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The Jurisdiction of Silence: Sodomy Law in 19th Century Law and Culture

THESIS

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MASTER OF ARTS

in Social Ecology

by

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Thesis Committee:
Professor Valerie Jenness, Chair
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DEDICATION

To

the “others”

in recognition of their dignity

a warning

Fear is the mind-killer.
Frank Herbert
Dune

and a remedy

One must have chaos within oneself, to give birth to a dancing star.

Friedrich Nietzsche
Thus Spoke Zarathustra

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ABSTRACT OF THE THESIS

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This thesis examines the effects of silence on sexuality law development in 19th century U.S. jurisprudence. Through qualitative and quantitative analysis of all Westlaw headnote case data on sodomy and close reading of a popular literary text, "silences" are traced to the production of the possibilities for sex criminalization in the 19th century and beyond. Early legal and literary narratives of silence produced in sodomy criminal, spiritual, and pathological dimensions and delayed jurisprudential definition of sex crime. Moreover, by the mid-19th century, narrative silence generated a legal crisis troubling the effects of silence on the law and relegating sodomy beyond the jurisdiction of the court. In turn, a totality of silence enabled dismissal of civil cases for failure to state a claim upon which relief can be granted. Subsequent interventions of post-Civil War law and new taxonomies of sexuality pathologizing criminal sex accelerated the codification and conviction of sodomy in the courts. By the end of the century, sex constructed vis-à-vis criminal pathology dominated the regulatory landscape of U.S. law and

society, resulting in a systematized criminalization in the criminal, spiritual, and pathological legacy of silence.

INTRODUCTION

In 1865, the Iowa Supreme Court heard a case stemming from the words: "When you see Mary Cleveland, say dog, howl or whistle, and that will make her drop her feathers" (*Cleveland v. Detweiler*, 1865). Upholding a lower court's decision that the defamatory claim merited Cleveland $700 in damages, the case was emblematic of the U.S. judiciary's efforts to define a national jurisprudence in the 19th century. While post-Revolutionary War states differed on the parameters of sexual slander, the state of Iowa defied English common law, which found that slander was actionable only when resulting in monetary harm to the plaintiff, and instead held that mere accusations of sodomy such as Cleveland's were actionable. Penning the Iowa Supreme Court decision *Cleveland v. Detweiler*, Justice John Forrest Dillon forged the U.S. rule that "words imputing to a female a want of chastity are actionable *per se*," and in a defining moment for sex regulation in the U.S., curtailed speech through an expression of national identity (1865).

Cleveland and aptly titled *Smith v. Silence* were among a line of case law that restricted sexual discourse and dictated a movement of silencing in U.S. law (*Cleveland v. Detweiler*, 1865; *Smith v. Silence*, 1856). For Justice Dillon's court, safeguarding the virtue of white women accused of indecency was tantamount to preserving the nation (p. 69). Consequently, 19th century common law imposed restrictions on both sexual activity and expression. These restrictions were twofold: (1) defamation cases censured accusations of sexual impropriety, stymying free speech, and (2) sodomy prohibition, which remained "unnamed" in legal texts, prohibited an ambiguous array of sex practices. From these silences, cultural and legal scripts converged in domains of legal meaning-making whose dynamics produced the conditions of possibility for sex criminalization in the 19th century and beyond. By the end of the 19th

century, legal narratives delimiting sex both realized the sexual subjects as criminal and crystalized regulatory landscapes of enforcement in U.S. law and society. These written and unwritten laws thus (in)formed the mutually constitutive relationship between formal law and legal consciousness, foregrounding the influence of silence on the law.

For as silence permeated legal texts and practice, sociolegal silencing of sex so too predominated popular imaginations. As evidenced in popular 19th century literature, sexual narratives of silence took root in the 19th century in various forms and across several domains, which underscores the mutually constitutive relationship between law and culture. Published and widely distributed in 1850, Nathaniel Hawthorne's masterpiece *The Scarlet Letter* popularized emergent narratives on silence and sexuality that emphasized their underlying (1) spiritual, (2) strategic/legal, and (3) pathologizing dimensions. In early years, these narratives called upon the punitive legacies of English common law and puritan thought to impose silence keeping sex crimes from explicit discourse and definition. Therein acts of undefined sexual criminality, sex crimes existed in a liminality that manifested "supernatural" (or religious), "natural" (or legal), and "scientific" (or pathological) punishment for mere utterance of the crimes. Thus discourse on sexuality embroiled subjects in sexual slander litigation that distinguished sodomy case law of the early 19th century.

However, by the mid-19th century, narratives of sexual restriction generated a legal crisis troubling the effects of silence. Appellate courts throughout the nation faced the question of how to uphold sodomy convictions when such crimes were "not fit to be named amongst Christians" and sufficient factual allegations were accordingly left out of the complaints setting off sodomy litigation (*Coburn v. Harwood*, 1822). Moreover, sodomy law imposed a silence that enabled dismissal of civil cases for failure to state a claim upon which relief can be granted since these

cases relied on criminal definition of the crime. In the case of sodomy, legal narratives that stipulated the possibilities for rendering the law legible marginalized sexuality beyond the jurisdiction of criminal enforcement. For a moment in time, sodomy law regulated itself into extinction.

