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Sex and Social Order: The Selective Enforcement of Colonial American Adultery Laws in the English Context

Mary Beth Norton, *Founding Mothers and Fathers: Gendered Power and the Forming of American Society*. New York: Alfred A. Knopf, 1996. Pp. x, 496. \$35.00.

Carolyn B. Ramsey*

Legal scholars and historians have found the subordination of women inscribed in literature, art, family conduct manuals, and, of course, in the law. Yet our heightened awareness that gender is a “question of power”¹ may have led us to overestimate the extent to which any theory of social relations permeates daily interactions between ordinary people. In *Founding Mothers and Fathers: Gendered Power and the Forming of American Society*,² Mary Beth Norton attempts to explain foundational shifts in American political philosophy by delving into the earthy records of sexual crimes in seventeenth-century America. She charts the course of myriad court cases to show the gradual exclusion of the state from the intimate lives of the early settlers.³ The result is a fascinating but flawed book.

According to Norton, demographic differences between New England and the southern colonies resulted in the emergence in Maryland and Virginia of a theory of gendered power that “severed the link between family and state” and justified the southern courts’

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1. CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32, 40 (1987).

2. MARY BETH NORTON, *FOUNDING MOTHERS AND FATHERS: GENDERED POWER AND THE FORMING OF AMERICAN SOCIETY* (1996).

3. See *id.* at 14, 404.

reluctance to monitor sexual behavior.⁴ Norton associates two theories of power with the incongruous development of New England and the Chesapeake. Immigrants to New England arrived in families headed by men whose patriarchal authority bolstered the divinely ordained hierarchy in which they believed.⁵ An apologist for the Stuart monarchy, Sir Robert Filmer saw the family and the state as analogous institutions: The subject's subservience to his king mirrored the subjection of Eve to Adam.⁶ The state thus had a vital interest in regulating family life and limiting sexual intercourse to the marriage bed. Norton argues that the dominance of Filmerian thinking in New England resulted in the rigorous enforcement of a criminal code that punished consensual acts of adultery, fornication, and sodomy.⁷

The divergent landscape of the Chesapeake was poor soil on which to erect a Filmerian society. Indeed, the disproportionate numbers of men (who sometimes shared female sexual partners) and single servants (who could not marry) made the analogy of the family to a little kingdom largely irrelevant.⁸ Anticipating the writings of John Locke by half a century, settlers in Maryland and Virginia gradually abandoned family metaphors in favor of a dichotomous theory of power in which the polity arose from contractual arrangements between men.⁹ Chaotic sexual relations occurred in a separate sphere, generally ignored by the criminal courts unless a woman brought an economically burdensome bastard into the community.¹⁰ According to Norton, the *de facto* zone of privacy that the southerners created foreshadowed the more permissive sexual culture of the eighteenth century.¹¹

Norton's tidy scheme is not very convincing. She imports two political theorists—Locke and Filmer—from England. Yet, by focusing narrowly on colonial American law enforcement, she ignores the longstanding tension between English reformers of varying religious stripes and a resilient popular culture that either tolerated informal sexual unions or inflicted extralegal punishments that alarmed reformers as much as the illicit sex did.¹² Further analysis of adultery, a crime briefly discussed in Norton's book, helps illuminate colonial sexual regulation in the context of the English experience. Viewed in this light, the prosecution of adulterous couples in colonial

4. *See id.* at 5, 323-58.

5. *See id.* at 13.

6. *See id.* at 4, 8.

7. *See id.* at 335-47.

8. *See id.* at 3-14, 48, 321-22, 402, 404.

9. *See id.* at 12.

10. *See id.* at 337, 347.

11. *See id.* at 404.

12. *See infra* notes 81-105 and accompanying text.

America was merely a chapter in an ineffectual English campaign to control the sexuality of both men and women. The anomaly lay not in the Chesapeake's reluctance to prosecute offenders (for English churchwardens often turned a blind eye to sexual misconduct), but in New England's doomed attempt to make adultery a capital crime.

Describing seventeenth-century New England as a Filmerian society tells us little about why some New Englanders believed that adultery should be punished with death, and even less about why most magistrates and jurors in the north hesitated to inflict capital punishment for consensual heterosexual offenses. This Book Review examines the failure of the capital adultery laws and concludes that neither the formal law nor a patriarchal ideal preordained the punishment of adultery suspects.

Part I argues that Norton exaggerates both the patriarchalism of New England and the uniqueness of the Chesapeake. Rather than presaging Lockean ideas, the Chesapeake adhered to mild forms of communal policing that were prevalent in England before the English Civil War. Part II contends that Norton gives short shrift to two factors militating against the enforcement of sexual morals: evidentiary problems and local loyalties tied to the suspect's wealth, race, political or religious persuasion, and ability to get along with her neighbors.

I. LOCKE AND LEWD BEHAVIOR: WAS THE CHESAPEAKE A LABORATORY FOR IDEOLOGICAL CHANGE?

A. *Structure of the Book*

Norton's tripartite division of social and political life into the family, the "informal public," and the state provides the organizational scheme for *Founding Mothers and Fathers*. The section devoted to the family describes relationships between male household heads and their wives, children, and servants in New England and in the Chesapeake.¹³ It also documents the ambiguous position of wealthy widows who ran their own households and demanded deference within the Filmerian hierarchy, especially from men of lower social status.¹⁴

With a perplexing disregard for Puritanism and Puritan opposition to absolute rule, Norton associates New England family government with Filmer's royalist ideology, which made the husbands and fathers the heads of a little kingdom.¹⁵ Men in New England were even

13. See NORTON, *supra* note 2, at 27-137.

14. See *id.* at 139-80.

15. See, e.g., *id.* at 16 (stating that "the most Filmerian government was that of New Haven,"

more patriarchal than their English counterparts, according to Norton. They could veto their children's choice of spouses,¹⁶ and their criminal codes prescribed the death penalty for sex with a married woman even before a similar law was enacted in England.¹⁷ Although women often failed to conform to the ideal of the submissive wife, they did so at their peril, in Norton's view.¹⁸ Even a high-status woman like Mistress Ann Hibbens might be excommunicated from her church for suggesting that the Bible instructed men to "hearken unto" their wives.¹⁹

In both north and south, women's legal subjection to their husbands restricted their participation in social, political, and economic life.²⁰ Norton contends, however, that neighbors and government officials scrutinized marital relations more zealously in New England than in the Chesapeake.²¹ In the southern colonies, she argues, the skewed gender ratio sowed seeds of a Lockean view of marriage as a consensual or apolitical arrangement.²²

The second and most interesting section of *Founding Mothers and Fathers* presents Norton's findings about the existence of an informal public in which women played influential roles as gossips and experts on childbirth.²³ Women could achieve centrality in the lives of other women, and even advise male officials, by becoming sexual experts.²⁴ Gossip networks created and sustained by women transmitted information about disordered families and illicit sexual activity and were thus important sources for the courts.²⁵ However, while reciprocity existed between "communities of men" and "communities of women," Norton emphasizes that women spoke to men "from the standpoint of importuning outsiders."²⁶ When the two communities disagreed, masculine viewpoints usually prevailed.²⁷

a colony usually associated with Puritanism).

16. See *id.* at 64.

17. See *id.* at 74.

18. See, e.g., *id.* at 77-80 (discussing instances of wife-beating and other penalties for unruly females).

19. See *id.* at 81-83.

20. See, e.g., *id.* at 83-89 (stating that, although women sometimes entered into informal commercial bargains, the men with whom they transacted business could renege at any time because wives could not form legally valid contracts without powers of attorney, and that, even then, their husbands might repudiate their actions).

21. See, e.g., *id.* at 48-49.

22. See *id.* at 5, 60-62. Although Locke initially argued that marriage was conjugal, rather than political, he revised his position in his *Second Treatise* by describing a voluntary compact between man and wife. See *id.* at 61.

23. See *id.* at 183-277.

24. See, e.g., *id.* at 206, 225-27; see also *infra* notes 49-56 and accompanying text.

25. See NORTON, *supra* note 2, at 253-77.

26. *Id.* at 206.

27. See *id.* at 239.

Norton's nuanced discussion of the informal public in the second section of her book blurs distinctions between New England and the Chesapeake, and her emphasis on the power of "collective judgment," not determined solely by gender or social rank,²⁸ undercuts her ambitious thesis about the creation of a "separate spheres" ideology. In contrast, the final section of *Founding Mothers and Fathers* reasserts the dichotomy of the Filmerian and proto-Lockean systems.²⁹ Presenting analyses of sex crime prosecutions, colonial politics, and the heresy trial of Anne Hutchinson, the last three chapters suggest that, in New England, the family metaphor led to vigorous attempts to cabin sexual intercourse within marriage, impose patriarchal government by a distant king, and eradicate religious heresies spread by women. Norton deftly weaves together these disparate examples of gendered power in the state—showing, for example, that Anne Hutchinson's ideas were alarming because of their alleged similarity to those of the Familists, who reputedly engaged in adulterous sex.³⁰

Norton believes that, while the northern colonies struggled to preserve the Filmerian hierarchy, the Chesapeake gradually abandoned it. In a chapter entitled "Marvelous Wickedness," she offers the laxity of the southern courts toward sexual transgressions as an example of this contrast.³¹ Norton describes varying patterns of prosecution in the two regions. In her analysis, the Chesapeake's tendency to wink at consensual sex acts that did not result in bastardy and to punish women more severely than men in the rare cases that reached the courts indicates that this "Lockean world was less concerned about familial disorder."³²

B. Norton's Lockean World

Norton is at her best when she writes about Maryland and Virginia. Historians have tilled northern court records to produce studies of moral enforcement in individual counties, particularly in Massachusetts Bay.³³ They have achieved an increasingly sophisticated understanding of colonial due process,³⁴ the extent of privacy

28. *Id.* at 241.

29. *See id.* at 281-399.

30. *See id.* at 390.

31. *See id.* at 321-58.

32. *Id.* at 347.

33. *See generally* DAVID T. KONIG, *LAW AND SOCIETY IN PURITAN MASSACHUSETTS: ESSEX COUNTY, 1629-1692* (1979) (describing the operation of criminal justice at the county level); ROGER THOMPSON, *SEX IN MIDDLESEX: POPULAR MORES IN A MASSACHUSETTS COUNTY, 1649-1699* (1986) (analyzing sex crime prosecutions to show that young people in Massachusetts engaged in sexual experimentation and innuendo and were restrained from greater transgressions by popular piety, rather than by patriarchal despotism).

34. *See generally* EDGAR J. MCMANUS, *LAW AND LIBERTY IN EARLY NEW ENGLAND:*

rights,³⁵ and the nature of the crimes committed by and against women.³⁶ But relatively little has been written about law in the Chesapeake in the seventeenth century. Except for a recent analysis of the relationship between sexual regulation and racial definition in Virginia,³⁷ most studies of the Chesapeake lack both sensitivity to the cultural construction of gender and the aid of computers in performing statistical analysis.³⁸ Thus Norton's discussion of the southern colonies covers fresh and interesting territory.

Norton's painstaking study of the Maryland county court records depicts a society in which tobacco planters like Edward Hudson and Richard Holt shared a roof, a business, and—with a good deal more acrimony—the sexual favors of Holt's wife.³⁹ Norton has found other examples of *ménages à trois* in Maryland and has concluded that the southern courts rarely pursued adultery prosecutions unless the cuckolded husband initiated the action.⁴⁰ After Holt complained that his wife and her lover intended to kill him, the court sentenced Hudson to be whipped with thirty lashes and banished from the

CRIMINAL JUSTICE AND DUE PROCESS, 1620-1692 (1993) (using printed sources to argue that, while the Puritans grounded their laws in Scripture, their concern for due process anticipated the guarantees of the Bill of Rights).

35. See generally DAVID H. FLAHERTY, *PRIVACY IN COLONIAL NEW ENGLAND* (1972) (contending that Puritanism was not antithetical to personal privacy).

