

BYU Law Review

Volume 2003 | Issue 3


Article 9

9-1-2003

Legal Scholarship and Membership in the Church of Jesus Christ of Latter-day Saints: Have They Buried Both an Honest Man and a Law Professor in the Same Grave?

Michael K. Young

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>

 Part of the [Ethics in Religion Commons](#), and the [Legal Writing and Research Commons](#)

Recommended Citation

Michael K. Young, *Legal Scholarship and Membership in the Church of Jesus Christ of Latter-day Saints: Have They Buried Both an Honest Man and a Law Professor in the Same Grave?*, 2003 BYU L. Rev. 1069 (2003).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2003/iss3/9>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Legal Scholarship and Membership in the Church of Jesus Christ of Latter-day Saints: Have They Buried Both an Honest Man and a Law Professor in the Same Grave?

*Michael K. Young**

I. RELIGIOSITY IN ACADEMICS IS PARTICULARLY DIFFICULT

A. The Conference Convener Always Knocks Twice

I initially declined when Professor James Gordon of the J. Reuben Clark Law School at Brigham Young University called to invite me to present at a conference entitled “LDS Perspectives on Law.” I had nothing against such a gathering. I am myself an LDS law professor and have been for most of the past twenty years. My perspective on most things is unmistakably LDS. The conference even sounded interesting. But, frankly, I thought I had little to contribute.

Professor Gordon described the agenda of the conference in general terms, but with enough specificity to make clear that he was hoping participants would prepare papers that examined various aspects of the American legal system (or, in my case, perhaps Japan’s legal system) against the backdrop of the religious beliefs held by LDS lawyers. Did LDS religious doctrine and theology illuminate the law? Could LDS lawyers derive any particular insight by holding up legal rules, institutions, and developments to the light of the restored gospel and revealed truth?

* Dean and Lobingier Professor of Comparative Law and Jurisprudence, George Washington University Law School. I very much appreciate the helpful comments on this presentation from a number of colleagues, including Professors Cole Durham and Brett Scharffs of Brigham Young University, and Professor Christian Johnson of Loyola University, Chicago School of Law.

The views expressed in this Comment do not necessarily reflect the views of the Church of Jesus Christ of Latter-day Saints, the J. Reuben Clark Law School, or the Brigham Young University Law Review.

I admired immensely his ambition, I told him, but I myself had not generally used gospel principles as a starting point for my legal academic work, at least not in any reflective or particularly self-conscious way. That is not to say that I have not studied the gospel or used gospel principles in my family and church lives. For example, I learned early on that my only hope of staying a few steps ahead of my three bright children was constant recourse to scripture and prayer. I have also served in a variety of church assignments, including a number of years as a stake president,¹ and frequent, indeed often frantic, scripture study was an essential part of most of those responsibilities.

But, still, I had rarely, if ever consciously, attempted to apply those gospel principles to my academic work. I have written and taught across three or four different fields, including contracts, international trade law, international environmental law and, most frequently, comparative law. Gospel principles might have been applicable to much of what I have done, I told Professor Gordon, but I have never started my analysis from that perspective or examined through an LDS prism any of the issues on which I have written. I might enjoy sitting in the audience, I informed him, but I suspected I had nothing to say as a participant.

Not to be deterred, Professor Gordon called again a few days later, asking whether I would reconsider and be a keynote speaker at lunch. If I didn't have much to say, he offered, I would be a perfect keynote speaker at lunch, brevity being the greatest virtue of anyone who speaks over a meal. Would I reconsider? As it turned out, I had already reconsidered. I still did not think I was prepared to undertake a serious substantive analysis of some aspect of Japanese law or trade law against the backdrop of the gospel. However, I had been thinking about why I had never done what Professor Gordon wanted me to do. Why wasn't the gospel, which was such a fundamental part of every other aspect of my life, particularly central to my scholarship and teaching? Or, put slightly differently, was there anything at all about me as an academic that was distinctive

1. A stake president is a member of the lay clergy designated by senior church officials from the Church's headquarters in Salt Lake City, Utah, to preside over and direct the affairs of a fixed number of congregations in a defined region called a "stake." For a discussion of the lay ministry in the Church of Jesus Christ of Latter-day Saints, see Nolan D. Archibald & Michael K. Young, *Nolan D. Archibald and Michael K. Young, in WHY I BELIEVE* 13, 13-24 (Bookcraft ed., 2002).

1069] *Legal Scholarship and Membership in the LDS Church*

from my colleagues at Columbia and now George Washington University because I was a member of the Church of Jesus Christ of Latter-day Saints? While I was not sure—and am still not sure—I could answer those questions, I was interested in thinking more about them. So, I accepted.

I am not sure my ruminations answer anything, but the process of thinking about this issue has clarified some things in my mind and has been modestly helpful to me as I consider how I fulfill my professional obligations. I hope it might also be useful to others.

*B. You'd Think this Paper Would Have Been
Easier to Write than it Was*

In many ways, one would have thought that I would rather naturally gravitate to gospel principles in my scholarly work. After all, the gospel is very much at the center of my personal life. Moreover, my membership in the LDS Church has always been highly relevant to my professional activities. From the very first moment I entered the legal academic world, my religion was among my most defining characteristics. I selected a law school to some large extent based on the quality of its East Asian programs, a choice dictated by my own interest in East Asia, which itself derived out of my two-and-a-half years living in Japan as a missionary for the LDS Church. I secured my first legal job as a summer intern at a Tokyo law firm because I spoke Japanese, a skill I had developed as a missionary in Japan. In addition, I paid my way through law school in some large measure with a fellowship that was awarded because of my language skills and my interest in Japan.

While I was serving as a law clerk to the U.S. Supreme Court, various schools approached me about the prospect of teaching, primarily because they were interested in my Japanese background. From my résumé it was clear I had not formally studied Japanese law in Japan, but, nevertheless, my language facility and my exposure to Japan seemed to hold enough promise for most schools. And it was clear from my curriculum vitae that I acquired that experience while a missionary.

True to that interest, I have spent much of the last twenty years studying and teaching about Japanese law, even creating and directing the Center for Japanese Legal Studies at Columbia Law School, as well as serving on numerous occasions as a visiting professor in Japan. And virtually no discussion of my chosen

profession, especially my area of principal academic interest, can proceed far without my revealing how I first became interested in Japan. As a professional matter, the identity of my religion and the depth of my commitment are basic, inescapable facts. Indeed, hardly anything defines me more.