The subsequent intervention of (1) criminal law at the end of the Civil War, which introduced standardized secular pathologies of sexuality quelled the legal impossibility resulting from the jurisdiction of narrative silence, ultimately codifying and accelerating sodomy and its prosecution in 19th century law. A solidifying social order that criminalized some post-Civil War subjects eclipsed the emancipatory potential of silence imagined in popular mid-century literature, such as Nathaniel Hawthrone's *The Scarlet Letter,* and that had kept sodomy from criminal conviction. These systematized languages of sexuality constructing sex vis-à-vis criminal pathology emerged as the new articulation of law that preceded the more widespread proliferation of sexuality criminalization in the 20th century.

Thus U.S. sodomy law came to be defined through 19th century religification, systematization, and mobilization of sexuality and silence. For sodomy law, the paradox of law on the books criminalizing sexuality and the socio-legal practice of sexual silencing formed an unstable legal history through the 19th century. These findings bolster theories framing the convergence of legal narratives as domains through which the reinforcement and/or resistance of social orders resolve legal disputes. Furthermore, they center narrative silence as demarcations not only of the sites of legal meaning-making but also of the impossibilities of criminalizing on the peripheries of social thought.

PART 1: Narratives of Silence: The Unnamed Letter

Sociolegal silencing of sexuality pervaded legal and cultural narratives in the 19th century. These narratives of silence influenced popular writer Nathaniel Hawthorne, who writing his mid-19th century masterpiece *The Scarlet Letter*, depicted the punitive aftermath of sex crimes committed by fictionalized characters Hester Prynne and Arthur Dimmesdale in a context of early U.S. Puritan society (2008b). Narrating resultant formal and informal punishments for violating 17th century law, Hawthorne rendered *The Scarlet Letter* in the natural, supernatural, and psychological experiences of his characters. Explaining the significance of his approach in his preface to *The House of the Seven Gables*, Hawthorne wrote that if "a writer calls his work a romance, it need hardly be observed that he wishes to claim a certain latitude, both as to its fashion and material, which he would not have felt himself entitled to assume, had he professed to be writing a novel" (2008a, p. 8).[1] Accordingly, Hawthorne decidedly constructed his narratives with a certain liberty and detail intended to "diffuse [...] thought and imagination through the opaque substance of today" (2008a, p. 10).[2]

These discursive liberties conferred Hawthorne the freedom to cross dimensions of law, religion, and science that impacted his characters as they experienced sex crime punishment. By instilling his narrative with details "beyond probability," he called forth the competing forces constructing sex criminalization amidst sexual silencing in the 19th century. A central example was Hawthorne's choice to keep the crime that provided *The Scarlet Letter's* namesake undefined. Though discernible in silence, the red "A" emblazoned on Prynne's chest was never

[1] Nathaniel Hawthorne, *The House of the Seven Gables*, pg. ii Bantam Books. Chicago (1996).

[2] Id., pg. iii.

explicitly denoted as adultery. This silence permeated a text decidedly explicative of an array of other elements of the crime and its attendant punishments, including spiritual, physical, and psychological consequences that may otherwise be omitted from popular literature. In the introduction of *The Scarlet Letter*, Hawthorne's narrator introduced the enigmatic letter as a hellish and otherworldly device:

> It seemed to me,—the reader may smile, but must not doubt my word,—it seemed to me, then, that [encountering the letter] I experienced a sensation not altogether physical, yet almost so, of burning heat; and as if the letter were not of red cloth, but red-hot iron. I shuddered, and involuntarily let it fall upon the floor (2008b, p. 27).

Bearing the letter for life in exile as a condition of her punishment, Prynne found that the letter's punitive power had "the effect of a spell, taking her out of the ordinary relations with humanity, and enclosing her in a sphere by herself" (Hawthorne, 2008b, p. 44). For Dimmesdale, who hid his part in the crime, guilt manifested psychologically, supernaturally, and physically as the red letter appeared to him in the sky and ultimately etched into his skin. While explicative of the effects of the transgression, Hawthorne remained silent on naming the crime that constituted the stigmatic "A."

By instrumentalizing silence as a fundamental plot device in his narrative, Hawthorne drew from silence as a strategy for characterization, contextualization, and multifaceted manifestation of the crime and consequent punishment. To accompany this array of narrativization, Hawthorne's characters diverged in their experiences of this silence. Most dramatically, the minister Dimmesdale suffered silently as a representative of Puritan society that proscribed nonmarital sex. By Dimmesdale's admission, his refusal to break silence on his participation caused him to carry "a guilty heart through life" and "to add hypocrisy to sin" (Hawthorne, 2008b, p. 54). His turmoil, which eventually resulted in personal deterioration,

derived from his failure to reconcile life as a religious minister with this sexual transgression. His fragmentation produced another state of possibility: a liminal space in which supernatural punishment materialized in the natural world. Preceding Dimmesdale's climatic confession of his crime, "[t]here was a momentary silence, profound as what should follow the utterance of oracles" (Hawthorne, 2008b, p. 193). In his final moments before death, the minister tore his pastoral clothes to reveal "a scarlet letter—the very semblance of that worn by Hester Prynne—imprinted in the flesh" (Hawthorne, 2008b, p. 200). Ultimately breaking the silence, Hawthorne inscribed the spiritual onto his narrative as a stigmatic "A" appeared on the minister's chest.