36. See, e.g., CORNELIA HUGHES DAYTON, *WOMEN BEFORE THE BAR: GENDER, LAW, AND SOCIETY IN CONNECTICUT, 1639-1789*, at 1-69, 157-284 (1995) (suggesting that Puritanism gave women more avenues of participation and greater equality before the courts in 17th-century Connecticut than did the social norms of the 18th century); N.E.H. HULL, *FEMALE FELONS: WOMEN AND SERIOUS CRIME IN COLONIAL MASSACHUSETTS* 142 (1987) (seeking to "partially exonerate the Puritans and their descendants against the charge of sexism in the law and the courts"). But see LYLE KOEHLER, *A SEARCH FOR POWER: THE "WEAKER SEX" IN SEVENTEENTH-CENTURY NEW ENGLAND* (1980) (positing a culture of patriarchy, sexual stereotyping, and spousal abuse in terms that Hull and others contend are exaggerated).

37. See generally KATHLEEN M. BROWN, *GOOD WIVES, NASTY WENCHES, AND ANXIOUS PATRIARCHS: GENDER, RACE, AND POWER IN COLONIAL VIRGINIA* (1996) (depicting colonial Virginia as a patriarchal society and contending that, in the second half of the 17th century, white Virginians increasingly used gendered discourses to subordinate blacks).

38. See generally EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* (1975) (offering a political and social history of Virginia centering on the way racial and class prejudice marred the colony's emerging vision of freedom). Morgan gives the proscription of certain sexual behaviors only the briefest mention. See *id.* at 79-80; see also ARTHUR P. SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA* 252-92 (1930) (presenting a more detailed analysis of the criminal law with a chapter on moral offenses).

39. See NORTON, *supra* note 2, at 344-46; see also JUDICIAL AND TESTAMENTARY BUSINESS OF THE PROVINCIAL COURT, 1649/50-1657, at 64, 109-12 (10 Archives of Md., William Hand Browne ed., Baltimore 1891) [hereinafter *MARYLAND PROVINCIAL COURT RECORDS*] (documenting the Holt-Hudson case).

40. See NORTON, *supra* note 2, at 344; see also Mary Beth Norton, *Gender, Crime, and Community in Seventeenth-Century Maryland*, in *THE TRANSFORMATION OF EARLY AMERICAN HISTORY: SOCIETY, AUTHORITY, AND IDEOLOGY* 123, 132 (James A. Henretta et al. eds., 1991) [hereinafter Norton, *Gender, Crime, and Community*]. Perhaps because southern men wanted to avoid the shame of admitting publicly that their wives had been unfaithful, only eleven adultery prosecutions appear in the Maryland records for the seventeenth century. Moreover, "no wife and just one husband formally accused a spouse of infidelity in a criminal trial" in Maryland during this period. Norton, *Gender, Crime, and Community*, *supra*, at 130.

county. Dorothy was ordered to endure fifty lashes, but the court later commuted both whippings to fines. The court also prohibited Dorothy from living as man and wife with Hudson, although he later fathered two of her children.⁴¹

The more severe corporal punishment prescribed for Dorothy lends support to Norton's assertion that "[a] clearly evident double standard of sexual behavior guided the authorities in Virginia and Maryland"⁴² In contrast to the more evenhanded punishments for sexual crimes meted out by New England courts, southern women felt the lash more often than did southern men.⁴³ Norton attributes this double standard to the Chesapeake's nascent Lockean world view.⁴⁴ As we shall see, this theoretical explanation rests on shaky ground.

According to Norton, the conviction of Dorothy Holt and Edward Hudson was an exception to the rule in Maryland. The case of Mary Taylor and George Catchmey, which was dismissed after the wronged husband decided to keep quiet, had a more typical outcome.⁴⁵ Indeed, the Maryland courts seem to have been more concerned with discouraging false accusations than with punishing women or men who engaged in extramarital sex. For example, when Bridgett Johnson informed the court that she had twice caught John Clymer *in flagrante delicto* with a married woman, the court concluded that her "complaint is only in malice" and sentenced her to twenty lashes for making claims she could not substantiate.⁴⁶ The number of sexual offenses revealed in civil suits indicates the laxity of criminal prosecution.⁴⁷ According to Norton, southerners tended not to inform against their neighbors unless they suffered slanderous insults or wanted to collect money from men who got their servants pregnant.⁴⁸

Unfortunately, Norton fails to clarify the relationship between the Chesapeake's relatively *laissez-faire* attitude toward sex and the

41. See NORTON, *supra* note 2, at 345-46.

42. *Id.* at 346.

43. See *id.*; see also Norton, *Gender, Crime, and Community*, *supra* note 40, at 141.

44. See NORTON, *supra* note 2, at 347.

45. See *id.* at 337, 343-44. Norton notes, however, that the long-distance relationship between Catchmey and Mary Taylor differed from the norm of two men sharing one woman under the same roof. See *id.*

46. PROCEEDINGS OF THE COUNTY COURTS OF KENT (1648-1676), TALBOT (1662-1674), AND SOMERSET (1665-1668) COUNTIES 534 (54 Archives of Md., J. Hall Pleasants ed., 1937). Norton discusses the Clymer case in a separate article. See Norton, *Gender, Crime, and Community*, *supra* note 40, at 131. She believes that Johnson was Clymer's spurned lover and that she had been replaced by Elizabeth Madberie, the married woman in question. The romantic jealousies implicated in the case cast doubt on Johnson's credibility. See *id.*

47. See NORTON, *supra* note 2, at 337.

48. See *id.*

opportunities for southern women to wield informal authority. On the one hand, she suggests that the Lockean world of Maryland and Virginia was “built upon the relationships of the informal public” in which women played vital roles as gossips and midwives.⁴⁹ On the other hand, she associates the southern colonies with a theory of power “that resolved the ambiguities in women’s status by rendering females irrelevant outside the household.”⁵⁰ In the Filmerian system, familial disorder had grave ramifications for the stability of the state. Consequently, knowledge of reproductive matters and ability to spread (or conceal) sexual information should have given northern women a more influential voice in the regulation of morals than their southern counterparts enjoyed.⁵¹ If sexual behavior attracted less concern in the Chesapeake, the expertise of midwives and gossips should have been correspondingly devalued by men. Moreover, the logic of the family-state metaphor implies that New England widows from socially prominent families could exercise a degree of political power unthinkable in a Lockean world, where “the household power structure was irrelevant to the polity.”⁵²

Norton’s discussion of the Chesapeake, however, often contradicts her association of female authority with the paradoxes of New England’s hierarchical system. Her evidence indicates, against the grain of her thesis, that southern women figured prominently as informers or deponents for the state. For example, the midwife who helped Mary Taylor deliver an illegitimate child by George Catchmey reported her suspicions to the authorities after her efforts to blackmail the adulterous couple failed.⁵³ Rose Smith scolded Dorothy Holt for breaking her marriage covenant and later deposed that Dorothy said “she were as good kill . . . [her husband] as live as [s]he did.”⁵⁴

In fact, many of Norton’s best examples of women in public roles come from the Chesapeake, rather than from New England. One intriguing chapter follows the efforts of a group of Virginia women to define the sexual identity of a neighbor who had male genitalia but dressed as a woman and displayed skill in sewing.⁵⁵ The female “searchers” of Thomasine (or Thomas) Hall’s body objected to designating a person with a penis as female. The General Court’s compromise—ordering Hall to wear masculine clothes adorned with

49. *Id.* at 404.

50. *Id.* at 10.

51. *See, e.g., id.* at 24 (noting that Massachusetts lawmakers recognized a quasi-public role for women by including midwives in a list of public persons).

52. *Id.* at 291.

53. *See id.* at 230.

54. *Id.* at 345.

55. *See id.* at 183-202.

an apron—demonstrated the informal influence of women upon the outcome of sexual cases: “Hall’s fate . . . was determined as much by a decision reached by ordinary women as . . . by a verdict formally rendered by the elite men who served on the General Court.”⁵⁶ Finally, it was in Maryland that the venerable spinster Margaret Brent gained respect as a shrewd financial manager and, after being designated Lord Baltimore’s attorney, demanded a vote in the Maryland Assembly.⁵⁷

Norton falls back on her Filmerian shorthand to explain Mistress Brent’s public power. “[I]n a polity organized along familial lines,” she writes, “*some* women—those who were high-ranking heads of households—necessarily constituted exceptions to the general rule of exclusion.”⁵⁸ Yet the court’s apathy toward the Catchmey adultery case, which occurred in the same colony less than a decade after Mistress Brent became His Lordship’s attorney, is offered as evidence that “the government of that *Lockean* world was less concerned about familial disorder.”⁵⁹ At this point, the reader may justifiably scratch her head.

C. *Misadventures in Political Philosophy*

1. *The Myth of the Filmerian System*

The chief problem with Norton’s book lies in its ambitious attempt to document the decline of an all-encompassing *mentalité*: the so-called Filmerian system. Even assuming for the moment that jurors, midwives, and other local folk pondered the nature of political power, the premise that the early settlers patterned their lives after a cohesive world picture—especially an extreme royalist one—does not bear scrutiny. If the Filmerian polity is suspect, its erosion under the demographic strains of the Chesapeake must also be reexamined.

Sir Robert Filmer wrote his treatise *Patriarcha*⁶⁰ in 1640, but it was not published for another forty years. When *Patriarcha* appeared in print, the Whigs, who were anxious to keep the English crown from passing to a Catholic, lambasted it as an apology for despotism.⁶¹ As David Wootton tells us, “Filmer’s arguments were untypical of royalists in general, both in his own day and in the 1680s when they

56. *Id.* at 197.

57. *See id.* at 281-82.

58. *Id.* at 291.

59. *Id.* at 347 (emphasis added).

60. SIR ROBERT FILMER, *PATRIARCHA, OR THE NATURAL POWER OF KINGS* (London, Walter Davis 1680).

61. *See* David Wootton, *Introduction to DIVINE RIGHT AND DEMOCRACY: AN ANTHOLOGY OF POLITICAL WRITING IN STUART ENGLAND* 22, 31 (David Wootton ed., 1986).

became the focus of controversy.”⁶² Filmer’s emphasis on lineage conflicted with the organization of contemporary English households, each headed by a husband who left his parents and established an independent life.⁶³ Although the family analogy upon which Norton places such heavy emphasis recurs frequently in Stuart writings,⁶⁴ its political meaning was less clear than she suggests. J.P. Sommerville cautions that the “belief that royal and fatherly power were in some respects similar did not imply any particular view about the origins and nature of political society.”⁶⁵

More importantly, to the extent that Filmer articulated a royalist vision, his world view was antithetical to that of Puritan New Englanders, who explicitly rejected the episcopal hierarchy in favor of voluntary covenants and elected ministers. In the seventeenth century, the patriarchal power of the king constituted a more intrusive force in Norton’s supposedly Lockean Virginia, which was governed by royal appointees, than it did in New England, where the colonists elected their own government officials.⁶⁶ At worst, Norton’s odd reluctance to explore Puritan beliefs leads her to characterize Oliver Cromwell, the roundhead general who toppled Charles I, as Maryland’s “undisputed Filmerian father.”⁶⁷

By conflating Puritanism and Filmerianism, Norton turns the clock of historical research back to a time when the patriarchal nature of the Puritan family was widely accepted.⁶⁸ As early as 1942, Edmund S. Morgan challenged the image of the sexually repressed Puritan patriarch, made infamous by Max Weber,⁶⁹ by arguing that the Puritans recognized sex as a human pleasure that strengthened the marital bond.⁷⁰ More recently, Roger Thompson, Margo Todd, and others have undermined the association of Protestant, and particularly Puritan, theology with “the total subordination of wives.”⁷¹ In

62. *Id.* at 32.

63. *See id.*

64. *See* KEVIN SHARPE, *A Commonwealth of Meanings*, in *POLITICS AND IDEAS IN EARLY STUART ENGLAND: ESSAYS AND STUDIES* 58-61 (1989) (citing examples of the family-state analogy in family conduct manuals and other works). Like Norton, Sharpe reads too much political meaning into conventional metaphors. His thesis that royalists and parliamentarians “spoke a shared language” does not go far toward explaining why England erupted in civil war. *See id.* at 61.

65. J.P. SOMMERVILLE, *POLITICS AND IDEOLOGY IN STUART ENGLAND, 1603-1640*, at 29 (1986).

66. *See* Edmund S. Morgan, *Subject Women*, N.Y. REV. BOOKS, Oct. 31, 1996, at 66, 67 (criticizing Norton’s association of the northern colonies with Filmerian political ideology).

