Type: Book Chapter

Defining Adultery under Illinois and Nauvoo Law

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Source: *Sustaining the Law: Joseph Smith's Legal Encounters*
Editor(s): Gordon A. Madsen, Jeffrey N. Walker, and John W. Welch
Publisher: Provo, UT; BYU Studies, 2014
Page(s): 401–426

Chapter Seventeen

Defining Adultery under Illinois and Nauvoo Law

M. Scott Bradshaw

The final weeks of the Prophet Joseph Smith's life were busy. Besides the usual press of Church business, Joseph was involved with many things, including reviewing work on the construction of the Nauvoo Temple, selling land, paying debts, making social visits, receiving visits from Indians and dignitaries, attending military training, and coordinating his presidential campaign. He also had to contend with brief bouts of illness affecting both him and Emma, swelteringly hot weather, the defection or removal of highly placed Church and civic leaders, the publication of an anti-Mormon newspaper, and a series of lawsuits and indictments brought against him.[1]

1. See generally Scott Faulring, ed., *An American Prophet's Record: The Diaries and Journals of Joseph Smith* (Salt Lake City: Signature Books, 1987); J. Christopher Conkling, *A Joseph Smith Chronology* (Salt Lake City: Deseret Book, 1979); and *A Chronology of the Life of Joseph Smith, BYU Studies* 46, no. 4 (2007). As to legal challenges, the indictments for adultery and perjury are described below in this article. Charges against Joseph before the Municipal Court of Nauvoo brought by Chauncey Higbee were investigated on May 8, 1844. On June 12 and 17, 1844, Joseph was arrested and charged for the destruction of the *Nauvoo Expositor* press; he was discharged both times, later voluntarily travelling to Carthage on June 24, 1844, to face new charges related to the destruction of the Expositor. The next day Joseph and Hyrum were charged with treason, a nonbailable offence. Joseph and his attorneys moved for a change of venue on June 27, out of concern that he would not obtain a fair trial in Carthage. Additionally, at least three civil suits were filed against Joseph in Hancock County during this time. These were *Charles A. Foster v. Joseph Smith, Chauncey Higbee v. Joseph Smith,* and *Alexander Sympson v. Joseph Smith* (discussed below). Two of these were known enemies of Joseph (Foster and Higbee). The third (Sympson), also discussed below, was to be a witness in the adultery trial against

Among the legal challenges that Joseph faced at this time was an indictment for adultery, a charge which arose out of his relationship with Maria Lawrence,[2] a young English convert to whom Joseph was sealed in Nauvoo and who lived with Joseph and Emma in their home. Several authors have assumed that Joseph's plural marriages were entered into in violation of the law.[3] Indeed, given the conservative social mores of nineteenth century, one could easily assume that this was the case. However, a study of Illinois law reveals a different situation. As explained below, Joseph could not have been properly convicted of adultery under the law of Illinois in 1844. Illinois law only criminalized adultery or fornication if it was "open." Had Joseph lived to face trial on this charge, he would have had good reason to expect acquittal because his relationships with his plural wives were not open, but were kept confidential and known by a relative few.[4] Given a fair trial on this indictment, Joseph could have relied on several legal defenses.

Joseph. Ironically, all three of these suits were transferred to the court in McDonough County, Illinois, after the plaintiffs expressed concern that they would not obtain a fair trial in Carthage. The author discovered them in the Illinois Regional Archives Depository collections of Western Illinois University a number of years back; see Circuit Court files 1844, boxes 190, 196.

2. For background on Maria, and on Joseph's polygamy in general, see Todd Compton, *In Sacred Loneliness: The Plural Wives of Joseph Smith* (Salt Lake City: Signature Books, 1997), 473–85; a recent work, Brian C. Hales, *Joseph Smith's Polygamy,* 3 vols. (Salt Lake City: Greg Kofford Books, 2013), contains considerable information about Maria (see the index, vol. 2).

3. See for example Compton, *In Sacred Loneliness,* 476–77; Hales, *Joseph Smith's Polygamy,* 2:192–94; 237; and D. Michael Quinn, *The Mormon Hierarchy: Origins of Power* (Salt Lake City: Signature Books, 1995), 88.

4. For example, Hales, *Joseph Smith's Polygamy,* 1:499, quotes Eliza R. Snow, one of the women to whom Joseph was sealed: "We women kept secrets in those days." Desdemona Fullmer reports that she was forbidden to make known to her parents that she had been sealed to Joseph, as it "would endanger the life of Joseph and also many of the Saints." See Hales, *Joseph Smith's Polygamy,* 2:3. Emily Dow Partridge recalls that both she and her sister Eliza were sealed to Joseph, but neither of them knew it initially because "everything was so secret." See Hales, *Joseph Smith's Polygamy,* 2:13. By the time of Joseph's death, Hales states that "several hundred Latter-day Saints had been taught about the principle [of plural marriage] by Joseph Smith or by an authorized representative." See Hales, *Joseph Smith's Polygamy,* 2:[33]. While the circle of those who knew of the doctrine was substantial, the citizens of Nauvoo overall, and the body of the LDS Church, were not yet aware of the doctrine. Most of those who knew of the doctrine would not have known who Joseph's plural wives were. The diaries and correspondence of polygamy insiders from the Nauvoo years are almost silent on the doctrine. Neither Joseph nor his wives left any contemporaneous records documenting their experiences.

The Indictment

Joseph's journal records that on May 25, 1844, several LDS brethren informed him that the Hancock County grand jury had preferred two indictments against him. One was said to be for "polygamy or something else" and was based on testimony by William and Wilson Law.[5] The other was for perjury and arose out of unrelated facts.

The first indictment, for adultery, alleged that Joseph had committed adultery with Maria Lawrence and other "women to the jurors unknown." The mention of other women seems to have been as a place holder in the event that evidence later justified expanded charges. The use of the term "women to the jurors unknown" suggests that no other names were available at the time the grand jury drew up the indictment. Under Illinois law of the day, "adultery and fornication" was a crime that was punishable by imprisonment of up to six months.[6]

A charge against Joseph for adultery had previously been issued by the grand jury on May 23, but it was dropped the following day when the state's attorney *pro-tem,* E. A. Thompson, indicated that he would no longer prosecute the indictment. Then that same day, the grand jury issued the charge against Joseph for "adultery and fornication" involving Maria Lawrence and other unnamed women, as well as the one for perjury. These are the charges mentioned in Joseph's journal on May 25.[7]

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5. Faulring, *American Prophet's Record,* 483; this entry in Joseph's diary seems to have been the basis for the account found in Joseph Smith Jr., *History of The Church of Jesus Christ of Latter-day Saints,* ed. B. H. Roberts, 2d ed., rev., 7 vols. (Salt Lake City: Deseret Book, 1971), 6:405 (hereafter cited as *History of the Church*). Among the men who brought Joseph this news were Edward Hunter and William Marks, both of whom served on the grand jury during this term of court. See Hancock County Circuit Court records, Book D, page (approx.) 100, LDS Family History Library film 0947496. The back of the original indictment has a case caption (People v. Joseph Smith } adultery) with the name of the grand jury foreman, listing William and Wilson Law as witnesses. See indictments of Joseph Smith for adultery and fornication, brought in the May 1844 term of the Hancock County Circuit Court, MS 3464, Archives, The Church of Jesus Christ of Latter-day Saints, Salt Lake City; and faint copies in the Wilford Wood collection, MS 8716, reel 5, file 4-C-b-2, LDS Church Archives.

6. See Criminal Code, section 123, *Revised Laws of Illinois* (Vandalia: Greiner & Sherman, 1833); and Criminal Jurisprudence, section 123, *Revised Statutes of the State of Illinois* (Springfield: William Walters for Walters & Weber, 1845).

7. For the perjury charge, see Hancock County Circuit Court records, Book D, 114, 128, and 166, LDS Family History Library film 0947496. A number of years back, I viewed the original in possession of the Clerk of the Circuit Court for Hancock County in Carthage, Illinois. The Clerk of the Court has this and other valuable legal papers concerning Joseph Smith locked in a box within the records vault.