On the other hand, Prynne's formal silencing as punishment for her crime turned to a quiet rebellion against the societal expectations of women to remain in submission to their circumstances, representing an emancipatory potential of silence (Persen, 1989, p. 468). After receiving the mark of the scarlet letter, Prynne's subsequent experiences were laden with silence as "[e]very gesture, every word, and even the silence of those with whom she came in contact, implied, and often expressed, that she was banished" (Hawthorne, 2008b, p. 67). Dimmesdale further encouraged Prynne to keep quiet by asking her to publicly confess the name of her fellow adulterer only if it "to be for [her] soul's peace" and then by praising her for refusing to testify: "Wondrous strength and generosity of a woman's heart! She will not speak!" (Hawthorne, 2008b, p. 55). However, contrasting the stigmatizing and oppressive effects of her punishment, Prynne achieved personal liberation in silence. "Standing alone in the world," she was able to maintain the "freedom of speculation," "human intellect [...] newly emancipated," and a revolutionary orientation that she sensed was "a deadlier crime than that stigmatized by the scarlet letter" (Hawthorne, 2008b, pp. 128-129). Prynne's subversion of silencing was summed up in her conclusions on the state of the world and her solutions to sex oppression:

> As a first step, the whole system of society is to be torn down, and built up anew. Then, the very nature of the opposite sex, or its long hereditary habit, which has become like nature, is to be essentially modified, before woman can be allowed to assume what seems a fair and suitable position (Hawthorne, 2008b, p. 130).

For Prynne, silencing as punishment engendered the conditions for subversive thought and practice in Puritan society. Enclosed in spheres of social, legal, and religious silence, Prynne uncovered the capacity of silence as a tool of resistance.

Finally, Roger Chillingworth, Dimmesdale's physician, mobilized a pathology of guilt while providing the minister medical treatment for an undefined and unspoken disease and remaining silent about his own identity as Prynne's estranged husband. Thus, the apparatus of silence enabled Chillingworth to reconstitute the parties' sexual transgression into criminal pathologies through which he administered an additional form of punishment. Addressing Dimmesdale, the minister determined:

> [T]he disorder is a strange one; not so much in itself, nor as outwardly manifested,—in so far, at least, as the symptoms have been laid open to my observation. Looking daily at you, my good Sir, and watching the tokens of your aspect, now for months gone by, I should deem you a man sore sick, it may be, yet not so sick but that an instructed and watchful physician might well hope to cure you. But—I know not what to say—the disease is what I seem to know, yet know it not (Hawthorne, 2008b, p. 107).

Applying this diagnosis, Chillingworth accelerated Dimmesdale's mental deterioration. Small (1980) noted that the minister's psychological state resulted from negotiation "between his ideal and libidinal selves" (p. 113). As confessing his crime "would be to admit the power of his sexuality" and failure in achieving his ideal, Dimmesdale artfully shrouded his offense while harboring guilt about his "sexual [...] impulses" (Small, 1980, p. 114). Dimmesdale's self-flagellating conversations with his doctor stemmed from his failure to conform to the religious norms of the Puritan community, which required him to confess his transgression, and Chillingworth deployed this silence to enact his retribution. Confronting Chillingworth, her

former spouse, Prynne remarked that it would have been "[b]etter he had died at once" than to be subjected to Chillingworth's pathologization (Hawthorne, 2008b, p. 134).

By imagining the possibilities of punishment, resistance, and religion in narratives of silence, Hawthorne reflected on the 19th century culture his contemporaries inherited from early Puritan law and society that (1) spiritualized, (2) criminalized, and (3) pathologized extramarital sexuality. As evidenced through the continuing criminalization of nonprocreative, nonmarital sex, Hawthorne's widely read mid-19th century text depicted the continuing influence of narrative silence on sex criminalization, which took form most predominantly in the 19th century through law proscribing the act of sodomy. Such legal narratives on sodomy, which also employed Hawthorne's three-pronged framework for enacting punishment, underscored the mutually constitutive relationship between law and culture and elucidated the narrative processes through which law is rendered legible to the state.

PART 2: Sodomy Law Data in the 19th Century

The first recorded cases of sodomy law in the U.S. appear in the 19th century when a variety of criminal provisions of British common law competed to shape criminal law in the newly forming states. This paper draws from Westlaw archives of precedential appellate-level cases using headnote search terms "sodomy," "buggery," and the "crime against nature." Westlaw headnotes containing these terms identify appellate cases that decide legal questions related to these issues of law, presumably with precedential value according to jurisdiction of the court. These terms were selected because they were sometimes referenced in U.S. cases interchangeably despite some historical distinctions in definition. Sodomy was variously used to refer to an array of practices outside marriage and procreation, including rape, bestiality, and sex with members of the same-sex. Buggery denoted similar offenses although more commonly

references instances of bestiality. The "crime against nature" also applied to all of these crimes but over time became associated with same-sex rape and consensual intercourse. This search inquiry also generated "defamation" cases, namely cases related to "slander," which referenced instances of oral defamation, and "libel," which related to defamation made in writing.

