"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 Woodruff[1]

"The judges in the several courts of justice . . . are the depositary of the laws; the living oracles . . ."

-William Blackstone[2]

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 they 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 exceptions[3] – has

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[1] *Journal of Discourses*, George D. Watt et al eds. (Liverpool: Latter-day Saints Book Depot, 1856 et seq) 9:324.
[2] William Blackstone, *Commentaries on the Laws of England* (Chicago: University of Chicago Press, 1979) 1:69. Blackstone's *Commentaries* were 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.

largely eschewed closely reasoned propositional 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 a Mormon thinker would respond, "Join the club." Given the difficulties presented by what is at the very least an as yet unarticulated 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?

To be sure there is a voluminous body of Mormon writing on many subjects, but the overwhelming majority of this work is homiletic and most of it consists of sermons meant to inspire and motivate their audiences 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. Indeed, 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 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

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[4] David Tracy, "A Catholic View of Philosophy: Revelation and Reason," in *Mormonism in Dialogue with Contemporary Christian Theologies*, Donald W. Musser & David L. Paulsen, eds (Macon: Mercer University Press, 2007) 449-462, 449.

[5] Richard Lyman Bushman, "What's New in Mormon History: A Response to Jan Shipps," *The Journal of American History* 94/2 (2007): 517-521, 518.

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 do epistemology, Mormons do historiography. Accordingly, one response to the methodological problem faced by Mormon intellectuals would be the interpretation of history in normative terms. Indeed, we can see something like this in the work of writers like Hugh Nibley who look to historical narratives about nineteenth-century Zion building as a basis for social criticism.[8]

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

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[6] See generally Alvin Plantinga, *Warranted Christian Belief* (Oxford: Oxford University Press, 2000).
[7] For a collection of the key papers see *Faithful History: Essays on Writing Mormon History*, George D. Smith, ed. (Salt Lake City: Signature Books, 1992).
[8] See Hugh Nibley, *Brother Brigham Challenges the Saints*, Don Norton ed. (Salt Lake City: Deseret Book & FARMS, 1994). Other examples include James W. Lucas & 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* 38/3 (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 & Dean May, *Building the City of God: Community and Cooperation Among the Mormons*, 2nd ed. (Urbana: University of Illinois Press, 1994).
[9] JD 9:324.

of the work for the dead – have made their weight felt not in narrative terms but in institutional terms. Strikingly, Brigham Young's sole contribution to the formal Mormon canon is a revelation on the structure of immigrant trains (See 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 infected with the divine, even when the practices and institutions cannot shown to be deduced in any unproblematic manner from sacred texts, theological first principles, or dramatic moments of charismatic revelation. 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 theory.[10]

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 Holmsian aphorisms, this statement is open to multiple interpretations; however, it rightly insists that first and foremost the common law is about resolving concrete disputes. A common-law judge seldom finds himself announcing abstract principles for their own sake. Rather, he is always concerned with the question of doing right in the particular case before him. 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

[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 identifiably Mormon perspectives rather than authoritative church doctrine. See generally Nathan B. Oman, "Jurisprudence and the Problem of Church Doctrine," *Element* 2/2 (Fall 2006): 1-19; Nathan B. Oman, "A Defense of the Authority of Church Doctrine," *Dialogue* 40/4 (Winter 2007): 1-28.
[11] Quoted in Louis Menand, *The Metaphysical Club* (New York: Farrar, Straus & Giroux, 2001) 339.

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 as to 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 pre-existing cases. Finally, it is only after the myriad of particular cases have been organized into a doctrinal structure of abstract legal rules that a theorist 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 legal theorist 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 that a system."[14] Hence, for example, a common law theorist would

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[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 agreeemtn discharges prior agreements to the extent that they are within its scope." *Restatement (Second) of Contracts* (St. Paul: 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* 103/6 (May, 2005): 1483-1506.

[14] A.W.B. Simpson, "The Common Law and Legal Theory," in *Oxford Essays in Jurisprudence*, 2nd sers. A.W.B. Simpson, ed. (Oxford: Oxford University Press, 1973) 77-99, 99.

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 go 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 be different than 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 writing 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 "living oracles," 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. A concrete example can illustrate the kind of analysis that I envision. Suppose that one was interested in a Mormon conception of property. One place to look for materials would be the nineteenth-century church court system,

which among other things decided property disputes between Latter-day Saints.[15] One will search the records of these cases in vain, however, for anything that even closely resembles a theory of property. The priesthood leaders resolving these disputes decided the case first, 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 a Mormon concept of property. Consider the case of Oliver Cowdery's excommunication.

In 1831, Joseph Smith received a revelation setting forth what became known as the "Law of Consecration and Stewardship" (See D&C 42). All members of the church were to "consecrate" their property to the Lord. This was done by executing a deed transferring land and other assets to the church. Each member then received in return a parcel of property as their particular "stewardship." 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. 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.

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

[15] For a summary of civil dispute resolution in nineteenth-century Mormon courts see Nathan Oman, "Preaching to the Courthouse and Judging in the Temple," Available at SSRN: http://ssrn.com/abstract=1092078 and Part III ("The Mormon Ecclesiastical Court System") in Edwin Brown Firmage & Richard Collin Mangrum, *Zion in the Courts: A Legal History of the Latter-day Saints, 1830-1900* (Urbana: University of Illinois Press, 1989).

abandoned Zion by selling his stewardship. In other words, he had violated a rule requiring priesthood assent prior to the sale of Jackson County land. 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.[16]

Scholars have long found his reference to "allodial" land and feudal tenures puzzling.[17] Oliver's objections, however, go at the heart of how Mormon practice 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 specifiy that Sir Cedric held Blackacre "in knight's service" of Lord Lothgar. What this meant was that Sir Cederic'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

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

[17] 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* 2003/3 (2003): 1057, 1065-66.