The perjury charge stemmed from confusion over whether Joseph had sworn an affidavit against a man named Alexander Sympson, who had been accused in a stabbing incident. Joseph believed the perjury charge was entirely baseless, and he vehemently denied having accused Sympson of a crime.[8] According to Joseph, Sympson had even made a public statement clearing Joseph of any involvement in the matter.[9]

On May 27, Joseph and an entourage of friends and guards confidently rode to Carthage, intent on having both indictments "investigated." Three attorneys assisted Joseph in this matter, namely "Messers [William A.] Richardson, [Almon W.] Babbit, and [Onias C.] Skinner,"[10] and although these lawyers "used all reasonable exertion" to have the perjury indictment tried immediately, "the prosecution party was not ready for trial."[11]

This attempt to secure an immediate trial seems to have surprised Joseph's enemies. One county paper known for its anti-Mormon rhetoric (and whose editor was among the accused assassins of Joseph Smith) wrote that "it was the general impression that Joe [Joseph Smith] would never submit to be tried on these indictments." According to this article, "the general opinion appears to be, that he [Joseph] thought to catch his enemies napping, and by a bold stroke, defeat them."[12]

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8. As reported by Thomas Bullock. See *History of the Church,* 6:409–10. Joseph states that these events occurred "last winter," which could mean either the winter of 1842/43 or the winter of 1843/44. The latter possibility may be more likely. Internet sources containing brief biographical material on Sympson state that he came to Carthage in 1844. Sympson became a prominent man in the area, having a fine house in which Abraham Lincoln reportedly stayed when visiting. Sympson and Lincoln knew each other as boys in Kentucky. See Infobahn Outfitters, "Hancock County Courthouse," http://illinois.outfitters.com/illinois/hancock/courthouse.html; and "The Lincoln Doorway," *Treasures from the Kibbe Museum,* http://kibbe.wordpress.com/2008/06/24/the-lincoln-doorway/).

9. Joseph described this incident during his public remarks on May 26, 1844. See *History of the Church,* 6:401. At the time of Joseph's death, a civil suit by Sympson for slander was pending against Joseph Smith in the McDonough County Circuit Court. This suit arose out of the same facts that resulted in the perjury indictment.

10. See Faulring, *American Prophet's Record,* 485. Richardson and Skinner later were among the lawyers who defended Joseph's accused assassins in their trial for murder. See Dallin H. Oaks and Marvin S. Hill, *Carthage Conspiracy: The Trial of the Accused Assassins of Joseph Smith* (Urbana: University of Illinois Press, 1975), 79, 82–84, 94. Babbitt was a well-known member of the Church who later lobbied the Illinois state government and the U.S. Congress on behalf of the Latter-day Saints. See Andrew Jenson, ed., *LDS Biographical Encyclopedia* (reprint; Salt Lake City: Western Epics, 1971), 1:284–86.

11. See Faulring, *American Prophet's Record,* 485

12. *Warsaw Signal,* May 29, 1844, p. [2].

Court records show that A[lexander] Sympson,[13] R[obert] D. Foster, John Snyder, and J[oseph] Jackson were ordered to come to the court "instanter," or immediately, in connection with the adultery indictment on May 27, 1844.[14] The return notation from Sheriff William Backenstos shows that he read the summons to Sympson, Foster and Jackson; however, Snyder's name is not listed, suggesting that Snyder could not be located that day.

Of the four witnesses, at least two were sworn enemies of the Prophet. Robert Foster was a leading figure in the efforts to organize a dissenting church for disaffected Latter-day Saints. His name is shown among the publishers of the *Expositor* newspaper (published June 7, 1844), which made strong statements about Joseph's plural marriages. Joseph Jackson, another known enemy of Joseph Smith, was seen with a pistol on the day Joseph and his entourage rode to Carthage to have the indictments investigated. While loading his gun, Jackson was reportedly overheard stating he would "have satisfaction" of Joseph and Hyrum.[15] It is unknown why the court thought that Sympson would have anything to say on the topic of Joseph's alleged adultery. He was a newcomer to Nauvoo who was apparently not LDS.

The inclusion of Snyder's name is curious. He was a Latter-day Saint who served missions and assisted with the disposition of LDS properties in Nauvoo after the Exodus. Snyder is listed in the Journal History of the Church on June 28, 1844, as one of the honor guards accompanying the bodies of Joseph and Hyrum back to Nauvoo. He eventually travelled to Utah in 1850, and died in Salt Lake City in 1875, still a faithful member of the Church. After his death in 1875, Snyder was eulogized by John Taylor, further evidence that he was a stalwart member.[16]

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13. Spelled "Simpson" in *History of the Church*.

14. This subpoena is found in the vault, kept by the Clerk of the Circuit Court for Hancock County in Carthage, Illinois. The Clerk of the Court has this and other valuable legal papers concerning Joseph Smith locked in a box within the records vault.

15. According to a book written by Jackson, the Prophet named two of these men, Foster and Sympson, among his worst enemies and called them a "pack of persecuting d'd rascals," prophesying their destruction. Jackson himself was known to have been a bitter enemy of the Prophet and was said by several Latter-day Saints to have been a counterfeiter, a charge which, ironically, he accused Joseph Smith of in his book. Joseph H. Jackson, *A Narrative of the Adventures and Experience of Joseph H. Jackson, in Nauvoo* (reprint; Morrison, Illinois, 1960), 26 (the original version was published in August 1844, just two months following Joseph's murder); Faulring, *American Prophet's Record,* 484. As to Jackson being a counterfeiter, see *Nauvoo Neighbor Extra,* June 17, 1844.

16. Frank E. Esshom, *Pioneers and Prominent Members* of *Utah, Comprising Photographs, Genealogies, Biographies: The Early History of the Church of Jesus Christ of Latter-day Saints* (Salt Lake City: Utah Pioneers Book Publishing, 1913), 1173. John Snyder is listed in Early

Notwithstanding the court's summons directed at the four witnesses (and Snyder's apparent unavailability), the efforts of Joseph's attorneys to have the adultery charge investigated did not lead the prosecutor to drop the second charge, as he had done with the initial adultery charge. Court records show that on the day that Joseph went to Carthage, William and Wilson Law were ordered by the court to appear as witnesses before the court for trial on the third Monday of October 1844.[17] Thus, by day's end, the court was making plans for a trial in the fall. Additional subpoenas were issued during the coming weeks, requiring Joseph Smith and other witnesses to appear in court on the third Monday of October.[18] These indictments against Joseph remained on the court's docket until the October term, when they were finally dropped due to the Prophet's death.[19]

Unfortunately, few records exist pertaining to this adultery indictment, and none contain the substance of the testimony against Joseph that was presented to the grand jury. The *History of the Church* provides a few clues, which are found in an account of a public speech that Joseph made in Nauvoo on May 26, 1844. In that speech, Joseph lambasted the Law brothers for their involvement in the adultery suit. Joseph stated that both William and Wilson Law had sworn that Joseph had said that he was guilty of adultery.[20] More will be said about this speech in the section on Joseph's possible legal defenses below.

Otherwise, all that is known of the adultery charge is contained within the wording of the actual indictments, which asserted that Joseph had lived in an open state of adultery and fornication from October 12, 1843, with

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LDS Membership Data, 1995, Infobases, Inc. The Journal History of the Church housed at the LDS Church History Library contains several entries for Snyder, reporting his death and republishing his obituary. See entry of December 18, 1875. Some sources list Snyder's wife, Mary Heron, as a wife of Joseph Smith. Hales, *Joseph Smith's Polygamy,* 1:460–74, discusses this topic in detail, also providing additional biographical information about John Snyder.

17. See Hancock County Circuit Court records, Book D, Family History Library Film 0947496.

18. See Wilford Wood collection, MS 8716, reel 5, file 4-C-b-2, LDS Church Archives; and "Capias on Indictment," June 22, 1844, stored with the indictments for adultery and fornication, MS 3464, LDS Church Archives. Andrew F. Ehat and Lyndon W. Cook, *Words of the Prophet Joseph Smith* (Salt Lake City: Deseret Book, 1996), 407 n. 21 (entry for May 26, 1844), incorrectly concludes that the case against Joseph was dropped during the May 1844 term of the court.

19. The court's minutes for the October term record: "This day came the state's attorney and suggested the death of the defendant Joseph Smith. Thereupon the court ordered that this suit abate." See Hancock County Circuit Court records, Book D, 166.