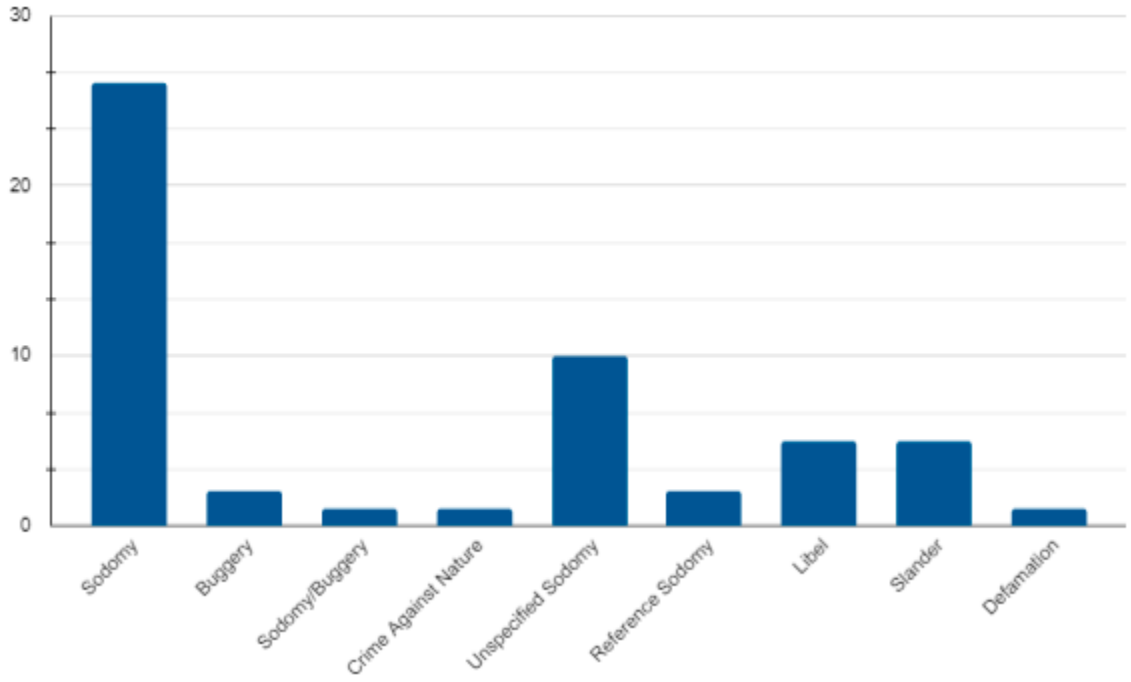

Figure 1: Sodomy and Related Crimes Case Distribution 1800-1900

Westlaw identified 53 cases from 1800-1900 generating headnotes related to "sodomy," "buggery," and the "crime against nature," which represented a low number of cases relative other legal issues of the century but comprised nearly all appellate cases related to these laws (see Figure 1). "Sodomy" cases occurred most frequently with 27 occurrences followed by 11 cases on which "sodomy" was ruled without direct reference to the crime or facts that made clear the nature of the crime. "Libel" and "slander" cases related to "sodomy," "buggery," or the "crime against nature" appeared in equal number with 5 cases of "libel" and 5 cases of "slander."

2 cases ruled on “buggery” and an additional 2 cases ruled on jurisdictional and other procedural issues related to “sodomy,” “buggery,” or the “crime against nature.” 1 case charged both “sodomy” and “buggery” and another case stated the “crime against nature.” A final case charged “defamation” generally without specifying whether the alleged offense was made orally or in writing.

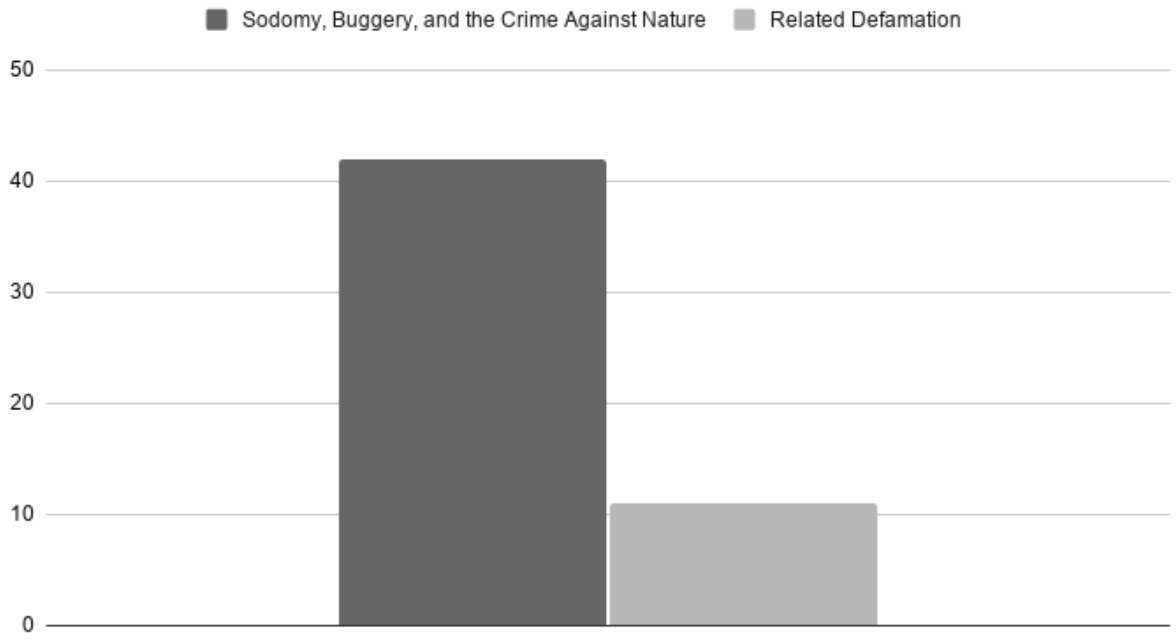

Figure 2: Sodomy and Related Crimes Versus Defamation Cases 1800-1900

In total, “sodomy” and related crimes of “buggery” and the “crime against nature” appeared in 42 cases while “libel,” “slander,” and “defamation” occurred in 11 cases (see Figure 2). Appellate courts therefore settled a clear majority of these legal issues as the result of a criminal defendant being accused of one or more of these crimes. A minority of cases related to an alleged defamatory statement that accused a plaintiff of “sodomy,” “buggery,” and/or the “crime against nature.” Both categories of cases, however, ruled on criminal issues as courts in both instances ruled on whether “sodomy,” “buggery,” and the “crime against nature” were

recognized criminal offenses either to adjudicate criminal conviction or to establish whether an alleged defamer had accused the plaintiff of a bona fide crime.

