

“The Living Oracles”: Legal Interpretation and Mormon Thought

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“We have only an outline of our duties written; we are to be guided by the living oracles.” –Wilford Woodruff¹

“The judges in the several courts of justice . . . are the depository of the laws; the living oracles . . .” –William Blackstone²

I

Mormon thinkers have a problem. Suppose that a Latter-day Saint were interested in learning what his or her religion has to say about some contemporary philosophical, social, or political issue. Where should a Mormon thinker begin? Consider the counter-example of Catholic intellectuals. Faced with such a question, they have the luxury of a rich philosophical and theological tradition on which to draw. They can turn to Aquinas or modern Catholic social thought and find there a set of closely reasoned propositions and arguments to apply to the questions before them. To be sure, the task of such a thinker is not simply to “look up” the answer, but Catholic intellectuals do have a religious tradition that has been digested over the centuries in intellectual categories that lend themselves easily to analysis and extension into new areas. This option, however, is not open to a Latter-day Saint. Mormonism—despite some important exceptions³—has largely eschewed closely reasoned systematic theology. As one sympathetic Catholic observer has written, “I have found it difficult to try to understand the complex relationships between philosophy and theology in

Mormon thought.”⁴ To which I would respond, “Join the club.” Given the difficulties presented by what is at best a nascent philosophical tradition, Mormon thinkers interested in offering a “Mormon perspective” on an issue such as the nature of property or the proper forms of political reasoning, for example, face a methodological problem. How does one begin looking for Mormon resources from which to construct such perspectives? Indeed, on many issues it would seem at first glance that Mormon thinkers might be justified in concluding that Mormonism just doesn’t have much of anything to say.

To be sure there is a voluminous body of Mormon writing on many subjects, but the overwhelming majority of this work is homiletic and is meant to inspire and motivate its audience rather than provide them with careful conceptual analysis. Furthermore, when one looks to the content of this work, one finds that much of it consists of narrative rather than exposition. Richard Bushman has observed that “Mormonism is less a set of doctrines than a collection of stories.”⁵ Indeed, the central obsession of Mormon intellectual life for the last half century has not been systematic theology but history. One might point to any number of things to underline the centrality of history for Mormon thought.

One example will suffice. The relationship between faith and reason is a perennial question for religious thinkers. Generally speaking, these debates are couched in the language of philosophy. The question is, as Alvin Plantinga has put it, whether or not belief is rationally warranted.⁶ In contrast, the most sophisticated and prolonged debates within Mormonism on the relative claims of faith and unaided human reason have been cast as battles between “faithful history” and “secular history.”⁷ Where other traditions debate epistemology and theology, Mormons debate historiography and historicity. Accordingly, one response to the methodological problem facing Mormon intellectuals discussed above would be the interpretation of history in normative terms. Indeed, we can see something like this in the work of writers such as Hugh Nibley who look to historical narratives about nineteenth-century Zion-building as a basis for social criticism.⁸ Such efforts, however, are dogged by persistent anxieties about the intellectual respectability of using the past as a springboard for broader conceptual or normative discussions. For many profes-

sional historians and the Mormon intellectuals who take them as models, straying beyond concrete debates over sources, chronology, and their interpretation smacks of apologetics or sectarian rather than “scholarly” history.

The two quotations at the beginning of this essay point toward a related but slightly different response to the methodological quandary of Mormon thinkers. Wilford Woodruff taught, “We have only an outline of our duties written; we are to be guided by the living oracles.”⁹ On its face, this seems like a fairly standard appeal to the authority of Mormonism’s living prophets. The contrast between “living oracles” and the mere “outline of duties” that is actually written down, however, suggests a second point. The formal, propositional content of Mormon scripture, it would seem, provides no more than a framework in which the concrete meaning of Mormonism is worked out by the inspired fiat of Mormon leaders. While Joseph Smith produced a mass of scriptural narrative, subsequent Mormon prophets—with notable exceptions such as Joseph F. Smith’s vision of the redemption of the dead (D&C 138)—have made their weight felt less in terms of new sacred stories than in terms of new institutions and practices. Strikingly, Brigham Young’s sole contribution to the formal Mormon canon is a revelation on the structure of immigrant trains (D&C 136). He—like most of his successors—spent the bulk of his energies on the delineation of Mormon practices and institutions.