As a matter of social interaction, moreover, my religion has never been very far from the center of my being. At law school, most of my friends were not members of the Church of Jesus Christ of Latter-day Saints, but virtually none of them turned down weekly opportunities to play basketball at our Church or to attend church social activities. A few even listened to lessons from our missionaries. The same was true while I served two judicial clerkships.

Upon arriving at Columbia, my religion remained highly relevant as a personal matter. All my colleagues understood the importance of my religious commitments and seemed themselves committed to assisting me in fulfilling those obligations. Colleagues at Columbia would sidle up to me at cocktail parties and tell me in hushed tones that my wife, Suzan, was drinking a Coke, implying that perhaps New York City was already taking its toll, but that they were prepared to help in any way they could to counter the city's heathen influences. Within a few years of my arrival at Columbia, we had attracted so many students from Brigham Young University that a colleague informed me (in jest, I think, but I was never entirely sure) that if I attracted a few more, I could open my classes with prayer. And at least two of my Jewish colleagues took great—and frequent—amusement in my membership in the only religion of which they were aware that considered them gentiles. In short, religion was never very far from the center of the way in which my colleagues identified and understood me and the way in which I presented myself to the professional world.

II. REASONS FOR RELUCTANCE TO CONSIDER THE IMPACT OF RELIGIOUS BELIEFS ON SCHOLARSHIP ACTIVITIES

The LDS religion has obviously been central to my life. Why, then, was I so hesitant to participate in this conference when I was first invited? What was it about this subject, unlike virtually any other, that made me unsure I had anything relevant or useful to say and therefore made me reluctant to give my opinion? After much reflection, three answers—one obvious, the others not so obvious—have come to mind. In the less obvious answers, moreover,

1069] *Legal Scholarship and Membership in the LDS Church*

there is something of relevance to the general enterprise of this conference, I believe.

A. Historical Separation of Religion and Academics

1. Little conscious attention to religious underpinnings of law in academic research

My most obvious and straightforward concern derived from the fields of study in which I have engaged as an academic. A somewhat restrained and nuanced version of rational choice theory informs and underpins my scholarship much more than philosophy and certainly much, much more than theology. As a comparativist, my writings range across a broad variety of subject areas. But, frankly speaking, while comparative law can be understood and taught from the perspective of, and as a way to illuminate, jurisprudence, my approach is decidedly more anthropological. I also teach and publish extensively in the field of international law, especially international trade law and international environmental law. But, again, in those fields as well, I am much more interested in institutional imperatives and incentive structures than in underlying philosophical debates.

Indeed, in virtually none of my main academic work have I considered the role of religion or, for that matter, even indirectly considered the role of religion, by, for example, paying attention to morally or arguably religiously derived value systems. I have generally accepted rather uncritically the values and goals identified by the major actors in the system and then analyzed the extent to which the institutional arrangements they have established are calculated to achieve those goals and advance those values or to do something quite different.

More recently I have done some work in the field of human rights, including the right to religious freedom. But even in that work I have generally worked from the existing human rights documents and identified both ways in which religious liberties are proscribed and steps that need to be taken to eliminate the abuse of those religious liberties. My interest in this work is undoubtedly fueled in part by my religious convictions, but I tend to approach this work from the international human rights side more than from the religious liberties side. In any event, I have rarely engaged in any philosophical debate regarding the nature and extent of these rights

that might draw on religious principles that are somehow uniquely linked to my understanding of the doctrines of the Church of Jesus Christ of Latter-day Saints.

In short, I have not wrestled with questions of morally derived values and principles in the work I have done, either as a matter of substance or as a matter of methodology. Even more to the point, I have never consciously examined legal behavior against the backdrop of gospel principles. I travel as an acknowledged member of the LDS Church, but I appear to use nothing more than the standard set of secular, positivistic tools characteristic of our legal age.

Viewed from that perspective, I had wondered whether I had any real contribution to make to a conference that explored what it means to be a law professor and a member of the LDS Church. It seemed that, at most, any contribution I could make would be largely on a social or personal basis. Could I articulate an academic reason, as opposed to a purely personal reason, that it mattered that I was both a member of the LDS Church and a law professor? If not, then, for these purposes, I suppose I could have just as easily been LDS and a ski instructor or LDS and an investment banker—both careers I considered and rejected (one sounded like too much fun and the other like no fun at all). In that case, it was hard to see what I could say that would deserve anyone's attention in a group as distinguished as a conference on LDS perspectives on the law.

2. Inadequacy of historical separation in explaining initial reluctance

But as I considered the matter further, I realized that my reluctance to participate in the conference did not lie in the fact that in the past I had not informed my scholarship with an LDS perspective. Like most legal academics, I generally do not find lack of knowledge to be a serious deterrent to the formulation of strong opinions. After all, I work in a field where I am permitted to range across virtually any area of law. With rare exceptions, moreover, I am rarely disinclined to opine—to the media or in print—on Japanese law subjects about which I have only passing familiarity (or at least have only passing familiarity just scant days before I am required to speak or write about the matter).

Nor did my lack of expertise ever seem to deter me or my bosses' assignments to me when I served in the State Department during the first Bush Administration. I went into the government as a Japan specialist and immediately became the lead lawyer for the U.S.

1069] *Legal Scholarship and Membership in the LDS Church*

Delegation to the German unification negotiations. I had never even been to Germany before. In fact, in four years in the Department of State, I visited Japan only once and that only for three days. Otherwise my responsibilities ranged from trade negotiations in the Uruguay Round and the North America Free Trade Agreement, to international environmental matters, including the United Nations Conference on Environment and Development, to dispute resolution in the context of the Conference on Security and Cooperation in Europe, and to the appropriate level of landing fees for U.S. airplanes at Heathrow Airport. No, excessive modesty about my capacity to master a new field, whatever my prior experience, has never been one of my failings. So I had to dig deeper to find my reluctance.

