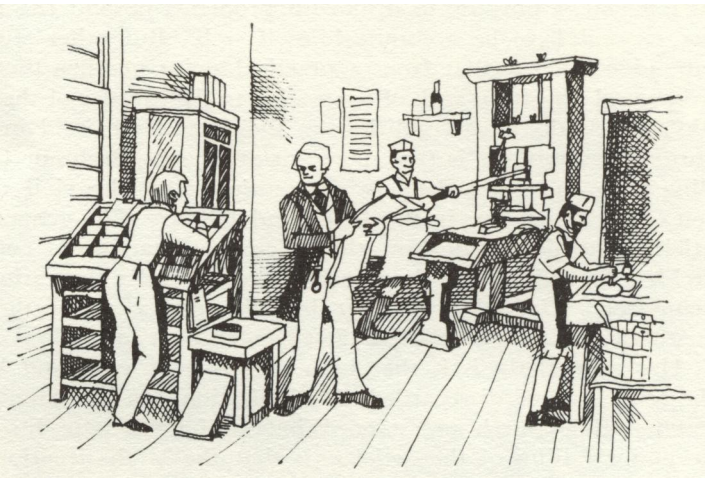
THE CHURCH AND THE LAW

by Thomas G. Alexander

"The Suppression of the *Nauvoo Expositor.*" By Dallin H. Oaks. *Utah Law Review,* IX (Winter, 1965), 862-903.
"The Mormons and the Law: The Polygamy Cases." By Orma Linford. *Utah Law Review,* IX (Winter, 1964, and Summer, 1965), 308-370 and 543-591. Thomas Alexander is Assistant Professor of History at Brigham Young University and has published a number of articles on Utah history in various historical quarterlies; he is a member of the bishopric of his L.D.S. ward.

Throughout the nineteenth century, the Church and its leaders were regularly involved with federal and state law. The recent article by Professor Dallin H. Oaks[1] is a prudent, well researched attempt to deal with one incident, the abatement of the *Nauvoo Expositor,* in which legal matters seriously affected the Church.

Oaks discusses the legality of subsequent actions in the Municipal Court of Nauvoo and in Justice Robert F. Smith's court in Carthage, but the central



issue is the legality of the abatement by the Nauvoo City Council. Newspaper statements against the Church fell into three categories: political, religious, and moral. Oaks concludes that the city council had no right to abate the newspaper on the basis of its political and religious allegations, but on the charges of immorality, the city could have made a case. Precedents from Illinois courts and from Blackstone justified the abatement of nuisances without trial.

Calling a newspaper a nuisance was unusual, but the Council may have been on good grounds because of the fear of mob action and the scurrilous and defamatory character of the paper's articles. There was, however, no legal justification for the destruction of the press, and the proprietors might have sued the council for recovery of the machine's value.

[1] Dallin H. Oaks is Professor of Law at the University of Chicago.

In the nineteenth century, Oaks points out, the only generally recognized guarantee under freedom of the press was protection against prior restraint in the form of licensing or censorship. The city could have either brought the newspaper's proprietors to trial for criminal libel or abated the paper by injunction. To assume that the city would have lost the case on its legal merits is to attribute to the Illinois courts a civil-libertarian attitude characteristic of the period since 1930, rather than the attitude of the nineteenth century, which Leonard W. Levy has characterized as a *Legacy of Suppression.*[2]

Oaks does not discuss the probable attitude of the Illinois courts had the Mormons been brought to trial in 1844. They could have made a good case for the abatement, but would they have won the suit? Mr. Dooley (Finley Peter Dunne) long ago commented that the Supreme Court follows the election returns. The Illinois Constitution allowed the legislature by a two-thirds vote to remove judges "for any reasonable cause which shall not be sufficient ground for impeachment."[3] A case could be made that public pressure would have influenced the court and that the Church would have lost despite its strong position.

It was not Oaks's purpose to deal with problems beyond the legality of the city's case, and here he accounts himself well. But other studies have made it abundantly clear that from a practical point of view the action of the council proved disastrous and, of course, led to the murder of the Prophet.[4]

If Oaks's article describes conditions as they actually existed in the nineteenth century, the opposite is true of recent articles by Professor Orma Linford dealing with the anti-polygamy prosecutions and the civil disabilities imposed on Church members in the 1870's and 1880's.[5] The general purpose of the articles is to determine how the federal and territorial courts interpreted the First Amendment while prosecuting cases under the various federal anti-polygamy acts. Linford argues that the polygamy cases were the Supreme Court's first "direct encounter with first amendment provisions regarding religion." Her general thesis is that both the United States and Utah Territorial Supreme Courts disregarded the limitations on government under the clause separating church and state. What she fails to state, however, and this is the major failing of the articles, is that the Utah situation was the federal government's only major confrontation with a theocracy.