67. NORTON, *supra* note 2, at 308.

68. *See id.* at 27-137.

69. *See* MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 158-59 (Talcott Parsons trans., Charles Scribner’s Sons 1958) (1920-21).

70. *See* Edmund S. Morgan, *The Puritans and Sex*, 25 NEW ENG. Q. 591, 593-94 (1942).

71. LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND, 1500-1800*, at 138 (1979) (discussing the subordination of Puritan women). For a monograph that uses colonial

contrast to Weber and Lawrence Stone, these revisionist writers contend that the family ethic gave women authority over the spiritual education of their children and made mutual affection, including sexual love, the centerpiece of marriage.⁷²

The prescriptions of family conduct manuals, from which many accounts of Puritan patriarchy derive, were neither distinctively Puritan nor reflective of behavior in actual families. When the emotionally fragile London artisan Nehemiah Wallington crumbled under the tragedy of his daughter's death, for example, his wife reproved him for his excessive grief.⁷³ Paul Seaver finds gentle irony in Nehemiah's claim to be a Puritan patriarch:

In 1622 Nehemiah had made a New Year's resolution to carry himself "as a head and governor" toward his wife, and Livewell Rampaigne in his letter written to the Wallingtons in 1628 also assumed conventionally that Grace was "the weaker vessel" in need of Nehemiah's comfort . . . but these were cultural conventions, not descriptions of social realities.⁷⁴

Seventeenth-century Puritan fathers were thus less dour and autocratic than Norton assumes. And, if the range of legal options and public roles that women enjoyed in the seventeenth century shrank as America moved into the eighteenth century, this contraction may have been attributable to the decline of Puritanism, rather than to the replacement of Filmer with Locke. As Cornelia Dayton's study of female participation in the colonial Connecticut courts reveals, Puritan legal innovations allowed women to appear as executors, witnesses, and litigants and demanded roughly equal penalties for both sexes.⁷⁵ Indeed, Dayton contends that "[i]f Puritan approaches to the law, such as simplifying civil procedure, punishing men and women

American legal records to question the idea of Puritan patriarchy, see THOMPSON, *supra* note 33. Thompson shows that unmarried folk in Massachusetts Bay enjoyed a vibrant youth culture that included premarital sex. *See id.* at 195. In contrast to both Lawrence Stone and Lyle Koehler, he contends that married women did not feel oppressed; rather, they chose their spouses and expected both emotional and sexual satisfaction from them. *See id.* at 193. *But cf.* KOEHLER, *supra* note 36, at 136-60 (arguing that marriages in New England were fraught with infidelity, dissatisfaction, and violence). A broader view, encompassing England and drawing on Catholic humanist and Anglican writings, can be found in MARGO TODD, *CHRISTIAN HUMANISM AND THE PURITAN SOCIAL ORDER* (1987). Todd argues that, whereas Lawrence Stone and others exaggerate the patriarchal nature of 16th- and 17th-century families, other scholars wrongly attribute the exaltation of the married state and the wife's role in family discipline to the Puritans. Rather than being innovators of a reformist vision that gave women greater equality in the family, the Puritans were "popularizers and practitioners of earlier ideas—more properly associated with the Renaissance than the Reformation." *Id.* at 16.

72. *See, e.g.*, TODD, *supra* note 71, at 105, 113.

73. *See* PAUL S. SEAYER, WALLINGTON'S WORLD: A PURITAN ARTISAN IN SEVENTEENTH-CENTURY LONDON 87 (1985) (recounting Wallington's trials and tribulations from his extensive manuscript diaries).

74. *Id.* at 86.

75. *See* DAYTON, *supra* note 36, at 30-33.

equally, and receiving women's stories of abuse supportively, had been retained as permanent fixtures of the evolving American legal system, the result would have been a less patriarchal society in the long run."⁷⁶

In addition to miscasting Puritan New Englanders as inflexible patriarchs and proponents of absolute monarchy, Norton relies on an anachronistic equation of the Chesapeake with the ideas of John Locke. Locke, whose *Two Treatises of Government* was not published until 1690, had some precursors in the earlier part of the seventeenth century.⁷⁷ The early Stuart common lawyer John Selden advanced the idea that, because civil society arose from a contract between men, the monarch could only demand obedience as long as he upheld his end of the bargain.⁷⁸ But a third and more common view than Selden's and Filmer's made the Crown accountable to an ancient constitution without anticipating what would happen if the king ignored the law.⁷⁹ The revolt against Charles I in the 1640s turned the world upside down in part because a political discourse had not evolved to justify it: The Lockean social contract that helped English people explain the ouster of James II in 1688 lay a half-century in the future.⁸⁰ Norton admits that, even in the latest years covered by her book, southern colonists had not been exposed to Locke's ideas. This admission forces her to argue that the southerners acted in accord with principles that had not yet been articulated.

2. *Cuckoldry and Popular Culture in England and America*

Norton's effort to gild her thick description of colonial life with an overlay of political theory underestimates the gap between elite ideologies of governance and the less lofty concerns of ordinary people. Although Norton devotes one-third of her book to the importance of neighborliness and communal norms, she often obscures the "bottom-up" perspective of the social historian. The sexual laxity that she attributes to nascent Lockean ideas is more properly located in the English popular tradition of wife sales⁸¹ and

76. *Id.* at 33.

77. See generally JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (London, Awnsham Churchill 1690) (presenting Locke's views of the origins and ends of civil government and explicitly rejecting Filmer's ideas).

78. See SOMMERVILLE, *supra* note 65, at 65.

79. See *id.* at 80 (suggesting that the differences between the theories of social contract and the ancient constitution were not apparent until Parliament took arms against the King).

80. See *id.*

81. Wife sales were a form of extralegal popular divorce that preceded the colonization of America. See SAMUEL PYEATT MENEFFEE, *WIVES FOR SALE: AN ETHNOGRAPHIC STUDY OF BRITISH POPULAR DIVORCE* 31 (1981) (noting that the practice of selling wives dated from the 11th century in the British Isles and was recorded in at least six English shires and in lowland Scotland in the 16th and 17th centuries). Although Meneffee's book largely addresses the 19th

pregnant brides—informal sexual unions sealed by physical intimacy or by the exchange of words and money.⁸²

Two interrelated aspects of popular culture, both with deep English roots, set bounds to the effectiveness of the written law. First, many local communities used extralegal pressures to enforce their moral values. Second, these values did not always correspond to those urged by formal legal institutions and—particularly in the area of sexuality—popular custom tolerated *de facto* unions that did not threaten the stability of the community. Norton's discussion of the informal public hints at the importance of grassroots influences. However, in focusing on the Chesapeake's special role as a harbinger of Lockean ideas, Norton ignores the extent to which southern tolerance of sexual misconduct resonated with traditional English practices.

Ménages à trois in Maryland seem less remarkable if we consider that, when Thomas Heath came before a church court in Oxfordshire, England in 1696, he was charged with "cohabiting in an unlawful manner with the wife of George Fuller . . . since having bought her of her husband."⁸³ The trading of women in the Chesapeake tapped into the broader plebeian culture that New England theologian Cotton Mather called "the vain conversation received by tradition from our fathers."⁸⁴ As the Puritan regicides discovered when they made adultery a capital offense in England in 1650,⁸⁵ local customs and loyalties constrained the godly reformation, much as they had hampered the effectiveness of the prewar ecclesiastical courts.⁸⁶

The presentment of moral offenders to the English church courts, or "bawdy courts," began before the Reformation and continued through the eighteenth century. The limits to ecclesiastical discipline

century, his characterization of wife sales as "a conservative and traditional social solution" that "relieved stress on the social fabric with a minimal strain on the communal *status quo*" merits attention. *Id.* at 210. *But see* MARTIN INGRAM, CHURCH COURTS, SEX, AND MARRIAGE IN ENGLAND, 1570-1640, at 207 n.47 (1987) (contending that, unlike other informal sexual arrangements, wife sales were rare in England during the 16th and 17th centuries).

82. See RICHARD P. GILDRIE, THE PROFANE, THE CIVIL, & THE GODLY: THE REFORMATION OF MANNERS IN ORTHODOX NEW ENGLAND, 1679-1749, at 96 (1994) (quoting the popular adage, "[t]o eat, drink, and sleep together; these things seem to make a marriage"); INGRAM, *supra* note 81, at 125-291 (analyzing the relationship between law, sex, and marriage in Elizabethan and early Stuart England); Keith Thomas, *The Puritans and Adultery: The Act of 1650 Reconsidered*, in PURITANS AND REVOLUTIONARIES: ESSAYS IN SEVENTEENTH-CENTURY HISTORY PRESENTED TO CHRISTOPHER HILL 257, 260 & n.6 (Donald Pennington & Keith Thomas eds., 1978) (citing INGRAM, *supra* note 81, for the statistic that about one-fifth of all English brides were pregnant at their weddings).

83. THE CHURCHWARDENS' PRESENTMENTS IN THE OXFORDSHIRE PECULIARS OF DORCHESTER, THAME, AND BANBURY 184 (10 Oxfordshire Record Soc'y, Sidney A. Peyton ed., 1928) [hereinafter OXFORDSHIRE RECORDS].

84. GILDRIE, *supra* note 82, at 45 (quoting COTTON MATHER, ADVICE FROM THE WATCH TOWER 27-28 (Boston, J. Allen 1713)).

85. See An Act for Suppressing the Detestable Sins of Incest, Adultery, and Fornication, 1650, 2 ACTS & ORDS. INTERREGNUM 387.

86. See Thomas, *supra* note 82, at 260-61.

were much lamented by the Puritans at the time. For example, in 1583, English moralist Phillip Stubbs complained in *The Anatomie of Abuses*:

The punishment appointed for whoredom now is so light that they esteeme not of it; they fear it not; they make but a jest of it. For what great thing is it to go two or three days in a white sheet before a congregation, and that sometimes not past an hour or two in a day, having their usual garments underneath, as commonly they have? And truly I cannot a little admire, nor yet sufficiently deplore that wickedness of the ecclesiastical magistrates in not punishing more grievously this horrible sin of whoredom, for to go in a sheet with a white wand in their hands is but a plain mocking of God and of his laws.⁸⁷

Public humiliation imposed by the bawdy courts rarely took the form of corporal punishment.⁸⁸ But it was local custom, rather than elite theory, that defined the limits of ecclesiastical discipline. As several historians have noted, the clemency of the bawdy courts "derived not from the explicit ideology—the canon law—but from the implicit consent of the populace: mild punishments were all they were willing to take for peccadilloes."⁸⁹

When English people settled in the southern colonies, they brought with them popular assumptions about the nature and limits of moral policing. Maryland's code embodied New Testament discretion, providing that adulterers and fornicators "shall be censured or punished as the governor or council or other chief judge . . . think fit."⁹⁰ And, in Virginia, the death penalty for adultery imposed by Dale's Code never took root. Rather, until the mid-seventeenth century, Virginia's adulterers and fornicators did the same mild public penance as offenders who came before the English ecclesiastical courts.⁹¹ For example, one Virginia couple in the 1640s was ordered to "stand in the middle of the . . . church upon a stool in a white sheet, and a white wand in their hands, all the time of divine service and shall say after the ministers such words as he shall deliver unto

87. BEFORE THE BAWDY COURT: SELECTIONS FROM CHURCH COURT AND OTHER RECORDS RELATING TO THE CORRECTION OF MORAL OFFENCES IN ENGLAND, SCOTLAND, AND NEW ENGLAND, 1300-1800, at 57 (Paul Hair ed., 1972) [hereinafter BEFORE THE BAWDY COURT] (quoting PHILLIP STUBBS, *THE ANATOMIE OF ABUSES* (1583)).

88. See Paul Hair, *Introduction* to BEFORE THE BAWDY COURT, *supra* note 87, at 28.

89. *Id.*

90. PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND, JANUARY 1637/38-SEPTEMBER 1664, at 286 (1 Archives of Md., William Hand Browne ed., Baltimore, Maryland Historical Soc'y, 1891) (quoting An Act for Punishment of Certain Offenses as Swearing, Cursing, Adultery, &c. (Apr. 1650)).