B. Perception That Compartmentalization Is Necessary for Success

After some thought, it dawned on me that at least part of my reluctance to examine more self-consciously the relationship between my academic scholarship and my religious beliefs derived from the realization that, in some ways, this precise issue has a tendency to put those of us who do not deal specifically with religiously oriented subject matter areas in a difficult spot. It creates an intellectual bind that we can happily and easily ignore most of the time. But precisely because of the difficulty of this issue and the challenge it presents to those of us who do not spend our time on topics relating to law and religion, I finally conceded that perhaps it was a particularly important topic for me to think about.

So, let me first turn to the tension inherent for most of us in this question posed at this conference. Then, I will turn to what I now understand to be ways in which my religious beliefs have shaped my work, admittedly in ways that have not always been entirely conscious, but which have had a profound impact nonetheless.

1. Dividing life into separate compartments

As I examine the general absence of gospel-based analysis in my legal scholarship, I am first struck by the remarkable degree to which I neatly divide my life into different compartments. From nine to five (actually, far too often from seven thirty in the morning until ten thirty at night) I am a law professor and dean working in a totally secular world. In this world I meet my colleagues largely on their

own terms. I write books and articles and teach classes using modes of argumentation and analysis as well as conceptual constructs and patterns of evidentiary support that resonate with my colleagues in the legal world. In this world I am first and foremost a lawyer. I talk and think and act in ways that are, for the most part, entirely comprehensible to my colleagues in the academy and at the bar. I believe I do this in a highly ethical and honorable way, but it is, in most instances, the way of the world. I believe I am a “good” lawyer in both senses of that word, but my actions do not seem to differ greatly from most of the large number of highly ethical, morally sensitive lawyers I know and with whom I often have the privilege of working. I believe I am honest and ethical and I strive to do good in the world, but so do they. And we all generally do it in quite similar ways.

At home and at church, however, my rhetoric and patterns of thinking are quite different than they are at the law school. I am also analytical and conceptually oriented at home and at church—perhaps even excessively so. But, at the same time, in the context of home and church I understand and employ the principles of the gospel and the language of the Spirit. The majority of what I do is informed by the gospel principles to which I have vowed allegiance and, in most cases, my actions are shaped by those fundamental religious principles.

This capacity to compartmentalize—to adopt one set of values and one set of behavioral patterns in one setting and a different set of values and behavioral patterns in another—is glaringly obvious in almost everything I do. I have flunked students and fired employees. And, when hiring, I think only of who is best qualified to do the job. But I cannot remember ever flunking a member of my congregation for inadequate performance of his or her church job, and I have only fired a congregation member on the rarest of occasions. Moreover, in church settings, unlike work, I constantly asked myself for whom the job was best, not who was best for the job. I frequently picked less qualified individuals over more qualified individuals precisely because they were less qualified and needed the experience. I could go on and on with such examples, but the point is as obvious as it is simple.

Nor do I think I am alone in this tendency. This was brought home strikingly at a high council meeting in New York City a

1069] *Legal Scholarship and Membership in the LDS Church*

number of years ago.² I was serving as stake president and my high council was blessed by the presence of a truly extraordinary man who served in a very senior position in the military. His advice was invariably wise, informed by years of experience working with people both in and out of the LDS Church. His advice was also inevitably forgiving and gentle. He understood both the underlying goodness of people and our almost limitless capacity for making wrong choices and for self-deception. He was certain that the trumpet must sound clearly and firmly,³ as it were, but he also believed that in the end it was souls with which we were dealing and, as Joseph Smith said, only a fool trifles with the souls of men. He suggested forgiveness seventy times seven and more.⁴ He counseled patience. He was the very essence of compassion.

So it was with considerable surprise that I first observed his professional interactions with his military colleagues. One evening he received an emergency page from his military base and was forced to return the call in my office. Through the open office door, I heard him dress down a junior officer with a vigor that undoubtedly made the person on the other end of the line fear for his career. He then issued a series of commands in quick succession. Gone was the reflective, contemplative manner of thinking and speaking that characterized all the advice and counsel he gave me. Gone was the slightest doubt and hesitancy. He spoke in terms and issued orders that clearly reflected his long years of military training. Again, none of this was inconsistent with the gospel, but it was clear that his pattern of behavior and thinking in that situation was very different from what I observed on Sunday.

In my judgment, none of this creates a problem for a military officer. It does, however, create an interesting and complicated situation for an academic. Indeed, it perhaps puts us in a particularly difficult situation, one not necessarily encountered by many of our

2. A high council is a body, usually comprised of twelve men chosen from the geographic region of the relevant congregations, to provide advice and counsel to the stake president. *See supra* note 1.

3. "For if the trumpet give an uncertain sound, who shall prepare himself to the battle?" 1 *Corinthians* 14:8 (King James).

4. "Then came Peter to him, and said, Lord, how oft shall my brother sin against me, and I forgive him? till seven times? Jesus saith unto him, I say not unto thee, Until seven times: but, Until seventy times seven." *Matthew* 18:21–22 (King James).

other colleagues in the legal academic world, a problem to which I will return shortly.

But first let me turn for a moment to the question of why we so easily compartmentalize.

2. Believing that we must compartmentalize to succeed

I suspect many of us, including aspiring professionals, believe that compartmentalizing is necessary for success. Hence, we adopt different patterns of behavior in different settings because we believe that such behavior is essential for success. In each of our different roles in life we learn from others. In law school, in practice, and in the academy, we watch and learn from those we admire most. We pick successful role models and emulate their behavior and attitudes. This does not mean we mimic them or that we do not exercise independent thought. But in a profession that is often more art than science, we necessarily take guidance from those whom we admire and whose career accomplishments reflect our goals and ambitions. As we get older, we may reflect much more critically on what we are doing, but, at least in the early stages of our careers, consciously or unconsciously, we tend to identify and model.

Put slightly differently (and applying this to a more specific academic context), lawyers want to be taken seriously as academics. We want to be respected. We want to succeed. Mixing religious methods of analysis and discourse, not to mention religious beliefs, is not an obvious and clear-cut route to respectability.

Ever since the time of Christopher Columbus Langdell in America (and even before that in Germany and elsewhere), the quest of legal academics has been to create a science out of the law. Rigorous empiricism and healthy skepticism have been the watchwords of the day for legal academics. I believe the legal realists and the law and economics movement are also almost certainly part of this same historical quest. Historically speaking (and perhaps not so historically), law professors want to sit at the same table with the physicists and biologists. We want to prove that we belong in the academy, that our discipline has all the intellectual rigor of the hard sciences. We are not alone in this quest, I suspect. Econometrics and even sociometrics and polimetrics probably arise out of a similar motivational wellspring. But however futile that ultimate quest, legal academics have long wanted to be taken seriously as scientists, legal scientists, to be sure, but scientists nonetheless. And as legal

academics we have consciously chosen to be part of that intellectual tradition. We will be measured and judged by its standards.