What Mormons see in this history is the accretion of many decisions in concrete historical situations made by wise and inspired leaders. The result is a set of practices and institutions that they regard as imbued with the divine, even when the practices and institutions cannot be shown to be deduced in any unproblematic manner from sacred texts, theological first principles, or dramatic moments of charismatic revelation. The same is true of the activities of Latter-day Saint leaders who have not reached the top of the hierarchy. They too have been involved mainly in the execution and building up of a set of practices and institutions. Accordingly, Bushman’s view of Mormonism as a collection of stories must be updated. Mormonism is also a set of practices and institutions. This fact points toward another answer to the methodological dilemma of Mormon thinkers: legal interpretation, particu-

larly the methods of interpretation used in the judge-made common law.¹⁰

II

According to Oliver Wendell Holmes Jr., “It is the merit of the common law that it decides the case first and determines the principle afterwards.”¹¹ Like most Holmesian aphorisms, this statement is open to multiple interpretations; however, it rightly insists that the common law is first and foremost about resolving concrete disputes. A common-law judge seldom finds himself announcing abstract principles for their own sake. Rather, he is generally concerned with the question of doing right in the particular case before him or at most with interstitial modifications of existing law. The resolution of the case will depend on analogies to past cases and the judge’s own wisdom and intuitions about justice. It is only after the piling up of innumerable particular cases that the abstract rules of legal doctrine emerge.

Hence, it is uncontroversial to claim that, for example, in the case of conflict between a written contract and the parties’ oral testimony about the content of their agreement, the writing will control.¹² This rule, however, was never announced in a distinct, legislative moment. Rather, it is an accepted generalization that captures the outcomes of hundreds of preexisting cases. Finally, it is only after the myriad of particular cases have been organized into a doctrinal structure of abstract legal rules that a common law thinker might try to discern within, say, the law of contracts a set of normative choices, such as a general preference for economic efficiency, personal autonomy, or transactional fairness.¹³ Hence, as Blackstone wrote, common law judges are “living oracles” who declare the law in particular cases rather than deducing it from first principles. In this sense, they function much like Mormon prophets and priesthood leaders.

Working within the common law system, a jurist doesn’t provide a conceptual foundation from which the law is deduced. Rather, her task is to uncover the latent normative judgments that emerge spontaneously from the accretion of particular precedents. These generalized statements of legal principles and policies can then serve as a basis for either criticizing or extending current practice. They are not, however, the common law itself.

Rather, the common law always continues on as a practice that is “more like a muddle than a system.”¹⁴ This process is true whether our jurist is a lawyer, a law professor, or even a judge reflecting on the law.¹⁵

Hence, for example, a common law lawyer would note that, in case after case, when a litigant in a contract case claims that the oral agreement of the parties was substantially different than the written contract, the judges always side with the writing over the oral testimony. This regularity might then be stated as a rule. In many cases, the theorist would note, the effect of this rule is to enforce contract terms that may differ from the subjective understanding of the parties. Such an outcome seems inconsistent with the notion that contract law is primarily concerned with advancing the autonomous choices of individuals. On the other hand, by privileging the written terms, the common law rule contributes to certainty in commercial transactions and reduces the cost to the courts of resolving contract disputes, throwing those costs back onto the parties who have an incentive to reduce their actual intentions to a clear writing. What emerges from this analysis is a conclusion that, at least in this area of contract interpretation, concern for economic efficiency seems paramount over concern for individual choice. This conclusion, however, is not the law. It is not even a major premise from which the law is deduced. It is simply an articulation of the latent normative logic of the law as it now stands. The case comes first, and it is only afterward that we discover principles. The “living oracles,” however, with their focus on particular cases, may well move the law in a different direction in the future.

This method of interpretation can be applied to the practices and institutions of Mormonism. The goal would not be to provide first principles from which correct conclusions can be deduced. Rather it would be to articulate the inchoate normative logic of these practices and institutions. Two concrete examples can illustrate the kind of analysis that I envision. Suppose that one is interested in Mormon conceptions of property and contract. These institutions stand at the center of modern market economies, and one might wonder what Mormonism has to say about them. At first glance, Mormon theology—or at any rate the extremely small literature on systematic Mormon theology—seems to have very lit-

tle to say about either property or contract. The analogy to legal interpretation, however, suggests that one should search for Mormon ideas not only in Mormon discourse but also in Mormon practice.

One place to look for materials would be the nineteenth-century Church court system, which among other things decided property and contract disputes between Latter-day Saints.¹⁶ One will search the records of these cases in vain for anything that even distantly resembles a theory of property or a theory of contract. The priesthood leaders resolving these disputes decided the case without recourse to any elaborate set of first principles. Nevertheless, in examining their practices and the institutions they sought to create, we can discern a distinctive set of normative choices that one might unapologetically label as Mormon concepts of property and contract. Consider first the case of Oliver Cowdery's excommunication.

