"SHE STEDFASTLY ACCUSED HIM IN THE TIME OF HER TRAVAIL": WOMEN'S WORDS AND PATERNITY SUITS IN 18TH-CENTURY MASSACHUSETTS

KRISTIN A. OLBERTSON*

INTRODUCTION

Lois Easton's bastard son was seven months old when she appeared before the Berkshire County Court of General Sessions of the Peace in February of 1784, naming John Chandler Williams, "gentleman," as the child's father.[1] This child, she alleged in her complaint, was "beget . . . upon her body" by Williams on September 23, 1782, and although she had "often . . . requested" that Williams contribute to his support, the man "always hitherto hath, & still doth, unjustly, neglect & refuse to do" so.[2] She asked the court, in the standard language of eighteenth-century paternity suits, that Williams be "adjudged the reputed father of the said bastard child, & stand charged with the maintenance of the said child, with the assistance of her the said Lois."[3]

This formulaic complaint about a purportedly deadbeat dad offers little indication of the lengthy and contested litigation which would ensue in this case. Allegations and counter-allegations, competing statutory constructions, and contradictory witness testimony sprawl across twenty-five pages of dense, spidery hand—quite a contrast from the records of more typical eighteenth-century paternity suits. In these cases, the clerk of court would record in just a few lines the woman's complaint, the man's plea, and the decision of the court—which was almost always, "guilty." In these run-of-the-mill cases as well as in *Easton v. Chandler*, however, the central matter for the court to decide was always the same: was the accused man to be deemed the "putative father" of the bastard child?[4]

---

* Kristin A. Olbertson is an Assistant Professor of History at Alma College. The Author would like to thank Cornelia Dayton and others who commented on this article when it was presented as a paper at the American Society for Legal History conference in 2008, as well as Alma College colleagues Kate Blanchard, Deb Dougherty and Stephany Slaughter, whose incisive comments strengthened the Article considerably. All remaining flaws are, of course, the responsibility of the Author alone.

[1] Easton v. Williams (Berkshire Cnty. Ct. Gen. Sess. of the Peace Files 1784) (transcribed by Author, originals available at the Massachusetts State Archives).

[2] *Id.*

[3] *Id.*

[4] In all of these sources, incidentally, the act of conceiving a child out of wedlock was always

Until about 1750, midwives and other upstanding women of the community were the ones who procured and evaluated knowledge about sex and babies, and they represented community judgments about liability and fairness. They then testified under oath to authoritatively answer legal questions about paternity. For colonial legal officials, the dispositive matter in determining the paternity of a bastard child was whom the mother had named while under the midwife's "strict examination" in the throes of childbirth. By the 1750s, however, justices of the peace ("JPs") were increasingly reluctant to admit women's testimony in these cases, and by 1785, Massachusetts legislators had made the judgment of male jurors the dispositive factor in matters of bastardy.

The ability to publicly and legally name a man as the "putative father" of a bastard child was a significant legal and social responsibility. The fact that this responsibility was initially allocated to women and then gradually shifted to men provides insight into eighteenth-century notions of gender, perception, and credibility. This Article will argue that Massachusetts courts first permitted women's testimony about paternity not only or even primarily for financial reasons—simply to facilitate privatizing child support costs—but because men in the legal system objectively *believed* women. Moreover, men's growing reluctance to allow women's testimony in these cases also reflects a new *skepticism* about women's ability to discern and tell "the truth." A combination of changing ideologies about gender and credibility, Anglicization of legal rules and procedures, and increased male access to formerly female bodies of knowledge functioned to discredit women's testimony and shunt women out of authoritative roles in bastardy proceedings in favor of male jurors. Finally, the power to deliver such judgments and impose legally enforceable child support obligations—or to protect men from such judgments—was delivered into the hands of male jurors. This transition, moreover, illustrates broader social and cultural shifts in post-revolutionary Massachusetts—namely, the shrinking of women's public roles as male patriots attempted to establish political hierarchies in the new republic.

To trace and explain these developments, this Article presents a qualitative analysis of paternity cases—and any associated legal procedures, such as fornication prosecutions—that appeared before Massachusetts General Sessions courts from the Second Charter to the Revolutionary era, approximately 1690 to 1790. This Article analyzes a sampling of over two hundred and fifty bastardy proceedings from this period.[5]

---

referred to as "bastardy," and the children of those unions were invariably labeled "illegitimate" and "bastards." To contemporary sensibilities, these terms seem judgmental and unnecessarily opprobrious; "out of wedlock child" or "natural child"—or even, depending upon one's generation, "love child"—seem more palatable. Yet more neutral terminology fails to convey the sting and slap of the word "bastard," with all the moral disapproval it communicated, and the rather serious social and legal disadvantages it inflicted. For these reasons, this article will freely use the historical legal terms for children born to unmarried couples—their subsequent marriage would legitimate the child.

[5] Most of these are full trials; the remainder include recognizances to appear at trial, depositions, petitions, and various written forms of evidence. Even for the full trials, however, the records for the

In an age before blood or DNA testing could conclusively establish paternity, people outside of courtrooms relied on common sense and intuition to link bastard children with their progenitors. Assessing the child's physical appearance, counting backwards from birth to conception, and gossiping about the woman's sexual activities were all epistemologically sound. While all these enterprises were also useful for courts in early Anglo-America, they were not conclusive. The men responsible for local law enforcement and administration, rather, relied upon the judgment and testimony of women.

This is an arresting proposition for the student of early America: a woman's word, even unsworn, was sufficient evidence upon which to name a man the begetter of a bastard—and thus, implicitly, also a fornicator—and to require said man to contribute towards the costs of the woman's lying-in and the child's maintenance for six years, at which time he or she was considered old enough to bind out to service. At what other times does a woman's word hold such public weight?[6] And when else do judges accept unsworn testimony with such alacrity? It is important to remember that childbed testimony, while initially employed for the assessment of paternity and child support, could potentially have far weightier consequences as well. When a neighbor defamed the putative father as the sire of a bastard child, he had an absolute defense—at least in a criminal defamation case—of truth. Men named as fathers by laboring women and their midwives faced not