91. See BROWN, *supra* note 37, at 189-90.

them before the congregation there present and also pay the charges of the court."⁹²

The criminal courts in the Chesapeake imposed harsher sentences when the case involved an aggravating circumstance, such as marital violence or the disobedience of a servant.⁹³ However, longstanding popular attitudes toward the cuckold sometimes deterred a man from complaining of his wife's "lewd and idle life."⁹⁴ In England, cuckolds had long borne the brunt of ridicule, as this entry in the church court records of West Ham, Essex in 1589 indicates:

[John Hopkinson] with others were in the company of a stranger in the house of John Ward of Westham, a vittling house, in the night time and, talking of Mr. Eborn, some said that he was jealous over his wife. The said stranger said, if he knew where he dwelt, he would nail a pair of horns at his door, and in further talk this examinant said that Robert Dickins would give him a pair of horns and so did, and he nailed them at the said Mr. Eborn's door.⁹⁵

While villagers nailed horns above a cuckold's door and carried him through the streets astride a pole, accompanied by the "rough music" of bells, pots and pans, and other raucous instruments, they often allowed his wife's lover to go unscathed.⁹⁶ The lover may have escaped without punishment because his peers admired the picaresque spirit of the sexually adventurous male romanticized in popular ballads and chapbooks—cultural forms that ordinary Americans may have encountered more often than the writings of elite political thinkers.⁹⁷

92. SCOTT, *supra* note 38, at 277 n.71.

93. In 1640, William Beard's wife escaped a public whipping in Virginia because she was pregnant. However, her lover—who was also Beard's servant—was beaten to deter others from the "grand enormity" of cuckolding their masters. MINUTES OF THE COUNCIL AND GENERAL COURT OF COLONIAL VIRGINIA, at 475 (H.R. McIlwaine ed., 2d ed. 1979) [hereinafter VIRGINIA GENERAL COURT]. The following year, Elizabeth Storkey received twenty lashes "for her offense in committing the act of fornication and adultery, as also for absenting herself and running away from her master's service without his privity and consent." COUNTY COURT RECORDS OF ACCOMACK-NORTHAMPTON, VIRGINIA, 1640-1645, at 117 (Susie M. Ames ed., 1973) [hereinafter ACCOMACK RECORDS].

94. VIRGINIA GENERAL COURT, *supra* note 93, at 475.

95. BEFORE THE BAWDY COURT, *supra* note 87, at 137-38 (excerpting W. HALE HALE, A SERIES OF PRECEDENTS AND PROCEEDINGS IN CRIMINAL CAUSES EXTENDING FROM THE YEAR 1475 TO 1640; EXTRACTED FROM THE ACT-BOOKS OF ECCLESIASTICAL COURTS IN THE DIOCESE OF LONDON 197 (1847)).

96. See Thomas, *supra* note 82, at 261, 263. But cf. INGRAM, *supra* note 81, at 165 (noting that, although "the cuckolded husband was in some sense reprehensible," adulterers could also be the targets of rough music).

97. See GILDRIE, *supra* note 82, at 90 (describing the "honor to be gained [within the picaresque tradition] by abandoning wife and family for a more independent existence"); MARGARET SPUFFORD, SMALL BOOKS AND PLEASANT HISTORIES: POPULAR FICTION AND ITS READERSHIP IN SEVENTEENTH-CENTURY ENGLAND 72 (1981) (suggesting that servants and apprentices, as well as more substantial yeomen and merchants, read the chapbooks in England).

Imported to America, popular shaming rituals tapped into a culture of festive misrule that the authorities, especially the Puritans, found threatening.⁹⁸ For example, Cotton Mather complained of the mocking youths who gathered outside his lodgings: "On purpose to insult piety, they will come under my window in the middle of the night, and sing profane and filthy songs."⁹⁹ Ridiculing the cuckold, or the henpecked husband, served a punitive function.¹⁰⁰ But because popular moral policing embraced bawdiness and riot and placed the blame on different actors (the cuckold, rather than the adulterer), it coexisted uneasily with formal discipline. Indeed, the festive element of "rough ridings" made it unclear what was being celebrated: patriarchy or its inversion by strong-willed females.¹⁰¹

The tradition of public scorn toward the cuckold helps explain the outcome of the Catchmey case in the Chesapeake, which Norton discusses at length.¹⁰² The adulterer George Catchmey warned Robert Taylor that, if Taylor went to the authorities, the court would record that he had been cuckolded. Unhappy with this prospect, Taylor offered to raise the bastard child conceived by his wife and Catchmey in exchange for some of Catchmey's tobacco. Because he realized the weakness of his bargaining position, Taylor only demanded two thousand pounds of tobacco and ultimately failed to exact any compensation from Catchmey.¹⁰³ Although Norton perceptively suggests that "each man decided that preserving his good name was his most important goal,"¹⁰⁴ she fails to accord sufficient weight to the longstanding tradition behind the cuckold's fears. Nailing horns to a man's door, literally or figuratively, amounted to a communal judgment that he was unable to control his wife's sexual habits. Like his initial impulse to get a warrant for Catchmey's arrest, Taylor's failure to press charges arose from his concern that the community would mock his troubles.¹⁰⁵ Rather than revealing a new

98. See, e.g., GILDRIE, *supra* note 82, at 2, 12 (stating that by the mid-17th century "a coherent provincial variant of English popular culture had emerged" in the colonies and that the Puritan Reformation of Manners targeted elements of this culture). But cf. Martin Ingram, *Ridings, Rough Music and the Reform of Popular Culture in Early Modern England*, PAST & PRESENT, Nov. 1984, at 79, 111 (contending that popular shaming rituals enjoyed strong links to elite culture and, hence, were not as vigorously opposed as some scholars have indicated).

99. GILDRIE, *supra* note 82, at 129 (quoting 2 DIARY OF COTTON MATHER 217 (Massachusetts Historical Soc'y Collections, 7th ser., No. 8, Worthington Chauncey Ford ed., 1911)).

100. See Ingram, *supra* note 98, at 92.

101. *Id.* at 97.

102. See NORTON, *supra* note 2, at 228-31, 261, 343-44.

103. See *id.* at 344.

104. *Id.*

105. Taylor was not hypersensitive in feeling that his neighbors took a keen interest in his sexual troubles. One Virginia woman stood on a hogshead of tobacco and, by peeking through a crack left by a loose board, saw "Mary West . . . [lying] with her coats up above her middle

distinction between public and private, the Catchmey case testifies to the resilience of popular norms that made adultery deeply shameful for the cuckold and indicates that men, as well as women, were the objects of extralegal policing in the southern colonies.

II. NEW ENGLAND ADULTERY PROSECUTION IN CONTEXT

New England adultery cases provide an excellent vehicle for further exploration of Norton's thesis. The definition of adultery as intercourse with a married or espoused woman embodied an explicit double standard, for a married man could not commit adultery by sleeping with a single female.¹⁰⁶ This asymmetry protected the husband's sexual access to and control over his wife, and the severity of the penalty—death by hanging—made the proscription seem all the more draconian. But, if New England's adultery laws appear at first glance to have bolstered the Filmerian hierarchy, a closer look reveals that they were an unworkable innovation that failed as miserably in the colonies as they did in England.

Keith Thomas has shown that the criminalization of extramarital sex had deep English roots outside of Puritanism.¹⁰⁷ When the church courts were abolished during the English Civil War, both Puritans and royalists thought that penal laws must be enacted "for punishing of adulteries and divers other offenses not punishable by the common law."¹⁰⁸ However, the Act of 1650, which prescribed death for extramarital sex with a married woman, exceeded the level of punishment to which English people were accustomed. Both the resistance of local communities and the evidentiary constraints embodied in the law itself insured that the Act remained "primarily symbolic."¹⁰⁹ If the failure of New Englanders to implement their draconian punishments is analyzed in this context, the laxity of the Chesapeake ceases to look like an ideological departure.

A. Religion, Politics, and the Adultery Laws

Although adultery prosecutions represent a relatively small part of Norton's subject matter, they offer a window through which the forces that shaped criminal justice in the colonies may be glimpsed. The

and Richard Jones with his breeches down lying upon her." But, with characteristic reluctance to clinch an adultery charge, she testified, "what they did I know not." ACCOMACK RECORDS, *supra* note 93, at 290-91.

106. See NORTON, *supra* note 2, at 342. For a discussion of the property argument behind the double standard, see Thomas, *supra* note 82, at 262. An unfaithful wife posed a threat to lineage and, hence, to "whole system of property relations." *Id.*

107. See Thomas, *supra* note 82, at 265-78.

108. *Id.* at 275 (quoting a royalist petition).

109. *Id.* at 280.

imposition of the death penalty for adultery was indeed debated at the level of high politics in colonial America, but not for the reasons that Norton suggests. Virginia made adultery a capital crime in 1610, forty years before the Puritan regime took the same step in England.¹¹⁰ In the northern colonies of Massachusetts Bay, Plymouth, Connecticut, and New Haven, extramarital sex involving a married or espoused woman was theoretically punishable by death at least until the 1670s.¹¹¹

The introduction of capital adultery laws in colonial America represented an unwelcome innovation in two ways. First, the offense was now based solely on the woman's marital status, whereas Protestant moralists previously had defined adultery as sexual infidelity by either spouse. Second, the capital laws imposed a much harsher penalty than was prescribed in England before the Civil War.¹¹² Attitudes toward the introduction of capital adultery laws did not distinguish the Lockean south from the Filmerian north however. The debate was much more complicated and scripturally grounded than Norton allows. As I have argued above, Norton gives too little attention to the Puritan values that influenced law and social organization in colonies like New Haven.¹¹³ She fails to explore adequately the extent to which New Englanders disagreed over the use of Old Testament laws to govern their communities.¹¹⁴

Neither the northern nor the southern colonies uniformly adhered to an Old Testament approach to adultery. Rhode Island's founding precipitated controversy in part because its residents harbored escaped adulterers and spoke out "against them which putteth people to death for witches."¹¹⁵ The Deputy Governor of Maine also

110. See WILLIAM STRACHEY, *FOR THE COLONY IN VIRGINEA BRITANNIA, LAWES DIVINE, MORALL AND MARTIAL* 12 (David H. Flaherty ed., University Press of Va. 1969) (1612) [hereinafter *VIRGINIA LAWS*].

111. For a discussion of the early adultery laws and their subsequent modifications, see KOEHLER, *supra* note 36, at 147:

Massachusetts, Connecticut, Plymouth and New Haven Colonies early prescribed the death penalty for adultery committed either with a betrothed or a married woman. Such laws stayed on the books until the 1670s; then, Plymouth substituted one law which punished offenders by two severe whippings and the wearing of an easily recognizable AD sewn on the arm or back of one's garment. New Hampshire adopted the Plymouth statute in the Cutt Code of 1680. Connecticut had, by 1673, liberalized its own adultery law; that colony sentenced adulterers to be whipped, to wear halters around their necks, and to have an A burned into their foreheads . . . [In Massachusetts] [a]nother law in 1694 removed . . . [the penalty of whipping and banishment, or death for those who refused to leave the colony] and sentenced offenders to spend an hour on the gallows, receive up to forty lashes, and wear a capital A two inches high.

Id. (citations omitted).

112. See Thomas, *supra* note 82, at 257, 261-62, 265.

113. See *supra* notes 66-76 and accompanying text.

114. See NORTON, *supra* note 2, at 343 (mentioning that the sentiments of Maine's Deputy Governor Thomas Gorges may have exemplified broader opposition to the death penalty).

115. 1 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN

opposed the death penalty for adultery. Discussing the difference between punishments in Maine and Massachusetts Bay, he wrote:

The governors of the Bay go according to the judicial laws of Moses 'Tis very doubtful that we are on all points held to them, as in the case of adultery. The law is established in the Bay to be death, but methinks . . . [the Jews] deserved a greater punishment for it than we do because polygamy and bills of divorce . . . practiced upon light occasions were allowed among them¹¹⁶

As this quotation suggests, the controversy surrounding the direct application of Old Testament proscriptions centered on the relevance of religious precepts to civil government.