III

In 1831, Joseph Smith received a revelation setting forth what became known as the "Law of Consecration and Stewardship" (D&C 42).¹⁷ All members of the Church were to "consecrate" their property to the Lord by executing a deed that transferred land and other assets to the Church. Each member then received in return a parcel of property as his particular "stewardship."¹⁸ In Jackson County, Missouri, which an earlier revelation had designated as the location of the New Jerusalem to be founded by the Saints, members received their stewardships as part an effort to build up Zion. In 1833, after growing tensions with the original settlers in the county, an ad hoc militia violently expelled the Mormons from the area.¹⁹ The loss of Jackson County precipitated a crisis for many Latter-day Saints. How were they to build up Zion if the revealed location of the New Jerusalem was held by "the Gentiles"? Coupled with other events, this loss caused a leadership crisis within the church that came to a head in 1838.²⁰

In the resulting struggle, Oliver Cowdery found himself on trial before a Church court. Among the charges leveled against him was that he had denied the faith and abandoned Zion by selling his stewardship. Oliver responded with a lengthy letter in which he refused to submit to the jurisdiction of the high council

that was trying his case, insisting that no Church court could interfere in his “temporal affairs.” The letter contained the following, revealing passage on property rights: “Now sir the lands in our Country are allodial in the strictest construction of the term, and have not the least shadow of feudal tenours attached to them, consequently, they may be disposed of by deeds of conveyance without the consent or even approbation of a superior.”²¹ Scholars have long found his reference to “allodial” land and feudal tenures puzzling.²² Oliver’s objections, however, go to the heart of how Mormon practices conceptualized property.

Feudal tenures refer to medieval doctrines in the common law by which the ownership of land created certain kinds of reciprocal social obligations. The way in which one owned property defined one’s place in the social system. Every freeman “held his land of” someone else. A deed, for example, might specify that Sir Cedric held Blackacre “in knight’s service” of Lord Lothgar. What this meant was that Sir Cedric’s ownership of Blackacre created an obligation on his part of loyalty and military service to Lord Lothgar. In turn, Lord Lothgar—at least in theory—had obligations to protect Sir Cedric and provide him with justice in disputes with his neighbors. The result was a thick set of social duties centered on the ownership of land. As one legal historian has written: “When feudalism was at full tide, it was clearly much more than a system of providing legal title in land; indeed, the sense of mutual personal obligation between lord and vassal may have been even more essential than the granting of fiefs in return for promises of services.”²³ Legally speaking, however, these were not free-floating rights or obligations. They inhered in the concept of property itself. To own Blackacre meant to have a certain set of obligations in the community where Blackacre was located. By contrast, holders of allodial land “were free from the exactions and burdens to which the holders of fiefs were subject, yet they did not enjoy the protection of a superior.”²⁴ Hence, allodial land had no “feudal tenures,” rendering its owner free of both the social obligations and the social benefits inherent in the lord-vassal relationship.

During the period prior to his Church trial, Cowdery was following an informal course of reading of the kind standard among would-be frontier attorneys.²⁵ In the perennial manner of law stu-

dents, he was no doubt eager to show off newly mastered jargon, but his appeal to allodial property and feudal tenures recognized that the Church was asking him to fundamentally reconceptualize property in terms very different than those that prevailed in American culture. Following the formulation given by Locke a century earlier, the American Revolution had rallied around the vindication of rights to “life, liberty, and property.” In this trinity of values, however, property had a particular meaning, one mediated in part through the legal concepts that Cowdery invoked. For example in 1765, John Adams attacked the Stamp Act in *A Dissertation on the Canon and Feudal Law* that identified the tyranny of Parliament as the latest chapter in a story of repression with its roots in feudal tenures. “All ranks and degrees held their lands by a variety of duties and services, all tending to bind the chains the faster on every order of mankind,” Adams noted.²⁶ The dire result of this system, he continued, was “a state of total ignorance of every thing divine and human.” In contrast, among those who “holden their lands allodially,” a man was “the sovereign lord and proprietor of the ground he occupied.”²⁷

A generation later, in his widely used American edition of Blackstone’s *Commentaries*, William and Mary law professor St. George Tucker noted with pride that, due to the “republican spirit,” feudal tenures had been abolished by statute in America, and “it was expected that every trace of that system would have been abolished in this country when the republic was established.”²⁸ Likewise, in his 1828 *Commentaries on American Law*, Chancellor James Kent traced in detail the end of feudal tenures in America and the rise of allodial holding, marking it as a restoration of ancient lost liberties. “Thus, by one of those singular revolutions incident to human affairs,” he wrote, “allodial estates . . . regained their primitive estimation in the minds of freemen.”²⁹ As an aspiring attorney, Oliver was well aware of such standard legal texts as Tucker’s and Kent’s commentaries, and his rhetorical fillip on allodial land was likely a deliberate allusion to this line of thinking.³⁰

The most salient feature of this “republican” vision of ownership was that it constituted a sharp limit on social obligation. Whatever a man’s obligations in the public realm, once within the private space of his allodial castle, he could do as he wished.

