Reflections on Mormon History: Zion and the Anti-Legal Tradition

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I. Zion

> I have Zion in my view constantly. We are not going to wait for angels, or for Enoch and his company to come and build Zion, but we are going to build it.
> —Brigham Young, *Journal of Discourses* 9:284[1]

SIR HENRY MAINE, OUR FIRST GREAT MODERN legal historian of the English language and law, in describing the paradigmatic shift from early feudal European society to a world of secular, territorial nation-states and market economy, observed that we had moved "from status to contract." "Status" assumes an immutable condition not changeable by individual choice and action. "Contract" assumes that one can change existing conditions by choice and action. No statement describes with more insight the nineteenth-century Mormon concept of Zion.

Zion was the society where brothers and sisters could live in harmony with each other in the presence of the spirit of God, in anticipation of a personal presence, a union of heaven and earth. The idea that religious life at the most profound level must be lived in community has existed from the beginning of the human quest for God. Many Christian

1. Much of the research for this essay is based on the first legal history of the Mormon experience in the nineteenth century, Edwin Brown Firmage and Richard Collin Mangrum, *Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-day Saints, 1830-1900* (Urbana: University of Illinois Press, 1988). See also Firmage, "Religion and the Law: The Mormon Experience in the Nineteenth Century," *Cardozo Law Review* 12 (1990); Firmage, "Free Exercise of Religion in Nineteenth Century America: The Mormon Cases," *Journal of Law and Religion* 7 (1989).

religious communities have formed primarily in anticipation of an immediate second advent. Mormons of the nineteenth century shared this anticipation. Other communities simply sought refuge, a separation from the world in order to live more completely in accordance with God's word. Mormons also followed this pattern.

But Mormons of the first decades of their own revelations shared an enthusiasm, like the first generations of most religious groups, that seemed to allow for the complete fulfillment of those revelations in the Saints' own time, by their own actions. While Jesus indicated that no one knew the time or the manner of God's fulfillment of things and the end-time, the powerful literalism of Mormon working-class converts, people who knew their own capacity to work with their own hands and affect directly their own world, propelled them to make Zion here and now. Interpreting the Hebrew Bible and the Christian commentary in such a way that they were heirs of the patriarchal practices and prophesies, as had been the converts of the first century of Christianity, Mormons of the nineteenth century felt empowered to create a society where they could live and grow in pure Christian fellowship without the obstructions of a secular and perverse world. Reading scripture, mediated neither by Christian tradition nor professional clergy, their interpretation was powerful, palpable, literal, and peculiar. Their vision was not attainable if they were absorbed and assimilated by the dominant culture, nor did they feel impotent from creating their own society now. They need not accept a fated status quo or rely on God simply to make it so. They need not wait for angels. Jedediah M. Grant said this with characteristic color and power: "If you want a heaven, go to and make it" (*Journal of Discourses* 3:66). Brigham Young was possessed by this same vision. "I have Zion in my view constantly. We are not going to wait for angels, or for Enoch and his company to come and build Zion, but we are going to build it" (*Journal of Discourses* 9:284).

II. The Anti-Legal Tradition: Why the Hearse Horse Snickered

> Do not go to law at all; it does you no good and only wastes your substance. It causes idleness, waste, wickedness, vice and immorality. Do not go to law. You cannot find a courtroom without a great number of spectators in it; what are they doing? Idling away their time to no profit whatever. As for lawyers, if they will put their brains to work and learn how to raise potatoes, wheat, cattle, build factories, be merchants or tradesmen, it will be a great deal better for them than trying to take the property of others from them through litigation.
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> —Brigham Young, *Journal of Discourses* 14:82

This notion of a gathered community with its own social and political institutions resulted in part from the Saints' original vision and in part from their early experience. Mormons had been driven from Kirtland, Ohio, to Jackson County, Missouri, to Nauvoo, Illinois. The law had never been their protector but was often used against them. Mormons, like minority groups throughout history, found that often those who led the mobs by night were officers of the law and the government by day.