20. *History of the Church,* 6:408–12; cited in Ehat and Cook, *Words,* 375–76; see also Ehat and Cook, *Words,* 406 n. 1.

Maria Lawrence and from July 10, 1843, with other women who were "to the jurors unknown."

The earlier indictment (dropped on May 24) exhibits confusion over the dates of the alleged conduct and is difficult to decipher, having numerous insertions and interlineations. It alleges that on January 1, 1844, Joseph lived "with women unknown" to the jurors. It also alleged that Joseph had lived in an open state of adultery with Maria Lawrence on October 12, 1843, this date being written over the date of December 15, 1843. This earlier document as first written did not allege that Joseph lived with Maria or other women on any dates other than the ones expressly alleged, though an insertion of additional wording added that the adulterous conduct occurred "on divers other days & times between that day & the day of finding this indictment."

Illinois Adultery Law

Under Illinois law, enacted in 1833, only open cohabitation of a man and woman not married to each other was punishable by law. The Illinois Criminal Code provided that

> Any man and woman who shall live together in an open state of adultery or fornication, or adultery and fornication, every such man and woman shall be indicted, and on conviction, shall be fined in any sum not exceeding two hundred dollars each, or imprisoned not exceeding six months. This offence shall be sufficiently proved by circumstances which raise the presumption of cohabitation and unlawful intimacy; and for a second offence, such man or woman shall be severely punished twice as much as the former punishment, and for the third offence, treble, and thus increasing the punishment for each succeeding offence: *Provided, however*, That it shall be in the power of the party or parties offending, to prevent or suspend the prosecution by their intermarriage, if such marriage can be legally solemnized, and upon the payment of the costs of such prosecution.[21]

21. Criminal Code, section 123, *Revised Laws of Illinois*; see also Criminal Jurisprudence, section 123, *Revised Statutes of the State of Illinois.* It is also possible, though less likely, that the grand jury was acting based upon a Nauvoo city ordinance enacted in May 1842 (discussed below at note 50), which also punished adultery and fornication. If so, indictment by the county court would have been improper; by the terms of Nauvoo's city charter, the city court had exclusive jurisdiction over all offenses arising under the city's ordinances. See An Act to Incorporate the City of Nauvoo, December 16, 1840, section 17. Compare to

The term "open" in this statute is a key element of this crime. The meaning of this term was then and still today is generally understood in law to cover conduct that is "notorious," "exposed to public view," or "visible," and which is "not clandestine."[22] Joseph's relationships with his plural wives did not meet this definition.

As seen in his remarks on May 26, 1844, Joseph never openly acknowledged his marriages to these women; in fact, they seem to have been known only to a limited number of his closest associates, some or all of whom were themselves practicing plural marriage at his instruction. Whatever stories may have circulated occasionally in Nauvoo, it would have been difficult for any witness to tell the grand jury that Joseph "openly" lived with Maria Lawrence in a state of adultery or fornication.

The Illinois statute also provided that the "offense shall be sufficiently proved by circumstances which raise the presumption of cohabitation and unlawful intimacy." In other words, circumstantial evidence could be advanced to raise a presumption of that offense, but construing the statute as a whole, the prosecution would still have needed to show, even by indirect evidence, that the offense was "open." Any presumption would be open to rebuttal by contrary evidence. As the indictments expressly allege that Joseph's conduct was "open," one must wonder if this charge was simply based preliminarily on circumstantial evidence, or perhaps was improperly based on false or overstated testimony.

The fact that only "open" behavior would bring criminal liability for adultery is seen in the wording used in indictments drawn up by prosecutors during this era. Such documents are found in the papers of Stephen A. Douglas and Thomas Ford, men who served during portions of Joseph's Nauvoo years as justices of the Illinois State Supreme Court. Both men earlier served as state's attorneys (prosecutors) and in that capacity had brought adultery charges.

In one case, Douglas brought charges against William S. Holton and Ruth Tanner in 1835 for adultery. This indictment stated that the accused parties "on

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Illinois divorce law which allowed adultery as a grounds for divorce; however, the cases that involved divorce petitions on this basis do not seemed to have followed any clear standard defining what constituted adultery, focusing rather on proving individual acts of adultery. Divorce law did not require that the conduct be "open" or "notorious." See for example Daniel W. Stowell, ed., Susan Krause, asst. ed., *The Papers of Abraham Lincoln: Legal Documents and Cases,* 4 vols. (Charlottesville: University of Virginia Press, 2008), 1:43–46 [*Wren and Hart et al.*]; and Isaac H. Burch, *The only complete report of the Burch divorce case … specially reported by the Law Reporter of the New York Daily Times,* electronic resource [Buffalo, NY]: William S. Hein & Co. (2007 [original case in Illinois, 1860]).

22. *Black's Law Dictionary,* 6th ed (St. Paul, Minn.: West Publishing Co., 1990), sv. "open."

the tenth day of June in the year of our Lord one thousand eight hundred and thirty four and for the period of six months preceeding [*sic*] that day at the County aforesaid willfully and unlawfully did live together in an *open* State of Adultery and fornication and did cohabit together as man and wife."[23] This wording shows that Douglas was charging the pair not with a secret relationship that was considered adulterous, but with openly cohabiting as man and wife during a specific time period, thereby committing adultery. One may also contrast the six-month period during which Holton and Tanner were alleged to have cohabited with the much less precise dates and time periods referenced in the adultery indictments drawn up against Joseph. The indictments against Joseph that were drawn up by the grand jury exhibit confusion over the dates, no doubt due to the fact that his conduct was not "open" and public.

Interestingly, Joseph was not the only person charged with adultery at the May 1844 term of the court in Hancock County. In *People v. Mullen,* the state accused Joseph Mullen of committing adultery with one Martha Jolly on May 5, 1844. Attorneys Richardson and Skinner, who represented Joseph in his adultery indictment, also happened to represent Mullen in this matter. They made a motion objecting to this indictment, on the grounds that the adultery "was charged to have been committed upon one day & is not sufficiently charged, the whole indictment is insufficient."[24]

Another example of an early Illinois adultery indictment is found in Thomas Ford's papers. Ford, who was elected governor of Illinois in August 1842, also prosecuted at least one couple for adultery as a state's attorney in the 1830s. This document asserted that the accused parties "did unlawfully live together … in an open state of adultery."[25] Even though this wording is less specific than seen in the Douglas indictment, it still contains the term "open," showing that Ford too deemed this an essential element of the offense.

The importance of the word "open" to any adultery conviction cannot be overstated. Two Illinois Supreme Court cases in the mid-nineteenth century illustrate this point.[26] Even though these cases were decided after Joseph's death, they nevertheless provide valuable clues as to how the courts likely

23. Stephen A. Douglas Papers, SC 415, fd. 1, Illinois State Historical Library, Springfield, Illinois, emphasis supplied. The wording *as man and wife* is not found in the actual wording of the statute, but rather seems to have been inserted by Douglas to bolster the allegation that the two had openly lived together in an improper relationship.

24. Original documents are kept by the Clerk of the Circuit Court for Hancock County in a locked box within the vault.

25. See Thomas Ford papers, SC 513, fd. 1, Illinois State Historical Library.

26. Searles v. The People, 13 Ill. 597 (1852); and Miner v. The People, 58 Ill. 59 (1873).

would have applied the statutory law to Joseph's circumstances, had his case gone to trial in October 1844 as scheduled.

According to the court in the first of these two cases, *Searles v. People* (Illinois, 1852), decided only eight years after Joseph's indictment, the purpose of the state's adultery statute was to "prohibit the *public scandal* and disgrace of the living together of persons of opposite sexes *notoriously* in illicit intimacy, which outrages *public* decency."[27] The court explained that "in order to constitute this crime the parties must dwell together *openly and notoriously,* upon terms as if the conjugal relation existed between them." The courts from several other states also affirmed the same principle, generally holding that "adultery is not indictable unless it is open and notorious."[28] Those and several states in the 1830s had adultery statutes similar to that of Illinois.[29]

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27. Searles v. The People, 13 Ill. 597, 598 (emphasis added).