---

vast majority of them are terse at best, including only the names of the accusing woman and putative father, the nature (but not generally the substance) of any testimony introduced, and the disposition of the case. Occasionally the sources are richer, including depositions of the parties directly involved as well as witnesses and neighbors. Some cases have left traces in the legislative records, as when one of the parties sought to appeal or stay the judgment of a court, petition for an exception to certain procedural rules, or recover monies posted as bond. This data set is incomplete, even for Massachusetts alone. These cases were heard before individual justices of the peace (JPs) or in the lower-level Courts of General Sessions of the Peace; these records for all counties except Plymouth and Essex Counties are currently available only in the original form or in microfilm. General Sessions courts heard all kinds of minor cases, including civil and criminal suits, and very few of these records are indexed by offense. Finding a paternity or fornication case in this farrago of criminal, civil, and administrative business is thus as much serendipity as it is the product of systematic research. Furthermore, the sheer number of cases to analyze would be overwhelming for a project of this scope. One collection of fornication presentments from a single county over a fifty-year period includes over 1000 records. *See* MELINDE LUTZ SANBORN, LOST BABES: FORNICATION ABSTRACTS FROM COURT RECORDS, ESSEX COUNTY, MASSACHUSETTS, 1692-1745 (1992). And of course, it is impossible to know how many instances of illegitimacy, particularly after the mid-eighteenth century, were resolved through private arrangement between the parents; in Connecticut by the mid-eighteenth century, according to Cornelia Hughes Dayton, nearly all were. *See* CORNELIA HUGHES DAYTON, WOMEN BEFORE THE BAR: GENDER, LAW, AND SOCIETY IN CONNECTICUT, 1639-1789 162-63 n.8 (1995).

[6] These examples apply exclusively to white women; no woman of color testifies, under oath or otherwise, in any of these cases. The "strict examination" of the delivery room bore little resemblance to standard legal procedure for taking depositions. In other types of cases, most sworn evidence was taken by Justices of the Peace, either privately in their homes or in the context of more public court proceedings. These men recorded the testimony they heard in writing, then had the deponent sign her name or make her mark. Most significantly, JPs always swore their witnesses. Contemporary JP manuals provided examples of appropriate oaths, including acceptable alternatives for the anti-oath Quakers. The testimony of laboring women, in contrast, was given in their own homes, to an all-female audience, was not recorded or signed, and most importantly, was unsworn. At English law, only aristocratic men were permitted to give courtroom testimony without bond. *See* STEVEN SHAPIN, A SOCIAL HISTORY OF TRUTH: CIVILITY AND SCIENCE IN SEVENTEENTH-CENTURY ENGLAND 69 (1994).

only the immediate burden of maintenance payments, but more long-term consequences of the loss of reputation and standing as well. One might imagine that married men confronted their own set of domestic turmoil.

This evidentiary practice is so irrational, so unusual, so far removed from standard practice, particularly in the increasingly Anglicized legal system of mid- to late-eighteenth century Massachusetts, that historians have struggled to find any sense or logic to it. Most have explained the acceptance of these procedural discrepancies simply as a means of meeting the larger goal of assessing child support somewhere other than the county coffers. These scholars emphasize the punitive aspects of paternity suits and identify their statutory genesis in the Elizabethan Poor Laws, as local governments simply became overwhelmed by the burden of supporting out-of-wedlock children.[7] Laurel Thatcher Ulrich, for example, while acknowledging that courts' "reluctance to question" such unorthodox testimony was indeed "remarkable," it merely reveals their acceptance of "a common assumption in English society . . . that women were guardians of the sexual values of the community."[8] And other historians have pointed out that at the most practical level, towns and parishes sought simply to allocate the costs of child support *somewhere*—anywhere, really, other than on their own coffers. As Dirk Hartog writes, "The [eighteenth-century general sessions] court was uninterested in the public declaration of guilt or innocence. Its concern was with the orderly perpetuation of a system for the support of bastards."[9] Ulrich, meanwhile, asserts that while the practice of questioning a woman in labor might strike us today as "a form of harassment"—positively actionable, in this author's opinion—it is properly interpreted as "a formality allowing the woman, her relatives, or in some cases the selectmen of her town to claim child support."[10]

However, if courts needed a formality by which to allocate the costs of illegitimate children, why this formality in particular? If it is fair to assume that Massachusetts colonists were not totally cynical about their justice system, then they were faced with the same set of questions in bastardy cases as in most others: Who has access to certain kinds of information or knowledge? Who can speak

---

[7] *See, e.g.*, Walter J. King, *Punishment for Bastardy in Early Seventeenth-Century England,* 10 ALBION 130, 149-50 (1978).

[8] LAUREL THATCHER ULRICH, A MIDWIFE'S TALE: THE LIFE OF MARTHA BALLARD, BASED ON HER DIARY, 1785-1812 150 (1990).

[9] Hendrik Hartog, *The Public Law of a County Court: Judicial Government in Eighteenth Century Massachusetts,* 20 AM. J. LEGAL HIST. 282, 305 (1976).

[10] ULRICH, *supra* note 8, at 149. Another possible explanation is that this acceptance of childbed testimony is simply another example of the eighteenth-century's many anachronistic exceptions to the hearsay rule, what James Oldham describes as purposeless "inconsistencies and incoherencies" doomed to wither under the scrutiny of Benthamite legal reformers. James Oldham, *Truth-Telling in the Eighteenth-Century English Courtroom,* 12 LAW & HIST. REV. 95, 119 (1994). However, Oldham does not address the admissibility of childbed testimony specifically, and the comparison to other odd evidentiary rules in eighteenth-century Anglo-American law, upon closer inspection, holds no weight; while the guidelines Oldham describes were common law rules, arising out of judges' decisions in individual cases, childbed testimony was permitted—actually required—by statute. *Id.*

truthfully? And who can accurately determine veracity? For the first half of the eighteenth century, their answer to all these questions, at least in bastardy cases, was the local women of good character, the female community of knowledge.

Moreover, assuming women to be the guardians of community sexual morality need not translate into making them de facto agents of the justice system. And in many cases of bastards, courts were not without alternatives. As Cornelia Dayton explains, most unmarried pregnant women in eighteenth-century Connecticut were supported by their families, or towns were able to make other arrangements for the child's support—e.g., apprenticeship—which undercuts the argument that courts were forced to accept otherwise substandard and irregular evidence to avoid placing dependents on the public rolls.[11] This is not to suggest that monetary considerations were insignificant and had no influence on evidentiary rules in bastardy litigation, but there might have been something more substantive at work regarding woman's oaths as to childbed testimony. This analysis will move beyond the "moral" versus "economic" dichotomy by which motivations for bastardy prosecutions have been often understood and suggests that there were unique and special qualities ascribed to the words a woman uttered in her "utmost extremity," as her labor was often described. This Article also questions the analytical paradigm according to which certain spaces and activities are conceived of as "private" simply because they were occupied or performed by women; as bastardy cases make clear, neither the birth of a bastard child nor the knowledge constructed by women about the child's paternity were considered private in colonial Massachusetts.