When Mormons fought to defend themselves, the full weight of the state could be mobilized against them. Governor Lilburn Boggs of Missouri directed that the state militia treat the Mormons as enemies who "must be exterminated or driven from the state, if necessary for the public good" (in *Zion in the Courts,* 74). Three days after this order, between eighteen and thirty-one Mormons were massacred at Haun's Mill. These victims included a number of women and children.

Mormons sought relief through state and federal courts and through petitions to Congress and the president. They even tried a novel idea of impeaching the entire state of Missouri for failure to provide a republican form of government. Meeting defeat at every level of law and government, Mormons attempted to establish their own community at Nauvoo. They fashioned a charter with a degree of autonomy that would render their community nearly sovereign from the rest of the state. In fact, the charter appears to us today more like a sovereign constitution. If the institutions of law and government could not meet the needs of the Mormons, they would fashion their own system of government. In retrospect, from this point the Mormons were on a collision course with the dominant community, unless they could sufficiently distance themselves from the nation and be left alone.

It is evident that the early Mormon experience with the law would be reason enough to reject traditional legal structure for governance or dispute resolution. But the reasons for the full flowering of anti-legalism are far broader.

First, it is consistent with the early decades of a new religious movement to reject use of legal institutions of the surrounding culture, now seen as at best irrelevant and at worst hostile. Jesus advised his disciples to settle disputes on the way to court; to turn the other cheek or offer one's cloak rather than dispute with a brother. His strongest invective was saved for the lawyer, so much so that "lawyers and hypocrites" seemed to be a hyphenated term (see Matt. 5-6, 23). St. Paul in his first letter to the saints at Corinth reflects his being scandalized that newly minted Christians were suing or being sued in Caesar's courts. If they are to judge angels, he says, can they not resolve their own disagreements among themselves and, by implication, by application of the teachings of Jesus? (1 Cor. 6:1-8).

Second, and related to the above, any group which sees a radically new vision possesses a new paradigm by which one determines the good, the true, and the beautiful. With this new paradigm, the group has little regard for the law, particularly the law of process—having to do with means rather than ends—supporting and defining the old order. People in general have to be educated over time to appreciate any self-interest in procedural means: exactly *why* evidence of a certain nature may not be admissible in a particular case when that very evidence might be highly relevant to determining guilt or innocence, legal right, and obligation. In a pluralistic society, a jurisprudence of means develops from necessity, since there exists a multiplicity of values, a pluralistic jurisprudence of ends. With such diversity, the common denominator for community consensus is a jurisprudence of means: *where* we are going will be variously determined, but *how* we get there, what rules of the road are permissible in this pluralistic community of competing values existing and protected together, must be agreed upon by all. This toleration of competing values, with a consequent sophisticated appreciation of "due process," is seen as unnecessary baggage within the community of newly shared values agreed upon by a people who have accepted the new vision of the new community. The shared vision of the new community enjoys the total acceptance of recent converts. Enthusiasm for the new vision is at a peak. At a later point in the evolution of community, alternative routes, different voices, may emerge; but that is for a later time.

Third, often the new vision really is new. That is, the new realization may make such radical demands upon the larger community that its institutions simply cannot bend enough to accommodate the new sub-culture. Nineteenth-century Mormonism certainly presented this challenge to American society. Traditional American notions of pluralistic democracy, biblical Protestant religiosity, monogamous marriage, and individualist capitalistic economics were confronted by a communal theology of Zion, theocratic government, a new book of scripture, polygamy, and a form of Christian socialism and communal life.

While all this does not insure an anti-legal tradition, at the least it leads to new approaches to self-governance and the birth of new institutions of law congruent with the new community—Zion. Two radically different societies were in direct conflict. Collision with the old order was assured.

III. Fulfillment

The American Puritans' "City upon a Hill" prospered because it was a City on the Sea. How different the story of New England, or of America, might have been if they had built their Zion in a sequestered inland place, some

American Switzerland, some mountain-encircled valley! The sea was the great opener of their markets and their minds.