28. See *American Digest* (St. Paul: West, 1897), vol. 1, s.v., "Adultery," I, §1[a] (this section cites cases from several states that support this proposition).

29. In addition to Illinois, states with similar statutes using the word "open" include Florida (1824, 1828, 1832), Georgia (1817, 1833), and Iowa (1839). Even clearer, Missouri law spoke of living "in a state of open and notorious adultery … lewdly and lasciviously," and the New Hampshire (1829) and Wisconsin (1838, 1849) statutes speak of "open gross lewdness and lascivious behavior." The requirement for open conduct would probably have applied in Ohio, where some have suggested that Joseph may have had a plural relationship with a female named Fanny Alger. The Ohio adultery statute (chapter 35, section 24) criminalized only "notorious" cohabitation, providing that "if any married man shall hereafter *desert his wife*, and live and cohabit with any other woman in a state of adultery; or if any married man, *living with his wife*, shall keep any other woman, and *notoriously cohabit* with her in a state of adultery, … every person so offending shall, on conviction thereof, be fined in any sum not exceeding two hundred dollars, and be imprisoned in the cell or dungeon of the jail of the county, and be fed on bread [and water] only, not exceeding thirty days" (See *Acts of a General Nature, Enacted, Revised, and Ordered to be Reprinted,…* [Columbus: Olmsted and Bailhache, 1831], 149; also in J. R. Swan, *Statutes of the State of Ohio, of a General Nature,…* [Columbus: Samuel Medary, 1841], 244–45). The Ohio statute against fornication of two cohabiting *unmarried* persons did *not* require open conduct. See *Statutes of the State of Ohio* (Cincinnati: Corey and Fairbank, 1835), "Punishment of Offenses," p. 1732, chapter 831, section 25. Given that Joseph was legally married to Emma, the applicability of section 25 is precluded as to Joseph and Fanny. The report of a discussion that took place in the High Council at Far West regarding rumors of Joseph's relationship with a woman other than Emma (likely Fanny Alger) is worth discussing here. Remarks of three of the participants show that they were satisfied that Joseph never confessed to the "crime alleged" (adultery). See Hales, *Joseph Smith's Polygamy,* 1:143. Although the evidence is uncertain, Fanny Alger is believed by many to have been Joseph's first plural wife.

In rendering its decision, the court in *Searles* held to be erroneous an instruction given by the trial court judge to the jury that would have permitted a guilty verdict even in the absence of evidence of a single act of sexual intercourse. While the state's adultery statute provided that the crime would be "sufficiently proved by circumstances which raise the presumption of cohabitation and unlawful intimacy," the court explained that mere suspicions based on circumstances were not sufficient to give rise to the presumption of guilt.

The circumstances under which the alleged crime in *Searles* took place bear some resemblance to those under which Joseph and Maria might have found themselves. The couple in *Searles* lived together—as did Joseph and Maria—in the "same family, but [were] apparently chaste, regularly occupying separate apartments."[30] In light of these facts, the court concluded that for purposes of instructing the jury, "a single instance of illicit intercourse surely would not constitute the crime of living together in an open state of fornication." Whatever the situation was in the *Searles* case, no eyewitness accounts or direct evidence of Joseph's being engaged in conjugal acts with Maria are known to exist.

In the second case, two decades later, *Miner v. People* (Illinois, 1871), the court cited the earlier *Searles* case and was no more inclined to uphold adultery convictions than the court had been in 1852. The court's opinion held that the "familiarities shown on the trial" were insufficient to support the conviction. These "familiarities" included testimony that the allegedly adulterous pair had been seen embracing each other twice—in the defendant's bedroom—and that the two stayed all night in bed on at least two occasions. It was further alleged that the woman, a certain Mrs. Jones, had moved her bed into the defendant's bedroom, where she slept for about three weeks.[31] Even under these facts, the court held that the evidence disclosed no relation between the two that would give rise to liability. Wrote the court, "It barely creates a presumption of illicit intercourse."[32]

Joseph's Possible Legal Defenses against the Charge of Adultery

If the adultery indictment against Joseph had actually gone to trial in October 1844, as scheduled, the Prophet's attorneys might have utilized a number of defenses or tactics on his behalf.

30. See Searles v. People, case file 11989, Illinois State Archives, Springfield, Illinois.

31. See testimony in Miner v. The People, case file 4391, Illinois State Archives.

32. Miner v. The People, 58 Ill 59, 60.

1. Not "open" or "notorious." As discussed, Joseph's first line of defense would have been to establish that he and Maria did not "openly" live together in a state of adultery or fornication. His attorneys could have summoned a string of witnesses who would have testified that, although Maria lived in Joseph's home, she was not understood in the community to be his wife, and they were not living openly as man and wife.[33] The presence in the Smith home of Maria and her sister Sarah, as well as of other women, would more likely have been viewed by the community and visitors as an act of kindness (Maria and Sarah were orphans, and Joseph was their guardian) and perhaps as an employment opportunity, allowing the young women to earn their keep.[34]

2. Lack of witnesses. Joseph's attorneys could also have challenged the prosecution to find even one eyewitness to a conjugal act between the two. As the court held in *Searles,* mere suspicions based on circumstances would not be sufficient to establish the case. Actual witnesses to one or more sexual acts

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33. The date of Joseph and Maria's sealing, and the dates on which she lived in the Smith home may be relevant here. Compton gives the date of Maria's sealing to Joseph as late spring 1843. See Compton, *In Sacred Loneliness,* 475. Van Wagoner estimates the sealing date as late summer or early fall 1843. See Richard S. Van Wagoner, *Mormon Polygamy: A History* (Salt Lake City: Signature Books, 1989), 36. Hales gives the sealing date as May 1843. See table 15.1 in Hales, *Joseph Smith's Polygamy,* 1:428 and discussion in 2:49. Maria and her sister moved in with the Smiths into the Mansion House on August 31, 1843. See Hales, *Joseph Smith's Polygamy,* 1:327. I am not aware of any evidence indicating whether Maria was still living with the Smiths in their home at the time of the indictment (May 24, 1844); however, the indictment specifically alleges that Maria and Joseph lived in an open state of adultery and fornication starting from October 12, 1843, to "the time and the day of finding this indictment." Maria was nineteen at the time of her sealing, her birthday being December 18, 1823. Curiously, the date of October 12 comes up in historical sources and Young family tradition as the date in 1844 when Sarah Lawrence was sealed to Heber C. Kimball and Maria was possibly sealed to Brigham Young. That a sealing to Brigham Young may have occurred was disputed by some early Latter-day Saints. See Compton, *In Sacred Loneliness,* 477, 745. Joseph Smith was guardian of Sarah and Maria Lawrence. See generally chapter 14 above.

34. Hales quotes an anonymous writer who visited Nauvoo in 1843, commenting that "there was no foundation to the report that Joe[seph Smith] kept virgins but that he, as guardian to several orphan girls supported and employed them as servants to do work at his hotel; … and from what we saw of those orphan girls—we sat at tea with them every meal—they were, I believe, as modest, chaste, and virtuous girls as can be found." This report was published in London in 1844. See Hales, *Joseph Smith's Polygamy,* 2:55. Two of the other girls the writer may have been referring to were Eliza Marie Partridge and Emily Dow Partridge, both of whom were plural wives of Joseph Smith and lived with him for a time in the Mansion House.

would likely have been needed, and it is very doubtful that these existed—otherwise the publishers of the *Expositor* would surely have splashed the names or initials of such witnesses and the details on the pages of the *Expositor.*[35]

Joseph's comments spoken on May 26, 1844, need to be reconsidered in this light. The material quoted below has been cited numerous times by his critics as proof that Joseph publicly denied polygamy while secretly practicing it:

> I had not been married scarcely five minutes, and made one proclamation of the Gospel, before it was reported that I had seven wives.... A man asked me whether the commandment was given that a man may have seven wives; and now the new prophet has charged me with adultery.... Wilson Law also swears that I told him I was guilty of adultery.... I am innocent of all these charges, and you can bear witness of my innocence, for you know me yourselves.... What a thing it is for a man to be accused of committing adultery, and having seven wives, when I can only find one. I am the same man, and as innocent as I was fourteen years ago; and I can prove them all perjurers.[36]

A review of Joseph's remarks in light of the circumstances under which they were spoken shows that Joseph's words were carefully chosen. In this speech, Joseph was specifically reacting to the indictments for perjury and adultery that were presented by the grand jury the day earlier. Thus, when Joseph affirmed during the same speech: "I am innocent of all these charges," he was in particular refuting a claim that he and Maria had openly and notoriously cohabitated, thus committing the statutory offense of adultery. He was also refuting the perjury charge. While the overall tone of Joseph's remarks may seem misleading, it is understandable that Joseph would have taken pains to dodge the plural marriage issue. By keeping his plural marriages in Nauvoo secret, Joseph effectively kept them legal, at least under the Illinois adultery statute.