Blackstone, the most important reference work for generations of American attorneys, insisted: "So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. . . . In vain may it be urged, that the good of the individual ought to yield to that of the community."³¹ Nor were these merely "legal" categories. For a lawyer of Oliver's generation, legal positivism had not yet shattered the identification of the common law with natural law. Accordingly, this absolutist conception of property marked off more than simply the positive law of the land. It represented a fundamental feature of moral reality. In effect, to own property was to have a sphere, however limited, beyond the reach of the community.

Mormonism did not try to reinstitute feudal tenures. It did, however, reject the notion of property as a boundary or limit of communal duties. Furthermore, in common with the feudal system, it fragmented the moral concept of ownership and transformed property into a nexus of obligations to others. In Joseph Smith's revelations nobody owns property in the absolutist way championed by Blackstone.³² Rather, one 1834 revelation declared, "I, the Lord, stretched out the heavens, and built the earth, my very handiwork; all things therein are mine" (D&C 104:14). The institutions of consecrated properties and stewardships served not only to redistribute wealth among the Saints, but also to redefine their relationship to property. In the same revelation, God declared that property is given to the Saints "that every man may give an account unto me of the stewardship which is appointed unto him" (D&C 104:12). One did not hold property as a way of creating a private sphere free of communal obligations. Rather the purpose of property was to create obligations to others and to become accountable to God. (See also D&C 42:32.) Obligations associated with ownership included the duty to "administer to the poor and needy," assisting to purchase property "for the public benefit of the church," and most inclusively for "the building up of the New Jerusalem" (D&C 42:34, 35).

While the concrete institutional arrangements of "the law of consecration and stewardship" were short lived, the underlying approach to property continued within Mormon practice. For ex-

ample, in 1838 Joseph Smith published a revelation that replaced the earlier system of consecrations and stewardships with a system of tithing requiring Mormons to “pay one-tenth of their interest annually” into the coffers of the community (D&C 119:4). However, the rule, which is still followed by Latter-day Saints, did not repudiate the earlier concepts of stewardship and subsidiary ownership. Rather, the revelation explicitly linked the new regime to the older rules requiring that “surplus property be put in the hands of the bishop” (D&C 119:1) and to a notion of property rights linked to the obligation to build up Zion:

Verily I say unto you, it shall come to pass that all . . . shall be tithed of their surplus properties

And I say unto you, if my people observe not this law, to keep it holy, and by this law sanctify the land of Zion unto me, that my statutes and my judgments may be kept thereon, that it may be most holy, behold, verily I say unto you, it shall not be a land of Zion unto you. (D&C 119:8–9)

Thus, in a single passage, “properties” are associated with divine obligations (“my statutes and judgments”) and the creation of a community defined by reciprocal obligations of love and service (“a land of Zion”). In place of the conception of property as a bulwark of individual freedom, Mormonism offers property as a nexus of obligation to God and to one’s neighbors. The 1838 revelation is particularly striking in this regard because it came in the context of a retreat from cooperative economic arrangements toward a regime of greater personal control of property. Nevertheless, it carried forward the notion that to care for the poor and build up Zion is not something that one chooses to do with property that is truly one’s own. Rather, everything one owns is a stewardship from God, given for the purpose of making one accountable to him. The obligation to build Zion inheres in the concept of property itself.

IV

The nineteenth-century Mormon court system can be similarly mined for Mormon conceptions of contract. In contrast to their detailed discussion of matters relating to property, Mormon scriptures have comparatively little to say about contract. In this sense, they mirror the law codes of the Old Testament, which like-

wise have little to say about enforcing voluntary agreements. Nevertheless, Joseph Smith's revelation on the law of consecration and stewardship clearly assumes an economic order involving commerce and voluntary exchange, commanding "thou shalt pay for that which thou shalt receive of thy brother" (D&C 42:54). Another revelation speaks of a store to be set up to serve the Saints in Zion (D&C 57:8–10). While contracts exist only in the margins of Mormon scripture, covenant is an enormously important concept in Latter-day Saint theology. Most dramatically, an 1832 revelation suggests that sacred promises bind even God. "I, the Lord, am bound when ye do what I say; but when ye do not what I say, ye have no promise" (D&C 82:10). This reverential attitude toward the power of promises carried over into Mormon contract cases.