—Daniel J. Boorstin, *The Americans: The National Experience*

There are advantages and costs, to some degree mutually exclusive, for a community to live and grow in its first decades in isolation, or in geographically enforced dialogue with neighbors with different visions. For reasons to some degree both within and without their own power to have had it otherwise, Mormons fared poorly with their neighbors during their brief communal residence in New York, Ohio, Missouri, and Illinois. In their Great Basin kingdom, they were denied the sort of interaction with other religious or secular communities which might have influenced Mormon history dramatically. For better and worse, Mormons had several decades of insular history—protected, as they were for a time, by their own mountain-encircled valley, their sequestered inland place. Powerful additional elements contributed during this period to a growing ethnicity: a history that included decades of persecution, and colonial and imperial experience in pioneering a major portion of the American West. These elements combined with the geographic isolation and the overwhelming predominance and sheer numbers of Mormons in the territory, and consequent control over most institutions of governance and society, to produce a people. Within this time, unique institutions came to fruition: theocratic government, communal economics and society, a system of lay dispute resolution through mediation, arbitration, and, finally, ecclesiastical court sanction, if necessary. A peculiar vision of Zion was the overarching idea within which these historical elements came into harmony.

National preparation by law to wage war against Mormon society was begun shortly after the Saints reached Utah territory. While Brigham Young attempted to extend the stakes of Zion's tent throughout much of the West to California and Mexico, statutes were passed by Congress, or by the state and territorial governments, criminalizing polygamy and denying fundamental human rights, including the right to vote, serve on juries, hold public office, emigrate, and the right to refuse to testify against one's spouse. Children of polygamous marriages were denied inheritance rights, and foreign-born Mormons were denied citizenship. By the end of this period of intense conflict, the federal government passed legislation providing for the disestablishment of the LDS church and confiscation of its property. The federal government and the Mormon people were locked in combat that swept beyond the issue of polygamy, to threaten the continuation of Mormon society.

Mormon leaders responded in various ways that included formation

of their own political party and a refusal to participate in many of the legal institutions of the federal and territorial governments.

First, the Mormon-controlled territorial legislature extended the jurisdiction of the probate courts, also staffed largely by Mormons, beyond matters traditional to such courts (wills, guardianship, and divorce) to include general jurisdiction over all civil and criminal cases. Since the governor and the territorial supreme court were appointed by the federal government, Mormons attempted to deal with the increasing convictions for polygamy and unlawful cohabitation by asserting probate court jurisdiction over such cases. The drawing of jury lists was also placed under probate court jurisdiction.

But this line of defense was breached by a decision of the Utah territorial supreme court, later upheld by the Supreme Court of the United States, holding that such jurisdiction of the probate courts extended beyond the intent of Congress in passing the 1850 Organic Act by which Utah became a territory.

Mormons were left yet with one powerful institution—the church courts. While this could not protect members from prosecution for unlawful cohabitation or polygamy, Mormon society, nevertheless, could exist and prosper. Polygamous marriages, together with the inevitable disputes relating to marriage of any sort, might continue. Issues of child custody, divorce, and property settlements could be resolved without recourse to federal or territorial courts.

But motivation for the resolution of disputes by means other than judicial settlement went beyond and existed before the conflicts over polygamy. Before the Utah period, elders' courts had helped define Mormonism in disciplinary proceedings involving Mormon leadership. Succeeding bishops' courts, appellate high council courts, and courts of the Quorum of the Twelve and First Presidency possessed jurisdiction over all civil matters. These courts went beyond questions of morality or ecclesiastical governance to include essentially all civil jurisdiction. Only crimes were beyond the competence of those courts.

This truly remarkable and unique system contained several essential components. First, the church asserted such sweeping jurisdiction over all matters of civil disputes under the exclusive jurisdiction rule. That is, Mormons were forbidden, under threat of disfellowshipment or excommunication from their church, from suing other Mormons at law. While no other sanctions or enforcement existed, that is, no penalty involving loss of property or imprisonment, the threat of loss of membership was deterrent enough for believers in Mormon society in the nineteenth century. The excommunicable offense for suing before territorial courts was either "suing before the ungodly" or "unchristian-like conduct."

Brigham Young advised, "[W]henever a man would attempt to 'pop'

you through the courts of law of the land, you should 'pop' him through the courts of our church; you should bring him up for violating the laws of the church, for going to law before the ungodly, instead of using the means that God has appointed" (*Journal of Discourses* 20:104-105). In fact, pursuing the profession of law was similarly categorized as unchristian-like conduct in a number of sermons.