In the academic universe, phrases like “revealed truth” and “I have a testimony” have a tendency to stop conversations and clear the faculty lunchroom. LDS dialogic and linguistic patterns, LDS styles of argumentation and proof, LDS methods of convincing in a gospel setting are all quite different than those in the academy. LDS lawyers who want to be accepted in the academy likely lean towards using the rhetorical methods and the conceptual constructs of the law, not those of the *Book of Mormon*. Simply put, LDS lawyers who want to be successful and well respected in their chosen profession feel they must engage their chosen profession on its own terms.

Accordingly, I suspect that some LDS lawyers, myself included, shy away from anything that appears too “religious” in its manner of expression or in its content. It is not exactly that we are embarrassed. After all, many of us freely tell our colleagues much about our Church and our own belief in its divinity. As we serve in the LDS Church, as our children serve LDS missions, as the LDS Church appears in the newspaper, we have frequent occasion to tell of our doctrines, beliefs, and practices. We even bear testimony from time to time. But, once we engage as academics, not merely as friends and acquaintances, our methods of logic, our patterns of speaking, and our styles of argumentation all change dramatically. Not surprisingly, that makes it much harder to claim with legitimacy that our religion influences our scholarship or that it makes a difference that we are members of the LDS Church who happen to be academics, as opposed to academics who happen to be members of the LDS Church. Or, put slightly differently, it makes it enormously difficult not to compartmentalize.

3. The easiest way to balance competing demands

Second, I believe we compartmentalize because it is simply a much, much easier way of living our lives. In particular, compartmentalizing makes it easier to reconcile the many competing demands imposed on us by our professions, our Church, and our family obligations. It is enormously challenging to fulfill all our obligations. I remember distinctly the pressure I felt serving as a stake president in New York, attempting to secure tenure at an Ivy League law school, and giving adequate—indeed, not merely adequate, but enough and more—time to my young family. I

realized that it was sometimes difficult to compartmentalize properly. On more than one occasion my family wondered why I was regaling them with tales of errant zoning boards in Japan, and my congregants wondered why I had one or two of my children in a stake or ward meeting. I occasionally used the Socratic Method at the dinner table and cut up the food of my dinner companion at a formal banquet.

Nor are these demands and the confusion they engender in any way unique to me. Many members of the LDS Church, as well as people of other faiths, have challenging church assignments, demanding careers, and families to which attention must be paid. While I have no empirical proof for this proposition, long observation leads me to believe that many people resolve these competing demands by keeping their imperatives quite separate. We feel a moral and religious tug to do good, so we perform considerable service in our church assignments. But, by and large, that fulfills our impulse to do good, so we do not much mix our charitable and service impulses with our work. In fact, I suspect that an honest survey would reveal that LDS lawyers do not perform any more pro bono work than the average attorney. Nor do I see many LDS law students leaping to the fore in human rights advocacy, public interest internships, membership in the Peace Corps, or employment at public interest organizations. There are exceptions to this, of course, but I suspect they prove the rule.

Nor do we much mix our careers and our family obligations. We probably do generally view our careers as lawyers, especially the comfortable living circumstances our careers make possible, as an important way in which we fulfill our family obligations, but I doubt most of us otherwise much involve our family in our professional obligations. We rarely take our children to work. We hardly even miss work to take care of them. Indeed, I suspect most lawyers consider themselves rather heroic (though undoubtedly completely underappreciated) when they leave work early to watch a soccer or little league game or to take an ailing child to the doctor.

I do not suggest this is necessarily bad or that LDS lawyers are somehow failing in any of their three main responsibilities by this tendency to compartmentalize. But I do think this compartmentalization is demonstrable in a very large number of LDS lawyers and law students with whom I am acquainted, and I do

think it derives to some considerable extent from the demands our beliefs and our conscience place upon us.

C. Fear of Critically Analyzing Eternal Principles

Finally, I think LDS lawyers shy away from applying gospel principles to scholarly work because of fear that such an approach will require them to apply to gospel principles the same degree of intellectual rigor and healthy skepticism that they apply to all other premises and conclusions that relate to their academic work. Moreover, LDS lawyers suspect that such intellectual distance and skepticism will not be welcomed in a religious community. We cherish our affiliation with the Church and do not want to be on its fringe or otherwise marginalized in our participation or our capacity to provide service.

It is not that LDS lawyers necessarily fear reprisals or even overt criticism from leaders or co-religionists. Rather, we love the Church and we want to contribute and engage. We do not want to be on the margins. The Church is the center of our lives in all the ways that matter most. We do not want to stand at a skeptical scholarly distance and opine on the legitimacy of the intellectual premises underlying the gospel and the foundational tenets of the Church. We know of the truthfulness of the gospel through a process more certain than sight or sound and more firm and unshakeable than intellect. We do not want to challenge the premises of the gospel. Instead, we want to home teach, teach our Sunday School and Primary classes, serve in our quorum presidencies and Relief Society, lead our boy scouts, and teach our young women.

Occasional speeches by LDS Church authorities directed towards academics might also be misinterpreted to suggest that critical analysis of divine principles is not favored and will not be rewarded within the Church. I believe that is a misinterpretation. As I read those presentations, it seems to me the logic and position of the speakers is unassailable. First, these authors usually start their instruction by enjoining Church members to prayer in their academic undertakings. This is hardly objectionable. W. Cole Durham, a law professor at Brigham Young University Law School, recited to me a conversation with a colleague regarding this point. The colleague insightfully queried what was so problematic about that injunction. After all, what faithful member of the Church starts

any enterprise without seeking guidance and assistance from the Lord at the outset?

