public square of generous dimensions, in the center of which stood the court-house, a substantial building of brick or stone.” FREDERICK TREVOR HILL, *LINCOLN THE LAWYER* 171 (1906).

239. See LOUNSBURY, *supra* note 1, at 317 (“Because many of these rural communities were devoid of a public place of worship, citizens gathered in the courthouse for divine services.”) John Phillip Reid, *The Layers of Western Legal History*, in *LAW IN THE WESTERN UNITED STATES* 7 (Gordon Morris Bakken ed., 2000) (“As Americans moved westward down the Ohio and Tennessee Rivers, and from the Georgia backcountry across the Mississippi, many of their important centers for commercial, social, and economic life grew up around courthouses. The courthouse square was often the center of town or county, stores and trade shops located about it, and often the better residences were in the vicinity.”).

240. See generally C. MARK HAMILTON, *NINETEENTH-CENTURY MORMON ARCHITECTURE AND CITY PLANNING* (1995) (discussing Mormon town planning and architecture in the nineteenth century); Martha Sonntag Bradley, *Creating the Sacred Space of Zion*, *J. MORMON HIST.*, 1 (Summer 2005) (same); Richard H. Jackson, *Sacred Space and City Planning: The Mormon Example*, 9 *ARCHITECTURE & BEHAV.* 251 (1993) (same).

241. See HAMILTON, *supra* note 240, at 53–75 (discussing the role of tabernacles in Mormon towns in the nineteenth century).

wise to admonish the wrong doer, free from all bias; and with integrity, truth, lowliness, patience, and fidelity, administer impartial justice to all.<sup>242</sup>

Moreover, while some attacked the actual outcomes in church court cases,<sup>243</sup> criticism of the system tended to emphasize the symbolic affront of displacing the secular law rather than the actual workings of the Mormon judiciary. For example, in April, 1838, Seymour Brunson filed a complaint against Oliver Cowdery, one of Joseph Smith's closest early associates and a leading elder of the Church, charging him with a long list of spiritual and civil lapses, including "dishonestly [r]etaining notes after they had been paid."<sup>244</sup> Cowdery responded with a lengthy letter to the High Council in which he denied their jurisdiction, invoking secular myths of noble Anglo-Saxon legality and the symbolic power of the Constitution. "My venerable ancestor was among that little band, who landed on the rocks of Plymouth in 1620," he wrote.<sup>245</sup> "[W]ith him he brought those maxims, and a body of those laws which were the result and experience of many centuries, on the basis of which now stands our great and happy Government."<sup>246</sup> He went on, "This attempt to control me in my temporal interests, I conceive to be a disposition to take from me a portion of my Constitutional privileges and inherent rights."<sup>247</sup> A short time later Lyman Johnson, another high-ranking elder, refused to submit to the jurisdiction of the High Council in a case involving a civil lawsuit, responding with similar imagery. "I should not condescend," he wrote, "to put my constitutional rights at issue upon so disrespectful a point."<sup>248</sup> The rhetoric testifies to the way that the Mormon courts displaced the

242. John Taylor, Dedicatory Prayer for the Salt Lake Tabernacle (October 9, 1875), in JOURNAL HISTORY OF THE CHURCH, Church Archives, The Family and Church History Department of the Church of Jesus Christ of Latter-day Saints, Salt Lake City Utah.

243. For example, the *Salt Lake Tribune* claimed that church courts were a means by which a church member could "use his power in the church to oppress and rob a brother member." *Church Robbery*, SALT LAKE TRIB., Jan. 1, 1891, at 4. More sinisterly, it insisted that even when the church excommunicated a member for serious misconduct (in this case incest) "the secret priestly court, as they always do, kept the crime a secret." *A Sorry Defense*, SALT LAKE TRIB., Oct. 1890, at 4.

244. FAR WEST RECORD, *supra* note 67, at 163.

245. *Id.* at 165.

246. *Id.*

247. *Id.*

248. *Id.* at 173.

secular symbols and rituals of litigation with a distinctively religious set of symbols and rituals.

### III. "LAWYERS OF THEIR OWN" AND THE DECLINE OF THE MORMON COURTS

After seventy years or more of practice, the Mormons ultimately abandoned the resolution of civil disputes in ecclesiastical courts, reserving church tribunals for more traditional questions of church discipline. The end of the expansive jurisdiction of the church courts was a ragged affair that involved both an official retreat from certain classes of disputes by church leaders and a gradual abandonment of the church courts by rank-and-file members. Ultimately, a variety of causes account for the shift. First, Mormon attitudes toward lawyers and litigation changed as a result of both attempts by Mormon lawyers to craft legitimating religious narratives for their work and dramatic changes in the nature of the legal profession itself. Second, as Mormon country integrated into the national economy in the late nineteenth century, ecclesiastical courts increasingly faced disputes that they had neither the technical expertise nor the remedial machinery to handle effectively. Both of these causes, in turn, were part of the accommodation of Mormonism to American culture at the end of the nineteenth century. This process involved the abandonment of distinctive Mormon practices—most notably polygamy—and an implicit agreement that Mormonism would henceforth conduct itself more in the manner of a Protestant sect rather than a theocratic kingdom.<sup>249</sup> Previous historians have noted that Mormonism was forced to accommodate itself to a Protestant view of the Constitution.<sup>250</sup> The end of the civil jurisdiction of church courts marked a similar accommodation to a late nineteenth century Protestantism that insisted on the separation of the private law from religious and (non-Anglo-Saxon) ethnic allegiances. In short, part of becoming fully American meant fully embracing the secular common law.

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249. See generally THOMAS ALEXANDER, *MORMONISM IN TRANSITION: A HISTORY OF THE LATTER-DAY SAINTS, 1890–1930* (1996) (discussing the accommodation of Mormonism to norms of Protestant American society at the turn of the twentieth century).

250. See, e.g., GORDON, *supra* note 22, at 82 (“Reformers [hostile to Mormon polygamy] were committed to the release of fetters of human progress, to the onward march of civilization through the purification of marriage to protect and promote freedom, democracy, and equality—all in a constitutional system that integrated Christianity and political liberty.”).

From the beginning, Mormon attorneys sought to create an ecclesiastical identity for themselves other than that of lying tricksters bent on stirring up litigation. For example, in 1850 one Mormon lawyer noted in his diary that his client's case was resolved by an "Elders meeting," a method that he praised for "sav[ing] the time, expense & hard feelings of a long and tedious lawsuit" and which he commended to the assembled people.<sup>251</sup> Brigham Young eventually came to adopt this self-conception of Mormon attorneys as working in the spirit of the church courts. Despite his hell-fire and damnation sermons against lawyers in the 1850s, his opposition to attorneys was never absolute. As early as 1852, for example, he said, after acknowledging the law as an educational pursuit, "[w]e want every branch of science taught in this place that is taught in the world."<sup>252</sup> An 1872 sermon shows a further softening. While insisting that he did not "want any lawyers in our society," he went on to say:

There are many lawyers who are very excellent men. What is the advice of an honorable gentleman in the profession of the law? "Do not go to law with your neighbor. . . ." Why not . . . say we will arbitrate this case, and we will have no lawsuit, and no difficulty with our neighbor, to alienate our feelings one with another? This is the way we should do as a community.<sup>253</sup>

From the amoral tricksters of his earlier sermons, Young's thinking developed to a point in which he envisioned wise and learned men who acted in the spirit of church-based reconciliation rather than court-based litigation.