The analysis begins with a review of the relevant colonial and English legal history of bastardy suits—more specifically, the rules governing evidence in these suits, rules notable for their acceptance of unsworn, hearsay testimony as well as their acceptance of what were essentially character witnesses. The analysis will then trace how these rules actually operated in Massachusetts courts over the course of the eighteenth century, from their early acceptance to their later rejection, and it will offer analysis of why these trends developed. The Article will then demonstrate how the gendered components of Anglicization, of knowledge, and of truth-telling in late eighteenth-century Massachusetts combined to deprive white women of the ability to make publicly valid judgments about men and other women alike. Finally, it will conclude with some suggestions about the larger social and political significance of excluding women from a role of authoritative public speaking in the Revolutionary and immediate post-Revolutionary eras.

I. RULES OF EVIDENCE IN BASTARDY SUITS

As determined by Richard Helmholz, the obligation to provide child support, while not present in English common law, was articulated and enforced in

[11] DAYTON, *supra* note 5, at 205-06.

ecclesiastical courts from the thirteenth century. The duty to support one's children, regardless of their legal status, was informed by Christian teachings of equity and benevolence. The procedure for assigning such duty, meanwhile, borrowed heavily from Roman law—including the standards by which to determine paternity.[12]

While medieval commentators agreed that "proof of paternity was 'difficult and almost impossible,'" they endorsed a two-step process for establishing this difficult matter.[13] In the first step, if the mother made a presumptive case against the putative father, temporary child support was ordered pending a fuller investigative process. Even at the second stage, definitive proof was hard to come by, but jurists considered such factors as evidence of "sexual relations, . . . the common fame of the community, prior admissions against interest by the father, and care for the child."[14] Sometimes a woman found compurgators to bolster her case; sometimes an accused father "purged" himself by swearing on oath he that was not the father.[15] Given the acknowledged fallibility of all these modes of proof, and given that paternity suits seem to have been guided much more by concern for the child than a drive to penalize the father, these cases were decided in a spirit of flexibility and compromise, rather than according to procedural fiat.[16]

In contrast, the first statutory requirement of child support in sixteenth-century England, as well as its subsequent colonial imitators, established childbed testimony, as reported by the women in attendance at the birth, as the essential and dispositive evidence in paternity proceedings, which by now had shifted from ecclesiastical to civil courts.[17] A 1668 statute provided that:

> [T]he Man charged by the Woman to be the Father, shee holding constant in it (especially being put upon the real discovery of the truth of it in the time of her Travail), shall be the reputed Father, and accordingly be liable to the charge of maintenance . . . notwithstanding his denial . . . .[18]

The childbed testimony was the most crucial evidence; if the woman failed to name names to a trustworthy interrogator while in labor, there could be no conviction of a reputed father. The statute did permit acquittal if the "circumstances of the case and pleas" suggested to the court that the accused should not be held liable.[19]

---

[12] *R.H. Helmholz,* Support Orders, Church Courts, and the Rule of Filius Nullius: A Reassessment of the Common Law, *63 VA. L. REV. 431, 431-48 (1977).*

[13] *Id.* at 439.

[14] *Id.* at 440.

[15] RONALD A. MARCHANT, THE CHURCH UNDER THE LAW: JUSTICE, ADMINISTRATION AND DISCIPLINE IN THE DIOCESE OF YORK, 1560-1640 225 (1969).

[16] *See* Helmholz, *supra* note 12, at 442-45.

[17] *See* King, *supra* note 7, at 149. This jurisdictional shift may well indicate a corresponding change in the conception of children as a private, rather than a public, good—and thus also a purely private responsibility.

[18] THE COLONIAL LAWS OF MASSACHUSETTS. REPRINTED FROM THE EDITION OF 1660, WITH THE SUPPLEMENTS TO 1672. CONTAINING ALSO, THE BODY OF LIBERTIES OF 1641 257 (1889).

[19] *See id.*

Aside from this rather vague provision, however, there was no real legal defense for putative fathers. They could attempt to prove they had never had sex with the woman in question—but then as now, proving a negative was a formidable challenge. Fornication and paternity prosecutions thus went hand in hand, often recorded together as part of the same set of proceedings; there would be no out-of-wedlock birth, after all, without some out-of-wedlock intercourse.[20]

Puritan magistrates prosecuted male and female fornicators with equal enthusiasm, but with different sorts of evidence. The woman's sin was evident on, or in, her body itself, and then, after birth, in the form of a small yet difficult-to-ignore person. Men, in contrast, manifested no bodily sign of their transgressions. In the absence of an eyewitness to the act of fornication or a confession pressured out of the man, courts relied upon childbed testimony to convict male fornicators. Women and men alike were usually fined and or sentenced to be whipped. But while the childbed accusation alone was sufficient basis upon which to assign maintenance, it was *not* always sufficient to convict the accused man of fornication.

When it came to establishing paternity, meanwhile, colonial legal authorities had no better evidence than they had in fornication cases—but said evidence, of course, proved only that the woman had had intercourse with *someone*, not necessarily the man accused of being the "putative father," as the legal phraseology went. Usually, they used evidence *obtained* in fornication cases to assign paternity—namely, childbed testimony, or to be more specific, the midwife's sworn statement about childbed testimony. Else Hambleton has determined that conviction rates for men accused of fornication steadily declined in the period from 1641 to 1685, while the rates of paternity convictions actually rose, a development which she interprets as evidence that Massachusetts legal officials had traded their moral concerns about premarital sex for more purely economic considerations.[21]

Leaving aside for the moment the question of whether we can so neatly separate "economic" from "moral" considerations, we can observe that within just a few decades, the evidentiary standards for paternity prosecutions had altered yet again. With the Second Charter, provincial Massachusetts modified its bastardy statute to conform more closely to the English model:

> [H]e that is accused by any woman, to be the father of a bastard child begotten of her body, she continuing constant in such accusation, being examined upon oath, and put upon the discovery of the truth in the time of her travail, shall be adjudged the reputed father of such child,

---

[20] As in England, church courts in Massachusetts also adjudicated instances of fornication. Unlike civil courts, however, they had no power to order child support and did not hear paternity cases.