By telling only part of the story, she gives a distorted picture of what the government was trying to do. Polygamy is discussed as if it existed in a vacuum. Opposition to plural marriage was not confined to moral and traditional arguments as she assumes. Though such objections were important, many were convinced, as Angie F. Newman said in her testimony before a Congressional committee, that the "foundation, the perpetuity of this government [the Mormon Church] is based upon the subjugation of women."[6]

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[2] *Legacy of Suppression: Freedom of Speech and Press in Early American History* (Cambridge: Belknap Press of Harvard University Press, 1960).

[3] State of Illinois, *Constitution* (1818), Art. IV, Sec. 5.

[4] See for instance B. H. Roberts, *Comprehensive History of the Church of Jesus Christ of Latter-day Saints* (6 vols.; Salt Lake City: Deseret News Press, 1930), II, 221-308.

[5] Orma Linford is Assistant Professor of Political Science, University of Wisconsin, Kenosha Center.

[6] U. S. Congress, *Senate Report 1279,* 49th Cong., 1st Sess., p. 10, Serial 2361.

Those who drafted the anti-polygamy legislation were convinced that they were attacking the foundation of church domination of political and social life in Utah. Linford could have seen this had she looked more closely at some of the arguments from the *Congressional Record* which she supplies in the article.[7] A similar limitation appears in the discussion of the naturalization decision of Justice Thomas J. Anderson.[8]

The main value of the articles is the excellent summary of the polygamy cases themselves. But the argument suffers from the implicit assumption that the courts then should have known the direction in which the law has developed since. In the Reynolds case, for instance, Linford seems to expect the courts to expound a sociological jurisprudence, such as Louis D. Brandeis developed in *Mueller* v. *Oregon* a quarter of a century later. Linford claims that "the Court never quite explained *why* plural marriage was a threat to the public well-being." This is hardly fair to the Court, which said that plural marriage was a threat because it had traditionally been held to be such. The Court's pronouncement that polygamy led to despotism also was in line with the prevalent belief that plural marriage was part of the basis of Church control in Utah.

As Linford points out, the courts changed the definition of unlawful cohabitation and used other means to make it difficult for people who continued plural marriage to support their families. The courts in Utah also went far beyond the bounds of propriety in allowing segregation of offenses into small time periods, and judges failed to observe strict rules of evidence. Contrary to what Linford asserts, however, judges sometimes did tell polygamists "how to remove themselves from the operation of the law." Utah Chief Justice Charles S. Zane on numerous occasions said they could simply renounce the practice of plural marriage. Where Mormons such as Bishop John Sharp tried to obey these injunctions, however, they were charged with disloyalty and ostracized by their coreligionists.[9]

To argue, as Linford does, that plural marriages "were not civil contracts amendable to the ordinary processes of civil law; they were spiritual unions recognized and regulated by ecclesiastical law," is to approach naivete. Were these simply spiritual unions, this reviewer, together with many others who descended from polygamous families, would still be in the spirit world. As far as the law was concerned, plural marriages were unrecorded civil and religious contracts. Probably to protect plural marriages, the territorial legislature passed no laws for recording any marriages until the passage of the Edmunds-Tucker Act made their recording mandatory.[10]

Moreover, the contention that juries in unlawful cohabitation and polygamy cases were packed is specious. It would be just as reasonable to argue that people who believe in theft should sit on the juries trying persons accused of stealing as to say that those who believed in polygamy had a right to judge persons accused of that crime.

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[7] *Utah Law Review*, IX, 315, 319.

[8] See *Deseret Evening News*, December 12 and 14, 1889.