Let me state again the extraordinary scope of jurisdiction possessed by the Mormon system of dispute resolution. All matters of civil jurisdiction were handled before church mediators, arbitrators, or bishops' courts, high council courts, or courts of the Twelve or the First Presidency; this included, but was not limited to, torts, contracts, water law, natural resources, family law, property law, inheritance, and so on. Only crimes were excluded, and even that line was very porous at the lower levels of mediation where, after all, most disputes were resolved. It was not unusual, in fact, for various of these church courts to modify a decision and judgment handed down by one of the territorial courts. Litigants accepted such church court action or they faced church discipline.

Dispute resolution began with the teachers. The home teachers of today, often the butt of a cartoon by Pat Bagley or Calvin Grondahl, are a pale remnant of a powerful system of mediation throughout Mormon communities through the nineteenth century. The teachers, two adult males assigned to every Mormon family, were to mediate all disputes within the wards and stakes of the church. Only if resolution could not be accomplished would a dispute proceed to a bishop's court. Considerable influence existed to encourage settlement by mediation.

In turn, before the bishop's court was formally convened, the bishop might assign an arbitrator to resolve the dispute, if successful mediation by the teachers was not possible. If members of different wards were the disputants, the bishops would agree upon an arbitrator, presumably with the acquiescence of the aggrieved parties.

On 24 February 1865 Brigham delivered a scathing attack on those practicing law or considering such a profession:

> I am ashamed of many of you; it is a disgrace for men of dignity and character to condescend to the mean, low-lived pettifogger and miserable tools at that. ... [T]o observe such conduct as many lawyers are guilty of, stirring up strife among peaceable men, is an outrage upon the feelings of every law abiding man ... and to sit among them is like sitting in the depths of hell, for they are as corrupt as the bowels of hell, and their hearts are as black as the ace of spades. ... God Almighty curse them from this time henceforth, and let all the Saints in this house say, Amen. For they are a stink in the nostrils of God and angels, and in the nostrils of every Latter-day Saint in this Territory (*Journal of Discourses* 3:240).

Brigham believed profoundly that any community based upon the ideals of Zion would have no disputes that could not be resolved by mediation or arbitration. He counseled, "[W]hat is the advice of an honorable gentleman in the profession of law? 'Do not go to the law with your neighbor, do not be coaxed into a lawsuit, for you will not be benefited by it. If you do go to the law, you will hate your neighbor;' ... why not ... say 'we will arbitrate this case, and we will have no lawsuit, and no difficulty with our neighbor, to alienate feelings one from another?' This is the way we should do as a community" (*Journal of Discourses* 15:224-25). If this was not successful, the dispute would be tried before the bishop's court, composed of the bishop and his two counselors. Counselors advised the bishop, but the bishop made the decision.

Parties were obliged to accept this decision on pain of disfellowship or excommunication. A right of appeal existed to the high council, composed of the stake president, his two counselors, and twelve members of the council. As Brigham Young exhorted 24 February 1865:

> 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. ... far better and more satisfactorily than to contend with each other in law courts, which directly tends to destroy the best interests of the community, and to lead scores of men away from their duties, as good and industrious citizens (*Journal of Discourses* 3:238).

Appeals from the high council could be had either to the court of the First Presidency or the Council of the Twelve.

Lawyers were not allowed in these proceedings, with rare exceptions. The common law was not formally recognized and no formal methods of pleading or due process were followed. No formal system of *stare decisis*—whereby present disputes could be governed by previous legal precedent with similar facts—existed.

Nevertheless, our reading of all cases in the church courts from 1830 until well into this century revealed a system of fundamental fairness, compassion, an innate sense of like cases being treated alike, and a powerful ethic of Christian reconciling love, throughout the period of this extraordinary system of lay justice.

Mediation through the teachers disposed of most disputes. Most remaining cases were resolved in the bishop's court where, again, a mediated decision was often accomplished.