Young's rapprochement with the legal profession went beyond mere rhetoric. In 1868, Young spoke with Franklin S. Richards, the son of a close associate, about Richards' future plans. Richards replied that he was studying medicine. Young insisted that it would

251. 2 ON THE MORMON FRONTIER, *supra* note 144, at 370. The diary records: "President Young recommended this method & for brethren to try their difficulties first in the church and not go to law untill [sic] a man will not abide the decisions of the church tribunals. I also made a short address recommending the same measures." *Id.*

252. Brigham Young, The Lord at the Head of His Kingdom—Self-Discipline—Necessity of Cultivating a Knowledge of Science, and Particularly of Theology, Etc. (sermon delivered April 7, 1852), in 6 JOURNAL OF DISCOURSES 314, 317 (George D. Watts et al. eds., 1856). It is possible that he was referring to a "Law School" established five months earlier by Mormon attorneys in Salt Lake City. See text accompanying *infra* notes 271–272.

253. Brigham Young, Discourse by President Brigham Young, Delivered at the 42nd Semi-Annual Conference, Salt Lake City (October 9, 1872), in 15 JOURNAL OF DISCOURSES 220, 224–25 (George D. Watts et al. eds., 1856).



be better if Richards were to take up the study of law, "because the time will come when the Latter-day Saints will need lawyers of their own to defend them in the Courts and strive with fearless inspiration to maintain their constitutional rights."<sup>254</sup> Richards went on to become an attorney, eventually serving as general counsel to the church. An 1883 sketch of Richards presented him as the incarnation of Young's later vision of learned lawyers embedded within the context of church courts. "As a churchman and High Councilor [Richards'] advice has uniformly been to litigants to settle their difficulties themselves or by arbitration, in the modes prescribed by Church discipline; that only such cases should go to the courts as could not be adjusted by these methods."<sup>255</sup>

As the nineteenth century progressed, Mormons continued to treat the legal profession with suspicion, but they simultaneously sought to sanctify it by embedding Mormon lawyers in the narratives of priesthood authority and revelation that stood at the core of the church judiciary. Hence, one Latter-day Saint attorney recorded that in the early 1880s he and his law partner were rebuked from the pulpit by their local bishop for having "blossomed out as full-fledged lawyers."<sup>256</sup> At about the same time, the stake president of another young man who was considering law school told him, "You will go to Hell!" and urged him to consult with Brigham Young's successor as president of the church, John Taylor.<sup>257</sup> The young man met with Taylor, who attempted to dissuade him. When he was unconvinced, Taylor laid hands on his head and gave him a blessing that cautiously sanctified his legal education. "Brother Moyle, in the name of the Lord Jesus Christ, and by the virtue of the Holy Priesthood, we lay our hands upon thy head to seal upon thee a blessing," Taylor began.<sup>258</sup> He continued, "we say unto thee that [law] is a dangerous profession, one that leads many people down to destruction."<sup>259</sup> The

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254. Ken Driggs, "Lawyers of Their Own to Defend Them": *The Legal Career of Franklin Snyder Richards*, J. MORMON HIST. 84, 88 (Fall 1995).

255. Edward W. Tullidge, *Franklin S. Richards*, 2 TULLIDGE'S Q. MAG. 456, 466 (1883).

256. John R. Alley, Jr., *Utah State Supreme Court Justice Samuel R. Thurman*, 61 UTAH H. Q. 233, 237 (1993).

257. MORMON DEMOCRAT: THE RELIGIOUS AND POLITICAL MEMOIRS OF JAMES HENRY MOYLE 108-09 (Gene A. Sessions ed., 1998) [hereinafter MORMON DEMOCRAT].

258. *Id.* at 109-10.

259. *Id.* at 110.

blessing, however, went on to affirm the young man's choice. "[I]f thou wilt abstain from arguing falsely and on false principles maintaining only the things that can be honorably sustained by honorable men . . . the Lord God will bless thee in this calling . . . with wisdom and intelligence, and with the light of revelation."<sup>260</sup> Using language normally reserved for men chosen as missionaries or for other church positions, the blessing concluded, "We set thee apart . . . to go forth as thou hast desired to study and become acquainted with all the principles of law and equity."<sup>261</sup> The trend continued when a decade later, Taylor's successor, Wilford Woodruff, issued a "call" to one young school teacher to travel east to Cornell to study law.<sup>262</sup> In doing so, he fused the study of law with the mechanism—a call from the prophet—through which earlier generations of Mormons had been sent forth to proclaim Joseph Smith's message of restoration or to found distant settlements as part of establishing Zion in the Great Basin.

Changing Mormon attitudes toward lawyers, not surprisingly, mirrored changes within the legal profession itself. Developments that occurred early in the metropolitan centers of the East often happened much later on the frontier inhabited by the Latter-day Saints. In the 1750s, incensed at "Pettyfoggers," John Adams recommended that Suffolk County create a bar association.<sup>263</sup> His complaints with what he regarded as the dishonest antics of lawyers bent on deceiving juries and taking advantage of clients might have been penned by Brigham Young a century later. Adams and his associates, however, responded to the failings that they perceived in the legal profession very differently. Their solution was to exclude irregular practitioners from the courts and increase the level of training required to become a licensed attorney,<sup>264</sup> a process of

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260. *Id.*

261. *Id.* at 110–11.

262. Justin David Call: Biographical Notes (unpublished manuscript in the author's possession) ("Father was called to be a missionary to New York and to study law at Cornell University. The call received was from the First Presidency of the L.D.S. Church and signed by President Wilford Woodruff, George Q. Cannon and Joseph F. Smith—Sept. 16, 1895.")

263. See GERARD W. GAWALT, *THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS 1760–1840*, at 13 (1979).

264. *Id.* at 131.

professionalization largely complete in Massachusetts by the third or fourth decade of the nineteenth century.<sup>265</sup>

On the frontier, however, the professional standards were much laxer. In contrast to the increasingly well-educated professionals in the East, “[w]estern lawyers, as a rule, were the sons of poor or middle-class people and seldom had a college education.”<sup>266</sup> Indeed, there was even a process of formal de-professionalization on the frontier. Prior to 1830, most state and territorial statutes required an apprenticeship of two to three years before a man could be admitted to the bar. A widespread movement abolished such requirements during the Jacksonian period, however, and the tendency on the frontier was “to allow a young man to practice law as soon as he could convince any judge that he knew ‘some law.’”<sup>267</sup>

Initially, Utah Territory adopted this relaxed attitude toward the profession. An 1852 “Act for the Regulation of Attorneys” stated that “it shall be the duty of all Judges of courts in this Territory, to grant a hearing as counsel to any person of good moral character, chosen by any person or persons to prosecute or defend a case.”<sup>268</sup> Many otherwise untrained advocates took advantage of this law, relying on their rhetorical powers to sway the jury rather than any specialized legal knowledge. For example, one newly minted attorney defending a man who killed his wife’s lover, argued brazenly for jury nullification, insisting that the man’s actions were justified by the “mountain common law.”<sup>269</sup> Indeed, even Brigham Young appeared as counsel in another 1851 case.<sup>270</sup> Early Utah lawyers did attempt to raise the standards among members of the bar by founding a short-lived “law school” taught by the territory’s first chief justice “who tender[ed] his sirvis [sic] as a teacher gratis for the

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265. *Id.* at 168 (“By 1840 the profession’s real power had reached a level that was almost immune to front attacks.”).