In England, the most powerful detractor of Mosaic law was not a prescient social contractarian, but the king himself. James I argued that the law of the Israelites was "only fit for that country, that people, and time," and civil authorities could tailor it to meet local needs.¹¹⁷ The coming of Christ abrogated Old Testament punishments, as evidenced by Christ's mercy toward the adulteress. The death penalty was thus a matter of discretion, to be used only in extreme circumstances.¹¹⁸

Rhode Island founder Roger Williams echoed the King's reasoning when he lamented the decision to hang Thomas Newton, a well-liked Connecticut tradesman, for adultery:

I grieve that my dear countrymen of Connecticut are so troubled with that filthy devil of whorish practices and more yet that they

NEW ENGLAND 234-35 (John Russell Bartlett ed., Providence, A. Crawford Green & Brother 1856) (publishing a letter written by William Arnold of Pautuxit, opposing Rhode Island's application for a charter). Rhode Island declared adultery to be "a vile affection, whereby men do turn aside from the natural use of their own wives" but only prescribed such penalties as "the wisdom of the state of England have . . . touching these transgressions." *Id.* at 173 (recording the adultery law promulgated at the General Court in May 1647). In 1647, adultery had not yet become a capital crime in England.

116. THE LETTERS OF THOMAS GORGES, DEPUTY GOVERNOR OF THE PROVINCE OF MAINE, 1640-1643, at 36 (Robert E. Moody ed., 1978) [hereinafter LETTERS OF THOMAS GORGES].

117. Thomas, *supra* note 82, at 269.

118. *See id.* at 269-70. Despite James's attitude toward Mosaic Law, the first criminal code promulgated in Virginia, with the King's blessing, theoretically made adultery a capital offense. *See VIRGINIA LAWS, supra* note 110, at 5. There is no evidence that anyone ever died for adultery in Virginia, although several men were executed for rape and sodomy. *See SCOTT, supra* note 38, at 277. My own reading of the Virginia General Court records corroborates Scott's findings about the lack of executions for adultery. In 1625, however, Richard Williams was executed for committing sodomy, and Peter Marten was whipped, set in the pillory, and had an ear cut off for suggesting that Williams, "an excellent mariner and skillful artist," had been wrongfully put to death. VIRGINIA GENERAL COURT, *supra* note 93, at 93. The case of Symon Hayle, who sexually assaulted four "maiden children" in 1627, also culminated in the death penalty. *Id.* at 149. These executions demonstrate that, although the southern courts may have had a more relaxed attitude toward adultery, they followed New England in severely punishing rape and homosexual acts.

are persuaded of such courses to cast him out. Adultery is a fire which will root out, but the . . . [gentile nations] of the world will never be proved capable of such laws and punishments as that holy nation . . . [Israel], bred and fed with miraculous dispensations, . . . [was] fit for.¹¹⁹

The Newton case captures the difficulties that the early settlers faced in adapting scriptural precepts to their need for an enforceable criminal code. Aided by several members of the community, Newton broke out of jail and fled—first to Rhode Island, then to the Dutch colonies, and finally to Long Island.¹²⁰ While Williams's sympathy for Newton derived from theology, the townspeople who helped him evade capture were arguably motivated by less ethereal impulses.

B. Limits to the Local Community's Willingness to Police Itself

In her path-breaking social history of criminal procedure in the English shire of Sussex between 1592 and 1640, Cynthia Herrup states that "[s]ocieties make laws, but individuals recreate those laws by applying or ignoring them."¹²¹ Herrup observes two layers of law enforcement in Sussex: the formal law derived from the Old Testament and the actual practices of the magistrates, constables, and jurors who had to reach a consensus on the guilt of local people.¹²² In particular, she notes a profound reluctance to send defendants to the gallows unless they exhibited a tendency toward evil, as opposed to mere moral weakness.¹²³ Evidence of mens rea came from much broader sources than the law permits in modern times. A defendant's gender, age, social status, relations with her neighbors, and past criminal activity could all be taken into consideration.¹²⁴ Distinctions between forgivable sins and outright evil, between insiders and outsiders, demonstrated contemporary awareness that "the criminal law as written worked as an ideal" to be selectively enforced.¹²⁵ Marginal figures like "strangers" or spinsters were more likely to be convicted.¹²⁶

Herrup's findings resonate deeply with the experience of moral enforcement in colonial New England. Two vital observations about the northern colonies erode the polarity between the Filmerian and

119. 1 CORRESPONDENCE OF ROGER WILLIAMS 308-09 (Glenn W. LaFantasie ed., 1988).

120. See William K. Holdsworth, *Adultery or Witchcraft?: A New Note on an Old Case in Connecticut*, 48 NEW ENG. Q. 394, 402 (1975).

121. CYNTHIA B. HERRUP, *THE COMMON PEACE: PARTICIPATION AND THE CRIMINAL LAW IN SEVENTEENTH-CENTURY ENGLAND* 25 (1987).

122. See *id.* at 193-94.

123. See *id.* at 191.

124. See *id.* at 115, 118, 129.

125. *Id.* at 193.

126. See *id.* at 175-78.

Lockean systems that *Founding Mothers and Fathers* seeks to document. First, it was the gap between the ideal of formal, companionate marriages and the more varied reality that made moral reformation seem necessary. New England families measured up to the standard only slightly better than did their southern neighbors. Second, the reluctance of New Englanders to act as informers,¹²⁷ to return convictions for capital offenses (especially when faced with tough evidentiary problems),¹²⁸ or to impose the death penalty suggests that their attitudes toward sexual misconduct did not differ vastly from those in the Chesapeake.

Norton correctly suggests that New England's magistrates took a hard line toward extramarital sex,¹²⁹ just as the Puritan leaders of the Commonwealth did after the execution of Charles I. But their efforts to deter adultery by ratcheting up the punishment drastically underestimated the extent to which law enforcement is defined from below—not necessarily by the poor, but by the local community as opposed to formal political leaders. Norton recognizes the importance of the informal public in the colonies. But, because she never looks to England, she fails to see that colonial resistance to sexual regulation arose from the tradition of discretionary justice that existed at least fifty years earlier in Sussex and other English counties.¹³⁰ Moral laxity was not a demographic accident unique to the Chesapeake.

1. *Disordered Families in New England*

Norton documents ways in which dysfunctional northern families seemed to threaten the political and religious order, but she neglects a vital aspect of the disjunction between ideal and reality: the fact that the formal law was too abstract and austere to resolve the ambiguous cases that New Englanders confronted. In a society in which model families were rarities, the recognition that humans were all sinners affected the community's involvement at every stage of the criminal process. In New England, as in the south, the problem of absentee spouses and mismatched couples widened the gap between the way the settlers lived and the ideal urged upon them by the magistracy.

Norton errs in suggesting that *ménages à trois* arose from "the sexual dynamics of life specific to the Chesapeake region."¹³¹ Although men outnumbered women four-to-one in the southern

127. See *infra* notes 170-173 and accompanying text.

128. See *infra* notes 146-157 and accompanying text.

129. See, e.g., NORTON, *supra* note 2, at 323-24.

130. See *supra* 121-126 and accompanying text.

131. NORTON, *supra* note 2, at 344.

colonies, compared to a three-to-one ratio in New England during the first generation,¹³² *ménages à trois* existed in the north as late as the 1670s and 1680s. For instance, in Maine, the grounds for suspecting Weymouth Bicketon's wife of adultery with a lodger arose from "their familiarity in riding up and down together and of having . . . [their beds] together in the same room."¹³³ The Court threatened Bicketon with a ten-pound fine if he did not order the lodger to leave the house "within a fortnight's time."¹³⁴ Norton contends that, with its excess of male fishermen, Maine "resembled the Chesapeake rather than its New England neighbors" and thus was "at least potentially a Lockean society."¹³⁵

Ménages à trois had counterparts in other northern colonies as well. For example, the records of Essex County, Massachusetts document the relationship between eighty-year-old Alexander Gilligan, his wife Elizabeth, and her quick-tempered lover, John Honiwell.¹³⁶ In 1685, Elizabeth and Honiwell took a long journey to Maine, apparently with her husband's consent, and cohabited for several weeks after they reached their destination. They also seem to have shared a bed at home in Marblehead, Massachusetts, where a neighbor testified that "she had often seen Honiwell lying in Gilligan's bed when the latter was lying at the bed's feet."¹³⁷ The uneasy time-share that the men arranged with regard to Elizabeth corroborates Lyle Koehler's observation that "[t]he heavy social pressure on Puritan women to marry at an early age . . . often led to bad marital choices."¹³⁸ At his advanced age, Alexander Gilligan may have recognized his sexual shortcomings.

More often than in the Chesapeake, New England authorities took steps to prohibit people from living in households like the Gilligans'. Yet the failure of these measures reveals basic similarities between ordinary people's role in law enforcement in the north and the south. In 1647, the Massachusetts General Court noted with alarm how

132. See JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 10 (1988).

133. 2 MAINE PROVINCE AND COURT RECORDS 290 (Charles Thorton Libby ed., 1931) [hereinafter MAINE RECORDS].

134. *Id.*

135. NORTON, *supra* note 2, at 16-17.

136. Honiwell—who faced charges of swearing, striking the constable, and "pursuing him with a great pole," in addition to his adultery conviction—confessed to having a wife and six children in England. 9 RECORDS AND FILES OF THE QUARTERLY COURTS OF ESSEX COUNTY MASSACHUSETTS 240, 537-38 (Mary G. Thresher ed., 1975) [hereinafter ESSEX RECORDS]. The court ordered Elizabeth "to be severely whipped twenty stripes and to return to her husband at Marblehead." *Id.* at 535. John was secured "by chains that he . . . [might] not escape" following his arrest, but his punishment remains unclear. *Id.* at 529.

137. *Id.* at 536-38.

138. KOEHLER, *supra* note 36, at 146.

many married people resided apart from their mates "by means whereof they live under great temptations, and some of them commit lewdness and filthiness amongst us, and others make love to women and attempt marriage and have attained it" ¹³⁹ The court ordered the couples to "repair to their relations by the first opportunity of shipping," unless they were "here in a transient way only for traffic or merchandise" or were "come over to make way for their families." ¹⁴⁰ However, the 1647 order did not solve the problem in Massachusetts. ¹⁴¹

Absentee spouses led to informal sexual relations and bastard children in the other northern colonies as well. For example, when Mary Attkinson of Plymouth became pregnant after her spouse abandoned her, ¹⁴² the ambiguity of her marital status justified reducing her count of conviction. The grand jury indicted Attkinson and her paramour, John Bucke, and the petit jury convicted them of adultery. But the court reduced the charge to fornication because it was "uncertain whether the husband . . . is or was living at the time." ¹⁴³ The court subsequently granted Attkinson a divorce on the grounds that her husband had "absented himself from her the full term of seven years and more, neither coming at her nor providing for her" ¹⁴⁴ Flexibility and mercy must have been the only palatable solution, considering the abandoned wife's predicament and her relatively high status in the community. ¹⁴⁵

2. *Two Eyewitnesses or the Equivalent Thereunto*

Evidentiary issues troubled colonial juries and meant that, in practice, defendants usually were convicted of lesser offenses than adultery. In New England, the slim chance that the requisite two eyewitnesses would observe a sex act made the capital offense almost impossible to prove ¹⁴⁶—a factor that did more to equalize northern and southern laws than Norton allows. The English faced even greater evidentiary hurdles because husbands, wives, and lovers could not

139. 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 211-12 (Nathaniel B. Shurtleff ed., Boston, William White 1853) [hereinafter MASSACHUSETTS RECORDS].

140. *Id.*

141. *See, e.g., infra* notes 149-152, 155-157, 165-178 and accompanying text.

142. *See* 5 RECORDS OF THE COLONY OF NEW PLYMOUTH IN NEW ENGLAND 82 (Nathaniel B. Shurtleff ed., Boston, William White 1855) [hereinafter PLYMOUTH RECORDS].

143. *Id.*

144. *Id.* at 159.

145. She came from a family wealthy enough to pay ten pounds sterling to keep her from the whipping post. *See infra* notes 187-188 and accompanying text.

146. *See* THE JOURNAL OF JOHN WINTHROP, 1630-1649, at 610 (Richard S. Dunn et al. eds., 1996) [hereinafter JOURNAL OF JOHN WINTHROP] (discussing evidentiary requirements for an adultery conviction in Massachusetts in the 1640s).

testify against each other. Indeed, Thomas indicates that evidentiary requirements alone may have dictated the failure of the 1650 Act, and a seventeenth-century writer believed that the English law was "so penned that few or none will ever be convicted upon it."¹⁴⁷ Thomas's theory merits consideration in the American context, for it implies that the reluctance of New Englanders to convict their neighbors was reinforced, rather than opposed, by the internal limits of the law.