On December 7, 1863, a local schoolteacher filed a complaint with the bishop of a ward in northern Utah against a local farmer (both teacher and farmer were Mormons) "for unchristianlike conduct, unworthy of a Latter Day Saint, in refusing to pay me a small debt due for School teaching in wheat flour or corn." The farmer admitted to having promised to pay but insisted that "prior to his calling on me for wheat, I had contracted my flour what I had to spare to raise a certain amount of money that I owed." A trial ensued, and testimony before the bishop's court revealed that the farmer had initially told the schoolteacher that he had no grain and had then tried to find a buyer who would pay for his wheat either with livestock or sufficient ready cash. When the schoolteacher found out, he demanded the wheat according to the earlier agreement; but by this time, the farmer had found willing buyers at the higher price, a group of Gentile miners. In his complaint to the bishop's court, the schoolteacher insisted that he had "very much needed" the wheat and expressed dismay that it had gone to "speculators from the Bannock Minz." Other Mormons testified that they had offered to buy the corn with cash or calves, but the farmer had refused them, either because the amount of money offered was too little or because the calves were too young. The clerk recorded that the bishop, after deliberating, "said it was a very plain case, many cases come up rather misty but this is a very plain case. . . . I think so and more than enough has been said to prove that [the farmer] has told in a number of in-

stances that which is not true and [the bishop] moved that we disfellowship [him] until he make satisfaction.”³³

The little drama described in this case is common enough in contract litigation. Able promises Baker some commodity at a fixed price. At the time of delivery, however, the market price of the commodity has risen, and Able breaches his contract to Baker to make a better deal elsewhere. The bishop’s approach to the case, however, deviates significantly from the common law of contracts. Holmes famously declared, “The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else.”³⁴ While laypersons commonly speak of “enforcing” a contract, in point of fact the common law generally will not force a breaching party to literally do what he promised in his contract. Rather, the usual remedy is damages. A breaching party must—in theory, at least—compensate the disappointed promisee for the lost value of the bargain but is always free to simply breach and pay. Furthermore, the breach of contract—while giving rise to liability—is not regarded as a legal wrong in and of itself. For example, with a few extremely rare exceptions, the mere breach of contract is not a crime or even a civil wrong giving rise to a fine nor do courts inquire into the culpability of breach in any but the rarest of cases. In short, one is always free to simply walk away from one’s agreements, albeit at the risk of a suit for damages.

The justifiability of the common law’s preference for compensatory damages is hotly contested among legal scholars. There are at least two possible arguments. The first is that contract law’s primary concern is and ought to be to provide contracting parties with incentives to behave in economically efficient ways. In this view, society does not want people to keep all of their promises. Rather, it only wishes to see promises kept when the benefits of doing so exceed the costs. Sometimes, however, it will be economically efficient for parties to breach their contracts; and in such cases, we wish them to do so. Damages incentivize performance but not too much, encouraging so-called “efficient breaches.”³⁵ Alternatively, some argue that, in a liberal society, the law should not concern itself with the personal morality of its citizens, confining itself to protecting them against invasions of their rights by others. The duty to keep a promise, being grounded in

personal virtue, is not something that the law should concern itself with. It will provide compensation to those whose legitimate expectations have been disappointed by breach, but it ought not to act to keep the promisor from breaking his promise merely on the basis of moral objections.³⁶

Thus, there is a sense in which both of these justifications treat contracts as extremely thin obligations between two essentially unrelated individuals. Both take an amoral attitude toward promises, treating them as either instrumentally useful in some cases to achieve economic goals or alternatively as matters about which a properly constituted political community ought to be indifferent. In this view, the actions of the farmer were altogether benign, even perhaps commendable from an economic point of view. To be sure, he ought to pay the schoolteacher something, but the common law would attach no stigma *per se* to his shopping his grain to the highest bidder, notwithstanding his prior promise to give it to the schoolteacher. The bishop, in contrast, viewed the farmer's actions in starkly moralistic terms. The farmer had not only breached his contract, but he had also lied. Furthermore, the remedy imposed was not simply an order to pay some amount of damages. Rather, he was cut off from the community until the man he had wronged determined that he was once again eligible to enter it. Under the rules that prevailed at the time, of course, the schoolteacher's power over the farmer's continued fellowship was not absolute. Someone who felt that he had been abused under a judgment from a Church court could always file a counter complaint for, in the words of one such action, "unchristianlike conduct in . . . depriving me of my fellowship in the Ch. Of J.C. of LDS."³⁷ Still, the bishop's resolution of the case gave more to the schoolteacher than a mere claim for money damages and had a punitive aspect foreign to the common law of contracts.

The Mormon preference for moralizing contracts shows up in other areas where Mormon adjudication differed sharply from secular legal doctrines. Where possible, Church courts required breaching parties to perform their obligations, awarding damages only when performance was no longer possible.³⁸ Even when damages were awarded, the Church courts took a tougher line with breaching parties than do secular courts. For example, under

the rule announced in the famous English case of *Hadley v. Baxendale*, a breaching party's liability includes few of the secondary negative effects of his breach because the law sharply limits so-called "consequential damages." The decisions in the Church courts were quite different.