Second, and of equal importance, I believe these authors are not urging us to avoid critical analysis, but rather are suggesting that when we engage in academic endeavors, we start from a divine perspective. After all, whether consciously or not, we all necessarily start any project from some perspective. For some of us, it is a rational choice perspective, for others it is utilitarian. Still others use Kant, Marx (Karl, I think, though occasionally Groucho, I suspect), Hegel, or Rawls as their lodestone. But I believe LDS lawyers are being urged to supercede, or at least override, all those perspectives with a divine perspective, with an eye less to Paul Samuelson and more to the Savior. That too hardly seems an unreasonable or anti-intellectual position. In fact, it seems to me that the entire underlying purpose of an LDS conference on perspectives on the law is to inquire whether we can find intellectually legitimate ways of doing precisely that.

Finally, when LDS Church leaders from Salt Lake City address academics, I think they are urging us to projects of genuine eternal significance. That is perhaps the hardest challenge of all. It is not that other projects are not worthwhile, but I think we are being told they are of less worth. Identifying which projects fit such a description is itself enormously challenging, but carrying out research and saying something of worth on such topics is even more difficult.

None of that advice strikes me as anti-intellectual. Nor should it necessarily cause LDS academics to fear genuine intellectual inquiry regarding divine principles. But I suspect that the difficulty of the challenge, as well as the possible risks of misunderstanding and misinterpretation, does cause some LDS academics to shy away from using gospel principles as launching points for scholarly inquiry. At least this seems to be a plausible reaction to the difficulty and sensitivity of the challenge.

III. CHALLENGES OF SUCCESSFULLY INCORPORATING RELIGIOUS PRINCIPLES IN ACADEMICS

On reflection, it seems to me that this hesitation on the part of LDS academics to derive our scholarly agenda out of our religious beliefs or to apply critical scholarly methods to fundamental gospel tenets raises a host of challenges that I had not fully considered

before Professor Gordon's invitation. Let me mention briefly four possible problems that it creates for LDS members as scholars.

A. Inevitability of Strong Biases

The first complication that faces many of us who do not self-consciously derive our legal principles from our religious codes starts with the inevitability of bias. In its simplest form this statement is a truism. But let me suggest a sense in which it is perhaps a bit less obvious, although perhaps very important, for purposes of the LDS conference on law and religion.

We all understand that our intellectual approach to matters is never shaped solely by our intellect. We are all products of our background, our experiences, and our instruction at the hands of parents, grandparents, teachers, and friends. Our political and social views, the conceptual constructs through which we order our world, even our political and frequently our religious affiliations, are very much products of the circumstances into which we are born and the things that happen to us in those circumstances. We accept or challenge this background to varying degrees. But, in one way or another, we are all shaped by it. That much is unarguable.

What is probably equally true, but which we consider far less often, is that the institutions and the people who shape us are also strongly shaped by the circumstances in which they are situated as well. This is undoubtedly true of our cultural understanding of our Church, just as it is for everything else.

Let me apply this in an LDS context. I believe our Church is our Savior's divinely restored church and is guided in all important respects by inspiration. At the same time, these days we are also relatively firmly situated in the mainstream of Christianity. We have serious doctrinal differences with many other Christian churches, to be sure, but we also clearly derive much of our culture of worship from centuries of traditional Christian practices. We have beautiful hymns of the restoration, but we also sing hymns that are familiar to any practicing Christian. We have unique stories from the *Book of Mormon*, but virtually all of us have read to our children Bible stories that are no different from those our neighbor uses. Our understanding of many of those stories comes as much from centuries of Christian thought, study, and theology as it does from

modern-day prophets. We even celebrate Christmas on the day identified not in the *Doctrine and Covenants*⁵ but on the day identified as Christ's birthday by thousands of years of Christian tradition.

Like it or not, it is also an extraordinarily rare—and, I must say, highly admirable—member of the LDS Church who is entirely free of some of the less savory cultural and historical baggage of those millennia of Christian history and practice. Christianity certainly has changed history in every way imaginable. At the same time, as it became an institutional force, it also took instruction from the history, culture, and practices of its adherents and the places in which they lived. One does not have even to be much of a student of history to understand that the pope's occasional apologies—or, for that matter, those of almost any leader of a major world religion—to some people or some country or another were probably warranted, overdue, and admirable.

Happily, at the same time, as LDS Church members we can be blessed with ways of separating ourselves from the cultural aspects of religion, especially the less savory ones, and demonstrating allegiance only to those principles that are true and right. We have been blessed with a capacity to study things out in our minds, a process that can be aided immeasurably by the Spirit.⁶ We have also been blessed with instruction about how to secure instruction directly from the Spirit.⁷ And we have been abundantly blessed with modern-day prophets, who guide and instruct us with a demonstrable prophetic capacity. So, while as scholars and members of the LDS Church we are inevitably affected by our beliefs as members of the Church and as practicing Christians, at the same time we can separate the wheat from the chaff and adhere only to true principles.

But that is precisely the rub. We can do that, but, unless we strive rather self-consciously to ground our work on true gospel principles, we generally do not pay much attention to sorting out precisely which parts of our religious beliefs, practices, and habits are essential and divinely ordained and which are simply the product of millennia of cultural accretion. For most purposes, such distinctions

5. In LDS doctrine, Jesus Christ was born on April 6. *Doctrine & Covenants* 20:1. (The *Doctrine & Covenants* is part of the canon of scripture of the Church of Jesus Christ of Latter-day Saints.)

6. *Doctrine & Covenants* 8, 9; see also *Alma* 5:46; 26:26 (Book of Mormon).

7. *Doctrine & Covenants* 8, 9; *Moroni* 7:6, 7:9, 10:4–5, 10:7 (Book of Mormon).

1069] *Legal Scholarship and Membership in the LDS Church*

are not terribly important. This careful analysis would not change our behavior in radical ways or make us more devoted Latter-day Saints. At the same time, since we hold the gospel so dear and have such devotion to the Church, we are probably much more shaped and influenced by these culturally derived norms than someone who does not share our religious devotion. In other words, we have very strong religious beliefs, often stronger than many of our colleagues in the academy. At the same time, we have perhaps less inclination to examine those beliefs and biases to separate the true from the false, the wheat from the chaff. Precisely because our religious biases are so important to us, we are at once more likely to be influenced by them and less likely to sort them out critically and skeptically.

Thus, in a way, most of us are the victim of our own devotion and avoid developing a divinely inspired set of legal principles from the gospel. There are those who do precisely that, of course, and I warmly applaud their efforts. I must confess that I occasionally find their perception of divinely inspired principles quite different from mine, and I suspect that one of us is wrong (and that it is not me). But, whatever the result, I have great respect for those who pursue their academic work in this manner.