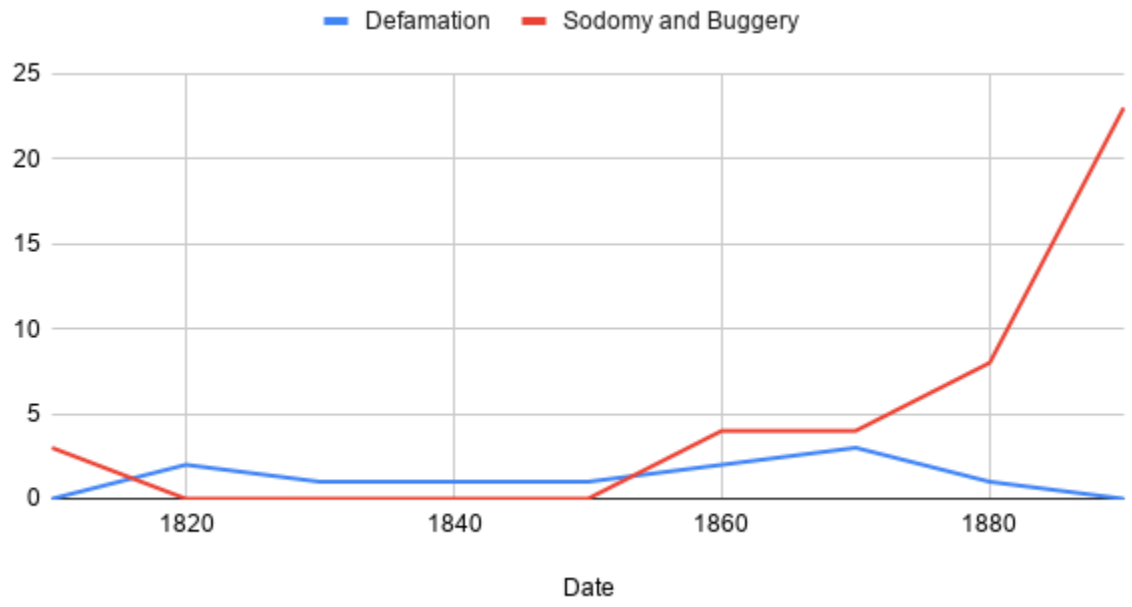

Figure 3: Sodomy, Buggery, and Defamation Temporal Distribution 1800-1899

Notably, a temporal distribution of cases from 1800 to 1899 indicates the majority of cases in the first half of the century were attributed to “defamation” with a heavy uptick of “sodomy,” “buggery,” and the “crime against nature” and overall cases occurring in the second half of the century (see Figure 3). From 1810 (the date of the first cited case) to 1850, 3 cases cover “sodomy” and related crimes while 5 cases rule on defamation related to “sodomy,” “buggery,” and the “crime against nature (see Figure 4).