As Norton indicates, the courts in New England found most adultery defendants guilty of lesser offenses like "shameful and unchast[e] behavior," instead of the capital crime.¹⁴⁸ One notable case that Norton does not mention highlights communal division over a jury's refusal to deliver a capital conviction. When Ensign Hudson returned to England to fight for Parliament, a married friend whose spouse was also abroad "grew over familiar" with Hudson's wife.¹⁴⁹ After being examined by the magistrate, the suspected adulterer confessed that he had lain in bed with the young woman, "but both denied any carnal knowledge."¹⁵⁰ The jury found the couple guilty of "adulterous behavior" rather than returning a capital conviction.¹⁵¹ John Winthrop wrote of the controversy that ensued:

[The jury's refusal to convict for adultery] was much against the minds of many, both of the magistrates and elders, who judged them worthy of death; but the jury attending what was spoken by others of the magistrates, 1. that seeing the main evidence against them was their own confession of being in bed together, their whole confession must be taken, and not a part of it; 2. the law requires two witnesses, but here was no witness at all, for although circumstances may amount to a testimony against the person, where the fact [of a sexual act] is evident, yet it is otherwise where no fact is apparent; 3. all that the evidence could evince was but suspicion of adultery, but neither God's law nor ours, doth make suspicion of adultery (though never so strong) to be death.¹⁵²

147. Thomas, *supra* note 82, at 279 (quoting MERCURIUS PRAGMATICUS, May 14-21, 1650).

148. NORTON, *supra* note 2, at 343. The records abound with cases that corroborate Norton's point. For example, in 1676, Sarah Bucknam of Boston and Peter Cole of Charlestown were indicted for adultery but were found "not guilty according to the indictment but guilty of unlawful and uncivil accompanying . . . being in bed together." 1 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF THE MASSACHUSETTS BAY 73-74 (John Noble ed., 1901) [hereinafter MASSACHUSETTS COURT OF ASSISTANTS].

149. JOURNAL OF JOHN WINTHROP, *supra* note 146, at 609.

150. *Id.*

151. *Id.*

152. *Id.* at 609-10.

Norton finds such avoidance of capital sentences disingenuous, noting that some adulterous couples were acquitted, despite such "seemingly irrefutable evidence" as "the birth of a child the woman's husband could not have fathered."¹⁵³ However, while some courts may have used evidentiary rules as a smoke screen, many cases reveal genuine confusion about how much evidence was needed for an adultery conviction. For example, the following special verdict was delivered in a Massachusetts case: "If by law Bethjah Bullojne lying in bed with Peter Turpin be adultery, we find her guilty. If by law Bethjah Bullojne lying in bed with Peter Turpin be not adultery, we find her not guilty."¹⁵⁴

The existence of an illegitimate child could be introduced as evidence against adultery suspects, but paternity was hard to prove, and the courts would not always accept a bastard in place of eyewitness testimony. In 1656, the Massachusetts General Court wrestled with a thorny problem certified to it by the Court of Assistants.¹⁵⁵ A married woman, residing with her husband in the house of another man, entered into an affair with the landlord, causing her angry husband to depart. Shortly after the husband returned, the woman delivered "a strong, lively, perfect child . . . four weeks and five days short of forty weeks."¹⁵⁶ The wife's lover, who was accused of adultery, posted bail and ran away, leaving the prosecution with nothing but the bastard child as evidence of adultery. The General Court answered the question certified to it—"whether here be two witnesses, or that which is equivalent to it"—in the negative.¹⁵⁷

Norton provides ample evidence of the courts' reluctance to order the death penalty, even for repeat offenders.¹⁵⁸ But her failure to examine the reasons for imposing nearly insuperable evidentiary requirements leaves the lawmakers' motivation a mystery. If adultery posed such a dire threat to the social hierarchy, why did the defenders and beneficiaries of that hierarchy insure that their legal code remained primarily symbolic? Herrup's insight about the religious distinction between sin, which is universal and forgivable, and evil,

153. NORTON, *supra* note 2, at 343.

154. 3 MASSACHUSETTS COURT OF ASSISTANTS, *supra* note 148, at 191-92.

155. See 4 MASSACHUSETTS RECORDS, *supra* note 139, at 213.

156. *Id.*

157. *Id.* In some cases, the courts got around evidentiary constraints by substituting the defendant's subsequent bad actions for an eyewitness. For example, Thomas Newton's attempts to run away counted as an "eyewitness," despite the fact that no one had actually seen him and his lover having sex. See Holdsworth, *supra* note 120, at 399 n.18.

158. See NORTON, *supra* note 2, at 343.

which is not, goes further toward explaining the restraints built into the adultery laws than the rigid Filmerian model does.¹⁵⁹

3. *Private Matters*

Evidentiary problems could be both a valid legal obstacle and a convenient cover for reluctance to prosecute "private" matters. Throughout her book, Norton skillfully navigates the varied meanings of "private" in the seventeenth century. She shows that the word meant "secret," as well as "personal" or "not public," and she describes dissension over the types of activities that could be considered "private."¹⁶⁰ In her excellent chapter on the Antinomian Controversy, for example, she suggests that the regularity of Anne Hutchinson's religious meetings and the large number of women in attendance made the meetings seem threateningly "public" to male authorities in Massachusetts Bay.¹⁶¹ Hutchinson presented a competing view of the gatherings as "private" occurrences in her own home.¹⁶² Moreover, Hutchinson argued that her statements to certain clergymen should be kept confidential, for they had been made during a "private conference."¹⁶³

Did similar disagreements exist with regard to the privacy of sexual matters? Although Norton argues that New England courts scrutinized sexuality more carefully than did their southern counterparts, she underestimates the efforts of some northerners to shield the bedroom from the public eye. Furthermore, her description of such events in the Chesapeake as the invasive body search of Thomasine Hall undermines her contention that southerners cared less about sexual policing.¹⁶⁴

The Greenland-Rolfe case in Massachusetts, which Norton fails to discuss, illuminates the disagreement in the northern colonies over the duty to report suspected adultery. In 1663, the hard-drinking doctor Henry Greenland, whose wife was still in England, tried to start a sexual relationship with Mary Rolfe in her husband's absence. Greenland tried "with many arguments [to entice] her to the act of uncleanness," grabbed her by the apron, and, after she let him into her home one night, climbed naked into her bed while she stood

159. See *supra* note 123 and accompanying text.

160. See, e.g., NORTON, *supra* note 2, at 20-24 (offering some preliminary definitions of "public" and "private"); *id.* at 191 (discussing the lack of privacy available to Thomasine Hall in the proceedings to determine her gender); *id.* at 359-99 (presenting a detailed analysis of tension over the meanings of "public" and "private" in the trial of Anne Hutchinson).

161. See *id.* at 380-81.

162. See *id.* at 379.

163. *Id.* at 383.

164. See *id.* at 404.

tending the fire.¹⁶⁵ Mary protested that these incidents were nonconsensual. In her view, John Emery, the neighbor with whom Greenland lodged, had shirked his duty to act as her "father" until her husband returned.¹⁶⁶

The conflicting testimony of the community did not result in a clear verdict for Mary. Although the jury found Greenland guilty of soliciting Mary to adultery and sentenced him to be whipped or to pay a fine of thirty pounds, Mary was presented for conduct indicating her complicity.¹⁶⁷ The court found that she had told "a scandalous lie that John Emery . . . brought the doctor to her house unknown to her, when she herself came and invited them."¹⁶⁸ Moreover, several people deposed that Mary continued to have supper with the Emerys after she accused Greenland, and that "she was so loving that she and Mr. Greenland ate out of one dish and with one spoon."¹⁶⁹

The Rolfe case undermines the idea that ordinary New Englanders were always zealous watchdogs of their neighbors' foibles. As a grand juror, John Emery had a duty to ferret out wrongdoing, as well as to indict suspects.¹⁷⁰ Yet, when Mary's mother asked Emery's advice about the troubles with Doctor Greenland, "he advised [her] to keep it close and warranted there should be no more harm done" because he planned to "lock . . . [Greenland] up at night and lock the liquors from him"¹⁷¹ The worried woman asked him "how he could dispense with his oath being a grandjuryman . . . [and he] answered, 'That I can do very well. I see no harm in none of them.'"¹⁷² The willingness of a grand juror to turn a blind eye to sexual misconduct corroborates the concerns of the prominent Puritan Cotton Mather, who lamented:

What can the *magistrates* do . . . if there be no informers? . . . When our grand juries are inquiring after delinquents, it would not be amiss for those good men to make this inquiry: *whether they do not sometimes, through inadvertency, let*

165. 3 ESSEX RECORDS, *supra* note 136, at 52; *see also id.* at 53-54.

166. *Id.* at 48.

167. *See id.* at 47, 65.

168. *Id.* at 65.

169. *Id.* at 50. Mary had also charged another man, Richard Cording, with trying to seduce her and was later observed "riding with . . . [him] at unseasonable times in the night." *Id.* at 66. Her habit of entertaining noisy guests in her home after dark compounded her credibility problems. Three local women testified that, while drinking liquor, Mary declared that she wanted to save part of the bottle "until Mr. Greenland came home for . . . he seemed to be a pretty man and she desired to be acquainted with him." *Id.* at 51.

170. *See FLAHERTY, supra* note 35, at 201. Flaherty notes, however, that knowledge based on intimate relationships could be privileged and that "jurors were not bound to reveal [s]ecrets." *Id.* at 202.

171. 3 ESSEX RECORDS, *supra* note 136, at 52.

172. *Id.* at 52-53.

some notorious violations of the laws pass without any presentment. Good Sirs, examine yourselves.¹⁷³

Although at least one of Mary's neighbors believed that "[t]hese things should not be kept private" for fear of provoking God,¹⁷⁴ others shared the grand juror's reluctance to get involved. Henri Lesenby heard a shriek as he passed Mary's house late at night and found Greenland in her bedroom when he investigated. Yet, he decided that "it was not best to make an uproar but to let him go away in a private manner."¹⁷⁵ David Flaherty notes that both Puritan moralists and popular adages censured gossips for poking into other people's affairs.¹⁷⁶ At the level of popular wisdom, Lesenby's failure to accost the influential doctor followed the proverb: "He that prieth into every cloud may be struck by a thunderbolt."¹⁷⁷ The case only reached the courts because Mary's mother "[r]evealed all to a wise man in the town, desiring his advice."¹⁷⁸ It is not clear whether Mary's mother intended for the affair to reach the courts, or whether the wise man (like the clergy in the Antinomian Controversy) breached a private confidence.

Regardless of who initiated the court's involvement, the Greenland-Rolfe case shows that New Englanders disagreed over the boundaries between public disorder and private sexual tension. One villager's fear that God would punish the community for the sins of Doctor Greenland resonates with the Puritan belief in Providential acts. However, the desire to keep the incident private represents an equally strong current in the court records. The grand juror's laxity in carrying out his duty as an informant (as well as the conflicting privilege that theoretically attached to private confessions) indicates that "[a]ny automatic association of Puritanism with the denial of privacy is a reflection of an outdated and monolithic interpretation."¹⁷⁹

173. COTTON MATHER, *The Reprover Doing His Duty*, in A FAITHFUL MONITOR 50-51 (Boston, Timothy Green 1704).

174. 3 ESSEX RECORDS, *supra* note 136, at 52.

175. *Id.*

176. See FLAHERTY, *supra* note 35, at 96.

177. *Id.* at 96 (quoting JOHN CLARKE, PAROEMIOLGIA ANGLO-LATINA IN USUM SCHOLARUM CONCINNATA; OR, PROVERBS ENGLISH AND LATINE 31 (London, Felix Kyngston 1639)).

178. 3 ESSEX RECORDS, *supra* note 136, at 53. Mary may have been deterred from complaining herself by the fear that she would be prosecuted for the offense of "adulterous carriages," or perhaps even adultery, if she could not prove that she had resisted Greenland's overtures. Indeed, one neighbor "asked why goody Rolfe did not cry out" and was only "persuaded [that] goody Rolfe . . . [was] an honest woman" after being assured that she had uttered a scream. *Id.* at 54. Cornelia Dayton believes that the courts were less likely to question a female rape victim's credibility in the 17th century than in the 18th century. See DAYTON, *supra* note 36, at 231-84. The Rolfe case, however, provides some evidence to the contrary.