266. 2 ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 106 (1965).

267. *Id.*

268. An Act for the Regulation of Attorneys § 1 in 1852 ACTS, *supra* note 174.

269. See Kenneth L. Cannon II, “*Mountain Common Law*”: *The Extralegal Punishment of Seducers in Early Utah*, 51 UTAH HIST. Q. 309, 310–14 (1983).

270. *Id.* at 310. In this case, Young also represented a man accused of killing the seducer of his wife. The case was tried before the Territorial Supreme Court and Young’s opponent was the Mormon attorney Hosca Stout. The man was acquitted.

benefit of all those who wish to inter [sic] into the Study of Law.”<sup>271</sup> The “Law School,” however, does not seem to have survived beyond the winter of 1851–1852.<sup>272</sup>

As conditions on the Mormon frontier became more settled, the leaders of the bar sought to recreate the closed and learned profession they imagined in the East by imposing additional requirements on the practice of law. By 1876, the Supreme Court of the Territory required “the favorable report of an examining Committee appointed for that purpose” before admitting a person to practice in “this Court . . . [and] in all Courts in this Territory.”<sup>273</sup> Perhaps most importantly, in 1869, the Union Pacific and Central Pacific Railroads met at Promontory Point, Utah. Retracing the steps of their parents in reverse, young men from Mormon country began riding the trains east to study in the law schools that, following the example of Langdell’s Harvard, were emerging as the gatekeepers of the legal profession.<sup>274</sup> Those who returned west after studying at Michigan and other eastern schools felt that they had been socialized into an entirely different legal profession than the half-educated courtroom brawlers Young had denounced in the 1850s. “[O]ur people generally,” wrote one such Mormon lawyer, “were not familiar with the ethics and high ideals that college law students have instilled in them by their teachers and the leaders of the legal profession.”<sup>275</sup>

The railroad also set in motion economic changes that would transform the nature of litigation. Brigham Young enthusiastically supported the coming of the railroad, which he saw as a means of hastening Latter-day Saint immigrants from overseas to the Mormon

271. 2 ON THE MORMON FRONTIER, *supra* note 144, at 410. Stout reports the content of instruction thus: “the Judge [Zararubbel Snow] gave us a short lecture on the nature and origin of government & law, after which it was agreed to establish the school.” *Id.*

272. *Id.* at 411–12 (recording meetings of the “Law School” during the winter of 1851–52).

273. Rules of the Supreme Court of the Territory of Utah, Rule 21, 1 Utah 1, 7 (1876).

274. See, e.g., JOEL FRANCIS PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE 15–21 (1951) (discussing George Sutherland’s move from Provo, Utah to Ann Arbor, Michigan to study law and his return to Utah to practice); MORMON DEMOCRAT, *supra* note 257, at 107–08 (discussing Utahns who traveled east to study law prior to 1882); see also JONATHAN LURIE, LAW AND THE NATION: 1865–1912, at 43–54 (1983) (discussing Langdell and the rise of American law schools).

275. MORMON DEMOCRAT, *supra* note 257, at 109.

Zion in the Great Basin.<sup>276</sup> However, it also marked the beginning of the integration of Mormon country into the national economy, a trend that the Mormons initially fought with a renewed emphasis on home manufactures, cooperative economic endeavors, and a boycott of Gentile merchants.<sup>277</sup> In the end, however, these efforts could not succeed against the massive forces of economic integration in the wake of the Civil War.

Not surprisingly, these forces changed the nature of litigation among Latter-day Saints, presenting problems that the church courts were ultimately ill equipped to handle. The economic depression that swept the nation in 1893 provides an illustration. Beginning with panics in the distant financial centers of London and New York, the depression spread rapidly through the nation's increasingly integrated economy, throwing thousands out of work and drying up credit for troubled enterprises.<sup>278</sup> Mormon businessmen in Utah found themselves scrambling to secure payment of debts in a falling market that was pushing many into bankruptcy. The natural move in such a situation would be for the creditor to obtain a lien on a debtor's property as rapidly as possible so as to secure repayment regardless of how the debtor's assets were distributed. The church courts, however, could only apply personal pressure to litigants before them. They lacked the ability to provide the kind of *in rem* remedies needed in the context of a race for the courthouse. The result was a Hobson's choice for many Mormon businessmen, who found themselves at a ruinous disadvantage vis-à-vis Gentiles who could pursue actions without impediment in the civil courts.<sup>279</sup> These forces ultimately pushed Mormons to abandon the church courts. One Mormon lawyer later explained:

For a good illustration, my bishop, an exceptionally splendid man, was in the mercantile business in Salt Lake City. All ward bishops presided over a bishop's court. But he came to me and said, "I have never sued a brother. And it greatly disturbs me to do so, but I

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276. See ARRINGTON, GREAT BASIN KINGDOM, *supra* note 84, at 236.

277. *Id.* at 240.

278. See generally CHARLES HOFFMAN, THE DEPRESSION OF THE NINETIES: AN ECONOMIC HISTORY (1970) (discussing the panic of 1893 and the resulting global economic depression). For a discussion of the effect of the Panic on business in Mormon country and the state of church finances, see RONALD W. WALKER, QUALITIES THAT COUNT: HEBER J. GRANT AS BUSINESSMAN, MISSIONARY, AND APOSTLE 115-42 (2004).

279. MORMON DEMOCRAT, *supra* note 257, at 10-11.

must or go into bankruptcy and let the property of my debtors be taken by strangers who have recently come among us." The conclusion was inevitable, and suits at law rapidly became common.<sup>280</sup>

Other forces were at work as well. After the Civil War, the first truly national capital markets emerged, and with them the corporation became the dominant form of business organization. In 1870, the territorial legislature adopted a general incorporation statute that allowed any group of people who were "desirous of associating themselves together for establishing and conducting any mining, manufacturing, commercial or other industrial pursuit in this Territory" to create a corporation.<sup>281</sup> While church courts initially did not hesitate to take jurisdiction over disputes involving Mormon-dominated corporations (particularly corporations that were part of communal Mormon economic efforts), church leaders eventually decided to disclaim jurisdiction over corporations.<sup>282</sup> The separation of ownership and control inherent in the corporate form necessarily created legal duties on the part of directors and officers. Did a Mormon corporate officer with a fiduciary duty to bring suit on behalf of a corporation violate his religious duties if the corporation sued another Mormon?<sup>283</sup>

Ironically, the First Presidency found itself in the position of seeking legal advice from its general counsel on the fiduciary duties of members in order to resolve cases appealed to it, injecting lawyers into the very apex of a system designed to exclude them from

280. *Id.* at 11.

281. An Act Providing for Incorporating Associations, for Mining, Manufacturing, Commercial and Other Industrial Pursuits § 1, *in* ACTS, RESOLUTIONS AND MEMORIALS, PASSED AND ADOPTED DURING THE NINETEENTH ANNUAL SESSION OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF UTAH (1870).