3. Offering physical evidence to prove Maria's virginity. While this might seem an extreme and grossly embarrassing step, one wonders if Joseph

35. Consider John C. Bennett's exposé on Joseph, which besides much information that was patently fanciful or false, contained the initials of alleged plural wives. Some of these initials seem to match with those of women known to have been sealed to Joseph. See John C. Bennett, *History of the Saints; or, an Exposé of Joe Smith and Mormonism* (Boston: Leland and Whiting, 1842).

36. *History of the Church,* 6:410–11.

and even Maria may have been prepared to take such measures.[37] Joseph instructed John Taylor on June 4, to initiate legal action against the Laws and Foster for perjury and slander against Maria.[38] No such suit is known to have been filed, since Joseph was killed three weeks later; however, the mere fact that Joseph planned to bring such a suit suggests that, in Joseph's mind, there was nothing to hide in his relationship with Maria. If there had been a sexual dimension to this particular plural marriage, it is almost unimaginable that Joseph would have wanted to file a lawsuit, knowing that Maria might be put on the witness stand—or even subjected to a gynecological examination. The possibility that Joseph's relationship with Maria Lawrence did not involve intimacy is also plausible given his comments regarding the publication of the *Expositor*: "They make it a criminality for a man to have one wife on earth while he has one wife in heaven."[39] Since the only specific allegation of "criminality" (the adultery indictment) with respect to Joseph's plural marriages concerned Maria Lawrence, this statement by Joseph could be understood as a reference to his spiritual connection, or sealing, with Maria, but perhaps no more.

4. Challenging the credibility of witnesses who had a poor reputation for truthfulness. Joseph's lawyers could well have cast doubt on the specifics of opposing testimonies. Indeed, a focus of Joseph's public remarks on May 26, 1844, seems to have been to undermine the reputation of the witnesses against him in the adultery and perjury cases. In this sense, Joseph may have been putting his enemies on notice that any eventual trial on these charges would inevitably involve questions regarding their own reputation for "veracity," or truthfulness. For example, Joseph stated that Jackson, one of the witnesses against him, was guilty of "murder, robbery, and perjury" and that he could "prove it by a half a dozen witnesses."[40]

5. Excluding testimony based on hearsay. Especially the Laws' statements that Joseph admitted to adultery could have been challenged. A leading United States Supreme Court case of this era held on the topic of hearsay: "Nothing said by any person can be used as evidence between contending

37. Some historians might be perplexed that I even raise such a possibility; however, the facts I cite calling this assumption into question deserve serious consideration. On the other hand, even Brian Hales, who writes from the perspective of a believing Latter-day Saint, assumes that Joseph and Maria's relationship involved intimacy. He bases this on three accounts; however, all of these are secondhand and were recorded at a much later date. See Hales, *Joseph Smith's Polygamy,* 2:386–87.

38. *History of the Church,* 6:427.

39. *History of the Church,* 6:441.

40. *History of the Church,* 6:427.

parties unless it is delivered on oath, in the presence of those parties."[41] While federal legal precedent would not necessarily have been followed by an Illinois state court, the legal reasoning expressed in this case is illustrative of the jurisprudence of the day.[42]

Possible Defenses Based on His Relationship with Maria Being Legal

1. Legal and Protected under Federal and State Constitutional Law. Joseph could also have attempted to invoke his rights of religious liberty, under state or federal law. In his day, it had not yet been decided, as the U.S. Supreme Court would hold in 1879 in *Reynolds v. United States,* that the law can restrict religious conduct that has been found by the legislature to offend public morals.[43] The Illinois Constitution had a broadly worded guaranty of religious freedom that could conceivably have been read by the state's judiciary to extend protection to religiously based polygamy. In 1844, this guaranty provided:

> That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; that no human authority can in any case whatever control or interfere with the rights of conscience; and that no preference shall ever be given by law to any religious establishments or modes of worship.[44]

Recognizing the breadth of this state constitutional provision as it stood in 1844, Illinois adopted a new constitution in 1869 that introduced a number of changes in the clause governing religious liberty, including wording specifically intended to give the state authority to prohibit Mormon

41. Ellicott v. Pearl, 35 U.S. 412, 437(1836).

42. See generally S. M. (Samuel March) Phillipps, *A treatise on the law of evidence: to which is added the Theory of presumptive proof, &c.,* 1st American from the 2nd London ed. by John A. Dunlap (New-York, 1816); *The Making of Modern Law* (Gale, Cengage Learning, 2013), http://galenet.galegroup.com.proxlaw.byu.edu/servlet/MOML?af=RN&ae=F105-003815&srchtp=a&ste=14 (accessed February 14, 2013); and Simon Greenleaf, *A Treatise on the Law of Evidence,* 3 vols. (Boston, 1842–53), vol. 1.

43. Reynolds v. United States, 98 U.S. 145 (1879).

44. Illinois Constitution (1818), Art. VIII, Sect. III.

polygamy[45] or other religiously-based practices that might be deemed offensive. Comments by certain delegates to the 1869 Illinois Constitutional Convention show that there was a concern that the Mormon practice of plural marriage could be protected under the state constitution. Borrowing wording from the New York Constitution, the Illinois Constitution then could not "be construed to … excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State."[46]

2. Defenses under Nauvoo City Ordinances on Religious Societies, Adultery, and Marriage. Joseph might have claimed rights of freedom of religion in 1844 under a Nauvoo City ordinance that was approved on March 1, 1841, less than a month after the Nauvoo Charter went into force, and only a month before Joseph is known to have entered into the first of his Nauvoo plural relationships.[47] Entitled "An Ordinance in Relation to Religious Societies,"[48] this ordinance provided that all religious sects and denominations, including "Mohommedans," were to have "free toleration" and "equal privileges" in Nauvoo. Given that polygamy is permitted under Islam, one

45. I discovered this fact by reading the published report of the debates held during the 1869 Illinois Constitutional Convention, which show that Mormon polygamy was specifically discussed. Several delegates expressed support for changes in the wording of the Illinois constitution in order to protect the state from what they viewed as extreme forms of worship, including Mormon polygamy. These delegates feared that the more liberal wording of the earlier constitution (in force in Joseph's day) might actually protect practices such as polygamy. One such delegate was Thomas J. Turner. In comments addressed to the convention delegates, Turner stated: "This section [Article II, Section III of the Illinois Constitution (1870)] secures the people of the State, in the free exercise of their religious professions and worship, without discrimination. It also provides that liberty of conscience shall not excuse acts of licentiousness or practices inconsistent with the peace, safety and morality of the State. The pagan world is full of religion … Mormonism is a form of religion 'grant it, a false religion' nevertheless, it claims to be the true Christian religion … [d]o we desire that the Mormons shall return to our State, and bring with them polygamy?" See *Debates and Proceedings of the Constitutional Convention of the State of Illinois, Convened at the City of Springfield, Tuesday December 13, 1869* (Springfield, April 29–30, 1870), 1561; see also similar comments by another delegate, George R. Wendling in *Debates and Proceedings,* 1565–66, available online at: http://www.idaillinois.org/cdm/compoundobject/collection/isl2/id/12546.

46. Illinois Constitution (1870), Art. II, Sec. III at http://archive.org/stream/constitutionofooilli#page/4/mode/2up/search/3.

47. According to the chronology prepared by Compton, all of Joseph's Illinois plural marriages occurred after this date, the first having occurred on April 5, 1841, when he married Louisa Beaman. Compton lists two marriages he believes may have occurred prior to this date and not in Illinois, one to Fanny Alger, and another to Lucinda Pendleton.