179. FLAHERTY, *supra* note 35, at 14.

C. Insiders and Outsiders: The Selective Enforcement of the Adultery Laws

The ambiguous relationship between Mary Rolfe and Doctor Greenland provided an excuse for not bringing the full force of the law against “a stranger and a great man,” of whom Mary supposedly said:

He is in credit in the town; some take him to be godly and say he hath grace in his face It is said he is in credit with those that are in authority in the country: It is said the governor sent him a letter counting it a mercy such an instrument was in the country, and what shall a poor young woman as I do in such a case, my husband being not at home?¹⁸⁰

Mary’s friend Betty Webster thought that if she and Mary had let the drunken doctor beat down the door, he would have been hanged.¹⁸¹ But the persistent failure of the northern courts to impose severe sentences on high-status sexual offenders suggests that she was wrong.

In England, less than a half dozen people died for the crime of adultery during the Interregnum; juries simply refused to convict the accused unless the alleged sex act involved an unpopular individual like a Catholic priest.¹⁸² In the northern colonies, there were only three documented executions.¹⁸³ The few who suffered the death penalty for sexual crimes (including sodomy, rape, and bestiality, as well as adultery) tended to be marginal figures—religious malcontents, homosexuals, Native Americans, and blacks. Both Norton and Cornelia Dayton emphasize that there was a single standard of punishment for men and women in New England during the seventeenth century.¹⁸⁴ But while northern men were relieved of

180. 3 ESSEX RECORDS, *supra* note 136, at 52.

181. *See id.* at 53.

182. *See* F.A. Inderwick, *THE INTERREGNUM (A.D. 1648-1660): STUDIES OF THE COMMONWEALTH, LEGISLATIVE, SOCIAL, AND LEGAL* 33-39 (London, Sampson Low, Marston, Searle & Rivington 1891) (confirming at least three English adultery executions pursuant to the Act of 1650 at Taunton, Chester, and Exeter, but noting that juries rarely convicted defendants of adultery, even where the evidence was conclusive). Inderwick believes that a pregnant woman sentenced to hang in Middlesex in 1652 was eventually reprieved. *See id.* at 37-38. Other sources indicate that Inderwick overlooked a few convictions. *See, e.g.,* Thomas, *supra* note 82, at 258 n.4 (noting an additional manuscript source that discusses an Essex woman condemned to death for adultery but later shown mercy).

183. *See* JOURNAL OF JOHN WINTHROP, *supra* note 146, at 500-02 (discussing the execution of James Britton and Mary Latham for adultery); *see also infra* notes 220-232 and accompanying text. For a reference to the execution of Thomas Newton’s lover, see 1 ANCIENT TOWN RECORDS: NEW HAVEN 30-32 (Franklin A. Dexter ed., 1917) (presumably referring to Elizabeth Johnson, who was executed in nearby Connecticut colony); *see also infra* notes 217-218 and accompanying text.

184. *See* DAYTON, *supra* note 36, at 164-72; NORTON, *supra* note 2, at 74-75. Both authors recognize that the legal definition of adultery itself embodied a double standard.

responsibility for sexual transgressions less often than were those in the south, the outcome of adultery cases in both regions depended on criteria apart from gender that historians have not analyzed in adequate detail.

This section discusses an area left vague in Norton's book: the role of status and reputation in determining the vulnerability of suspects to prosecution for sexual offenses. I conclude that factors such as wealth, race, economic dependence, and religious or political dissidence affected every stage of the criminal process from arrest to sentencing.

1. *Wealth and Influence*

In New England, money and influence could almost always buy leniency. The lecherous Maine preacher George Burdett was found guilty on three counts: "one for . . . a common breach [of] the peace, another for adultery, a [third] for . . . often soliciting [three] sexy women to his incontinent practice and persuading [them] by scripture to satisfy his insatiable lust."¹⁸⁵ Although Burdett paid a fine for each count, the deputy governor felt that this penalty was "many degrees beneath the quality of his offenses . . . but he is strongly upheld by some and maintained by others to the grief of good people."¹⁸⁶

Money also allowed women to escape corporal punishment. The contrast between the fate of Mary Attkinson of Plymouth and that of Ensign Hudson's wife in Massachusetts Bay is particularly instructive. The existence of a bastard child constituted strong evidence that Mary had consummated her affair with John Bucke; however, her father paid ten pounds sterling to spare her from being publicly stripped to the waist and whipped.¹⁸⁷ Even if motivated by a desire to preserve the family reputation, the willingness of Mary's father to come to her aid reveals deep flaws in Norton's image of "the Filmerian father who coldheartedly arranged for the death or disinheritance of disobedient offspring."¹⁸⁸

In contrast to Mary Attkinson, the Hudson woman escaped an adultery conviction due to the lack of eyewitnesses but nevertheless came under the lash. As Winthrop recalled in his *Journal*:

The husband . . . was so confident of her innocency in point of adultery, as he would have paid the 20 pounds rather than she should have been whipped; but their estate being but mean, she

185. LETTERS OF THOMAS GORGES, *supra* note 116, at 36.

186. *Id.*

187. See 5 PLYMOUTH RECORDS, *supra* note 142, at 82.

188. NORTON, *supra* note 2, at 404.

chose rather to submit to the rest of her punishment, than that her husband should suffer so much for her folly.¹⁸⁹

Winthrop gave the Hudson story the moralistic closure of a Sunday school lesson; taken together, however, the two cases reveal a basic class distinction built into the administration of punishment. Although juries might treat defendants equally with regard to their convictions (Attkinson and Hudson were both found guilty of lesser crimes than adultery), status and wealth made a big difference at the sentencing stage. Poorer people could not atone quietly for their extramarital exploits because their inability to pay steep fines ensured that their punishment would draw a curious crowd.

2. Race

Race was another factor that affected the calculus of guilt and punishment. Indeed, adultery first appeared as a capital offense in Massachusetts Bay in 1631 after John Dawe was convicted of "enticing an Indian woman to lie with him."¹⁹⁰ The importance of race in the enforcement of sexual morality remains unclear, however, and Norton's silence on the subject does not further our understanding.¹⁹¹

In their study of miscegenation laws in antebellum Virginia, Leon Higginbotham and Barbara Kopytoff conclude that "[i]n Virginia before the 1660s, there was no unambiguous legal statement against interracial sex per se, as distinguished from . . . [non-marital] sex in general."¹⁹² At first glance, nonwhites (usually Native Americans) in New England also appear to have received equal treatment. For example, in 1674, a jury of "six English and six Indians" found Tom Indian guilty of "a rape on the body of Sarah the wife of John Jempson an Indian" and sentenced him to "hang til he be dead."¹⁹³ The fact that a jury partially composed of nonwhites tried Tom Indian reveals a basic concern for procedural due process.

However, whites also tended to ascribe weaker morals to Native Americans—a form of prejudice that cut two ways. On the one hand, juries were less likely to attribute a criminal mental state to nonwhites. For example, a Native American named Tinsin seems to have received a milder punishment than the white woman with whom

189. JOURNAL OF JOHN WINTHROP, *supra* note 146, at 610.

190. 1 MASSACHUSETTS RECORDS, *supra* note 139, at 91.

191. See NORTON, *supra* note 2, at 15 (stating that, due to the relative dearth of cases involving nonwhites, "this study can say less than I would have preferred about issues of race and ethnicity during the early years of colonization").

192. A. Leon Higginbotham & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1988 (1989).

193. 1 MASSACHUSETTS COURT OF ASSISTANTS, *supra* note 148, at 122.

he committed adultery because the woman allured and enticed him.¹⁹⁴ Similarly, in a Plymouth rape case, the defendant got a whipping rather than a death sentence, "considering he was but an Indian, and therefore in an incapacity to know the horribleness of . . . [his] act."¹⁹⁵ Whites considered nonwhites to be ignorant heathens, not hardened evildoers, and the punishments prescribed for nonwhite defendants were correspondingly less severe.

On the other hand, the perceived cultural "otherness" of Native Americans and blacks may have made them more susceptible to prosecution for rape (a crime that contemporaries regarded as more serious than adultery).¹⁹⁶ Barbara Lindemann argues that the rape cases that attracted the most attention involved male defendants of a different race or a lower social status than their victims. Indeed, where there was ambiguity, juries often refused to accept that a white woman would consent to sex with a nonwhite male.¹⁹⁷ Lindemann cites the eighteenth-century case of a Native American laborer accused of attempting to rape his white neighbor. The alleged victim offered wildly inconsistent accounts of the incident, blaming first the devil and then a thief for the assault before settling on the Native American, Simon Tripp. Four witnesses testified that Tripp was "as good credit as she that talk of him," but the jury nevertheless declined to acquit him.¹⁹⁸ The line between adultery and rape was thus redrawn in favor of the higher-status white woman.

The Tripp case may have had seventeenth-century counterparts in both New England and the Chesapeake. In Virginia, surviving depositions tell a conflicting story about the relationship between Katherine Watkins, a married white woman, and a mulatto slave named John Long in 1681. After she discovered her pregnancy, Katherine decided to accuse Long of binding her mouth with a handkerchief and forcibly raping her. One deponent corroborated Katherine's version of the incident, testifying that her mouth was bloodied and swollen, but several other witnesses asserted that Katherine had "put her hand in . . . [Long's] codpiece," kissed him, and led him into a secluded room.¹⁹⁹ The disposition of the case has

194. See 1 PLYMOUTH RECORDS, *supra* note 142, at 132.

195. 6 *id.* at 98.

196. See, e.g., LETTERS OF THOMAS GORGES, *supra* note 116, at 36-37. Although Gorges found the death penalty too draconian a punishment for adultery, he expressed surprise that a nineteen-year-old who raped a child was not put to death. *Id.* at 37.

197. See Barbara S. Lindemann, "To Ravish and Carnally Know": Rape in Eighteenth Century Massachusetts, 10 SIGNS 63, 79-80 (1984); see also BROWN, *supra* note 37, at 209-10 (suggesting that "presumptions of white female resistance" increased the chances of black men being convicted in interracial rape cases).

198. Lindemann, *supra* note 197, at 80.

199. Higginbotham & Kopytoff, *supra* note 192, at 2028 n.211.

not survived, but its ambiguity remains troubling because in six Virginia rape cases prior to 1774 involving black defendants, juries found three blacks guilty of rape and two guilty of attempted rape or assault.²⁰⁰ In contrast, three out of five white defendants were found innocent or were not indicted.²⁰¹ Similarly high conviction rates for nonwhites appear in the records of the Massachusetts Court of Assistants between 1630 and 1692. In the cases I located, not a single nonwhite was ever acquitted. Of the five rapists sentenced to death in Massachusetts Bay, though, only two were clearly nonwhites.²⁰² Furthermore, all of the rape cases that resulted in death or banishment for nonwhites involved an aggravating factor that sometimes even led to the death penalty for white men: The victim was either a child or a married woman.²⁰³

The evidence of racial prejudice is thus too flimsy to support the argument that seventeenth-century Americans singled out Native Americans and blacks for hanging. It does suggest that race figured in the jury's willingness to convict. And, because nonwhites could seldom pay fines to avoid whipping, they often fell into the category of defendants receiving harsher punishments.

3. *Bastard-bearers and Other Troublemakers*

A less quantifiable form of status than wealth or race—the good will of one's neighbors—spared almost all New England adultery defendants from the death penalty. Not surprisingly, loyalty to well-reputed local people had long influenced the outcome of church and secular court cases in England. Under the ecclesiastical system, a defendant who denied her charge had to undergo compurgation, which entailed appearing with two to six neighbors who would testify to her innocence.²⁰⁴

200. See *id.* at 2009-10. The sixth black defendant was never apprehended. See also BROWN, *supra* note 37, at 209 (citing similar statistics for Virginia in the late 17th century). Brown notes that, of 18 interracial rape cases in Virginia courts between 1670 and 1767, only 2 were dismissed, and that 12 of 19 black defendants were executed for rape. See *id.*

201. See Higginbotham & Kopytoff, *supra* note 192, at 2009-10.

202. See 1 MASSACHUSETTS COURT OF ASSISTANTS, *supra* note 148, at 22 (recording that a Native American was sentenced to death for raping a married Native American woman); *id.* at 74 (documenting a capital sentence for a black slave for raping his master's daughter, a three-year-old child). I am assuming, perhaps erroneously, that a defendant was white if his race does not appear in the record. Nonwhites were almost invariably identified as being "Indian," "African," or "Negro."