The problem, however, is that most of us do not seem to do that. By way of complete empirical accuracy, I suppose I should limit that assertion and say only that at least I do not do it in my scholarly work. But it does seem to me as I read the work of people situated like me that I frequently find extraordinary legal scholarship, but I can only rarely point to what seem to be carefully considered and spiritually derived gospel insights that underlie my colleagues' work and which are explicitly articulated in that work. That is not to say that we write in a way that is inconsistent with the gospel, at least as we understand it. But writing in a way that is not inconsistent with our core values is not the same thing as premising our work on gospel principles.

Of course, the tendency to compartmentalize exacerbates this already considerable tendency to avoid critical analysis of our underlying religious beliefs in an academic setting. Simply put, the dilemma is this: on the one hand, as members of the LDS Church we inevitably have biases and prejudices that are not really part of the gospel but are nevertheless part of our intellectual makeup. All this intellectual and emotional baggage must surely inform our work on some important level. On the other hand, because we are so capable

of and inclined towards compartmentalization between our religious and professional lives, when we are engaged in our professional activities we do not examine these biases and prejudices with the same rigorously rational inquiry that we apply to our other professional activities. Thus, these prejudices inform our work, but we are not inclined to examine them in the same way or with the same intellectual rigor that we do the other important parts of our scholarly and academic work.

This tension seems very real to me and thinking about this topic forced some challenging reconsideration of two decades of scholarly and academic activity.

B. Uncertainty in the Method and Advisability of Bringing Spiritual Values into the Academic Realm

A second challenge I believe LDS lawyers face in this context is whether and how to bring fundamental spiritual values into our academic work. We are more than a little reluctant to do so. At some level, I am not sure this challenge is so different from that faced by LDS lawyers in all realms of our profession. How much do LDS law students focus on issues of “social justice”? How often are LDS lawyers in the vanguard of anti-war movements, civil rights marches, or humanitarian relief efforts here and abroad? How many LDS lawyers have on their resumes a two-year stint in the Peace Corps? How many LDS law students have undertaken human rights internships here or abroad while in law school? How much ahead of the national average in the provision of pro bono services are we as LDS lawyers?

I do not mean to suggest that we are at all below the mythical national average in giving service to our fellow man. Indeed, to the contrary, I suspect on average we give an appreciably higher percentage of our income to charity and serve many more hours than most in charitable activities. But I also suspect that the vast majority of that money goes to the LDS Church and the vast majority of that service is performed in the context of a church calling or otherwise under the auspices of the LDS Church.

In short, perhaps the problems I have identified above make LDS lawyers, academic and non-academic alike, reluctant, or perhaps less able, to make our religious values the fundamental underpinning of our work. We are LDS lawyers to be sure, but, for all that, do we generally act simply like we are lawyers who are LDS or is there some

1069] *Legal Scholarship and Membership in the LDS Church*

distinct way in which our professional activities are different from lawyers who do not share our faith? In defining differences in our “professional activities” I do not mean, of course, simply that we undertake our professional activities in a highly honorable and ethical way, but rather that we undertake a different range of professional activities because we are LDS.

At some levels, I occasionally believe that perhaps I am immune from this charge because I am an academic, committed to a life of the mind and all the self-righteous poverty that goes with it. But, frankly speaking, I strongly suspect I am as guilty as the next person, focusing on the life of the mind to be sure, but, as a close colleague has suggested to me, the “material life of the mind.” I engage my mind with great energy and focus in my professional activities. But I serve the Lord largely only with my heart, might, and soul. Combining my mind and my Church, especially in a professional context, is a challenge to which I am not at all sure I have yet risen.

C. Failure to Remember

As I mentioned earlier, as LDS lawyers we are challenged by our religious leaders to impose an eternal perspective, a divine frame of reference, on all our academic work. This is an intellectual challenge of the highest order. Oddly enough, I think for many of the reasons described above, we find it very difficult to do that. Then, in a wonderful twist of irony that would elude only academics, we consider the religious leaders who issue that challenge to be anti-intellectual.

Perhaps another way of putting this same challenge is a simple reference to the sacrament prayer that LDS Church members hear every Sunday. In that prayer, we partake of the blessed bread and water in some large measure as a material manifestation of our promise to remember Jesus Christ “always.”⁸ I think I do that reasonably well before nine in the morning and after seven in the evening, and I do it particularly well on Sunday. But am I “always remembering Him” as I write an article on the intricacies of U.S. trade law or the unique perspective that the Japanese have on the use of law as a device to order and control society? Far too infrequently, I suspect.

8. *Doctrine & Covenants* 20:77, 20:79.

The challenge is to consciously analyze within and impose upon our work a divine frame of reference. But, for the reasons I discussed above, I suspect that is very difficult for most of us.

D. Choice of Topics

Finally, I suspect that LDS lawyers often consciously or unconsciously choose topics that do not require us to confront these tensions in our lives. After all, choosing a topic that requires us explicitly and self-consciously to address the relationship between our private and public selves is certainly very challenging and, in all likelihood, both personally and professionally risky. Who does not prefer to avoid unnecessary complications?

Our religious principles should probably shape our choice of topics in very significant ways. We should be inclined to study matters of long-term, indeed eternal, significance. But precisely because of the depth of our religious feelings and the problems associated with examining our religious beliefs in a secular academic environment, I suspect we pick topics quite distant from our personal center of gravity. This is not an inconsiderable problem.

IV. WHERE GOSPEL PRINCIPLES MEET SCHOLARLY WORK

Having identified how difficult it is for LDS scholars to incorporate their religious beliefs into their scholarly work, let me share a few additional conclusions I have reached after reflecting considerably on this matter, conclusions that are perhaps slightly more optimistic than those I reached above. The main conclusions are rather simple. Despite all my previous disclaimers, I have observed in my scholarly work two different, indeed almost opposite, ways in which my understanding of the gospel seems relevant, and even important, to my scholarly activities. First, I have observed on occasion that my research confirms fundamental gospel truths, even though I am not looking for such confirmation. Or, perhaps, I have unconsciously framed my research in a way to test the truth of gospel principles and then, happily, confirmed precisely that. Second, as I mature as a scholar and see links between legal scholarship and many other kinds of learning, I increasingly see striking ways in which gospel principles might usefully inform and guide us as scholars. Allow me to give one example out of many of each of these phenomena.