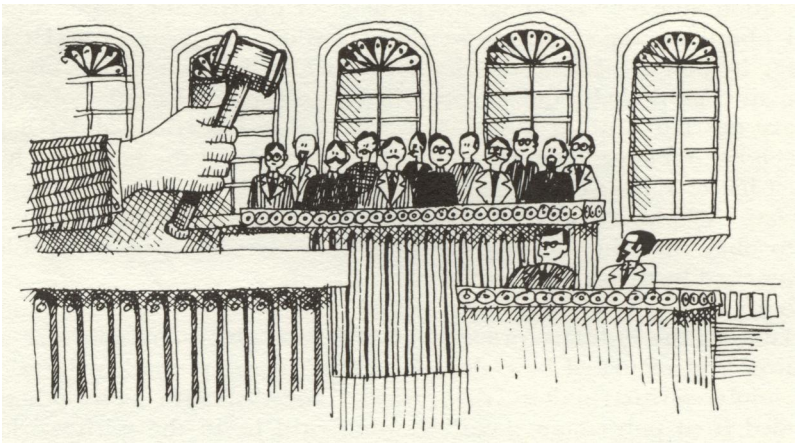
[9] *Salt Lake Tribune*, November 4, 1884 and July 22 and September 18, 1885; Charles S. Zane. "The Death of Polygamy in Utah," *Forum* XII (November, 1891), 368, 370.

[10] Jacob Smith Boreman, "Crusade Against Theocracy: the Reminiscences of Judge Jacob Smith Boreman of Utah, 1872-1877," ed. Leonard J. Arrington, reprinted from The *Huntington Library Quarterly*, XXIV (November, 1960), 17-18; *22 U. S. Statutes at Large*, 635.

The author is on much firmer ground when she discusses disfranchisement and disqualification from office. It is clear, as the United States Supreme Court decided, that the Utah Commission had no right to disfranchise all who believed in polygamy. In Idaho, where Mormons were in a minority, the Idaho test oath was nothing short of reprehensible. The law there punished mere adherence to a powerless minority group.

The L.D.S. Church escheat cases present a thorny problem because they involved much more than the mere practice of polygamy. One might well conclude from the evidence which Linford presents that in "abolishing the Church of Jesus Christ of Latter-day Saints, Congress overstepped the legitimate bounds of its obligation to preserve the separation of church and state, and infringed upon the religious freedom of the Mormons." Again, however, Linford fails to take into account the temporal as well as spiritual power of the Church and the dual view which Gentiles held of polygamy — that it was immoral and the basis for the Church's political power.

As the Reynolds case made clear, separation of church and state is a two-edged sword. It imposes on the government the obligation not to interfere with religious beliefs and actions so long as they are not detrimental to the



general welfare. On the other hand, as Linford says, quoting Jefferson, the founding fathers proposed by the First Amendment to erect "a wall of separation between the church and State."[11] The church was not to interfere in state affairs. Even though the dividing line between religious and political questions may be narrow, the L.D.S. Church owed it to the government to try to observe the line.

The Church's position on its political role in building the Kingdom of God was summed up in a discussion of one of Utah's constitutional conventions in the *Millenial Star*. The article said that in

> . . . case of any dispute or dubiety on the minds of the convention, the Prophet of God, who stands at the head of the Church, decides. He nominates, the convention endorses, and the people accept the nomi-

[11] Jefferson's reply to an address sent to him by the Danbury Baptist Association, cited in *Utah Law Review*, IX, 581.

> nation. . . . So in the Legislature itself. The utmost freedom of speech free from abuse is indulged in; but any measure that cannot be unanimously decided on, is submitted to the President of the Church, who, by the wisdom of God decides the matter, and all the Councillors and Legislators sanction the decision. There are no hostile parties, no opposition, no Whigh[sic] and Tory, Democrat and Republican, they are all brethren, legislating for the common good, and the word of the Lord, through the head of the Church guides, counsels, and directs.[12]

On this basis, the Church tried to insulate itself from the rest of the United States and from Gentiles in Utah as much as possible. Members were urged to take their disputes to the Church rather than to civil courts. The legislature vested local probate courts with civil and criminal jurisdiction and created the offices of territorial attorney and marshal, the incumbents of which were elected by joint vote of the legislature. Even the commander of the Nauvoo Legion, who should have been responsible to the territorial governor as commander-in-chief of the territorial militia, was elected by joint vote of the legislature. The People's Party regularly ratified Church nominees, and, on occasion, economic sanctions were voted against Gentiles.[13]