For example, in October 1847, the Salt Lake High Council heard a complaint against a man who had apparently breached a contract to deliver some gunpowder in his possession, selling it instead to a third party. He offered to pay for it, but the council went on to hold that he "be held responsible for *any damage* that may accrue from the want of it, until paid," greatly enlarging the man's liability beyond what would be available under the common law.³⁹ Elsewhere, Church courts awarded punitive damages for breach of contract, something almost totally unheard of in the common law.⁴⁰ Likewise, Mormon courts regularly enforced debts that had been discharged by bankruptcy or even death, on the theory that Latter-day Saints had a moral duty to meet their obligations come what may.⁴¹ This highly moralistic approach to obligations was never tied to communitarian economic institutions and has survived in contemporary Mormon discourse, notwithstanding its sharp divergence from secular ideas of contract.⁴²

V

Obviously, the interpretation of these two Church court cases is open to debate. They do illustrate, however, the way in which one can extract fairly abstract ideas from a concrete set of practices that do not themselves articulate the abstract ideas. Hence, Cowdery's property dispute reveals an idea of property as a nexus of communal obligations rather than as a boundary of those obligations. The dispute between the farmer and the schoolteacher shows a contract as a locus of moral testing and obligation, rather than the amoral vision of a contract as a mere facilitator of efficient behavior or as another boundary line among rights-holding strangers. In short, the analogy to legal interpretation shows how the nitty-gritty response of Mormonism to concrete questions of practice contains the germ of more generalized discussions.

Such an approach has a number of attractive features. First and most importantly, it shows that Mormonism has something to say on subjects where it appears initially taciturn. While a philos-

opher might view the relentlessly practical and practice-focused Mormon landscape as a mute wasteland, a legal theorist can see it as a vast reserve of material waiting to be rendered articulate.

Second, a jurisprudential approach largely sidesteps the thorny issue of authority within Mormonism.⁴³ At a conceptual level, it rests on the authority of the “living oracles” and their ability to invest the prosaic, practical aspects of Mormonism with the divine. The concrete confrontation over the sale of Cowdery’s parcel of Jackson County land or between the farmer and the schoolteacher serve to fill in the “outlines of our duties [that] are written.” They do not, however, purport to uncover the first principles that ought to guide the decisions of the living oracles. The legal analogy provides no critical leverage against the authorities of the Church. Those with ecclesiastical offices giving them stewardship over a particular practice or institution may always change it and, in so doing, will provide new cases to be interpreted and enfolded into our ongoing understanding of what Mormonism has to say about the world. Hence, even at the conceptual level, the jurisprudential analogy assumes that the practice of Mormonism is logically and normatively prior to any theory that one might have about it.

Third, this approach allows us to sharpen our normative analysis of Mormon history while sidestepping the morass of debates over historiography and historicity. If we adopt the stance of a legal theorist, successful examinations of the past no longer consist of providing an “objective,” “neutral,” “scholarly,” or “historical” assessment of it. The jurisprudential approach can mine past practices and institutions in normative terms without intellectual embarrassment because it is, from first to last, an exercise in normative archeology rather than ostensibly disinterested history. Past practices and institutions become interesting primarily as the instantiation of a particular constellation of normative choices. It is this constellation of normative choices, rather than the concrete historical details and their interpretation, that is of interest. In a sense, institutions and practices become more akin to arguments to be appreciated and evaluated rather than events to be explained on causal or historical grounds. Finally, and most importantly, the turn to legal interpretation helps to render artic-

ulate what was previously mute and reveals Mormon practices and institutions—and by extension Mormonism itself—as “worthy of the interest of an intelligent [person].”⁴⁴

Notes

1. Wilford Woodruff, April 8, 1862, *Journal of Discourses*, 26 vols. (London and Liverpool: LDS Booksellers Depot, 1855–86), 9:324.

2. William Blackstone, *Commentaries on the Laws of England*, 3 vols. (Chicago: University of Chicago Press, 1979), 1:69. Blackstone’s *Commentaries* was originally published in England in 1765.

3. One might point to the early work of Orson Pratt, the synthesis attempted by B. H. Roberts, or modern Mormon philosophers such as Sterling McMurrin, Blake Ostler, and David Paulsen.

4. David Tracy, “A Catholic View of Philosophy: Revelation and Reason,” in *Mormonism in Dialogue with Contemporary Christian Theologies*, edited by Donald W. Musser and David L. Paulsen (Macon, Ga.: Mercer University Press, 2007), 449.