A. Research Reinforces Gospel Truths

In the first place, as a scholarly matter, I think that in some ways my experience has been the opposite of what I expected and what I think the planners of this conference on LDS perspectives on the law intended. Rather than self-consciously identifying gospel principles and then applying them to various areas of law, to some extent my research has, rather inadvertently, done precisely the opposite. That is, my research has confirmed that certain gospel laws and principles operate as firmly in the legal world as they do in the spiritual universe. Let me give an example that derives out of work I did over twenty years ago, but that has taken on surprising relevance in the past few months.

The law review on which I served as an editor in law school selected one topic every year for special treatment. Five students were selected to work on this topic and then publish the results of their research in a special issue that was entirely devoted to the students' work on that topic. When I was a 2L, the topic selected was election law. Accordingly, an entire issue of the review was to be devoted to that subject, and five students were needed to undertake a comprehensive review of various aspects of the law related to elections. I agreed to research and write the section on post-election remedies.

In the manner of all breathtakingly compulsive law students, I undertook to read every single case that had been decided up to that time anywhere in the United States that challenged an election result. And I did precisely that.

I drew a number of conclusions from the review of all those cases, of course, most of which are irrelevant for the immediate purpose. But one conclusion does bear directly on today's topic. That conclusion derived from my gradual realization that literally dozens of different systems had been established in the various states to ensure the honesty and integrity of election results. Each was structured to ensure that one party or the other could not steal the election. All sorts of systems of checks and balances were put into place, with various election officials appointed to watch over not only the balloting and counting process, but also over each other. Democratic observers were paired with Republicans. Supposedly neutral officials were inserted into various positions in the process. Overseers were watched by still more overseers. Government officials

and private officials all had important oversight responsibilities. Every system under the sun had been tried.

In the end, however, every single one, and I do mean every single one, of these systems was corruptible, and, if these cases were any guide, most actually had been corrupted at some point in time. Each new corruption generated its own set of reforms. Each reform was, in turn, corrupted by some imaginative new scheme. In short, there seemed to be absolutely nothing the legal system could do to ensure that elections were absolutely fair and incorruptible. In the end, neither I nor apparently any of the thousands of government officials who had addressed this issue could conceive of an electoral system that was foolproof.

The principal lesson I took away from that exercise was simple. No one seemed able to devise a legal system for elections that guaranteed honesty in the electoral process, unless you could be certain of the presence of at least one totally honest and incorruptible person. In other words, all the checks and balances in the world could not guaranty the system. The only true guaranty was at least one good person.

I have reflected on that lesson more than once over the years. It has always seemed a good lesson on the law's limitations. I have even tried to convey this notion to my students from time to time. I occasionally quote to students lines from one of Dr. Martin Luther King, Jr.'s great speeches to that effect. In a little-known presentation to a church conference in Nashville, Tennessee, in 1962, Dr. King indirectly, but eloquently, made this precise point. In defending his philosophy of integration, he referenced Dr. Harry Fosdick's insightful distinction between enforceable and unenforceable obligations. Enforceable obligations are regulated by codes and laws and implemented by law enforcement agencies. Violating those obligations may result in fines and incarceration. In that speech, Dr. King himself stressed that we should never underestimate the importance of law in creating a better, more just society. He said:

Let us never succumb to the temptation of believing that legislation and judicial decrees play only minor roles in solving this problem [of segregation]. Morality cannot be legislated, but behavior can be regulated. Judicial decrees may not change the heart, but they can restrain the heartless. The law cannot make an employer love an employee, but it can prevent him from refusing to

1069] *Legal Scholarship and Membership in the LDS Church*

hire me because of the color of my skin. The habits, if not the hearts of people, have been and are being altered everyday by legislative acts, judicial decisions and executive orders.⁹

But at the same time Dr. King made clear that the more important unenforceable obligations are “beyond the reach of the laws of society. They concern inner attitudes, genuine person-to-person relations, and expressions of compassion which law books cannot regulate and jails cannot rectify. Such obligations are met by one’s commitment to an inner law, written on the heart.”¹⁰

Lawyers or not, our most important obligations revolve around trying to write these unenforceable obligations on our hearts and onto the hearts of others, to make us all obedient to the unenforceable.

Now if those two ideas, in combination, aren’t gospel ideals, I don’t know what gospel ideals are. LDS scriptures teach us that good governance depends not on the political ideology or professed positions of our leaders but on whether they are “honest men . . . good men and wise men.”¹¹ The Lord has left no doubt, moreover, that the law written on our hearts is much more important than the law written on the tablets.¹² Each has its place, but writing laws and even obeying the letter of laws does not get us to heaven. Changing our hearts and living the spirit of the law are necessary for that.

So, even in the earliest stages of my scholarship, while I did not embark to rewrite the law in some particularly LDS way, I nevertheless believe I would have seen gospel principles validated by my work if I had been more attentive to the matter. It has taken me some time to understand fully the implications of all this, but as I mature as a scholar I now understand that in important ways—perhaps the ways that matter most—it does make a difference

9. Dr. Martin Luther King, Jr., Speech at Church Conference in Nashville, Tennessee (Dec. 27, 1962) (on file with the author).

10. *Id.*

11. “Nevertheless, when the wicked rule the people mourn. Wherefore, honest men and wise men should be sought for diligently, and good men and wise men ye should observe to uphold; otherwise whatsoever is less than these cometh of evil.” *Doctrine & Covenants* 98:9–10.

12. “Forasmuch as ye are manifestly declared to be the epistle of Christ ministered by us, written not with ink, but with the Spirit of the living God; not in tables of stone, but in fleshy tables of the heart.” 2 *Corinthians* 3:3 (King James).

that I am both an academic and a member of the Church of Jesus Christ of Latter-day Saints.

It is also possible, of course, that I understood this religious principle at the outset of my research and unconsciously structured my project in order to test its validity. If that is the case, then it makes even more of a difference that I am an LDS scholar. But, in either event, I realize that I should not downplay the possibility that my religious beliefs have informed my scholarship in critical ways.