What should the federal government have done in such a case? This reviewer is certainly not wise enough to say, but to view the problem simply as a matter of religious freedom for Church members is to rob the problem of its meaning. If, as Linford argues, the anti-polygamy campaign failed to take into consideration the total damage done to the L.D.S. community, *she* fails to take into account the damage done First Amendment guarantees which Gentiles in Utah had a right to expect.[14]

Finally, Linford argues, as others have, that the prosecution of polygamy may have delayed the dissolution of the institution.[15] This argument forgets that plural marriage was a divine principle believed devoutly by Church members who would not easily abandon it. In the Church service in which I reported on my mission, it was announced that another missionary, also a member of the ward, had been excommunicated for joining the Church of the First Born. She had not been coerced or persecuted; she was merely convinced that the principle of plural marriage was correct. At least one of her sisters and one other family from the ward joined with her. It is not

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[12] Cited in Klaus J. Hansen, "The Theory and Practice of the Political Kingdom of God in Mormon History, 1829-1890" (Unpublished Master's Thesis, Brigham Young University, 1959), p. 49.

[13] On these points see *Journal of Discourses*, I, 218; III, 238; Orson F. Whitney, *History of Utah* (4 vols. Salt Lake City: George Q. Cannon and Sons, 1892-1904), II, 549-551, 496-504; Robert N. Baskin, *Reminiscences of Early Utah* (n.p.: By the Author, 1914), pp. 23-27; Leonard J. Arrington, *Great Basin Kingdom: An Economic History of the Latter-day Saints, 1830-1900* (Cambridge: Harvard University Press, 1958), pp. 248-249.

[14] The First Amendment rather than the Fourteenth Amendment applied in Utah because Utah, as a territory, was under the exclusive jurisdiction of the United States. U. S. Constitution, Art. IV, Sec. 3.

[15] Stanley Ivins, "Notes on Mormon Polygamy," *Western Humanities Review*, X (Summer, 1956), 231-232. It should be noted that segregation in the South grew stronger rather than perishing when it was left alone: C. Vann Woodward, *The Strange Career of Jim Crow: A Brief Account of Segregation* (New York: Oxford University Press Galaxy Book, 1957), pp. 49-95.

obvious that plural marriage or Church domination of politics would have died out if they were merely left alone any more than that these people will give up polygamy simply because they are not prosecuted.

Some maintain that because Mormons were law abiding they gave up plural marriage after the Supreme Court declared the anti-polygamy acts constitutional.[16] But long after the 1879 Reynolds decision, Church members brought to the bar for sentencing told federal judges that the law of God was higher than the law of the land and deserved prior obedience. The Manifesto officially ending polygamy as Church practice was not issued until 1890, and excommunication for practicing plural marriage did not come until 1904. After 1891, however, the Church did cease to demand adherence to the political policy announced by Church leaders and, as a sign of good faith, broke up the People's Party and adopted the two-party system.

As an historian, I see the problems of the 1870's and 1880's as a conflict of two systems of law, tradition, and morality, which, because they were mutually incompatible, had to be reconciled in some way. As a devoted member of the Church, however, I see in the action of the federal government a manifestation of God's will. The Constitution, which the Church holds to be divinely inspired, demands the separation of church and state. The power exercised before 1890 to compel adherence to the Church's political and economical policies infringed upon that separation. The two principles, which were self-contradictory, could not both stand; and the Lord chose to have the Church abide by the Constitution.

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[16] This view is presented by James E. Talmage, *A Study of the Articles of Faith: Being a Consideration of the Principle Doctrines of the Church of Jesus Christ of Latter-day Saints* (Fortieth English Edition; Salt Lake City: The Church of Jesus Christ of Latter-day Saints, 1960), pp. 424-425.

ECUMENICAL CINEMA

Rolfe Peterson

A former Utahn, who taught at Brigham Young University and became a successful radio and television movie critic, Rolfe Petersen now has his own television show in San Francisco and teaches at the College of San Mateo.

God is not dead in Hollywood. The phenomenal success of *The Sound of Music* means that nuns are in again, and two current movies give us a choice, according to side-by-side newspaper ads, of Rosalind Russell on a bicycle and Debbie Reynolds on a Vespa, both of them with their habits billowing behind them, and both of them obviously regular guys.

An interesting footnote to this cinematic stampede to the nunnery is that both *The Sound of Music* and Miss Russell's *The Trouble with Angels* feature a girl from Brigham City named Portia Nelson playing one of the nuns. I don't know if it's art, but it's certainly ecumenical.