Cedric and provide him with justice in disputes with his neighbors. 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.[18]

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."[19] 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, Oliver was following an informal course of reading of the kind standard among would-be frontier attorneys.[20] In the perennial manner of law students, 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 Oliver invoked. For

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[18] Arthur R. Hogue, *The Origins of the Common Law* (Indianapolis: Liberty Fund, 1984), 94.
[19] George W. Thompson, *Commentaries on the Modern Law of Real Property*, John S. Grimes, ed. 14 vols. (New York: The Bobbs-Merrill Company, Inc., 1980) 1:168-169.
[20] See Stanley R. Gunn, *Oliver Cowdery, Second Elder and Scribe* (Salt Lake City: Bookcraft, 1962), Richard Llyod Anderson, "Oliver Cowdery, Esq.: His non-Mormon Career," *Proceedings of Utah Academcy of Science, Arts & Letters* 45/1 (1968): 66-80.

example in 1765, John Adams attacked the Stamp Act in an essay entitled *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. "[A]ll 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.[21] The dire result of this system was "a state of total ignorance of every thing divine and human."[22] In contrast, among those who "holden their lands allodially," a man was "the sovereign lord and proprietor of the ground he occupied."[23] 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 "[i]t was expected that every trace of that system would have been abolished in this country when the republic was established."[24] 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."[25] As an aspiring attorney, Oliver was well aware of such standard legal texts

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[21] John Adams, *The Revolutionary Writings of John Adams*, C. Bradley Thompson, ed. (Indianapolis: Liberty Fund, 2000), 23.

[22] Ibid.

[23] Ibid 27.

[24] 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 & Abraham Small Pubs., 1803), 3:44.

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

as Tucker's and Kent's commentaries, and his rhetorical fillip on allodial land was likely a deliberate allusion to this line of thinking.[26]

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.[27]

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.[28] Rather, one 1834

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[26] In an 1837 letter setting forth the books necessary for his study of the law, Oliver listed both St. George Tucker's edition of Blackstone and Kent's *Commentaries*. See Gunn, *Oliver Cowdery, Second Elder and Scribe*, ___.
[27] Blackstone, *Commentaries*, 1:135.
[28] Interestingly, however, section 134 of the *Doctrine & Covenants* takes a somewhat different attitude toward property, insisting that "we do not believe that any religious society has authority to try men on the

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 amongst the saints, but also to redefine their relationship to property. In the same revelation, God declared that property is given to the saints "[t]hat 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, 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" (D&C 42:34), assisting to purchase property "for the public benefit of the church" (D&C 42:35), and most inclusively the "the building up of the New Jerusalem" (D&C 42:35).

While the concrete institutional arrangements of "the law of consecration and stewardship" were short lived, the underlying approach to property continues within Mormon practice. For example, 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" (D&C 119:4) into the coffers of the community. However, the rule, which is still followed by Latter-day Saints, did not repudiate the earlier notions of stewardship and subsidiary ownership. Rather, the revelation explicitly linked the new regime to the older rules requiring that

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right of property" (v. 10) and insisting that "we believe that all men are justified in defending . . . their. . . property . . . from unlawful assaults" (v. 11). This section, however, was authored by none other than Oliver Cowdery. See Robert J. Woodward, Historical Development of the Doctrine and Covenants, Brigham Young University, unpublished Ph.D dissertation, (1974), 1784-1794.

"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).

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 towards 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 adheres in the concept of property itself.

Obviously, this interpretation of Oliver's property dispute is open to debate. It does illustrate, however, the way in which one can extract fairly abstract ideas – in this case the notion of property as a nexus of communal obligations rather than as a boundary of those obligations – from a concrete set of practices that do not themselves articulate the abstract ideas. In short, it 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, while a philosopher 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.[29] At a conceptual level it rests on the authority of the "living oracles" and their ability to infect the prosaic, practical aspects of Mormonism with the divine. It does not, however, purport to uncover the first principles that ought to guide the decisions of these oracles. Rather, even at the conceptual level it assumes that the practice of Mormonism is logically and normatively prior to any theory that one might have about it. Third, it allows us to sharpen our normative analysis of Mormon history while side-stepping the morass of historiographic debates. Adopting the stance of a legal theorist, successful examinations of the past not longer consist of providing an "objective," "neutral" or "historically professional" assessment of it. Rather, past practices and institutions are interesting primarily as the instantiation of a particular constellation of normative choices. In this 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 theory reveals Mormon practices and institutions – and by extension Mormonism itself – as "worthy of the interest of an intelligent man."[30]

[29] See Armand Mauss, "Alternative Voices: The Calling and its Implications," *Sunstone*, April, 1990; Dallin H. Oaks, "Alternative Voices," *Ensign*, May, 1989.

[30] This phrase is taken from a letter of Oliver Wendell Holmes Jr. to Harold Laski, in which he stated that one of his goals in writing his book *The Common Law* was to reveal jurisprudence as a topic "worthy of the interest of an intelligent man." See Oliver Wendell Holmes, Jr., *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.*, ed. Richard Posner (Chicago: University of Chicago Press, 1992).