5. Richard Lyman Bushman, “What’s New in Mormon History: A Response to Jan Shipp,” *Journal of American History* 94, no. 2 (2007): 518.

6. See generally Alvin Plantinga, *Warranted Christian Belief* (Oxford, England: Oxford University Press, 2000).

7. For a collection of the key articles, see George D. Smith, ed., *Faithful History: Essays on Writing Mormon History* (Salt Lake City: Signature Books, 1992).

8. See Hugh Nibley, *Brother Brigham Challenges the Saints*, edited by Don Norton (Salt Lake City: Deseret Book/Provo, Utah: FARMS, 1994). Other examples include James W. Lucas and Warner P. Woodworth, *Working toward Zion: Principles of the United Order for the Modern World* (Salt Lake City: Aspen Books, 1994), and Phillip J. Bryson, “In Defense of Capitalism: Church Leaders on Property, Wealth, and the Economic Order,” *BYU Studies* 38, no. 3 (1999): 89–107. For historical works setting forth the narratives on which this work is largely based, see Leonard J. Arrington, *Great Basin Kingdom: An Economic History of the Latter-day Saints, 1830–1900*, new ed. (Urbana: University of Illinois Press, 2004), Leonard J. Arrington, Feramorz Fox, and Dean L. May, *Building the City of God: Community and Cooperation among the Mormons*, 2d ed. (Urbana: University of Illinois Press, 1994).

9. Woodruff, *Journal of Discourses*, 9:324.

10. I have written elsewhere about the relationship between legal thinking and Church doctrine. In a sense I am repeating many of the same arguments here, although I offer them as a way of generating iden-

tifiably Mormon perspectives rather than as a way of discovering authoritative Church doctrine. See Nathan B. Oman, "Jurisprudence and the Problem of Church Doctrine," *Element* 2, no. 2 (Fall 2006): 1–19; Nathan B. Oman, "A Defense of the Authority of Church Doctrine," *Dialogue: A Journal of Mormon Thought* 40, no. 4 (Winter 2007): 1–28.

11. Quoted in Louis Menand, *The Metaphysical Club* (New York: Farrar, Straus and Giroux, 2001), 339.

12. This is the so-called parole evidence rule, which holds, in the technical language of the American Law Institute, that "a binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them . . . [and] a binding completely integrated agreement discharges prior agreements to the extent that they are within its scope." *Restatement (Second) of Contracts* (St. Paul, Minn.: American Law Institute, 1978), §212.

13. For a brief introduction to the contemporary philosophy of contract law, see Nathan B. Oman, "Unity and Pluralism in Contract Law," *Michigan Law Review* 103, no. 6 (May, 2005): 1483–1506.

14. A. W. B. Simpson, ed., "The Common Law and Legal Theory," in *Oxford Essays in Jurisprudence*, 2d series (Oxford, England: Oxford University Press, 1973), 99.

15. Admittedly, law professors are less tied than lawyers or judges to what H.L.A. Hart called "the internal point of view" described here. Nevertheless, when law professors are engaged in what is called "doctrinal scholarship" or—at a higher level of abstraction—"interpretive reconstruction," they are engaged in the sorts of activities described above. For Hart's discussion of the "internal point of view," see, e.g., H.L.A. Hart, *The Concept of Law*, rev. ed. (New York: Oxford University Press, 1991), 88–91.

16. For a summary of civil dispute resolution in nineteenth-century Mormon courts, see Nathan B. Oman, "Preaching to the Courthouse and Judging in the Temple," *Brigham Young University Law Review*, no. 1 (2009): 157–219; and Edwin Brown Firmage and Richard Collin Mangrum, *Zion in the Courts: A Legal History of the Latter-day Saints, 1830–1900* (Urbana: University of Illinois Press, 1989).

17. Richard Lyman Bushman, Joseph Smith: *Rough Stone Rolling* (New York: Alfred A. Knopf, 2005), 154–55.

18. Firmage and Mangrum, *Zion in the Courts*, 61–63.

19. Bushman, *Rough Stone Rolling*, 222–27.

20. *Ibid.*, 346–49.

21. Donald Q. Cannon and Lyndon W. Cook, eds., *Far West Record: Minutes of the Church of Jesus Christ of Latter-day Saints, 1830–1842* (Salt Lake City: Deseret Book, 1983), 164.