While Brigham lived, he took an active part in this system, and for all his talk of the evils of "court-watching," he seemed drawn to the proceedings of the Salt Lake City High Council where he was a frequent observer. Justice was fast and inexpensive. While no jurisdictional claim was made over non-members of the Mormon church, sometimes non-

members asked to have a dispute with a Mormon handled through the church courts. In one case, for example, a non-member sued ZCMI in bishop's court and won.

The life of the devout Mormon lawyer (surprisingly, this is not necessarily an oxymoron) was not easy. Not only did he face interminable sermons at general conference suggesting that he find honest work. When he was lucky enough to get a client, perhaps before the Mormon-controlled probate courts, he found it difficult and often impossible to collect his fee. Zerubbabel Snow was a prominent Mormon attorney, at different times one of the first federal associate justices in Utah, serving in all districts until a full bench of the Utah Supreme Court could be appointed; he defended Brigham Young against polygamy charges (a tough case to win), and later in private practice when the Poland Act of 1874 abolished all territorial officers. Snow was accused before a bishop's court for unchristian-like conduct for suing a Mormon constable before the U.S. Third District Court of Utah. Snow won the case against the constable in the district court, but the constable prevailed in part, in the church court, even though Snow was actually suing on behalf of his non-Mormon son. Snow was ordered, in effect, to return half of the judgment won in district court for his lack of Christian compassion toward his brother, the constable. Snow appealed to the high council, which body again reiterated Snow's obligation of brotherly Christian love toward the constable who had wronged Snow's son. Snow also suffered the fate of other Mormon attorneys in being charged, successfully, before church courts, when they sued at law to collect legal fees.

All was not dour, stern, and serious, however, in the life of the Mormon community. Frontier humor lightened even the most weighty matter of church discipline. An obvious parody of more serious cases was the mock charge to Orrin Porter Rockwell at Pioneer Camp on 26 May 1847:

> Sir you are hereby commanded to bring wherever found, the body of Col. [GM] before the Right Reverend Bishop Whipple at his quarters, there to answer the following charge, viz: — that of emitting a sound (in meeting on Sunday last) a posteriorari (from the seat of honor) somewhat resembling the rumble of distant thunder, or the heavy discharge of artillery, thereby endangering the ... nerves of those present, as well as disturbing the minds from the discourse of the speaker (in *Zion in the Courts*, 365).

The church court system continued to hear cases in all areas of the civil law at least until 1900. By 1908 the movement away from this practice was noted when a committee of apostles recommended that the bishops' courts no longer be used for the collection of ordinary debts.

Church courts influenced to some extent later substantive civil law in the areas of contracts, torts, family law, property law, and, particularly, water and other natural resources law throughout the West.

IV. Accommodation

> But now they desire a better country, that is, a heavenly: wherefore God is not ashamed to be called their God: for he hath prepared for them a city.
> —Hebrews 11:16

> If this people neglect their duty, turn away from the holy commandments which God has given us, seek for their own individual wealth, and neglect the interests of the Kingdom of God, we may expect to be here quite a while—perhaps a period that will be far longer than we anticipated.
> —Brigham Young, *Journal of Discourses* 11:102

The remarkable, even heroic, effort to establish Zion and to provide institutions congruent with such an endeavor lasted well beyond any time that would be explainable purely upon a theory of economic interpretation of history. Long after continental railroads opened Utah as a "market," the institutions of Zion continued to function. But when the full weight of the federal government was brought to bear upon Mormon society, unique aspects of Mormon culture were discontinued. After *Reynolds* and then the 1890 Woodruff Manifesto, church leaders by conscious decision moved toward accommodation and, eventually, integration within the larger society. The church's Peoples Party was disbanded and Mormons joined both political parties (though clearly a few more might have remained Democrats). Church courts gradually receded in jurisdictional competence until all civil offenses came to be tried in the courts of the country. Mediation and arbitration disappeared from Mormon ecclesiastical competence, indeed from memory.

One stands in awe and humility, however, of those in that generation who did not wait for angels but tried with all their might to make heaven here. Perhaps we must wait for angels, after all. But if Mormons and many others are right—that the fullness of the religious experience is reached only in community—then with Moses and Isaiah, St. Paul and St. Augustine, and Joseph and Brigham—we continue the quest for the City of God.