282. MORMON DEMOCRAT, *supra* note 257, at 110.

283. James Henry Moyle, a Mormon attorney active in Utah from the 1880s on, records one such case:

It was in the early 1890s that I was put on trial in the Twelfth Ward before the bishop with all of the leading officers of a corporation for suing a brother in court. It was my only offense in a Church court but in this case I was only the attorney. The case was promptly dismissed when the corporate offense of the defendants became apparent, which it very soon did.

MORMON DEMOCRAT, *supra* note 257, at 137.

adjudication.<sup>284</sup> Church leaders ultimately decided that rather than wading into these difficulties, church courts should simply avoid resolving such disputes. "In applying [the rule that Mormons should resolve their disputes in church courts]," wrote *The Deseret Evening News*, "corporations whose stock holders may be Church members are not included, and have no standing in Church courts, which are for the benefit and discipline of members individually."<sup>285</sup>

Another force at work was the growth of the legal profession. In the late nineteenth century, the number of lawyers in America skyrocketed. For example, in 1880 there were roughly 64,000 lawyers in the country, but thirty years later the number had nearly doubled to 122,000.<sup>286</sup> The expansion of the legal profession in the West, however, was even more rapid. Nationally, there was roughly one lawyer per thousand in 1850. By 1890 that number had risen to nearly 1.5 lawyers per thousand.<sup>287</sup> In the West, however, there were less than 0.5 lawyers per thousand in 1850, while by 1890 the region was well ahead of the national average with over 2.5 lawyers per thousand.<sup>288</sup> The explosion of the profession in the West was largely the result of legal uncertainty created by Congress. In the years after the Civil War, Congress passed a series of laws designed to encourage farming, ranching, mining, and railroading in the Far

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284. For example, in an 1896 case, the First Presidency was faced with a church suit against a woman who had sued another Mormon on behalf of an estate for which she was the administratrix. The secretary to the First Presidency wrote to the stake president in the case:

Brother Richards [Franklin S. Richards, general counsel to the church] is of the opinion that the court will not permit her to waive any of her legal rights in this matter, and that she should be free to wind up the estate as the law directs. The first presidency see this matter in the light in which Brother Richards presents it, and they request that you write the parties (Sister Bouton and the Brothers Harris) to this effect, which will leave Sister Bouton free to act in this matter as she may be legally advised; and this will leave her in the position as though no arbitration proceedings had been taken.

*Smoot Hearings*, *supra* note 87, at 3:16 (reproducing a letter from George F. Gibbs to President E.D. Wooley).

285. *Lawsuits Between Church Members*, DESERT EVENING NEWS, Feb. 1, 1896, at 1.

286. LURIE, *supra* note 274, at 43.

287. See Kelly Paulson, *Lawyers and the American West: An Empirical Investigation into the Components of Demand for Legal Services from 1850 to 1930*, at 8 graph 1 (2005) (unpublished Master's Thesis, Stanford University), available at [http://www-econ.stanford.edu/academics/Honors\\_Theses/Theses\\_2005/Paulson.pdf](http://www-econ.stanford.edu/academics/Honors_Theses/Theses_2005/Paulson.pdf). The regional definitions are those used by the Census Bureau. *Id.* at 9 ("The Western region mirrors the Census classification.").

288. *Id.* at 9 graph 2.

West. They did this by granting huge amounts of federally owned land to those willing to develop it. The result was a legal bonanza, as those involved in the land grabs litigated over title to property and the meaning of complex and newly minted federal statutes.<sup>289</sup> These economic forces, however, changed the nature of civil litigation. No longer was it a generally accessible ritual in which lawyers tried to sway juries with their rhetorical skills, while the local crowd looked on. Rather, litigation in the 1870s, 1880s, and 1890s became a specialized affair involving increasingly well-trained attorneys arguing over the implications of arcane federal statutes. The public spectacle of litigation that had so concerned Brigham Young in the 1850s and 1860s was largely dead a generation later.

Litigation over the ownership of land illustrates the complexity of the legal environment as the nineteenth century progressed. When the Mormons arrived in the Great Basin in the summer of 1847, the region was still nominally Mexican territory, part of the province of Upper California. Under the Treaty of Guadalupe Hidalgo, the entire region transferred to the United States.<sup>290</sup> Neither Mexican nor American authorities, however, granted formal title to the Mormons, who were, legally speaking, squatters. Rather, the church allocated land first on a communal basis and then to individual settlers.<sup>291</sup> The uncertain legal status of these ecclesiastical land grants led to contradictory Mormon attitudes toward federal land law. On one hand, they repeatedly petitioned Congress for a territorial land office to regularize title to their land. At the same time, they feared

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289. See generally William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976) (arguing that litigation and the demand for lawyers is driven by legal uncertainty). Kelly Paulson provides empirical support for this conclusion by running regression analysis of the number of lawyers against indicia of railroad and mining activity. He concludes, "given the lingering significance of the Western dummy in 1860, 1870, 1890, and 1900, it seems that the railroad and mining variables, while explaining most of the Western effect, do not account for all of it." Paulson, *supra* note 287, at 25. Paulson's conclusion is also supported by a qualitative analysis of the (very limited) surviving Utah Territorial Court records for civil cases, the vast bulk of which are from after the Civil War and involve litigation over property rights conferred under federal statutes.

290. See Treaty of Peace, Friendship, Limits, and Settlement, U.S.-Mexico, art. V, Feb. 2, 1848, 9 Stat. 922 (setting forth the new border between the United States and Mexico, ceding all of the Great Basin to the United States).

291. See Lawrence L. Linford, *Establishing and Maintaining Land Ownership in Utah Prior to 1869*, 42 UTAH HIST. Q. 126, 127-28 (1974) (tracing the history of land ownership in early Utah); see also Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1342-44 (1993) (providing an economic theory of why Mormons shifted from communal to private ownership of land in early Utah).



that new settlers would take advantage of federal legislation to appropriate communally or privately held Mormon lands. Nor were their fears entirely unfounded, as federal officials regarded land policy as a tool for diluting Mormon power in Utah Territory. "There can be no doubt," wrote the federal Surveyor General of Colorado and Utah in 1864, "that the true policy of the government in regard to Utah is to encourage the emigration to that Territory of a population less hostile to the United States than the present."<sup>292</sup> He went on to write, "[t]o do this, Gentile emigration must have the chance of acquiring title to the land, and must be protected in that title."<sup>293</sup>

The result in Utah was sporadic hostility toward federal surveyors in the 1850s, violence toward Gentile claim jumpers in the 1860s, and gradual regularization of title to land beginning in 1870.<sup>294</sup> Throughout Mormon country, however, the title of Mormon settlers to land remained uncertain. Virtually all of the settlements began as church-sponsored "missions" directed by the Mormon hierarchy in Salt Lake City, and most Mormon settlers acquired land initially via an ecclesiastical grant. The situation was further complicated in the decades after the Civil War as Congress passed a slew of statutes multiplying the methods by which ownership of public land could be moved into private hands.

The case of *Birdsall v. Leavitt* illustrates these problems.<sup>295</sup> The Birdsall family moved from Nebraska to Utah in 1881, eventually settling in Sevier County, located in the central part of the Territory.<sup>296</sup> Three years later, the family converted to Mormonism. Members of the Birdsall family began trying to acquire land under various federal statutes. They purchased land from the Rio Grande railroad, which had been given huge tracts by Congress as a subsidy.<sup>297</sup> They also claimed land under the Timber Culture Act, which granted "ten acres of timber on any quarter section" of public

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292. Linford, *supra* note 291, at 137.