[21] ELSE L. HAMBLETON, DAUGHTERS OF EVE: PREGNANT BRIDES AND UNWED MOTHERS IN SEVENTEENTH-CENTURY MASSACHUSETTS 38-43 (2004). As William E. Nelson has noted, reputed fathers were entitled to a jury trial, should they request one, but they could nevertheless be convicted on the—apparently unsworn—testimony of the mother. *See* William E. Nelson, *The Utopian Legal Order of the Massachusetts Bay Colony, 1630-1686,* 47 AM. J. LEGAL HIST. 183, 213 n.199 (2005).

> notwithstanding his denial, and stand charged with the maintenance thereof[.][22]

This 1692 statute is implicitly punitive in orientation—it constitutes Section 5 of "An Act for the Punishing of Criminal Offenders"—and is explicitly concerned "to save the town or place where such child is born free from charge for its maintenance," rather than to protect and support the child.[23] This new statute presumed that pregnant or newly-delivered women would make their accusations, upon oath, directly to a JP, and *also* that the midwife and possibly other women who attended her in childbirth would testify in court, again upon oath, as to the statements she made while in labor.

No studies like Hambleton's have been completed for the period after 1685, so it is not yet possible to know whether or to what extent this new, higher evidentiary standard resulted in a depressed conviction rate in paternity cases. What is clear, however, is that sometime after 1700, courts apparently began to think differently about these sorts of cases. On the criminal side, judges and juries began to apply "stricter standards of proof" in fornication cases against men. Soon enough, a sexual double standard developed in the prosecution of fornication, and after 1743, the majority of fornication cases were brought against single women.[24] The few bastardy cases, meanwhile, "were less criminal prosecutions to establish the legal guilt of a man than attempts by accused men to prove their innocence of charges."[25] Women, particularly single women with no familial or economic safety net, were still prosecuted for premarital sex, and were still fined and whipped as punishment, but men were likely to escape sanctions entirely unless a woman could make a paternity charge stick.

And by the mid-eighteenth century, paternity suits became more difficult for women. As before, the best—and, typically, the only—evidence for the plaintiff was her own constant accusation. While legal authorities found such evidence dicey in criminal prosecutions, they continued to find it sufficient in many civil paternity suits.[26] Courts occasionally found themselves in the awkward position of acquitting a man on fornication charges, yet finding him liable for child support in the associated paternity suit—essentially agreeing that he had not had sex with the

---

[22] *See* An Act for the Punishment of Criminal Offenders, Province Laws, 1692-93, Ch. XVIII, § 5, THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY, VOL. I., at 52 (Boston: Wright & Potter Printing Co., 1869).

[23] *Id.*

[24] Hartog, *supra* note 9, at 300.

[25] *Id.* at 307. Similarly, by the 1730s, Connecticut courts essentially ceased criminal prosecutions of men for fornication, with a corresponding drop in assessments of child support from the courts. And after 1740, women could not count on the justice system to criminally prosecute the fathers of their children for "Bastardy," but had to initiate private civil paternity suits. DAYTON, *supra* note 5, at 195, 206-07, 225.

[26] *See* MARCHANT, *supra* note 15, at 224; *see also* Malcolm Gaskill, *Witchcraft and Evidence in Early Modern England*, 198 PAST AND PRESENT 33, 47 (2008); *see also* HAMBLETON, *supra* note 21, at 38.

woman on trial, yet finding that he was the father of her child.[27] However, in the paternity cases that remained—and in many counties by the 1780s, these matters constituted the *majority* of court business—the sole evidentiary requirement remained the woman's childbed testimony, as attested by the women in attendance at the birth.[28]

We must consider more seriously the meanings and import of women's testimony *about* what a woman said during childbirth. Her words would never enter the legal record, after all, if these other women did not testify to them. Their roles as investigators, interrogators, and informal jurors, as well as their roles as reporters and authenticators—not to mention as birth attendants—deserve greater attention. A closer examination of their production of knowledge, within and without the legal system, not only reveals public trust in women's judgment and speech, but also complicates dichotomies of public and private, male and female.

II. STRICT EXAMINATIONS: WOMEN'S TESTIMONY IN PATERNITY SUITS

Sociologists and anthropologists have analyzed the experience of childbirth in pre-modern societies as a highly ritualized, transformative experience and have described being in labor as a liminal period in a woman's life.[29] During this time, the woman was neither of this world nor of the next. She was making the transition to motherhood, whether for the first or for the eighth or tenth time. She was transcendent, or in the words of one early modern diarist, "transported" in her pain, her exhaustion, and her joy.[30] In this state, perhaps she could not help but tell the truth, particularly regarding the identity of the individual most directly involved in bringing her to that transcendent state.[31] Less transcendently, let us not forget that "[u]nder the midwife's direction the woman in labor was liberally fortified with hard liquor or mulled wine," substances which have also been known to elicit truthful revelations.[32]

These libations would also have been served to the female friends, family, and midwife in attendance at the birth. This group of women ate and drank, provided physical and emotional support for the laboring woman, and swapped

---

[27] *See* King, *supra* note 7, at 145-50. To be sure, there were not many of these predicaments, largely because courts simply stopped prosecuting men for fornication.

[28] *See* Hartog, *supra* note 9, at 299.

[29] *See* AUDREY ECCLES, OBSTRETICS AND GYNECOLOGY IN TUDOR AND STUART ENGLAND (1982); *See also* JACQUES GÉLIS, HISTORY OF CHILDBIRTH: FERTILITY, PREGNANCY AND BIRTH IN EARLY MODERN EUROPE (1991); ARNOLD VAN GENNEP, THE RITES OF PASSAGE (1961); Adrian Wilson, *The Ceremony of Childbirth and its Interpretation, in* WOMEN AS MOTHERS IN PRE-INDUSTRIAL ENGLAND (Valerie A. Fildes ed., 1990).

[30] *See* Alice Thornton, *Diary, in* ENGLISH FAMILY LIFE, 1576-1716: AN ANTHOLOGY FROM DIARIES 121 (Ralph Houlbrooke ed., 1989).

[31] Moreover, colonists presumed deathbed testimony—as statements in childbirth always potentially were—to be truthful. *See* Cornelia Hughes Dayton, *Taking the Trade: Abortion and Gender Relations in an Eighteenth-Century New England Village,* 48 WM. & MARY Q. 19, 26 n.21 (1991).

[32] *See* CATHERINE M. SCHOLTEN, CHILDBEARING IN AMERICAN SOCIETY: 1650-1850, at 433 (1987).

gruesome and amusing stories of childbirth and motherhood, constituting an exclusively female community of knowledge.[33] When the woman in labor was unmarried, however, this group of women also exercised an important legal function: determining the identity of the baby's father.