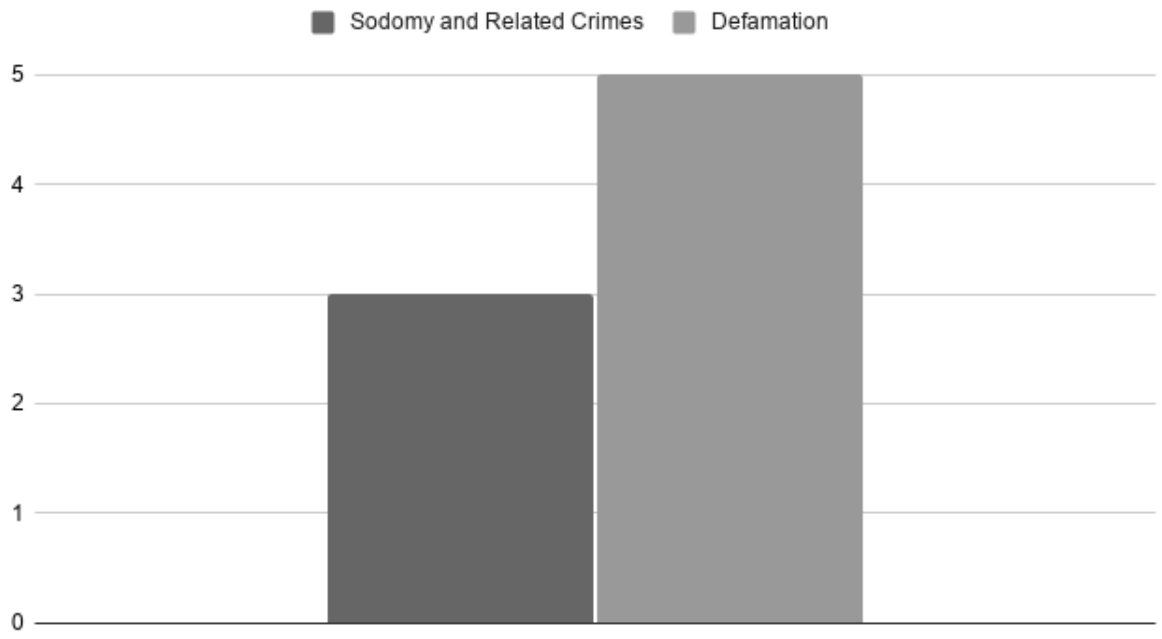

Figure 4: Sodomy and Related Crimes and Defamation Cases 1810-1850

Conversely, in the second half of the century, “sodomy,” “buggery,” and the “crime against nature” far outnumber cases of related “defamation” (see Figure 5). In total, 39 cases from 1860-1900 rule on the former crimes while 6 rule on related “defamation.” Therefore, the latter half of the century presented an increase in each category of cases, as well as an overall increase in the number of cases when accounting for both categories.

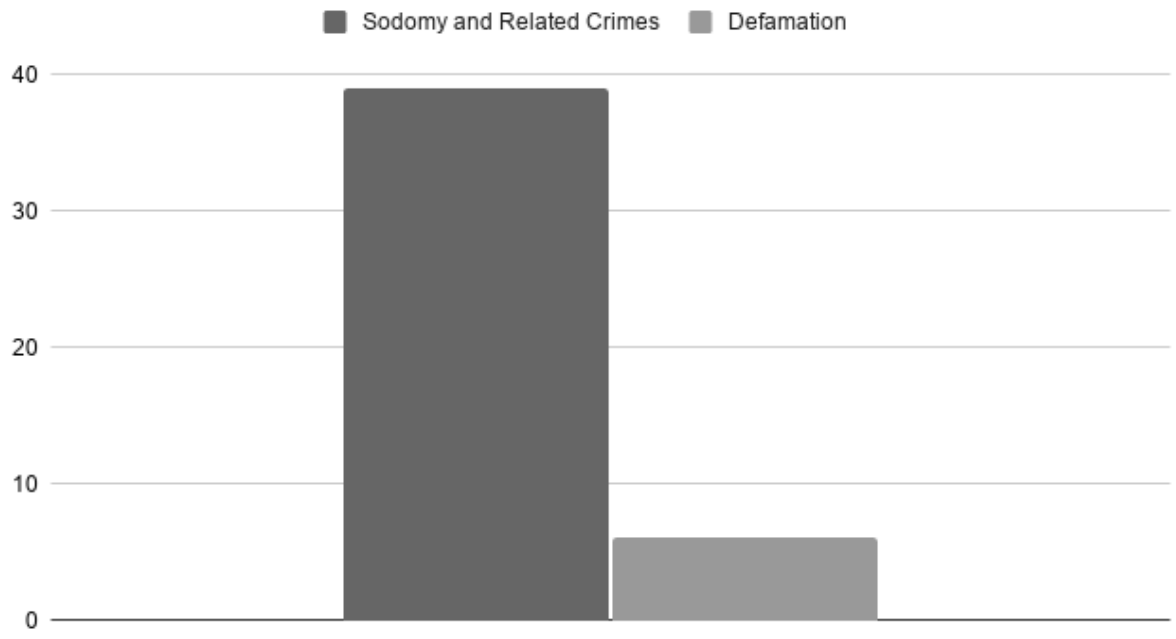

Figure 5: Sodomy and Related Crimes and Defamation Cases 1860-1900

As a result, of the 53 from 1800-1900 in which appellate courts shaped precedent for crimes of "sodomy," "buggery," and the "crime against nature," as well as "libel," "slander," and "defamation" related to these crimes, "sodomy" and its relatives accounted for the majority of the overall occurrences in the 19th century. However, the later century rapid increase in cases related to "sodomy" is responsible for the crime presenting a majority over "defamation." "Defamation" held a slight majority over "sodomy," "buggery," and the "crime against nature" in the small number of cases from 1810-1850 but remained relatively constant throughout the century. As points of inquiry, this paper examines the societal influences that shaped (1) the relative obscurity of "sodomy," "buggery," and the "crime against nature" cases while "defamation" predominated in the first half of the century and (2) the significant increase of "sodomy" and related cases in the second half of the century. These points elucidate the relative legal "silence" and "silencing" of "sodomy" and accompanying "defamation" in the first half and

the (1) religious, (2) strategic, and (3) pathological forces that influenced the proliferation of 19th century sodomy prohibition. Selecting illustrative cases, the following sections take each of these social forces in turn.

PART 3: *Davis*: The Crime "Among Christians Not to be Named"

During the post-Revolutionary War period, the laws of the U.S. aggregated in an emerging national jurisprudence that adopted and distinguished itself from English common law. As courts established the rule of law following rebellion against foreign governance, judicial understandings of sodomy diverged among the states (*Louisiana v. Charles Williams*, 1882). Some appellate courts cited the relative obscurity of English punishment of sodomy as reason for overturning sodomy convictions despite on-the-books criminalization in English law (Statute of King Henry VIII, 1533). Conversely, the majority of states preserved and enforced prohibition in law and in practice.