22. Mormon law professor Steven D. Smith, for example, has written: "Oliver's position seems a bit bizarre. . . . I admit to being in sympathy with some of Oliver's concerns. Even from a distance, though, I think we can say that on this specific issue of property, Oliver seemed confused. . . . Why would the fact that in this country property is allodial rather than feudal (whatever that means) preclude a church from giving direction to those who choose to belong to it, even in temporal affairs?" Steven D. Smith, "The Promise and Perils of Conscience," *Brigham Young University Law Review*, no. 3 (2003): 1057, 1065–66. Bushman, *Rough Stone Rolling*, 348, however, sees Cowdery as making a deeper point with his pedantry over allodial property.

23. Arthur R. Hogue, *The Origins of the Common Law* (Indianapolis, Ind.: Liberty Fund, 1984), 94.

24. George W. Thompson, *Commentaries on the Modern Law of Real Property*, edited by John S. Grimes, 14 vols. (New York: Bobbs-Merrill Company, 1980), 1:168–69.

25. See Stanley R. Gunn, *Oliver Cowdery: Second Elder and Scribe* (Salt Lake City: Bookcraft, 1962); Richard Lloyd Anderson, "Oliver Cowdery, Esq.: His Non-Mormon Career," *Proceedings of Utah Academy of Science, Arts, and Letters* 45, no. 1 (1968): 66–80.

26. John Adams, *The Revolutionary Writings of John Adams*, edited by C. Bradley Thompson (Indianapolis, Ind.: Liberty Fund, 2000), 23.

27. *Ibid.*, 27.

28. St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*, 5 vols. (Philadelphia: William Young Birch and Abraham Small Pubs., 1803), 3:44.

29. James Kent, *Commentaries on American Law*, 4 vols. (New York: O. Halsted Pub., 1828), 3:412.

30. In an 1838 letter setting forth the books necessary for his study of the law, Oliver listed both Blackstone and Kent's *Commentaries*. See Gunn, *Oliver Cowdery*, 168.

31. Blackstone, *Commentaries*, 1:135.

32. Interestingly, however, Doctrine and Covenants 134:10–11 takes a somewhat different attitude toward property, insisting that "we do not believe that any religious society has authority to try men on the right of property" and further insisting that "we believe that all men are justified in defending . . . their . . . property . . . from unlawful assaults." This section, however, was authored by none other than Oliver Cowdery. See Robert J. Woodward, "Historical Development of the Doctrine and Covenants," 2 vols. (Ph.D. diss., Brigham Young University, 1974), 1784–94.

33. Ecclesiastical Court Cases Collection, Disfellowshipment Re-

cords, 1839–1965, CR 355, 2, 1863, fd. 1, LDS Church Library, Salt Lake City. These restricted records are used by permission on condition of masking individuals' identity.

34. Oliver Wendell Holmes Jr., "The Path of the Law," *Harvard Law Review* 10, no. 8 (1897): 457, 459.

35. See A. Mitchell Polinsky, *An Introduction to Law and Economics*, 2d ed. (New York: Aspen Law and Business, 1989), 27–38. For reasons to doubt the economic validity of these arguments, see Nathan B. Oman, "The Failure of Economic Interpretations of the Law of Contract Damages," *Washington and Lee Law Review* 64, no. 3 (2007): 829–75.

36. Randy Barnett, "Some Problems with Contract as Promise," *Cornell Law Review* 77, no. 5 (1991–92): 1022–33.

37. Ecclesiastical Court Cases Collection, Disfellowshipment Records, 1839–1965, CR 355, 2, 1858, fd. 2.

38. See, e.g., Nicholas Groesbeck Morgan Sr., *The Old Fort: Historic Mormon Bastion, the Plymouth Rock of the West* (Salt Lake City: n.p., 1964), 55, reproducing minutes of the Salt Lake Stake High Council in a case for "non-delivery of an ox" ordering the defendant to deliver the ox rather than pay damages.

39. *Ibid.*, 71–72; emphasis mine. It is not entirely clear that this was a purely contractual case. The man may have been the equivalent of a bailee, holding the gun powder as an agent rather than simply promising to deliver it. Needless to say, Church courts made no attempts to draw such fine distinctions in their decisions.

40. Firmage and Mangrum, *Zion in the Courts*, 344.

41. *Ibid.*, 341–44.

42. See, e.g., Dallin H. Oaks, "My Brother's Keeper," *Ensign*, November 1986, 20.

43. For some thoughtful discussion of the issue, see Armand Mauss, "Alternative Voices: The Calling and Its Implications," *Sunstone*, April 1990, 7–11, and Dallin H. Oaks, "Alternative Voices," *Ensign*, May 1989, 27–31.

44. The phrase appears in Oliver Wendell Holmes Jr., Letter to Harold Laski. One of his goals in writing *The Common Law* was to reveal jurisprudence as a topic "worthy of the interest of an intelligent man." Holmes, *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes Jr.*, edited by Richard Posner (Chicago: University of Chicago Press, 1992), 265.