As we have seen, both the 1668 and 1692 Massachusetts bastardy statutes required evidence that the laboring woman had consistently named the purported father. And so the laboring woman's female helpers, in particular the midwife, did indeed become her inquisitors. They repeatedly demanded the name of the baby's father so that they could later testify in court that the mother had been "steadfast in her accusation" during her labor. Many midwives would report to the court that they had "stricktly [sic] examined"[34] their patients and had even made them repeat the legal formula that Mr. X, and no one else, was the father of her child[35]—often at the point of their "extremity."[36]

In early Anglo-America, female networks of inquisition and knowledge already operated as a sort of informal mechanism of enforcing social and sexual norms; courts simply tapped into them and exploited the knowledge they generated for the purposes of legal proceedings. As Dayton puts it, "truth telling in childbirth, the midwife's testimony, community corroboration of who was keeping company with whom" functioned together as a "set of rituals rooted in early modern mentalité and society."[37] A central point of all these rituals was to establish consistency in the woman's story, to ensure that the man she named when her pregnancy first became apparent was the same man whom she named throughout her pregnancy. In this scheme, the ultimate testimony "at the time of her extremity" functioned as a sort of fact check, albeit a singularly significant one. Elizabeth Dunwell, for example, is recorded having been "Constant in her Accusation in her Extremity & *other times.*"[38] Thus, JPs in eighteenth-century Massachusetts essentially deputized the investigative function of legal procedure in bastardy cases to the midwife and other women of the community.

---

[33] *See* ECCLES, *supra* note 29; *See also* GÉLIS, *supra* note 29; ULRICH, *supra* note 8.

[34] Records (Essex Cnty. Ct. of Gen. Sess. of the Peace Files 1705) (transcribed by Author, originals available at the Massachusetts State Archives).

[35] *See, e.g.*, Deposition of Rebekah Warrin, Cherry v. King (Middlesex Cnty. Ct. Gen. Sess. of the Peace Files, 1762-1827) (transcribed by Author, originals available at the Massachusetts State Archives).

[36] Records (Essex Cnty. Ct. of Gen. Sess. of the Peace Files 1705) (transcribed by Author, originals available at the Massachusetts State Archives).

[37] DAYTON, *supra* note 4, at 225.

[38] Trial of L. Perkins (Essex Cnty. Ct. Gen. Sess. of the Peace Files 1699) (transcribed by Author, originals available at the Massachusetts State Archives) (emphasis added). Similarly, Elizabeth Collins provided the usual oaths as well as "other Evidences that he [the reputed father] frequented her Company at unseasonable time[s] of Night for severall Months together," and Sarah Sawyer "proved that he [the reputed father] frequented her Company late at night." Collins v. Silsby (Essex Cnty. Ct. of Gen. Sess. of the Peace Files 1708) (transcribed by Author, originals available at the Massachusetts State Archives); Sawyer v. Morrill (Essex Cnty. Ct. Gen. Sess. of the Peace 1708) (transcribed by Author, originals available at the Massachusetts State Archives).

When these women came before the JPs, they swore an oath that the mother was telling the truth, an oath which was informed by their own, independent investigation and interpretation of the facts. In both its procedure and its assumption, this procedure strongly resembles the medieval English legal practice of wager of law. According to this procedure, which replaced the ordeal as a means for determining truth, the plaintiff in a case provided eleven compurgators, male neighbors who were willing to swear to his credibility.[39] Although wager of law, like the ordeal, was truly an "inscrutable system" that substituted a formulaic procedure for any sincere investigation into the evidence of the case, it did manifest the assumption that the individuals closest to the facts in dispute were in the best position to take a side; perhaps this was the same assumption that lay behind accepting testimony from midwives and other women in attendance at a birth.[40] By 1600, however, wager of law had degenerated to the point where litigants were simply hiring professional oath-takers, a practice which seems to have finally delegitimated the procedure in the eyes of English justices.[41] The seventeenth-century Anglo-American legal system, then, used juries and not compurgators to find facts.[42]

Except, it would seem, in bastardy cases, in which a woman whose credibility had been sufficiently established could enter her sworn, dispositive testimony. Then, the accused man would be named the reputed father—"notwithstanding his denial," as the relevant statutes said, or opposing witnesses, or even contradictory evidence.[43] The legal commitment to this procedure was so strong that it sometimes required JPs to override the evidence of their own eyes, as in the case of Liddel Bucks, a white man. In April of 1735, the Suffolk County Court accepted Rebecca Wight's paternity accusation against him—even though, as Bucks alleged in a later petition to the General Court, he had "declared his Innocence and Saith, it is, a Molutto Child."[44]

The *Wight v. Bucks* case is probably our most extreme example from this period of the elevation of form over substance, procedural over factual accuracy, and from a contemporary perspective seems fundamentally unjust.[45] The sessions court had stubbornly persevered in its application of the law, regardless of how

---

[39] *See* J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 87 (3d ed., 1990).

[40] *Id.* at 88-9.

[41] *Id.*

[42] *See* SHAPIN, *supra* note 6, at 69.

[43] *See* An Act for the Punishment of Criminal Offenders, Province Laws, 1692, Ch. XI, § 5, ACTS AND RESOLVES, VOL. I., at 239 (transcribed by Author, originals available at the Massachusetts State Archives).

[44] *See* Order of Notice on Liddel Bucks Petition to File an Appeal, Resolves, 1736, Ch. 51, *in* THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY, VOL. XII, at 283 (1904). Buck sought to file an appeal to the decision; the General Court elected to reconsider his request after hearing from Wight. The records, unfortunately, do not indicate whether the General Court ultimately allowed him to appeal.

[45] *See id.*

obvious were the facts. And yet, as H. L. Ho has observed, the distinction between fact and law is not one that necessarily exists in a pre-scientific mentality. In medieval methods of proof such as wager of law,

> [w]hat is visible, instead, is a different divide, a distinction between the initial decision of whether or how a party, or someone in his stead, should be put to the test . . . and the conduct of the test itself. It has been noted that human decisions were concentrated on the first stage, and when the matter was referred to God, proof followed 'as of course'; judgment, on this view, preceded proof.[46]

This is precisely the pattern prescribed by statute and followed in case after case in eighteenth-century Massachusetts. In many respects, the midwife and the other women attending a birth truly did function as a set of female compurgators, much like the compurgators that appear in medieval paternity cases.[47] They constituted a group of individuals likely to have first- or second-hand knowledge of the circumstances of the case, whose testimony was introduced to corroborate the testimony of the individual litigant. Like the ordeal, wager of law did not *prove* the underlying facts of the case; rather, it stood *in place of* any factual inquiry.