48. *History of the Church,* 4:307; Dinger, *Nauvoo City and High Council Minutes,* 17.

could easily argue that the mention of "Mohammedans" was intended to bring plural marriage within the scope of Nauvoo's ordinance on religious toleration. Comments that Joseph made during a sermon in 1841 support this interpretation. Joseph Lee Robinson's autobiography, published in 1853, provides this interesting recollection:

> While speaking to the people in that place he [Joseph Smith] supposed a case, he said suppose we send one of our elders to Turkey or India or to a people where it is lawful to have several wives. Where they practiced polygamy and suppose he should say to them your laws are not good, you should put away your plural wives. What would they do to him? They would kick him out of their realm. Said he, what right has he to speak against their laws and usages. Said he, God doesn't care what laws they make if they will live up to them. What shall they preach? Said he, they shall preach the gospel and nothing but the pure gospel and some will believe and be baptized.

Discussing what the hypothetical LDS elder would say to the Turk or Indian who embraces the gospel and wishes to gather to Zion with his wives, Joseph further stated:

> He shall say, yes, brother, there is a land of Zion where Saints of God are required to gather to. Then, said he, to the elder, I have five wives and I love one equally as well as I do the other and now what are the laws in that land? Can I bring my five wives there and enjoy them there as well as I can here? Said the prophet, yes the laws in Zion are such that you can bring your wives and enjoy them here as well as there, the elder shall say to his brother.[49]

Robinson gives the date of this sermon as "fall 1841," which would mean that it followed the adoption of the Nauvoo ordinance on religious liberty by perhaps six months. The only "Zion" to which foreign converts would have been required to gather in 1841 was Nauvoo or surrounding communities. Thus, this reference to the laws of Zion may be understood as a reference to Nauvoo, or perhaps to the State of Illinois. This reference seems to suggest

49. Oliver Preston Robinson and Mary Robinson Egan, eds., *The Journal of Joseph Lee Robinson Mormon Pioneer,* 41–42; available at www.boap.org/LDS/Early-Saints/, cited in Hales, *Joseph Smith's Polygamy,* 1:246–47.

that Joseph believed that the laws of Nauvoo and possibly Illinois would not reach polygamy.[50]

One would not normally expect that a city ordinance could grant rights of religious freedom; however, the Nauvoo Charter granted broad authority for the municipal government to enact ordinances. Section 11 of that document provided that:

> The city council shall have power and authority to make, ordain, establish and execute all such ordinances, not repugnant to the Constitution of the United States or of this State, as they may deem necessary for the peace, benefit, good order, regulation, convenience and cleanliness of said city.[51]

Joseph's lawyers might have pointed out that any Nauvoo city ordinance was authorized, so long as it was not "repugnant" to the Illinois State Constitution and served to promote the peace and good order of the city—even if it varied from the usual Illinois statutes or laws. An examination of the wording in the charters for other Illinois municipalities of this era shows that this clause was unique and probably granted Nauvoo unusually expansive powers. The charters for Illinois *towns* often stipulated that ordinances must not contradict state *law* or the state and federal constitutions. On the other hand, the charters for *cities* sometimes contained wording similar to Section 11 of the Nauvoo Charter, but unlike in this charter, such wording was inevitably linked to a specific list of enumerated powers. Thus, these cities could pass ordinances that would contradict state law, but only covering a prescribed range of topics.[52] Nauvoo's powers, by comparison, seem to have

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50. Joseph was a member of the city council at this time (see *History of the Church,* 4:295) and personally presented this ordinance to the city council for consideration (*History of the Church,* 4:306), so we may presume that the ordinance reflected his thinking.

51. "The City Charter: Laws, Ordinances, and Acts of the City Council of the City of Nauvoo," sec. 11 (1840) (hereafter cited as Nauvoo City Charter), Church History Library.

52. A comparison between Nauvoo's powers under its charter with the powers of other Illinois towns and cities is instructive. Towns in Illinois were often incorporated by the General Assembly under the terms of a standard charter empowering the town to establish ordinances on a defined range of topics "not inconsistent with the laws, or the constitution" of Illinois. See Incorporations, section 5, An Act to Incorporate the Inhabitants of Such Towns as May Wish to be Incorporated (passed 12 Feb. 1831), *Revised Laws of Illinois* (1833), 382. Under the terms of this standard charter, town ordinances could not contradict state law. On the other hand, some cities had broader legislative powers. For example, Springfield could pass ordinances within a prescribed range of topics, even if these ordinances contradicted state law, as long as the ordinances were not "repugnant to, nor inconsistent with" the U.S. or Illinois constitutions. See An Act to Incorporate the City

been intentionally crafted to be broader. Given the Saints' recent history of persecution in Missouri which had culminated in the infamous "extermination order" by Governor Boggs, Nauvoo's city authorities would have had more than ample reason to establish the broadest possible legal basis for religious freedom in Nauvoo.

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of Springfield, *Laws of the State of Illinois Passed by the Eleventh General Assembly, at Their Special Session, Began and Held at Springfield on December 9, 1839* (Vandalia, Ill.: William Walters, 1840), art. V, sec. 36.

The Nauvoo Charter provided even broader powers than granted to Springfield. Section 11 provided that the "city council shall have power and authority to make, ordain, establish and execute all such ordinances, not repugnant to the Constitution of the United States or of this State, as they may deem necessary for the peace, benefit, good order, regulation, convenience and cleanliness of said city." The Nauvoo Charter included Springfield's powers by reference in section 13, but those were treated as being supplemental. See the full text of these sections in chapter 12 above. Thus, Nauvoo's powers were not limited to the same list granted to Springfield.

Compare Springfield and Nauvoo's municipal powers to those of Quincy. The charter for the city of Quincy, also passed in February 1840, originally stated that Quincy was to have the power to "make all ordinances which shall be necessary and proper for carrying into execution the powers specified in this act so that such ordinance be not repugnant to nor inconsistent with the constitution of the United States or of this State" (passed February 3, 1840, see section [41]); however, the legislature pared back Quincy's authority the following year. On January 7, 1841, the General Assembly of Illinois amended the Quincy Charter to clarify that the city council "shall pass no ordinance contrary to, or which in any way conflicts with, the laws of the United States or of this State, and any such ordinance which the city council may have passed, shall be void and of no effect." See An Act to Amend an Act Entitled An Act to Incorporate the City of Quincy (approved January 7, 1841), 12th General Assembly, 1st Sess., 1840, sec. 5. Interestingly, the General Assembly amended the Springfield Charter the next month, but in doing so left intact the broader enabling clause. See An Act to Amend An Act to Incorporate the City of Springfield, February 27, 1841, 12th General Assembly, 1st Sess., 1840. Thus, Springfield and Nauvoo could pass ordinances that contradicted state law, but Quincy could not (Springfield within the defined range of topics, and Nauvoo as long as the ordinance was, as provided in section 11, for "the peace, benefit, good order, regulation, convenience and cleanliness of said city"). Seen in this context of legislative awareness and intent, it seems almost certain that the General Assembly in fact intended to grant Nauvoo the very broad powers claimed here. Agreeing, a Hancock County history (Nauvoo was located in Hancock County) notes the breadth of municipal authority granted under the Nauvoo Charter: "Except as to constitutional questions the city of Nauvoo possessed all legislative power, or, to say the least, its ordinances and proceedings were not to be rendered invalid by reason of being repugnant or inconsistent with the laws of the state." Charles J. Scofield, ed., *History of Hancock County,* vol. 2 of *Historical Encyclopedia of Illinois,* ed. Newton Bateman, Paul Selby, and J. Seymour Currey (Chicago: Munsell, 1921), 717, 835.