However, at the turn of the 19th century, the grounds for criminalization of sodomy in U.S. jurisprudence were unstable. Moreover, sociolegal silence taking root in spiritualization of the crime generated legal narratives (de)limiting the possibilities of sodomy criminalization in the 19th century. Leaving unsettled a legal inquiry that shaped the course of sodomy jurisprudence, the first recorded case of sodomy in the U.S., *Davis v. State* (1810), heard the appeal of a conviction sentencing Davis to four month in jail and a fine of $200. Davis' appeal rested on the assertion that his crime was too ill-defined to be prosecuted and, therefore, the conviction represented a miscarriage of justice (*Davis v. State*, 1810). Arguing he did not receive a fair trial, Davis maintained that "no such crime as that charged in the indictment" existed in Maryland law, and, even if it were recognized, the crime "was not sufficiently set out in the indictment" (*Davis v. State*, 1810). *Davis*' legal uncertainty, which interrogated the legal

foundations of sodomy, characterized the complaints of a host of appellants in the period who argued neither common law nor state statutes criminalized sodomy. Other litigants joined Davis in asserting legal complaints did not sufficiently set out the crime.

These issues compelled courts to throw out sodomy convictions or to name the crime "not to be named"; as the *Davis* court described:

> Davis, not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil [...] in and upon one W.C., a youth of the age of 19 years, in the peace of God, and of the state of Maryland, [...] did beat, wound, and illtreat, with an intent [to commit] that most horrid and detestable crime, (among Christians not to be named,) called Sodomy (*Davis v. State*, 1810).

Later described by the *Davis* court as the "sodomitical, detestable, and abominable sin," sodomy case law bore the religious discourse that silenced legal definition of sodomy for half a century (*Davis v. State*, 1810). In the early 19th century, when sodomy was prosecuted in lower courts for bestiality, rape, and consensual same-sex sex, judges relied on religious enjoinment to maintain that the crime was, as in *Davis*, "too well known to be misunderstood, and too disgusting to be defined farther than by merely naming it" (*Davis v. State*, 1810).

Silence surrounding sodomy thus centered the role of legal narratives in rendering law legible to the state. In the case of spiritualized narratives, silence served to shift discourse away from substantive judicial lawmaking and toward procedural justification for legal non-disclosure (i.e. silence). And by drawing from contemporary religious proscription of the crime, narrative silence had the force of law in early 19th century sodomy cases with the effect of paralyzing the legal development and enumeration of the constituent elements of sodomy. As a result, silence became the impetus of future patterns in case law, namely, (1) strategic silencing of accusations of sodomy in defamation law, and (2) the impossibility of upholding cases in which silence efficiently expelled sodomy from the jurisdiction of the courts.

PART 4: Strategic Silencing: Accusatory Silence in *Colburn*

19th century courts also imposed the silence of religious forces through defamation law's silencing effects. As was most common in reported case law of the first half of the 19th century, sodomy appeared in appellate libel and slander cases contesting defamatory accusations of the infamous "crime against nature." Rhetorically implied in "*crime* against nature" and requisite of findings of defamation during the period, the law required appellate courts to determine that sodomy was a crime in order to uphold related defamation rulings. In the Supreme Court of Alabama, the landmark case *Coburn v. Harwood* reversed a lower court's ruling awarding relief to a plaintiff accused of sodomy by "innuendo" (1822). The appellate court, which carried over earlier courts' religious characterizations of the act "the very mention of which [was…] a disgrace to human nature: a crime not fit to be named amongst Christians," found that the lower court's decision on which few factual details were reported ought to be reversed because Alabama law was silent on the criminality of sodomy (*Coburn v. Harwood,* 1822).

To justify its ruling, The Supreme Court of Alabama sided with English common law, which awarded relief to plaintiffs of defamation cases only when it resulted in pecuniary damages to plaintiffs. But the court made another argument in which silence took full effect:

> It does not appear that [the crime against nature...] was punishable in England otherwise than by death, excepting that in the time of Popery it was subject to Ecclesiastical censure. By the ancient Britons it was sometimes punishable by burning. In the time of Richard I. the practice was to punish it by hanging. The Statute of Henry VIII., after reciting that there was not a sufficient punishment appointed, declares it felony without benefit of clergy. It is said in the English books, that previous to the passage of this Statute, the practice of punishing this offence with death had been for some time discontinued; and this is strongly corroborated by the enactment of the Statute and its recital as prefixed. It does not appear what other punishment, or that any, was inflicted, from the time of discontinuing capital punishment, and till the enactment of the Statute of Henry VIII (*Coburn v. Harwood,* 1822).

Accordingly, the court held the accused could not obtain relief because punishment for the "infamous crime" was no longer in practice. Breaking with the court of Mary Cleveland, who was said to "drop her feathers" at the mention of a dog, the Alabama Supreme Court privileged legal silence over the mandate of defamatory silencing (*Cleveland v. Detweiler*, 1865). This movement from judicial preference of (1) religious censure of sodomy to (2) strategic employment of legal silence surrounding the crime set off a line of cases discharging the enforcement of sodomy criminalization from the mandate of the courts and, subsequently, reclassifying it.

PART 5: Breaking Silence: The (Im)possibilities of Silence in *Campbell*

In the second half of the century, silence embroiled courts in legal disputes on the undefined nature of sodomy, resulting in sodomy's final articulation in 19th century law. The absence of established sodomy criminalization in common law and the wide breadth of acts the offense criminalized had rendered the possibilities for criminalization during the period, but the impossibilities of enforcing a crime imbued in silence presented a legal paradox invoking courts' use of religious and/or legal strategies to resolve legal disputes. In a turning point for sodomy jurisprudence at the end of the Civil War, the effects of silence troubled the adjudication of two cases in two years in the Supreme Court of Texas.