293. *Id.*

294. *Id.* at 134–43.

295. See generally Ardis E. Parshall, "Church Hounds Woman to Madness": The Trials of Cora Birdsall, unpublished paper presented at the August, 2002, Sunstone Symposium, Salt Lake City, Utah.

296. See *Smoot Hearings*, *supra* note 87, at 2:321 (testimony of Isaac Birdsall).

297. See Deed, Sevier County, Utah, Book 28 Entry 5289 (11 June 1904) (Birdsall deed to the disputed land).

land to any person “who shall plant, protect, and keep in a healthy, growing condition for eight years.”<sup>298</sup> The land the Birdsalls claimed, however, had long before been claimed by an earlier settler, who had sold the property to a James Leavitt in 1883.<sup>299</sup> Leavitt, who had “owned” the land for a decade in 1893 when the Birdsalls first claimed it, insisted later that they agreed to sell to him the portion he occupied, thus quieting title.<sup>300</sup> The Panic of 1893, however, kept Leavitt from obtaining financing, although he apparently gave the Birdsalls some cows in partial payment.<sup>301</sup> In doing so, Leavitt seems to have been trying to follow the established Mormon policy for dealing with title conflicts between older settlers and claims based on federal statutes. As the First Presidency explained in a 1903 letter to one bishop:

With President Young we hold that when any person secures title from the Government to land, part of which has been occupied and cultivated by others, he or she should respect the rights of such persons by being willing to deed to them the land they have improved, provided that they pay their share of the expenses incurred in securing the Government title, and also a fair remuneration to the pre-emptor or homesteader for the loss of his or her preemption or homestead right in proportion to the amount of land to which they are benefited.<sup>302</sup>

Without successfully finalizing his claim to the land, Isaac Birdsall conveyed it to his daughter Cora, who eventually gained title under the Timber Culture Act.<sup>303</sup> Leavitt continued to press his

298. An Act to Amend an Act Entitled “An Act to Encourage the Growth of Timber on the Western Prairies” § 1, 20 Stat. 113 (1878). *See also* Minutes of a Special Session of the High Council of Sevier Stake of Zion Held at the Tabernacle, Richfield, Utah, Tabernacle (Oct. 21, 1902), reprinted in *Smoot Hearings*, *supra* note 87, at 2:331 (“Isaac Birdsall first took the land under the timbericulture act.”).

299. *See Smoot Hearings*, *supra* note 87, at 2:326 (reproducing a statement by William A. Warnock). Sevier County was not settled by Mormons formally called to pioneer in the area. Rather, as the Mormon population filled up more hospitable valleys to the east, Mormons moved into the area on their own. Their efforts, however, ultimately received substantial encouragement and economic support from the church. *See generally* Leonard J. Arrington, *Taming the Turbulent Sevier: A Story of Mormon Desert Conquest*, 5 W. HUMAN. REV. 393 (1951) (discussing the settlement of Sevier County).

300. *See 2 Smoot Hearings*, *supra* note 87, at 331–32.

301. *Id.*

302. 3 *Smoot Hearings*, *supra* note 87, at 18 (reproducing a letter from the First Presidency to Bishop O.B. Andersen).

303. 2 *Smoot Hearings*, *supra* note 87, at 333.

claims based on the rights of the earlier settler as well as the 1893 agreement with Birdsall. In 1901, he “prefer[red] a charge of unchristianlike conduct against Isaac Birdsall and Sister Cora Birdsall” before their bishop.<sup>304</sup> All parties appeared and presented evidence. The bishop issued a decision “[t]hat Cora Birdsall shall deed unto James E. Leavitt [the disputed land].”<sup>305</sup> Cora wrote the First Presidency asking for permission to proceed at law, and received a letter instructing her to appeal to the Sevier Stake High Council if she was dissatisfied with the bishop’s decision.<sup>306</sup> She did so, the case was retried, and the High Council affirmed the decision of the bishop’s court.<sup>307</sup> The High Council seemed to regard the Birdsalls’ actions as an underhanded attempt to use the federal statutes to rob Leavitt of his property. “If you were placed in Leavitt’s place and paid for the land and possessed it,” one of the High Councilors asked Cora during the trial, “would you feel right if you were treated as he is?”<sup>308</sup> Cora appealed to the First Presidency, and in 1903 received a letter affirming the High Council’s decision.<sup>309</sup> She refused to deed the land to Leavitt and was subsequently excommunicated.<sup>310</sup>

At this point, the litigation took an unexpected turn. After her excommunication, Cora began acting increasingly distraught and erratic. In February, 1904 a doctor from the state mental hospital adjudged her insane, insisting that she suffered from hereditary madness. In June, 1904, Cora was visited by local priesthood leaders who gave her a blessing and insisted that she could be rebaptized if she would comply with the decision of the church courts and deed the disputed land to Leavitt. She did so and was rebaptized, but her mental condition continued to deteriorate.<sup>311</sup> By this time, Utah had chosen Mormon apostle Reed Smoot to become its new U.S. Senator, sparking a national drive to unseat him, a movement Cora’s

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304. *Id.* at 326 (reproducing a letter from James E. Leavitt to Cora Birdsall).

305. *Id.* at 327 (reproducing a letter from Bishop Samuel W. Goold and his counselors to Cora Birdsall).

306. *Id.* at 328 (reproducing a letter from the First Presidency to Cora Birdsall).

307. 2 *Smoot Hearings*, *supra* note 87, at 336 (reproducing a letter from the Sevier Stake Presidency to Cora Birdsall).

308. *Id.* at 335.

309. *Id.* at 337 (reproducing a letter from the First Presidency to Cora Birdsall).

310. *Id.* at 339 (reproducing a letter from J. M. Lauritzen to Cora Birdsall).

311. *Id.* at 339–41.

father was willing to support. The Senate Committee on Privileges and Elections launched a massive investigation of the economic, legal, and political affairs of the Mormon church,<sup>312</sup> and in December, 1904, Isaac Birdsall traveled east to testify before the Senators. For a brief moment, the case became national news, providing evidence of Mormon dominance in Utah.<sup>313</sup>

The case did not stop with the newspapers. Upon his return to Utah, Isaac Birdsall, acting as guardian for his daughter, sued Leavitt for the disputed land, arguing that the deed Cora had executed was invalid. The district court rejected his claim that she was mentally incompetent and that the elders who “labored” with her to comply with the church court’s decision exercised undue influence, writing:

All churches . . . have a right to discipline their members and . . . they have a right to handle such person so far as their fellowship in such . . . church is concerned. The members, however, are under no legal obligations to obey such regulation or decision of their . . . church . . . .<sup>314</sup>

On appeal to the Utah Supreme Court, however, Birdsall prevailed.<sup>315</sup> The Court held that “[Cora], at the time she executed the deed, was mentally incapacitated and therefore incompetent to

312. See generally KATHLEEN FLAKE, *THE POLITICS OF AMERICAN RELIGIOUS IDENTITY: THE SEATING OF SENATOR REED SMOOT, MORMON APOSTLE* (2004) (recounting Smoot’s election and the congressional investigation that it precipitated).