Since Nauvoo had adopted its own adultery ordinance on May 17, 1842, Joseph's lawyers might also have argued that the circuit court lacked jurisdiction to bring a charge of adultery against Joseph outside of Nauvoo on the grounds that Nauvoo—where the offense allegedly occurred— had jurisdiction. This enactment banned the keeping and frequenting of brothels or houses of ill-fame; adultery and fornication were also punishable, the penalty for violations being stipulated as imprisonment for six months and a fine ranging from five hundred to fifty thousand dollars.[53]

It is likely that city authorities intended their ordinances to replace the state law when the two covered the same topics and the alleged offenses arose within Nauvoo. According to Section 17 of the charter, the mayor's court was to have "exclusive jurisdiction in all cases arising under the ordinances" of the city.[54] Joseph's lawyers might have argued that any trial for adulterous conduct that allegedly took place in Nauvoo would have to be tried in

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53. The timing of the adoption of this ordinance is very curious. The ordinance itself was signed by John C. Bennett as mayor, yet he resigned his office as mayor that very day, on May 17, 1842. See "Letter from General Bennett," *Sangamon Journal,* July 8, 1842, p. 2. A note that Joseph sent to the Church's clerk, James Sloan, also on that same day, instructed him to "permit Gen. Bennett to withdraw his Name from the Church Records, if he desires to do so, and this with the best of feelings towards you and General Bennett." See Joseph Smith Papers, MS 155, box 2, fd. 5, LDS Church Archives. That same day Bennett also appeared before alderman Daniel H. Wells and swore an affidavit that Joseph had never taught him "that illicit intercourse with females, was under any circumstances, justifiable." Bennett reiterated his belief in Joseph's virtue before the city council two days later. See *Times and Seasons* 3 (July 1, 1842). Bennett is said to have been a seducer of a number of females in Nauvoo and to have kept a brothel. See Andrew F. Smith, *The Saintly Scoundrel: The Life and Times of John Cook Bennett* (Urbana: University of Illinois Press, 1997), 80–114. Bennett does not appear to have ever been prosecuted in Nauvoo for this offense. See foreword by Morris S. Thurston in John S. Dinger, *The Nauvoo City and High Council Minutes* (Salt Lake City: Signature Books, 2011).

54. If this was indeed the council's intent, it would not have been the only instance when this body acted to supplant state law in a significant way. In March 1843, the city council passed an ordinance making gold and silver the only legal tender in the city. See "An Ordinance Regulating Currency," March 4, 1843, in Proceedings of the Nauvoo City Council, 167–68, LDS Church Archives. In public comments spoken a few days prior to the adoption of this ordinance, Joseph explained that this law was needed so that the city would not be governed by a state law "making property a lawful tender for payment of debts." Joseph implied that this state law was unconstitutional and explained to the Saints that without a law on the same subject, the city would be governed by the state law; Joseph also justified the Nauvoo ordinance on other grounds. His comments, recorded in *History of the Church,* 5:289, show several arguments that could support a claim that this ordinance was for "the benefit" of the city.

Nauvoo, under the city adultery ordinance, and of course, if the couple were considered married under the laws of Nauvoo, their relationship would not be considered adulterous under the law in Nauvoo.

Thus, the Nauvoo City Council ordinance on marriage, enacted on February 17, 1842, might have further helped shield Joseph and Maria from prosecution, particularly if the State had brought bigamy charges (which never occurred).[55] This ordinance was based on the Illinois statute regarding marriage (see fig. 1), but it made several important changes as well. Like Illinois law in general, it allowed males over the age of 17, and females over the age of 14, to contract for marriage. The Nauvoo ordinance also followed the Illinois law in allowing "any persons … wishing to marry" to go before any regular minister or other authorized person to "declare their marriage, in such manner and form as shall be most agreeable," but it allowed marriages to be performed by the city mayor (who was Joseph Smith) and the aldermen, to take place without a marriage license or the issuance of a marriage certificate, without any notification of the public, and by filing a record of the marriage only with the city recorder, rather than with the clerk of the county commissioner's office.[56]

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55. An Illinois newspaper of the day commented on these Nauvoo ordinances. This paper stated, "To carry on the pantomime the wise body called the 'Mayor and Alderman of the City of Nauvoo,' has passed a series of ordinances, some of them of rather a whimsical character, others of a conflicting nature. One, in relation to marriages, ordinances that boys of the age of 17 may be joined in wedlock to girls of 14, and that too without licenses." *Davenport Gazette,* February 15, 1844, in Dale L. Morgan, *News Clippings from Iowa and Illinois, 1841–1849* (Burlington, Wisc.: John J. Hajicek, 1992). The editors misquote the age requirements for marriage under the Nauvoo ordinance and seemed unaware that, with respect to marriage age, the Nauvoo ordinance retained the requirements of state law.

56. "An Ordinance Concerning Marriages," February 17, 1842, in Proceedings of the Nauvoo City Council, 1841–45, MS 3435, LDS Church Archives. See sidebar. The next day, February 18, the Nauvoo City Council passed an ordinance establishing a registry of deeds in Nauvoo. According to *History of the Church,* 4:516, Joseph prophesied in this setting that no judge would set aside this law. Among the several unusual features of the Nauvoo marriage law was the omission of a provision in the state's law banning interracial marriage. The Nauvoo marriage enactment did not go unnoticed by Governor Ford, who himself commented on its adoption in his *History of Illinois*, and at least one of the newspapers in the region noted its provisions. Nevertheless, under the broad wording of the Nauvoo Charter, this exercise of the council's authority was probably sound. As with the freedom of religion ordinance, so long as the City Council deemed this ordinance of "benefit," etc., to the city, and its provisions were not "repugnant" to the state and federal constitutions, it would have been presumptively valid. Thomas Ford, *A History of Illinois, from Its Commencement as a State*, ed. Milo Milton Quaife (reprint; Chicago: Lakeside Press, 1946), 160.

Figure 1. Illinois Marriage Statute (approved February 14, 1827)

Sec. 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly,* That all male persons over the age of seventeen years, and females over the age of fourteen years, may contract and be joined in marriage: *Provided,* in all cases where either party is a minor, the consent of parents or guardians be first had, as is hereinafter required.

Sec. 2. All persons belonging to any religious society, church, or denomination, may celebrate their marriage according to the rules and principles of such religious society, church, or denomination; and a certificate of such marriage, signed by the regular minister, or if there be no minister, then by the clerk of such religious society, church, or denomination, registered as hereinafter directed, shall be evidence of such marriage.

Sec. 3. Any persons wishing to marry, or be joined in marriage, may go before any regular minister of the gospel, authorized to marry by the church or society to which he belongs, any justice of the supreme court, judge of any inferior court, or justice of the peace, and celebrate or declare their marriage, in such manner and form as shall be most agreeable. And such minister of the gospel, justice of the supreme court, judge, or justice of the peace, shall make a certificate of such marriage, and return the same, with the license, to the clerk of the county commissioners' court, who issued such license, within thirty days after solemnizing such marriage; and the clerk, after receiving such certificate, shall make a registry thereof, in a book to be kept by him for that purpose only; which registry shall contain the Christian and sur-names of both the parties, the time of their marriage, and the name of the person certifying the same: and said clerk shall, at the same time, endorse on such certificate, that the same is registered, and the time when; which certificate shall be carefully filed and preserved, and the same, or a certified copy of the registry thereof, shall be evidence of the marriage of the parties.

Sec. 4. No person shall be joined in marriage as aforesaid, unless their intention to marry shall have been published at least two weeks previous to such marriage, in the church or congregation to which the parties, or one of them, belong; or unless such persons have obtained a license, as herein provided.

Sec. 5. In all cases when publication of such intention to marry has not been made, as before described, the parties wishing to marry shall obtain a license from the clerk of the county commissioners' court of the county where such marriage is to take place; which license shall authorize any regular minister of the gospel, authorized to marry by the church or society to which he belongs, any justice of the supreme court, judge, or justice of the peace, to celebrate and certify such marriage; but no such license shall be granted for the marriage of any male under twenty-one years of age, or female under the age of eighteen years, without

the consent of his or her father, or if he be dead or incapable, of his or her mother or guardian, to be noted in such license. And if any clerk shall issue a license for the marriage of any such minor, without consent as aforesaid, he shall forfeit and pay the sum of three hundred dollars, to the use of such father, mother, or guardian, to be sued for and recovered in any court having cognizance thereof: and for the purpose of ascertaining the age of the parties, such clerk is hereby authorized to examine either party, or other witness, on oath.

Sec. 6. If any clerk shall, for more than one month, refuse or neglect to register any marriage certificate which has been, or may hereafter be delivered to him for that purpose, (his fee therefor being paid,) he shall be liable to be removed from office, and shall moreover pay the sum of ___ hundred dollars to the use of the party injured, to be recovered by action of debt in any court having cognizance of the same.