In Massachusetts, however, where the courts had an overtly divine mission and were ostensibly guided by specifically Puritan theories of legal knowledge and judging, legal authorities began to manifest some "queasiness" regarding the exceptional standards for conviction and the near-impossibility of mounting a defense in paternity cases.[48] Dayton asserts that lawyers for accused male fornicators probably emphasized "this singularity in the fornication law—its reliance on a woman's word"—in their courtroom arguments.[49]

Historians have suggested that even such epistemologically-related nausea, or preoccupation with procedural safeguards, was counterbalanced by the overweening concern for public funds.[50] Thus, legal authorities apparently stopped caring—if they ever had cared—about guilt or innocence in paternity cases and focused their energies solely on the pocketbooks of putative fathers. And yet, if a woman failed to meet her initial burden of proof, courts tended to protect men, even when it seemed likely that the child would be chargeable, as in the 1710 case of Elizabeth Dunwell, who was turned away empty-handed upon the court noting that she had "no proof" of any childbed testimony and "it appearing this [is] the 3rd

---

[46] H. L. Ho, *The Legitimacy of Medieval Proof,* 19 HAMLINE J. L. & REL. 259, 263-64 (2003-04).

[47] "In some cases the woman was obliged to find compurgators, that is, neighbors who would swear they believed her oath, to support her claim." *See* Helmholz, *supra* note 12, at 441.

[48] *See* DAYTON, *supra* note 5, at 163; *see also* Hartog, *supra* note 9, at 305. Hartog points out that the putative father could only attempt to prove that he had never had sex with the mother.

[49] DAYTON, *supra* note 5, at 196. Although this Author has not encountered evidence that lawyers in Massachusetts courts made similar arguments, it would be surprising if they did not.

[50] *See, e.g.*, WILLIAM E. NELSON, DISPUTE AND CONFLICT RESOLUTION IN PLYMOUTH COUNTY, MASSACHUSETTS, 1725-1825 (1981).

bastard Child she hath had & so being a common Strumpet or little better[.]"[51] These sorts of considerations are consistent with thinking of paternity judgments as punitive measures, which ought not be inflicted without a modicum of evidence; this is as opposed to a charitable method for protecting the children of unwed parents, which is how medieval ecclesiastical courts had treated them. They are also consistent with the premise that women's words—or the lack thereof—*mattered* in a way that they later would not.

The midwife's testimony itself, of course, *was* sworn—but it must be stressed that, strictly speaking, she was not swearing as to the truth of what the laboring woman had said; she was only verifying what she had heard the woman say. On the other hand, she also had the discretion, as a "compurgator," to adjust her sworn testimony to reflect what she did in fact believe about a child's paternity. This discretion extended into the birthing room itself, in which she held considerable power and authority to investigate the matter of paternity, including interrogating the woman in labor.[52]

A midwife's bedside manner could be comforting and supportive—a picture of female solidarity which some women historians have found highly appealing—or she could be unhelpful to the point of cruelty—a picture of female capacity for viciousness which other women historians have found more realistic.[53] She could leverage the fact that many women going into labor, accurately, perceived that they could well be on their deathbed. Women were advised by John Oliver, in *A Present for Teeming American Women* (1669), to

> get linen and other necessaries for the child, a nurse, a midwife, entertainment for the women that are called to the labour, a warm convenient chamber, and etc. . . . [but] all these may be miserable comforters, [for] they may perchance need no other linen shortly than a Winding Sheet, and have no other chamber but a grave, no neighbors but worms.[54]

With visions of worms and final judgment dancing in her head, what rational woman would imperil her soul by lying? Margeret Cotes of Hampshire County seems to have been aware of the spiritual consequences of a lie during labor when

---

[51] Case of Elizabeth Dunwell (Essex Cnty. Ct. Gen. Sess. of the Peace Files 1710) (transcribed by Author, originals available at the Massachusetts State Archives).

[52] Linda A. Pollock, *Childbearing and Female Bonding in Early Modern England*, 22 SOC. HIST. 286, 300-01 (1997).

[53] For the "solidarity" view, *see* ADRIAN WILSON, THE MAKING OF MAN-MIDWIFERY: CHILDBIRTH IN ENGLAND, 1660-1770 (1995). For the opposing perspective, *see* HAMBLETON, *supra* note 21, at 100; *See also* Mary Beth Norton, *'The Ablest Midwife That Wee Knowe in the Land': Mistress Alice Tilly and the Women of Boston and Dorchester, 1649-1650*, 55 WM. MARY Q. 121-22 (1998). For the argument that women's presence at a birth could be partly "supportive" and partly "regulatory," *see* Pollock, *supra* note 52.

[54] ULRICH, *supra* note 8, at 149.

she asserted between contractions that she could name Samuel Taylor as the father of her child "with a Clear Conscience before GOD and Man." [55]

And if women themselves failed to fully recognize the mortal peril in which they now found themselves, their midwives could make it clear. In Cotton Mather's pamphlet for midwives, *Elizabeth in Her Holy Retirement*, he encouraged them to remind parturient women that "[f]or ought you know, your Death has entered into you, you may have conceived that which determines but about Nine Months more at the most, for you to live in the World."[56] This cheery reminder would have been especially important for unmarried pregnant women, as their very survival could well depend upon their degree of cooperation with the midwife's "strict examination" about the identity of the child's father. Indeed, in stressing the "regulatory" nature of midwifery, Linda Pollock describes a case from seventeenth-century England in which the women in attendance at the birth of a bastard "left [the laboring woman] in great extremity so long as they durst for fear of casting her away," in an effort to pressure the father's name from her.[57] In Lois Easton's paternity suit against John Williams, more than a century later in Massachusetts, her attorney introduced into evidence that

> in the time of her travail with the said bastard child [Lois] had a very severe travail & that the midwife there several times told her, her case was difficult, that she ought not falsely to charge any man, & that the said Lois constantly accused the said John Chandler [Williams] during the time of her travail to be the father of the said bastard child . . . .[58]

By telling Lois "her case was difficult," did the midwife mean to suggest she ought to be truthful because she could well perish, or was she implying that her assistance with the difficulty would be more forthcoming if she believed her—or both? Either way, it is clear that Easton's midwife, like the midwives in many other bastardy cases, fully exercised both her obstetrical and legal discretion in the birthing room.