313. See generally *Apostle Again Takes the Stand: Story of a Bishop’s Court: How One Case Was Decided in Utah*, SALT LAKE HERALD, Dec. 20, 1904, at 1; *Apostle J.H. Smith Again on Stand*, DESERET EVENING NEWS, Dec. 19, 1904, at 1 (discussing the case); *Apostle Smith on the Stand: Strange Case of Isaac Birdsall, His Daughter, His Land, and Why He Left Church*, SALT LAKE TRIB., Dec. 20, 1904, at 7; *John Henry Smith Denies Idaho Story: Isaac Birdsall Testifies to Alleged Forcing of Property from Members of the Church*, MORNING EXAMINER (Ogden, UT), Dec. 20, 1904, at 1; *Mormonism Taught in School Buildings: Girl Deprived of Property: Excommunicated Until She Gave It to the Church, Her Father Testifies at Smoot Inquiry*, N.Y. TIMES, Dec. 20, 1904, at 6; *Mormons in Schools: Testimony Shows that Religions Classes Exist*, WASH. POST, Dec. 20, 1904, at 4; *Plural Marriages Not Authorized: Apostle John Henry Smith Says He Found No Evidence that Any Had Been Performed in Mexico, as Said*, SALT LAKE TELEGRAM, Dec. 19, 1904, at 2; *Public Against Apostle Smoot: Opposed by Sentiment of Country*, SALT LAKE TRIB., Dec. 25, 1904, at 5; *Smith Concludes His Testimony: Birdsall Land Case*, IDAHO DAILY STATESMAN, Dec. 20, 1904, at 2; *The Birdsall Land Case*, SALT LAKE TRIB., Dec. 22, 1904, at 4; *Woman Banned by the Church: Excommunicated Because She Wouldn’t Obey Mormon Chief: Bishop’s Court Deprived Her of Property to Which She Held Lawful Title, and When She Defied Court She Was Put Under Arrest*, ATLANTA CONST. (Georgia), Dec. 20, 1904, at 3.

314. *Court Findings in Birdsall Case*, DESERET EVENING NEWS, Sept. 30, 1905, at 7.

315. *Birdsall v. Leavitt*, 89 P. 397, 399 (Utah 1907).

make the same.”<sup>316</sup> The justices went on to signal their concerns with the church courts: “While courts do not interfere in disputes between churches and their members in respect to church or spiritual affairs, the property rights of the members will be protected as readily from church interference as from any other.”<sup>317</sup>

The perennially pugnacious *Salt Lake Tribune*, always anxious to attack the Mormon majority, hailed the court’s decision with glee. “The opinion of the Supreme Court,” wrote the paper, “is a stinging castigation of the methods brought to bear by the Mormon elders. It is a ringing denunciation of the methods of the ‘church courts . . . .’”<sup>318</sup> Elsewhere, the *Tribune* insisted that “[t]he decision made by the Supreme Court . . . will excite the admiration and win the support of all mankind.” As for the church courts,

[t]he attention of the civilized world is called anew to the horrors of the hierarchical rule in Utah. . . . [This case] illustrates perfectly the treasonable autocracy with which the hierarchs dominate over the civil government; it demonstrates their intention to maintain themselves as superior to earthly law . . . .<sup>319</sup>

All of these developments took place against a background of decades of legal hostility to Mormon institutions and practices. The most dramatic manifestation of this hostility, of course, was the massive federal legal crusade against polygamy, but the Mormon antipathy toward the common law did not go unnoticed. Rather than seeing Mormon practice as the afterlife of a Protestant tradition of civil dispute resolution in church courts, Mormonism’s mainly Protestant critics in the last half of the nineteenth century saw it as further evidence of Mormonism’s sinister and un-American power in Utah. For example, Robert N. Baskin, the chief legal strategist against the Mormon Church in Utah in the nineteenth century, strikingly begins his memoirs of conflict with the Mormons by noting their hostility to the common law:

All the states except Louisiana, and territories except Utah, had by statute adopted the common law so far as applicable to the new

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316. *Id.* at 397.

317. *Id.* at 399.

318. *Birdsall Triumphs in Supreme Court: Great Outrage Perpetrated by Church Tribunals Thoroughly Put Right*, SALT LAKE TRIB., Mar. 9, 1907, at 3.

319. *The Supreme Court Decides Against the Tyrant*, SALT LAKE TRIB., Mar. 10, 1907, at 6.

conditions. That law was and is indispensably necessary for the proper government of any American community. It was, therefore, the imperative duty of the Utah legislature to adopt it at the first territorial session. Instead of doing so the foregoing absurd section of the judiciary act excluding it was passed.<sup>320</sup>

Note the way in which Baskin identified the common law with the “American community,” marking Mormon antipathy toward that law as evidence of their status as un-American outsiders. As Gentiles penetrated Utah, the church courts became one of the flash points in the increasingly bitter battles between Mormons and non-Mormons for political, economic, and social power in Utah.<sup>321</sup> For example, the first “Gentile” newspaper in Utah—*The Valley Tan*, named for a locally brewed whiskey of the same name—claimed that Brigham Young’s denunciations of lawyers were part of a plot to “throw obloquy upon the character of law courts and drive the people into their ecclesiastical courts, for the adjustment of all grievances.”<sup>322</sup> The ultimate goal was “suppressing the Judiciary, and depriving men of their Constitutional rights of trial, by *due process of law* . . . .”<sup>323</sup> Likewise, in the eyes of the anti-Mormon *Salt Lake Tribune*, Mormons who refused to comply with the edicts of church courts were praised for preserving their “manhood,” while those who accepted ecclesiastical decisions, the *Tribune* insisted, “are not men who are fit to exercise the more sacred rights of American citizenship.”<sup>324</sup>

The rhetoric surrounding the *Birdsall* case powerfully illustrates the way in which allegiance to the secular courts became a condition

320. R.N. BASKIN, REMINISCENCES OF EARLY UTAH 6 (Signature Books 2007) (1914).

321. See generally ROBERT JOSEPH DWYER, THE GENTILE COMES TO UTAH: A STUDY IN RELIGIOUS AND SOCIAL CONFLICT (1862–1890) (1948) (discussing non-Mormon settlement in Utah and the resulting tension between Mormons and “Gentiles”); SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA (2002) (recounting the political and legal confrontation between Mormons and the federal government over polygamy and other Mormon practices).

322. *Kirk Anderson, Esq.*, VALLEY TAN, Dec. 24, 1858, at 3.