Moreover, the more consciously I understand this, the more I am aware that these religiously derived insights may also lead to interesting and useful scholarly work. For example, if it is clear that we need “good” people in certain positions within the legal system to ensure its honest operation, then one could profitably study which kinds of institutional arrangements and incentive structures are necessary to ensure that good people are positioned where we need them. In addition, we might usefully consider whether the law can be structured in a way to reward “good” people, that is, to develop in people and reward more fully those attributes we consider “good.” In other words, can we take this fundamental gospel principle, a principle that seems demonstrably true in practice in the legal world, and develop policy prescriptions that advance the underlying truths of that premise? That is not an easy task, but it would be highly useful all the same.

So, to that extent, I think serious reflection on the theme of this conference has persuaded me that there are legal insights that derive from my understanding of the gospel. It is also fair to say that I do not think I have much developed those insights in my scholarship. Nevertheless, the insights and their relevance are apparent.

B. Religion as a Guide for Scholars

Now let me turn the inquiry in a slightly different direction and suggest another example of ways in which my personal religious beliefs might impact my legal scholarship. This turn, by the way, may be more of a U-turn than a “slightly different direction,” but nevertheless it strikes me that we, as members of the LDS Church, may be confronted with significant challenges to our understandings of our faith through thinking about important legal issues. In this regard, it is not so much a question of starting from some gospel principle and then developing a legal theory or opining on the propriety of certain legal rules or structures as it is of looking at

1069] *Legal Scholarship and Membership in the LDS Church*

developments in the legal world and trying to divine what our faith teaches us about the legitimacy and wisdom of those developments. Let me give a case in point.

If one were to review the history of this past century to identify the most significant scientific breakthroughs, at least in terms of impact on society, then the splitting of the atom or the creation of the computer chip would have to be at or very near the top. I strongly suspect, however, that, over time, the single greatest breakthrough will relate to the discovery and mapping of the human gene. In even the very short time we have begun to unravel the mysteries of genetics, we have revolutionized the way in which we think about many diseases, their causes, and, most importantly, their cures. The same is increasingly true for mental illnesses.

But the implications of this research go far beyond diseases, be they physical or mental. Researchers think they have discovered genes that give some of us a greater propensity to addiction, to violence, and perhaps even to crime. Some researchers even claim to have identified the possibility of a biological basis for our moral codes. (Even injunctions against polygamy arguably have roots in our genes' quest for immortality.)¹³

The implications of this kind of thinking for moral and legal responsibility are staggering. It turns our finely tuned (but often incomprehensible) notions of mens rea, culpability, and even willfulness entirely on their heads. It is hard to imagine the ultimate impact of all this on criminal or, frankly, even tort liability. Even concepts of free will in contracts take on an entirely new meaning when the underlying premises of will are unsettled.

I claim no particular expertise in this area, nor do I want to predict where it will end or what its ultimate impact will be. Indeed, I can hardly fathom its beginning. But it is clear that its ultimate impact on society, not to mention the law, will be nothing short of cataclysmic.

What is the relevance of all this for today's topic? The answer is not entirely clear or easy, but let me suggest at least one possible area of concern. If the LDS religion makes central any single philosophical principle, it is that of free will. We go so far as to assert that a war in heaven was fought over this principle.¹⁴ It is hard to

13. R. WRIGHT, *THE MORAL ANIMAL* 89–107 (1994).

14. *Moses* 4:2–4 (Pearl of Great Price); *Abraham* 3:24–28 (Pearl of Great Price). (The

think of anything that goes more to the center of the plan of salvation as we understand it. It is precisely the meaning of free will that is at stake in these debates, however.

Does that mean we should resist this new science, challenge its conclusions, and otherwise take issue with all the new learning that seems to be emerging? Of course some will, and there is absolutely nothing wrong with that. I strongly believe that all conclusions, scientific or otherwise, should be challenged with vigor and intellectual rigor. Only those that survive those challenges should then enter the domain of truth.

At the same time, all of this new learning might find easy accommodation in our theology. After all, even our scriptures tell us that the “natural man” is an “enemy” to God.¹⁵ Some considerable part of our task is to overcome the “natural man.” From that are we to understand that we may well have some tendencies and proclivities that are less than honorable? Do we already accept the fact that overcoming the world, while essential to our salvation, is nevertheless a great challenge? If so, then we might not find this new science so challenging.

In fact, we might have something to contribute in the sense that one of the principal purposes of our religion is to help us do precisely that: overcome the natural man and overcome the world. The gospel urges us to order our lives to accomplish this task. Can we look to the gospel for instruction about ways in which the legal system should be ordered to allow people to do the same thing, that is, to overcome their destructive tendencies and proclivities? In other words, is there something we can learn from the gospel about how

Pearl of Great Price is part of the canon of scripture of the Church of Jesus Christ of Latter-day Saints.)

15. *Mosiah* 3:19 (Book of Mormon). The scripture states,

For the natural man is an enemy to God, and has been from the fall of Adam, and will be, forever and ever, unless he yields to the enticings of the Holy Spirit, and putteth off the natural man and becometh a saint through the atonement of Christ the Lord, and becometh as a child, submissive, meek, humble, patient, full of love, willing to submit to all things which the Lord seeth fit to inflict upon him, even as a child doth submit to his father.

Id.

But remember that he that persists in his own carnal nature, and goes on in the ways of sin and rebellion against God, remaineth in his fallen state and the devil hath all power over him. Therefore he is as though there was no redemption made, being an enemy to God; and also is the devil an enemy to God.

Id. at 16:5.

1069] *Legal Scholarship and Membership in the LDS Church*

to create a just legal order that responds to this increasingly sophisticated understanding of what moves and motivates human beings?

V. CONCLUSION

After much thought and considerable effort devoted to unraveling this topic, my conclusion is relatively simple. It does matter that we are LDS and academics at the same time. It may matter a great deal in the selection of our topics for research, in the way we frame our inquiry, and in the principles we test against our empirical and logical analysis. It may matter even more for prescriptive claims we make against our legal system.

At the same time, it takes a conscious—and, I would argue, courageous—effort to link our professional and religious selves. It is not a task for the fainthearted.

But, most importantly, it is essential for our growth as scholars and as people. And, in the final analysis, it will redound to the great benefit of the law, the LDS Church, and ourselves.