Midwives and other women were well aware of the specific testimonial formula that would be expected in a court of law. When Martha Ballard recorded her attendance at the lying-in of Sally Pierce, she wrote that "Sally declard that my son Jonathan was the father of her child."[59] As Laurel Thatcher Ulrich points out, Ballard was likely expecting a paternity suit to be lodged against her son; in anticipation of such a suit, she engaged in careful recordkeeping.[60] In fact, in most of the other out-of-wedlock births she attended, she "recorded the name of the father, using stylized language that suggests she had indeed 'taken testimony' as

---

[55] Deposition of Abigail Miller (Hampshire Cnty. Gen. Sess. of the Peace Files Aug. 24, 1744) (transcribed by Author, originals available at the Massachusetts State Archives).

[56] COTTON MATHER, ELIZABETH IN HER HOLY RETIREMENT (1710).

[57] Pollock, *supra* note 52, at 304.

[58] Easton v. Williams (Berkshire Cnty. Ct. Gen. Sess. of the Peace Files 1784) (transcribed by Author, originals available at the Massachusetts State Archives).

[59] ULRICH, *supra* note 8, at 147.

[60] *Id.* at 147-51.

the law instructed."[61] She also, by her own account, made every effort to elicit the appropriate testimony.[62]

The occasional rare description of such "strict examinations" does survive, as in this 1743 deposition from Rebekah Warrin:

> I Rebekah Warrin being at ye Travel of Mary Cherry of Waterto[wn] . . . singlewoman and her mother then desered me . . . to Examine & ask her dauthor mary who the father of her child was she was then in travel with & accordingly I asked ye sd Mary Cherry who the father of her Child was . . . and she answer that Richard King was ye father of it and no man else I asked her whether no other man never had to do with her whereby such a thing might com to pas she answered no man ever had and Richerd King and she was gilty of the sin of fornication.[63]

Here, Mary Cherry's mother specifically requests a childbed examination, likely for the express purpose of enabling future legal action against Richard King for child support.[64] In another example, Margeret Cotes—she of the "Clear Conscience" about her childbed testimony—endured an especially dedicated midwife, who deposed that she had "askt her Several times who was the Father of the Child . . . [and] askt her In her Last pangs whose it was."[65]

Performing this strict examination and observing the laboring woman's response enabled midwives and other women in attendance to determine what they would later say while under oath. In this subsequent testimony, they represented their own judgment about the laboring woman's truthfulness, a judgment to which courts were wholly deferential. In 1700, Stephen Perkins was accused by Sarah Stevens, and "Mrs. Dimond the Midwife & Mrs. Newman Making Oath that she stedfastly accused him in the time of her traveil & Extremity," he was deemed the father.[66] Conversely, when Jane Soames brought Nathaniel Whaffle before the authorities, the court indicated that "she did not accuse him by name in Time of her Travail by the Oathes of the Midwife & other women," and Whaffle was dismissed.[67]

---

[61] *Id.* at 151.

[62] *See id.*

[63] Deposition of Rebekah Warrin, Cherry v. King (Middlesex Cnty. Ct. Gen. Sess. of the Peace Files 1762-1827) (transcribed by Author, originals available at the Massachusetts State Archives).

[64] *Id.*

[65] Deposition of Abigail Miller (Hampshire Cnty. Gen. Sess. of the Peace Files Aug. 24, 1744) (transcribed by Author, originals available at the Massachusetts State Archives).

[66] Stevens v. Perkins (Essex Cnty. Ct. of Gen. Sess. of the Peace Files 1700) (transcribed by Author, originals available at the Massachusetts State Archives); *see also* Birch v. Peggy (Essex Cty. Ct. of Gen. Sess. of the Peace Files 1700) (transcribed by Author, originals available at the Massachusetts State Archives); *see also* Easton v. Williams (Berkshire Cnty. Ct. Gen. Sess. of the Peace Files 1784) (transcribed by Author, originals available at the Massachusetts State Archives).

[67] Similarly, Ruth Eaton's suit against Ebenezer Kimball came to naught when "nothing appearing [that] she accused him in the time of her travail," and Elizabeth Dunwell had "no Proof [from the] midwife or any one else that She accused [Thomas Goodale] in time of her Travail," and therefore recovered nothing. Eaton v. Kimball (Essex Cnty. Ct. of Gen. Sess. of the Peace Files 1710) (transcribed by Author, originals available at the Massachusetts State Archives); Dunwell v. Goodale

The court's decision became more complicated when the women were not unanimous. When Elizabeth Emerson accused Timothy Swan in 1686, only two of the attending women would swear that Elizabeth had uttered the exact words that Swan "and no one else" was the father of her child. The two other women refused to swear that Elizabeth had said "the three last words" of the statement.[68]

The difference between including and not including the words seems little more than semantics, especially considering that all the women agreed Emerson had named Swan while in labor. But these women clearly felt it to be significant enough to insist upon entering it into the record, most likely because their different perceptions of Emerson's words directly reflected their different beliefs about her veracity. Apparently the court found it significant, too; it took over a year before Timothy Swan was finally ordered to financially support his child with Elizabeth.[69]

Emerson's case also illustrates that the accusation in childbirth absolutely had to be in the correct form. In their formulaic nature and their dispositive power, paternity accusations from women in labor seem to have been almost talismanic, like ritual incantations with a power of their own. Perhaps the ability to name consistently the father of the child you were in the process of delivering proved paternity in the same way that the ability to recite the Lords Prayer proved you were not a witch.[70] In a premodern mentalité, after all, speech—and silence—were often capable of revealing spiritual, supernatural, and sexual truth.[71]

The 1713 case of Priscilla Eams provides a fascinating exception to the usual requirement of the midwife's oath. When Eams, a "Deaf and Dumb Woman" was presented for fornication, she appeared in court with her "bastard Child . . . in her arms" and "by all Signs to ye Satisfaction of ye Court Confessed her Crime."[72]

(Essex Cnty. Ct. of Gen. Sess. of the Peace Files 1710) (transcribed by Author, originals available at the Massachusetts State Archives).

[68] Transcribed in Ellen Fitzpatrick, *Childbirth and an Unwed Mother in Seventeenth-Century New England*, 8 SIGNS 744, 744-749 (1983).