323. *Id.*

324. *Church Robbery*, SALT LAKE TRIB., Jan. 1, 1891, at 4. Similarly, when a Mormon witness stated before Congress that “the judiciary are the judges” of whether people are protected in their inherent rights, the *Tribune* insisted that his words had an esoteric and treasonable meaning. “He meant the chiefs of the Church when sitting as a Church court, and nothing else, and he would obey an edict of that court if it was in direct violation of the laws of the land, after being upheld, unanimously, by the court of last resort in this Republic.” *A Little More of Richards*, SALT LAKE TRIB., Mar. 9, 1888, at 2.

for full entry into the American community. The *Washington Post* reported that the bishop's court had deprived Cora of "property to which she held the lawful title,"<sup>325</sup> while the *Washington Times* noted that "[p]robably there is not another organization in the United States with the gall to set itself up as a judicial authority and apply its own code, regardless of statutory law."<sup>326</sup> The *Times* went on to compare the Mormons to the "Chinese highbinders of San Francisco," writing:

[The Chinese] are reckoned to be living in heathen darkness. They scorn utterly the duly constituted courts, even in relation to such serious acts as murder. However, there is not involved in their demeanor any threat to society. They are aliens, in no manner concerned with the affairs of the land. They . . . could no more appreciate what we think is civilization than they could fly. They do not think in terms that can be grasped by any but the Oriental mind.<sup>327</sup>

The racial status of the Mormons, however, made their courts much more threatening. "The Mormon is in our midst . . ." the paper wrote. "His defiance is brazen, deliberate, and the climax of arrogance."<sup>328</sup> The editorial closed darkly, "If any banded bigots can rise superior to the United States, it is interesting to watch them rise, and speculate as to the character of the meat on which they feed."<sup>329</sup> In short, the hostility of Mormons to the common law was evidence that they—like the Chinese—were dangerous outsiders.

In an era when the Mormon Church was aggressively seeking the shelter of respectability after decades of intense hostility, it is not surprising that church leaders had actually been trying to disentangle the church courts from disputes over land for some time by 1900. In 1896, the *Deseret News* published an article instructing that "in cases involving title to lands . . . the Church courts could not consider them if requested to do so, as the Church discipline is such that it will not attempt the adjustment of any controversy where there

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325. *Mormons in Schools: Testimony Shows that Religions Classes Exist*, *supra* note 313, at 4.

326. *Public Against Apostle Smoot: Opposed by Sentiment of Country*, *supra* note 313, at 5 (citing the *Washington Times*).

327. *Id.*

328. *Id.*

329. *Id.*

might be a possibility of conflict with the laws of the land.”<sup>330</sup> Likewise, during the 1890s, the First Presidency sent a number of letters instructing lower church courts not to try cases “when matters relating to the boundary of lands and kindred subjects are in dispute.”<sup>331</sup> The First Presidency’s pronouncements, however, were ambivalent. Another 1896 letter reads:

We can not, as a church, put ourselves in the position of using our church courts to enforce the laws or to set aside the laws or the decisions of the courts. With a little reflection you can readily see that this would be dangerous. But if men who are members of the church act unjustly and trespass upon their neighbor’s rights by the misuse of the law or by taking advantage we can deal with them.<sup>332</sup>

Church leaders wished both to avoid the perception of hostility to the common law, but also desired to discipline members for conduct that, while technically legal, violated religious standards. Elsewhere, the First Presidency seemed to draw the jurisdictional line for church courts between *in personam* complaints against individuals and *in rem* attempts to settle title to land.<sup>333</sup> Not surprisingly, the precise limits of ecclesiastical jurisdiction in cases like *Birdsall v. Leavitt*, which involved claims based on both the title of earlier

330. *Lawsuits Between Church Members*, DESERET NEWS, Feb. 1, 1896, at 8.

331. 3 *Smoot Hearings*, *supra* note 87, at 14 (reproducing a letter from the First Presidency to the President and High Council of the Bannock Stake). For a reproduction of a number of letters from the First Presidency regarding land disputes in church courts, see *id. et seq.*

332. *Id.* at 15 (reproducing a letter from the First Presidency to Elder John A. Kidman).

333. The First Presidency explained the policy thus in a 1903 letter:

Before our lands were surveyed by the Government settlements had been formed and boundaries clearly established. After the survey was made it was found that, as a general thing, the lines of a quarter section would run through the lands of more than one settler; and in order that every man might have title to that which belonged to him, one of the interested parties would comply with the provisions of the law and obtain title, and after doing this he would deed to others such portions of the homestead entry as belonged to them; and it was not an uncommon thing for our church courts to settle disputes arising under those circumstances. But since the Government survey it has not been customary for church courts to entertain complaints involving the title to lands, and the same may be said with respect to water. All disputes involving legal titles must be adjudicated by courts of competent jurisdiction. The point we wish to make clear is this, that church courts must not undertake to deprive any of its members of their legal rights.

*Id.* at 18. The letter, however, went on to insist that members had an obligation to accommodate the claims of earlier settlers whose rights conflicted with government surveys. *Id.*



settlers and personal contracts, was unclear.<sup>334</sup> The resulting confusion, however, exposed the church to widespread charges of duplicity, as church leaders had claimed during the Smoot hearings that church courts did not adjudicate cases involving land.

In the years after the Utah Supreme Court's decision in *Birdsall v. Leavitt*, high church leaders resolved to further limit the jurisdiction of church courts. In October, 1908, a committee of apostles authored a report to the First Presidency suggesting that church courts "be not used as agencies for the collection of ordinary debts."<sup>335</sup> The report went on to suggest that "Church Courts shall not be used to enforce compliance with [the] moral obligation" to pay debts discharged in bankruptcy or otherwise unenforceable at law.<sup>336</sup> The report, however, reveals the same ambivalent attitude seen in the First Presidency letters on land disputes a decade earlier. The church was unwilling to say that questions of church discipline were disposed of by resolving questions of legality. Hence, the report stated:

[B]ut if a member of the church shall unjustly, and in an unchristianlike manner, bring his brother before the civil courts, or if there be an element of fraud or dishonesty on the part of a member who owes a debt, which he refused to pay, either would be liable to trial for his fellowship in the church by the Bishops Court or High Council.<sup>337</sup>

Likewise, while church courts were not to be used to enforce debts discharged by bankruptcy, "every consistent effort should be made

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334. The *Birdsall* case was probably further complicated by the fact that in 1896, just five years before Leavitt preferred charges to Cora's bishop, the First Presidency had sent a letter to the Sevier Stake President specifically encouraging him to promote the arbitration of title disputes among his flock. *Id.* at 17 (reproducing a letter from the First Presidency to President W.H. Seegmiller stating that they "heartily approve" arbitration of a dispute over title to "22 acres of school land"). In context, the First Presidency seems to have endorsed arbitration as a process separate from church courts whereby "[t]here is a method which can be adopted under the law by which the decision of arbitrators can be entered on the court records and made legal." *Id.* It is possible, however, that when the *Birdsall* case came before his High Council, President Seegmiller did not make a distinction between arbitration and church courts, taking the previous letter as permission for church courts to hear land disputes. In any case, none of the First Presidency correspondence in the *Birdsall* case suggests that they regarded the dispute as being improper for church courts.

335. FIRMAGE & MANGRUM, *supra* note 17, at 343 (quoting the report).

336. *Id.* at 343–44 (quoting the report).

