Sexual Slander and Polygamy in Nauvoo

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ONE OF THE MAJOR PROBLEMS ENCOUNTERED when studying the beginnings of Mormon polygamy is the lack of contemporaneous historical documentation.[1] This is because of the secret nature of polygamy and the crime of polygamy. The LDS Church's "Gospel Topics" plural marriage essay dealt with secrecy in Kirtland, Ohio, and Nauvoo, Illinois. The essay argued participants "[kept] their actions confidential."[2] George D. Smith agreed, "Secrecy itself defined and delineated

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[1]See Brian C. Hales, *Joseph Smith's Polygamy,* 3 vols. (Salt Lake City: Greg Kofford Books, 2013), 1:17, where Hales states, "Authors who approach Joseph Smith's polygamy are forced to confront important limitations in the availability and reliability of pertinent historical documents."

[2]"Plural Marriage in Kirtland and Nauvoo," Gospel Topics, https://www.lds.org/topics/plural-marriage-in-kirtland-and-nauvoo?lang=eng&old=true#5.

this tragedy." However, he added, "Mormon record-keepers faced a dilemma in writing about Nauvoo" because they were "engaged in 'illegal' bigamous marriages."[3]

Another reason for the lack of contemporaneous documents is the existence of sexual slander laws and their criminal and civil use in nineteenth-century Illinois. While legislatures created these laws to protect women's reputations, Joseph and Hyrum Smith used them to counter claims against their participation in polygamy or "spiritual wifery."

Such lawsuits help to explain the lack of detail in John C. Bennett's *History of the Saints*, and William and Wilson Law's *Nauvoo Expositor*. While these laws may have helped to protect polygamists, they challenge historians studying Nauvoo polygamy. A legal lens provides context to the limited polygamy sources in the 1840s.

Sexual Slander Laws in Illinois

The Illinois legislature passed a law in 1823 dealing with sexual slander that stated, "If any person shall falsely use, utter, or publish words, which in their common acceptation shall amount to charge any person with having been guilty of fornication, or adultery, such words so spoken shall be deemed actionable, and he, she or they, so falsely publishing, speaking or uttering the same shall be deemed guilty of slander."[4] With this law, Illinois became one of the first states to move away from the common law doctrine of slander and pass a specific statute dealing with the sexual issue.[5]

These changes were implemented following the American Revolution. Historian Andrew J. King explained, "As traditional means of social control eroded, an increasingly secular society turned to lawmakers—both judicial and legislative—to craft new norms."[6]

[3]George D. Smith, *Nauvoo Polygamy: ". . . But We Called It Celestial Marriage"* (Salt Lake City: Signature Books, 2008), 411.

[4]An act declaring certain words actionable, Laws Passed by the Third General Assembly of the State of Illinois at their First Session, commenced at Vandalia, December 2, 1822 and ended February 18, 1823 (Vandalia [IL]: Blackwell & Berry, 1823), 82.

[5]Andrew J. King, "Constructing Gender: Sexual Slander in Nineteenth-Century America," *Law and History Review* 13, no. 1 (Spring 1995): 84–87. North Carolina was the first state to pass a sexual slander law in 1808. They were followed by Kentucky in 1811, Indiana in 1813, and Illinois in 1822.

[6]Ibid., 63.

While most judges "resisted and undermined legislation that liberalized women's rights," in the cases of sexual slander, judges "found the need for heightened protection of female reputation justified liberalizing the law to secure an unmarried woman's opportunity to marry."[7] This was an economic decision by judges and legislators because "it was only through marriage that young women took their place in the community."[8] In addition, "married women needed to maintain such reputations to remain within the community."[9]

While the obsession with female sexual purity is patriarchal, historian Daniel Stowell argues, "Paternalism better defines the attitudes of Illinois jurists."[10] Judicial paternalism is "the relationship of a dominant group, considered superior, to a subordinate group, considered inferior, in which the dominance is mitigated by mutual obligations and reciprocal rights."[11] Though they had a gendered view of the law, judges after the American Revolution sought to protect disadvantaged groups like women and children.[12] While these laws were to protect women, the Illinois statute used gender neutral language, allowing men to take advantage of the law.

There were many cases of sexual slander in antebellum Illinois, and the participants received significant awards after jury trials. In the 1840 case of *Russell v. Martin*, Mary Martin sued James and Elizabeth Russell for accusing her of adultery, fornication, and being a "whore." Specifically, she claimed that they said she was "unchaste; thereby meaning that the plaintiff was guilty of adultery," that she had a "want of chastity; thereby meaning that the plaintiff had been guilty of fornication," and that the Martins said that "she was a whore." The jury awarded her $400. The Russells appealed before the Illinois Supreme Court, which upheld the judgment.[13]

In the 1843 case of *Cabot v. Regnier*, Eliza Cabot sued Francis Regnier under the sexual slander law. She alleged that Regnier said that a third man had "rodgered" (sexually penetrated her) and was

[7]Ibid., 65–66.