One of these landmark sodomy cases, *State v. Campbell*, demonstrated the emancipatory potential of silence (1867). *Campbell* heard the appeal of a newly freed slave who questioned whether merely bringing charges for the "crime against nature" was sufficient for a charge of sodomy, or whether the acts constituting the offense must be specifically alleged. Breaking with a half century of cases that obscured sodomy in language such as the "abominable and detestable" "crime against nature," *Campbell* ruled that sodomy "must first appear by direct

averment, and [...] not [..] be inferred from other facts alleged" to be legally cognizable (1867). In effect, through the jurisdiction of sociolegal silence, sodomy jurisprudence regulated itself into extinction, which achieved demonstrable freedom from sodomy criminalization.

As a result of this defining decision compelling courts to break their silence, *Fennell v. State* (1869), another landmark sodomy case in the Supreme Court of Texas two years later consequently followed this logic to decriminalization. Since the offense appeared only in contested common law, the court found no basis to uphold Fennell's conviction and decided to decriminalize sodomy in the state. *Campbell* and *Fennell*, which compelled the naming of the silent crime, sparked the legal articulation that extinguished sodomy criminalization.

Courts across the nation met the Texas judiciary's turn with final legal delineation of sodomy. In the Supreme Court of California, *People v Williams* (1881) took the appeal of a man convicted of forcible sodomy of a same-sex adult and considered the issue of the legal definition of sodomy. Like *Campbell*, *Williams* argued that if common law provided the basis for sodomy criminalization, "the indictment must allege the ingredients that complete the offense" (1881). However, the court in *People v. Williams* broke with the Supreme Court of Texas in deciding:

> The acts constituting the offense are stated in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended. Every person of ordinary intelligence understands what the crime against nature with a human being is (1881).

Void of the religious rhetoric pervading sodomy case law in the first half of the century, in *Williams* the nature of the crime became one of "ordinary and concise language," an articulation that followed cases through to the turn of the 20th century (1881). The remaining cases of the 19th century that decided the constituent elements of sodomy law across the nation addressed the issue by asserting the clarity of the offense in social consciousness, contrasting the obscurity and silence of religious prohibition in the earlier period. The "abominable crime not to be named

among Christians" became the "disgusting" offense "plainly understood by "every person of ordinary intelligence." While the language of "sodomy" and "crime against nature" did not change, a new era of secularized pathology established the final justiciability of sodomy in 19th century law.

CONCLUSION

In the 19th century, U.S. courts regulated sexual activity and speech expression by distinguishing national jurisprudence from the common law of its descendants. The resulting restrictions of (1) defamation proscription censuring accusations related to sodomy, and (2) sodomy criminalization curtailed sex and speech, which were rendered legible to the courts through a jurisdiction of legal silence. Within law and popular literature, discourse on the religious, strategic, and pathologizing dimensions of the crime converged to form a mutually constitutive relationship between law and legal consciousness on which silence imposed the (im)possibilities of sodomy criminalization for the century. However, by mid-century, when courts faced the instability of a space of legal liminality surrounding sexuality, sodomy experienced an abrupt legal emancipation. First instrumentalized as a tool of regulation over sexuality, silence became a jurisdiction of its own by subsuming the court's power to enforce law. As a result, the authority of silence permeated U.S. jurisprudence on sex to the point in which it no longer reinforced, but resisted, the social order that produced it. By employing burgeoning criminal taxonomies of sex at the end of the Civil War, the courts intervened to resolve this legal paradox and repositioned once silenced sodomy from the peripheries of sociolegal consciousness to a place within a secularizing legal institution.

These conclusions bolster findings that legal narratives converge in domains of enforcement and/or resistance of law to maintain social order(s). By considering sociolegal

silence not only as sites where legal meaning-making take place, but also as demarcating the impossibilities of criminalizing on the margins of legal consciousness, scholarship is better able to interrogate how deviance and taboo are socially regulated and legally recognized, as well as understand the processes through which new forms of criminalization take root in U.S. law. Further research should explore the path from silence to articulation of other proscriptions started in early American society, such as regulations on gambling, drugs and alcohol, witchcraft, crossdressing, mixed-race coupling, and others. Additionally, as the mutually constitutive relationship between law and social norms dictates new articulations of criminal law, the process from silence to legal cognition should be expanded when applicable to the narratives of countermovements that intervene to decriminalize or deregulate, such as the case of anti-miscegenation laws. The connections between imposed silences and social movements can be applied to social movements later contesting sodomy laws, namely, the gay and lesbian movement, which has been recognized as counteracting silence(s) (Stein, 1989). Finally, research may investigate the lingering outcomes of criminalization catalyzed in states of silence, which has been conceived in other criminological literature as the stigmatizing collateral effects of criminalization. In sum, social behavior and speech whose criminalized status originates from silence continues to succumb to the jurisdiction of silence even after criminal law speaks their name. For this reason, silence centrally influences the life of the law.

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APPENDIX: Cases

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Enos v. Sowle, 2 Haw. 345 (1860).

Estes v. Carter, 10 Iowa 400 (1860).

Cleveland v. Detweiler, 18 Iowa 299 (1865).

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Fennell v. State, 32 Tex. 378 (1869).

Haynes v. Ritchey, 30 Iowa 76 (1870).

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Frazier v. State, 39 Tex. 390 (1873).

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