Sec. 7. If any minister, justice of the supreme court, judge, or justice of the peace, having solemnized a marriage, or clerk of any religious society, as the case may be, shall not make return of a certificate of the same, as required, within the time limited, to the clerk of the commissioners' court of the county in which such marriage was solemnized, he shall forfeit and pay one hundred dollars for each case so neglected, to go to the use of the county, to be revered by indictment. And if any minister of the gospel, justice of the supreme court, judge, or any other officer or person, except as herein before excepted, shall solemnize and join in marriage any couple without a license as aforesaid, he shall, for every such offence, forfeit and pay one hundred dollars to the use of the county, to be recovered by indictment.

Nauvoo City Ordinance on Marriages (passed February 17, 1842)

Sec. 1. *Be it Ordained by the City Council of the City of Nauvoo,* That all Male Persons over the Age of seventeen years, and Females over the Age of fourteen years, may contract and be joined in Marriage: Provided in all Cases where either Party is a Minor, the consent of Parents or Guardians be first had.

Sec. 2. Any Persons as aforesaid wishing to Marry, or be joined in Marriage, may go before any regular Minister of the Gospel, Mayor, Alderman, Justice of the Peace, Judge or other Person authorized to Solemnize Marriages in this State, and Celebrate or declare their Marriage, in such manner and form as shall be most agreeable; either with or without License.

Sec. 3. Any Person solemnizing a Marriage as aforesaid shall make return thereof to the City Recorder, accompanied by a recording Fee of Fifty Cents, within thirty days of the Solemnization thereof, And it is hereby made the Duty of the Recorder to keep an accurate Record of all such Marriages. The Penalty for a Violation of either of the Provisions of this Ordinance shall be twenty Dollars, to be recovered as other Penalties or Forfeitures.

3. Countering a Charge of Bigamy. It is worth noting that Joseph was never charged with bigamy. It is unknown why he was not. Quite likely, the evidentiary challenges would have been very onerous. The State would have had to prove the existence of both marriages (i.e. with Emma and Maria) in some way, such as by producing marriage certificates or actual witnesses to the ceremonies. The prosecutor could also rely on "such evidence as is admissible to prove a marriage in other cases,"[57] but that would probably

57. Criminal Code, section 121, *Revised Laws of Illinois*; and Criminal Jurisprudence, section 121, *Revised Statutes of the State of Illinois.* This statute provided, "Bigamy consists in the having of two wives or two husbands at one and the same time, knowing that the former husband or wife is still alive. If any person or persons within this State, being married, or who shall hereafter marry, do at any time marry any person or persons, the former husband or wife being alive, the person so offending shall, on conviction thereof, be punished by a fine, not exceeding one thousand dollars, and imprisoned in the penitentiary, not exceeding two years. It shall not be necessary to prove either of the said marriages by the register or certificate thereof, or other record evidence; but the same may be proved by such evidence as is admissible to prove a marriage in other cases."

Although the wording of this law first mentions "two wives or husbands," the subsequent language ("marry any person or persons") would have been sufficient to reach third and subsequent marriages. An illustration of how a prosecutor might have used the bigamy law is seen in an indictment for bigamy at the May 1843 term of the Hancock County Circuit Court of Jordon P. Hendrickson (sometimes spelled Jordan; see Hancock County Court Records, Book C, 458). The indictment later that year alleged that Hendrickson had married four women in different years, his first wife still living and undivorced from him. Curiously, this particular man was a member of the Church, though he was not a close associate of the Prophet and there is no evidence that these bigamous marriages were entered into with the Church's sanction. In fact, charges were brought against him before the Nauvoo High Council in February 1843 for one such bigamous marriage and for neglecting that wife (see Dinger, *Nauvoo City and High Council Minutes,* 458, spelling the name Hendrixson). County court records show that this man never stood trial for these crimes; summons repeatedly returned by the sheriff show that he could not be located for trial. Other cases involving adultery or bigamous marriages are recorded in Dinger, *Nauvoo City and High Council Minutes,* for example 444, 445.

Bigamy laws had historically been intended under Anglo-American jurisprudence to reach and include polygamy. Sources linking bigamy and polygamy include James Kent, *Commentaries on American Law,* 2d ed., vol. 2 (New York, 1832), pt. 5, pp. 80–81; Joel Prentiss Bishop, *Commentaries on the Law of Marriage and Divorce and Evidence in Matrimonial Suits* (Boston, 1852), ch. 1, secs. 201–203; and William Blackstone, *Commentaries on the Laws of England*, ed. John Wendell (New York, 1854), vol. 1, ch. 15, sec. 1; however, at least one authority wrote that bigamy, "in its proper signification, is said to mean only being twice married, and not having a plurality of wives at once. See William Oldnall Russell, *A Treatise on Crimes and Misdemeanors,* Charles Sprengel Greaves, ed., 7th American ed., 2 vols. (Philadelphia, 1853), 1:186 n. a.

have required proof of open behavior typical of married couples. As discussed above, the law governing marriage in Nauvoo did not require marriage licenses or public notices of marriages; and given the privacy of Joseph's plural sealings, circumstantial proof of such marriages would have been difficult to obtain. The fact that Joseph was the legal guardian of Maria could also have explained and undercut circumstantial evidence that the State otherwise might have presented in establishing the existence of a marriage to Maria, such as the fact that she resided in Joseph's home.[58]

Conclusion

In any prosecution under the Illinois adultery statute, Joseph would have had every reasonable expectation of acquittal. His conduct did not fit the crime with which he had been charged. The wording of the adultery statute, case law, and actual indictments from the nineteenth century indicate strongly how Illinois courts would have interpreted and applied the law. Joseph could also have mounted a credible defense using the State's constitutional guaranty of freedom of religion. It is likely not coincidental that the first of Joseph's many plural marriages in Nauvoo came only a month after the passage of the ordinance on religious toleration, which assured even "Mohommedans" free toleration and equal privileges in Nauvoo. This ordinance, along with others passed by the Nauvoo City Council, would have helped legitimize plural marriages within the confines of the City of Nauvoo. The adoption of those ordinances at a time when Joseph served as a member of the Nauvoo City Council and later as mayor suggests that Joseph was already working to ensure the legality of Nauvoo plural marriage for himself and his followers.

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58. Presumably, the Law brothers would have wanted the grand jury to present a bigamy charge against Joseph, if possible. The fact that such a charge was not brought against Joseph suggests that there was either not enough evidence to bring the charge, or that the city ordinances and constitutional defenses mentioned above presented enough complications that the charge was not brought at that time.

Any conviction for bigamy or other serious crime would have rendered Joseph an "infamous person" under Illinois law, and this would have meant that Joseph would have been forever "rendered incapable of holding any office of honor, trust, or profit, of voting at any election, of serving as a juror, and of giving testimony," Criminal Code, section 164, *Revised Laws of Illinois,* 229; or he could have been "exclude[d] from the privilege of electing or being elected," Illinois State Constitution, art. 2, sec. 30. Joseph, thus, would have been ineligible to serve as mayor of Nauvoo, as lieutenant general of the city's militia following a bigamy conviction, as a guardian, or as a trustee of Church assets.

Joseph's apparent concern for working within the law to ensure the legality of plural marriage in Nauvoo may surprise some people. Historian D. Michael Quinn, for example, has used Joseph's performance of marriages in Ohio and the subsequent practice of plural marriage in Nauvoo in part to extrapolate a broader principle: namely, that Joseph was guided by "theocratic ethics" and chose to disregard civil law whenever it did not serve his purpose.[59] Several other writers, influenced by Quinn's conclusions, have borrowed this term in describing Joseph's approach to ethics and legal matters. In view of legal and historical evidence presented here and elsewhere, however, it is now clear that sweeping, negative characterizations of Joseph's legal ethics based on his approach to marriage are in need of reevaluation.[60]

59. Quinn, *Origins of Power,* 88.

60. See my previous article on Joseph's performance of marriages in Ohio. M. Scott Bradshaw, "Joseph Smith's Performance of Marriages in Ohio," *BYU Studies* 39, no. 4 (2000): 23–68.