203. In addition to the two cases cited, *supra* note 202, see also 3 MASSACHUSETTS COURT OF ASSISTANTS, *supra* note 148, at 216 (noting that for raping a nine-year-old Native American girl, a Native American defendant was sold into slavery in the Caribbean and threatened with death if he returned); 3 *id.* at 199-200 (noting that a white defendant was sentenced to death for raping an eight-year-old girl); and 1 *id.* at 50 (documenting the hanging of a presumably white defendant for raping a married woman).

204. See INGRAM, *supra* note 81, at 51-52, 331-34.

In 1611, two churchwardens from Banbury Peculiar in Oxfordshire asked the bishop to "deal well with Zacharias Richardson," who had been presented for fornication with Anne Harise. Richardson was "well thought of with us," whereas the woman (who had left the community) had been "ever reputed a bad member."²⁰⁵ More than a century later, twenty-eight people from Thame made a similar plea, claiming that Mary Towsen "in hopes . . . to gain [Thomas West] for her husband" falsely accused him of impregnating her.²⁰⁶ Mary "had been a loose and scandalous person before and since she came to live at Thame."²⁰⁷ In contrast, West "hath lived in service in one place for twenty years and upwards" and was "never suspected of any unchastity or dishonesty."²⁰⁸ Those New Englanders executed as punishment for their sexual behavior lacked the good esteem that Zacharias Richardson and Thomas West enjoyed.

Married women who gave birth to bastards caused strife in England and America not because they subverted the so-called Filmerian hierarchy, but because either the wronged husband or the locality had to bear the financial burden if the biological father fled or could not be identified.²⁰⁹ According to Norton, the high percentage of single servant women in the Chesapeake led to a much higher prosecution rate for bastardy than in New England—half of all sex-related prosecutions in the south, compared with one-tenth of northern prosecutions.²¹⁰ However, New England courts often collapsed bastardy into fornication or adultery charges with the child serving as evidence of an illicit sex act.²¹¹ It would thus be a mistake to suppose that New Englanders did not worry as much about the economic ramifications of bastard births.

Several Massachusetts cases shed light on the role of bastardy in the administration of stiffer penalties. In 1678, a jury convicted Ellinor May of "whoredom and of having a bastard child in her husband's absence."²¹² She was sentenced "to be tied to a cart's tail and

205. OXFORDSHIRE RECORDS, *supra* note 83, at 276.

206. *Id.* at 191.

207. *Id.*

208. *Id.* at 190-91.

209. The Elizabethan poor law, 18 Eliz. 1, ch. 3 (1576) (Eng.), for example, "punished parents of bastard children who 'defrauded' the parish of its capacity to relieve the 'true poor' by thrusting destitute infants upon the local charity." PETER C. HOFFER & N.E.H. HULL, *MURDERING MOTHERS: INFANTICIDE IN ENGLAND AND NEW ENGLAND, 1558-1803*, at 13 (1981). The fathers of these children fled or disputed paternity, leaving the mothers to face public humiliation for placing "great dishonor" on the parish and the nation. *Id.*

210. See NORTON, *supra* note 2, at 336.

211. For example, in the Atkinson case, the accused woman testified to the existence of a bastard child after her lover denied committing adultery with her. See 5 PLYMOUTH RECORDS, *supra* note 142, at 81; see also *supra* notes 142-145, 155-157, 187-188 and accompanying text.

212. 1 MASSACHUSETTS COURT OF ASSISTANTS, *supra* note 148, at 138.

whipped upon her naked body thirty-nine stripes well and severely laid on and also to depart out of the town of Boston within ten days and not to return again without license”²¹³ The Massachusetts Bay people who suffered banishment, the official punishment for adultery in that colony after 1638, had usually aggravated their crime with other bad acts. For instance, one adulterer banished in 1675 was also convicted of “contemptuous carriage,” for which he had his ear nailed to the pillory.²¹⁴ Repeat offenders often got more severe punishments than did first-timers.²¹⁵ Ellinor May’s banishment for adultery thus represented a compromise between the death penalty (imposed upon the mother of a bastard only once in New England²¹⁶) and a punishment that did not reflect the additional grievance occasioned by her pregnancy.

Banishment solved an economic problem left unresolved by capital punishment: It removed two hungry mouths from the community. As the case of Elizabeth Johnson in Connecticut demonstrated, sentencing a mother to die burdened those close to her with the upbringing of her child. Ambiguous as to Johnson’s last moments, or indeed whether she was executed at all,²¹⁷ the Connecticut records clearly testify to the money and effort expended to insure that “Nathaniell Rescew should have Goodwife Johnson’s child, which was born in prison, as an apprentice to him, til he is of the age of twenty-one years.”²¹⁸

4. *Religious and Political Dissidents*

A woman like Elizabeth Johnson might alienate the community by having a bastard that she could not afford to raise, but a reputation as an outsider or troublemaker was not a risk reserved for women or nonwhites. The only man executed for adultery in New England seems to have ensured the death penalty for himself and his lover with his religious dissidence. A close reading of the Britton-Latham

213. *Id.*

214. *Id.* at 56. This defendant, Maurice Brett, had also come before the court on murder charges, for which he was acquitted, and his trail of diverse court appearances was probably viewed as a sign of hard-core criminality rather than of mere moral weakness. *See id.* at 51.

215. In Maine, for example, Mary Puddington had to ask forgiveness publicly for committing adultery with George Burdett—a much lighter punishment than the whipping inflicted upon Mary Batcheller, a minister’s wife repeatedly before the court for affairs with several men. *See* 1 MAINE RECORDS, *supra* note 133, at 74, 146, 164, 170, 176, 180.

216. *See infra* notes 217-218 (discussing Elizabeth Johnson, who bore a bastard child while in prison for adultery with Thomas Newton).

217. *See* Holdsworth, *supra* note 120, at 405 (suggesting that Elizabeth Johnson was still alive in 1655, five years after a cryptic entry in the New Haven town records indicated that an adultery defendant, often presumed to be Elizabeth, was executed in Connecticut). *But see* NORTON, *supra* note 2, at 468 n.68 (disagreeing with Holdsworth).

218. 1 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT PRIOR TO THE UNION WITH NEW HAVEN COLONY 222 (J. Hammond Trumbull ed., Hartford, Brown & Parsons 1850).

case of 1643-1644, to which Norton devotes only a brief paragraph,²¹⁹ demonstrates that, although adultery charges sometimes became intertwined with high politics, northern magistrates distinguished between problems dividing the family and those afflicting the state. They saw sexual misconduct as a sin that required correction but did not necessarily equate it with calculated political or religious disobedience.

James Britton spoke against the church in Massachusetts Bay and was also "ill affected" toward the civil government.²²⁰ In March 1639, he was whipped for criticizing and being an enemy to the ministry.²²¹ His lover Mary Latham also confessed to misconduct that strained communal norms. According to Winthrop, she "did frequently abuse her husband, setting a knife to his breast and threatening to kill him, calling him old rogue and cuckold, and . . . [saying] she would make him wear horns as big as a bull."²²² She ultimately accused twelve men besides Britton of committing adultery with her.²²³ Yet, in describing the death of Britton and his lover, Winthrop reserved special sympathy for the woman. The words he chose to describe Mary ("very penitent"²²⁴ and "a proper young woman"²²⁵) contrasted with those applied to the "dissolute" Britton, who had lost "both power and profession of godliness."²²⁶ Although the authorities apprehended five of the accused men, only Britton and Mary suffered death.²²⁷ The contrast between the lenient treatment of the other defendants and Britton's notorious demise underscores the vital role that Britton's political and religious dissidence played in the outcome of the case.

The humble demeanor that Mary exhibited on the scaffold suited Winthrop's admonitory narrative: She died a submissive female, repudiating her rebellious life and giving Winthrop "some comfortable hope of pardon of her sin."²²⁸ But the chief explanation for his gentler tone toward the woman recalls the *mens rea* issue that Herrup

219. See NORTON, *supra* note 2, at 324.

220. JOURNAL OF JOHN WINTHROP, *supra* note 146, at 500; see also WILLIAM HUBBARD, A GENERAL HISTORY OF NEW ENGLAND FROM THE DISCOVERY UNTIL 1680 (Massachusetts Historical Soc'y Collections, 2d ser., No. 6, Boston, Charles C. Little & James Brown 1818) (1815); COTTON MATHER, PILLARS OF SALT: AN HISTORY OF SOME CRIMINALS EXECUTED IN THIS LAND FOR CAPITAL CRIMES, WITH SOME OF THEIR DYING SPEECHES 62-63 (Boston, B. Green & J. Allen 1699).

221. See JOURNAL OF JOHN WINTHROP, *supra* note 146, at 500 n.99.

222. *Id.* at 501.

223. See *id.*

224. *Id.* at 502.

225. *Id.* at 500.

226. *Id.* at 502.

227. See *id.*

228. *Id.*

identified in Sussex.²²⁹ Winthrop noted that, “against her friends’ minds,” Mary had become the wife of “an ancient man who had neither honesty nor ability, and one [unto] whom she had no affection.”²³⁰ While Britton’s appeal raised a controversy over “whether adultery was death by God’s law now,”²³¹ it was Mary’s moral weakness, rather than Britton’s overt challenge to the regime, that constituted the lesser and more excusable crime. The fact that Winthrop differentiated between Mary and her lover—the wayward wife and the religious dissident—indicates that familial and political disorder called for different analyses.

We have seen that law enforcement depended on the cooperation of ordinary people, but it would be incorrect to assume that juries always had more sympathy for sexual offenders than the magistrates did. Winthrop noted that “some of the magistrates thought the evidence *not* sufficient against [Latham], because there were not two direct witnesses; but the *jury* cast her, and then she confessed the fact”²³² Indeed, the Latham case shows that the controversy over Old Testament punishments in New England did not cleanly divide magistrates from villagers any more than it pitted Filmer against Locke.

III. CONCLUSION

Norton’s lack of attention to colonial America’s English roots makes things that were old seem new. In the pages of her book, the willingness of southern authorities to let sexual misconduct go unprosecuted looks like the beginnings of a radical new separation of family and state. But the selective enforcement of sexual mores was *not* new. It was an old ad hoc response that winked at weaknesses that jurors, magistrates, and suspected adulterers shared and lashed out at transgressors who ventured beyond the pale of the community’s moral standards. In the Chesapeake, where men outnumbered women, people of varying social ranks engaged in sex outside of monogamous marriages. To keep order, these relationships had to be tolerated. Yet, rather than heralding a sea change in political philosophy, the reluctance of the southern courts to prosecute otherwise well-respected individuals for consensual sex offenses echoed the sentiments of English people half a century earlier.

229. See *supra* notes 121-124 and accompanying text.

230. *Id.* at 501. Note that Winthrop’s low opinion of the husband in this case harmonizes with traditional popular scorn toward cuckolds.

231. *Id.* at 502.

232. *Id.* at 501 (emphasis added).

By imposing the death penalty for adultery, the colonial magistrates, like English Puritans during the Commonwealth, bucked traditional modes of discretionary justice and strained popular willingness to punish local people. Yet the tough evidentiary requirements built into the capital adultery laws meant that, in actual practice, communities continued selectively to prosecute marginal figures and to find excuses to reduce or drop the charges against well-liked individuals. The desire for social stability underlying these decisions owed little to political theory; rather, an intricate web of religious, economic, and racial considerations combined with less easily quantifiable personal ties to determine the outcome of adultery cases.

Founding Mothers and Fathers uncovers valuable information about sexual mores in the Chesapeake. When Norton moves beyond the confines of a local study to explain how the family became a private realm, however, she falls considerably short of the mark. The cultural change she seeks to identify did not occur in the mid-seventeenth century. Like the efforts of English churchwardens to shield upstanding citizens who got into sexual scrapes, lax moral enforcement in Maryland and Virginia was an old means of preserving good will among neighbors.