337. *Id.* at 343.

to persuade [debtors financially able to pay discharged debts] to settle with their former creditors.”<sup>338</sup>

The reality, however, was that the Mormon judiciary was already in decline by 1908. Indeed, in urban areas Mormons seemed to have largely abandoned the church courts for civil disputes by the turn of the century. In 1904, Mormon attorney James Henry Moyle was called to the High Council of the newly organized Ensign Stake in Salt Lake City, where he continued to serve for more than twenty years. During that time, the High Council did not consider a single civil dispute. “So ended,” he wrote, “a salient feature of pioneer times when pretty much all were of one faith.”<sup>339</sup> Ecclesiastical disputes in outlying settlements where the legal culture was simpler continued for longer, as illustrated by the *Birdsall* case. As late as 1919, an article in the church-published *Improvement Era* stated that:

We hold that in matters of difference between brethren, in which no specific infraction of the secular law is involved, and in offenses called “civil” as distinguished from “criminal”, it is truly unworthy of members of the Church today as it was in Paul’s time that “brother goeth to law with brother” and that it stands to our shame if righteous judgment cannot be rendered among ourselves.<sup>340</sup>

Despite this plea, however, Mormons continued to take their civil disputes to the secular courts. The forces of a modernizing economy, the quest of Mormon lawyers for religious legitimacy within their community, and not least the importance of allegiance to the common law as a condition for Mormon entry into the American community had combined to end the judging of civil cases within the temple of the church.

#### IV. CONCLUSION

The inheritors of a strong Protestant tradition of church discipline, early Mormons took it for granted that adjudication was a central religious practice, and as Joseph Smith developed his

338. *Id.* at 344.

339. MORMON DEMOCRAT, *supra* note 257, at 136.

340. James E. Talmage, *Judiciary System of the Church of Jesus Christ of Latter-day Saints*, IMPROVEMENT ERA, April, 1919 at 498, 499, *reprinted in* THE ESSENTIAL JAMES E. TALMAGE 198, 200 (James P. Harris ed., 1997).

increasingly radical theology in the 1830s and 1840s he found ways of embedding the emerging Mormon judiciary within its narratives. This Article began with two contrasting stories: one about Mormon elders preaching to a court-day crowd, and the other about Mormon elders adjudicating a civil dispute in their Temple. The arc connecting these events illustrates the relationship between religion and litigation for nineteenth-century Latter-day Saints. The Mormons wished to preach to the court house, denouncing its divisiveness, chicanery, and corrosive moral spectacle. At the same time, they wished to domesticate civil disputes, forcing litigious church members to embed their arguments within the theological narratives and institutional settings of the church. Suing before the ungodly was to be replaced by lawsuits in the Temple.

In a world where most disputes were relatively simple and could be resolved without specialized legal knowledge, such a system was tenable. Indeed, given the frequent legal illiteracy of frontier judges, church courts were not necessarily even at a comparative disadvantage vis-à-vis secular courts with regard to legal knowledge. With the economic integration that came in the wake of the Civil War and more importantly the completion of the transcontinental railroad in 1869, the disputes church courts were called upon to resolve became increasingly complicated. In addition, the nature of civil litigation itself changed in ways that made it less religiously objectionable. Given these forces, the decline of the Mormon court system is less surprising than the fact that it continued to aggressively operate for decades after the coming of the railroad.

An important part of this transition was the creation of a religiously sanctioned persona for Latter-day Saint lawyers. This not only facilitated the softening of Mormon attitudes toward recourse to secular courts but also provided a bridge that allowed Mormons to maintain continuity to the older tradition of the church judiciary. In 1856, Brigham Young referred to litigation as a Satanic froth that right-thinking Latter-day Saints should avoid.<sup>341</sup> In 1872, however, he insisted that “[f]or a man to understand the law is very excellent.”<sup>342</sup> He went on to explain the proper Mormon understanding of the law: “They that [understand the law],” he

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341. Young, *supra* note 187, at 237.

342. Young, *supra* note 253, at 224.

insisted, “are peacemakers, they are legitimate lawyers.”<sup>343</sup> This vision of law properly understood could continue even in the absence of church courts deciding civil cases. It also facilitated Mormon acceptance of the common law by providing continuity with the older tradition of church courts, even as these tribunals were abandoned as part of Mormonism’s accommodation with American Protestantism.

Indeed, this vision of law properly understood continues to be echoed in modern Mormon sermons. For example, in 1986, former law professor and judge Dallin H. Oaks, then a Mormon Apostle, gave a sermon to the church’s semiannual general conference denouncing sharp dealing and frivolous litigation:

We live in a world where many look on the marketplace as a ruthless arena where the buyer must beware, where no one is obligated to do more than the law requires, and where fraud isn’t fraud unless you can prove it in court.

Members of the Church of Jesus Christ have a higher standard.<sup>344</sup>

He went on to denounce “[s]cheming promoters with glib tongues and ingratiating manners [who] deceive their neighbors into investments . . . . Difficulties of proof make fraud a hard crime to enforce. But the inadequacies of the laws of man provide no license for transgressions under the laws of God.”<sup>345</sup> Likewise, he condemned “[p]ersons who prosecute frivolous lawsuits.”<sup>346</sup> In the same sermon, however, he praised an “idealistic young professional,” presumably an attorney, who denounced the illegal and unchristian treatment of migrant farm workers.<sup>347</sup> The themes of supra-legal religious obligations, the denunciation of litigation, and the role of the religiously informed professional mark the afterlife of the ideals that both gave rise to the expansive jurisdiction of the Mormon courts in the nineteenth century and negotiated its eventual decline.

Likewise, something of the First Presidency’s ambivalence in the 1890s remains in the current procedures governing Mormon courts, which continue to operate albeit on a smaller scale. Today, the

343. *Id.*

344. Dallin H. Oaks, *Brother’s Keeper*, ENSIGN, Nov. 1986, at 20.

345. *Id.*

346. *Id.* at 21.

347. *Id.*

justification for the Mormon judiciary is couched almost entirely in pastoral terms. According to modern guidelines promulgated by the church, ecclesiastical discipline exists to “facilitate repentance by helping transgressors recognize and forsake sin, seek forgiveness, make restitution, and demonstrate a renewed commitment to keep the commandments.”<sup>348</sup> Consonant with Oaks’ sermon, however, the church refuses to concede its prerogative to inquire into misconduct related to civil litigation: “Disciplinary councils should not attempt to resolve disputes over property rights or other civil controversies. However, if such a dispute involves accusations that a member has committed acts that would justify Church discipline, the accusations should be treated like any other accusations of transgressions.”<sup>349</sup>

In a similar vein, the modern rules state that “[n]ormally a disciplinary council is not held to consider conduct being examined by a criminal trial until the court has reached a final judgment” but clearly reserve the right to inquire into matters resolved in secular courts.<sup>350</sup> Indeed, the rules even contemplate that church leaders might be asked by members to arbitrate disputes, but insist that in such a case “they should act as unofficial, private advisers and should not involve the Church.”<sup>351</sup> In short, while the Mormon courts have abandoned the expansive jurisdiction that they once claimed, preaching continues to the court house, and judging continues apace within the Temple.

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348. THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, CHURCH HANDBOOK OF INSTRUCTIONS: BOOK 1, STAKE PRESIDENCIES AND BISHOPRICS 105 (2006) [hereinafter CHURCH HANDBOOK]. I am indebted to President Brad Hansen of the Newport News Virginia Stake of The Church of Jesus Christ of Latter-day Saints for access to this material. I remain solely responsible for all interpretations offered here of church procedures. For an extensive discussion of the modern role of church discipline among Mormons and its legal implications, see Kif Augustine-Adams, *The Web of Membership: The Consonance and Conflict of Being American and Latter-day Saint*, 13 J.L. & RELIGION 567 (1999).

349. CHURCH HANDBOOK, *supra* note 348, at 111.

350. *Id.* at 116.

351. *Id.* at 111.