[8]Ibid., 73.

[9]Ibid., 105.

[10]Daniel W. Stowell, ed., *In Tender Consideration: Women, Families, and the Law in Abraham Lincoln's Illinois* (Champaign: University of Illinois Press, 2002), 5.

[11]Ibid.

[12]Ibid., 6.

[13]*Russell v. Martin*, 3 Ill. 492, 493 (Ill. 1840).

"after skin and he has got it." The case was tried twice and she prevailed both times. After the second trial, the court awarded her the incredible sum of $1600. Later the Illinois Supreme Court upheld the award.[14]

In an 1844 case, *Patterson v. Edwards*, a jury awarded the plaintiff, Mrs. Edwards, a white woman, $220 because Patterson said she "has raised a family of children by a negro," thus insinuating she was guilty of adultery. The Illinois Supreme Court overturned the case, because claiming someone "raised a family of children by a negro, do not in their plain and popular sense, or in common acceptation, necessarily amount to a charge of fornication and adultery."[15] In the 1845 case *Hatch v. Potter*, a jury awarded $425 when they found that Hatch said that Potter's wife, "slept with me one night before she was married, and I screwed her, thereby imputing a charge of fornication." Hatch attempted to argue that he had no criminal intent because what he said was a joke. The court denied this, stating: "In point of law it is immaterial whether a party, who slanders his neighbor, designs or expects to be believed, or not. He can not be permitted, either carelessly or wantonly, to sport with the character of another, and then excuse himself upon the ground that he was not really in earnest."[16] These cases show the courts and juries took sexual slander seriously.

There were three valid defenses to the charge of sexual slander: (1) they did not speak the words that they were accused of speaking, or true innocence, (2) they spoke without malice and thus, any damages should be mitigated, and (3) they spoke the words but that what they said was true, known as justification.[17] Relying on the defense of justification "was a risky strategy" because the defendant had to "admit speaking the words" and "the defendant carried a strict burden in proving that the charged words were true."[18]

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[14]*Regnier v Cabot*, 7 Ill. 34, (Ill. 1845). This would equal approximately $50,000 in 2017 value.

[15]*Patterson v. Edwards*, 7 Ill. 720, 723–24 (Ill. 1845). This would equal approximately $7000 in 2017 value.

[16]*Hatch v. Potter*, 7 Ill. 725, 727–28 (Ill. 1845). This would equal approximately $13,500 in 2017 value.

[17]King, "Constructing Gender," 78. Mark E. Steiner, "The Lawyer as Peacemaker: Law and Community in Abraham Lincoln's Slander Cases," *Journal of the Abraham Lincoln Association* 16, no. 2 (Summer 1995): 11.

[18]Steiner, "The Lawyer as Peacemaker," 11.

accuse anyone of following or carrying out the revelation. Nothing would be actionable under the slander laws in Illinois in 1844. Austin Cowles affidavit is similarly unactionable:

> In the latter part of the summer, 1843, the Patriarch, Hyrum Smith, did in the High Council, of which I was a member, introduce what he said was a revelation given through the Prophet; that the said Hyrum Smith did essay to read the said revelation in the said Council, that according to his reading there was contained the following doctrines; lst. the sealing up of persons to eternal life, against all sins, save that of sheding innocent blood or of consenting thereto; 2nd, the doctrine of a plurality of wives, or marrying virgins; that "David and Solomon had many wives, yet in this they sinned not save in the matter of Uriah.[80]

Cowles states only David and Solomon lived the doctrine of "plurality of wives." While the Laws may have planned to release the names of men and women living in polygamy in future issues of the *Nauvoo Expositor*, the press was destroyed and the enterprise ended. However, apparently the sexual slander laws at the time had a chilling effect on the Law's ability to expose the doctrine of polygamy.

Conclusion

There is much to be learned by viewing the lack of contemporaneous documentation of polygamy through a legal lens. While the Illinois sexual slander law was originally passed as a paternalistic mechanism to protect the reputation of women, it was used by both Joseph and Hyrum Smith to protect their reputations, though they were both engaged in polygamous relationships at the time. It also helps explain the somewhat reserved exposés of John C. Bennett and William and Wilson Law.

The slander laws certainly had a chilling effect on those who would expose the practice of polygamy, which protected the reputations of the women and men involved at the time. Exposing those that were living in the practice would have been embarrassing and could have led to negative consequences. However, it is unfortunate for historians and those who have an interest in the full picture of Nauvoo polygamy. While secrecy and the fact that polygamy was criminal contributed to this lack of sources, it is clear that the Illinois sexual slander laws also played a part in the scarcity of evidential information.

[80]Affidavit of Austin Cowles, *Nauvoo Expositor*, June 7, 1844.