[69] It is pure speculation, of course, whether the JPs in this case were perturbed by an apparent instance of perjury—not all the woman could be telling the truth, after all—and if so, whether they reconciled the opposing accounts according to the rule from *Bethel's Case* (1681): that juries should resolve contradictory oaths by construing one party's witnesses as *mistaken*, rather than as *lying under oath*. According to this rule, as later formulated by Sir Geoffrey Gilbert in his 1755 treatise on evidence, and as often cited by eighteenth-century American lawyers, positive evidence ("I heard her say") was more likely to be accurate than negative ("I did not hear her say"), because the latter was much more likely to be mistaken than the former. *See* George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 626-630 (1997).

[70] RICHARD FRANCIS, JUDGE SEWALL'S APOLOGY: THE SALEM WITCH TRIALS AND THE FORMING OF AN AMERICAN CONSCIENCE 140 (2005).

[71] For the most thorough analysis of cultural attitudes about speech and silence in seventeenth-century America, *see* JANE KAMENSKY, GOVERNING THE TONGUE, THE POLITICS OF SPEECH IN EARLY NEW ENGLAND (1997). For an analysis of speech in law and culture in the eighteenth century, *see* Kristin A. Olbertson, Criminally Impolite: Speech Transgressions & Social Order in Massachusetts, 1690-1776 (2005) (Ph.D. dissertation, University of Michigan) (on file with the Dissertation Abstracts Interlibrary Loan at the University of Michigan).

[72] Rex v. Pratt (Middlesex Cnty. Ct. of Gen. Sess. of the Peace Files 1713) (transcribed by Author, originals available at the Massachusetts State Archives). Thomas subsequently "humbled himself" and begged forgiveness from the court, which it magnanimously granted. *Id.*

She also, again apparently through signs, "did Satisfy the Court that Daniel Pratt. . . was the father of sd Child, and offered ye Child to him wth Earnestness . . . ."[73] The court pronounced itself "fully Satisfied by all Signs and Circumstances," and judged Pratt to be the father of Eams' child, assessing maintenance.[74] Eams was clearly incapable of accusing anyone in travail, at least according to a strict construction of the statute. One Thomas Pratt, probably Daniel's father, apparently took issue with this procedural irregularity, and "behaving verry Rude and abusive to the Court in Contemptuous Carriage to them," was ordered removed from the courtroom.[75]

A. Gendered Epistemologies and the Law

The *Eams* case is an unusual one; whether the more typical cases of this sort indicate that the laboring women had not named names, as a factual matter, or that the women attending simply gave her no credence, cannot be determined. However, the point remains that these women had virtually unfettered discretion to develop and render what would ultimately become legally binding judgment about the parentage of a bastard child. It is this discretion, and the assumptions upon which it was based, that begins to fade in the 1750s. If the central, or only, purpose of the rules of evidence in bastardy cases was to shift child support costs away from the town, as so many historians have claimed, why would justices of the peace be so generous in granting women the latitude to make these independent determinations of credibility, and why would they then be so solicitous of the women's judgment? Did these JPs believe that these women had greater access to "the truth" about credibility in childbed testimony or about paternity, or did these women's judgments about credibility and paternity reflect community knowledge or judgments more broadly?

The answer is probably both. Justices of the peace, probably correctly, assumed that women would have the most accurate knowledge about matters of sexuality and women's bodies. Many historians have described the exclusively female communities of knowledge and exclusively female "ways of knowing," that existed in early modern England and its American colonies.[76] And in fact, Anglo-American courts regularly demonstrated the assumption that women possessed and could accurately report legally relevant information, particularly information about

---

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] Laura Gowing, for example, has analyzed how women in London wove local networks of gossip to monitor all manner of sexual behavior. LAURA GOWING, DOMESTIC DANGERS: WOMEN, WORDS, AND SEX IN EARLY MODERN LONDON (1999). Linda Pollock has described the network of female supervision of, and knowledge about, other women's bodies. *See* Pollock, *supra* note 52. Lisa Forman Cody expands this analysis to describe a uniquely gender-based epistemology, which ultimately constituted "an alternative public sphere of women" in seventeenth-century England. Lisa Forman Cody, *The Politics of Reproduction: From Midwives' Alternative Public Sphere to the Public Spectacle of Man Midwifery,* 32 EIGHTEENTH-CENTURY STUDIES 482, 477-495 (1999).

women's bodies. In England as well as in its American colonies, courts often appointed committees of women, frequently including the local midwife, to examine the bodies of accused women for "witch's marks," unusual marks or growths indicating that they had given suck to Satan.[77] The leading JP manual recommended this practice; these committees of women actually became more common in England in the seventeenth century precisely because civil magistrates wished to replace testimony from witches' purported victims with evidence of a more "tangible" and verifiable nature.[78] As examiners and witnesses upon whom courts heavily relied, women seem to have exercised considerable power in witchcraft prosecutions.[79]

Courts also depended upon committees of women to assess claimed virginity or pregnancy in a variety of civil and criminal cases, including capital cases when the purportedly pregnant convict sought a delay of execution—in contemporary parlance, "pleading the belly."[80] Such juries often made "mistakes," which have been interpreted as a reflection of community sentiment favoring mercy for the condemned woman. The question of whether these mistakes were genuine or not is unanswerable; what is clear is that such knowledge was highly susceptible to manipulation. And yet courts continued to accept it, even require it, as critical and dispositive evidence.[81] Similarly, women's "knowledge" of paternity often was knowledge based on gossip and innuendo, and therefore, was sometimes mistaken as a matter of fact and susceptible to practically undetectable manipulation.

The authoritative opinion of women, at least in matters of sexuality and reproduction, was also sometimes essential to mounting an effective defense to criminal charges. In 1719, when Henry and Elizabeth Prentice were charged with fornication in Middlesex for having a child within seven months of being married, they pleaded that the baby had arrived prematurely due to Elizabeth "being hurt by a fall."[82] Their argument, the court recorded, was "Strengthened by the oaths of Sundry women that [were] wth her at her Travil and often Since that they apprehend She by her fall was occasioned to Come before her time."[83] The Prentices were dismissed.[84] It is not surprising, then, that midwives and other respectable women of early modern communities, after all, "in their capacity as

---

[77] Clive Holmes, *Women: Witnesses and Witches*, 140 PAST AND PRESENT 45, 69-71 (1993).

[78] *Id.* at 76.

[79] *Id.*

[80] Pollock, *supra* note 52; *see also* Oldham, *supra* note 10.

[81] Holmes, *supra* note 77, at 74.

[82] Rex v. Prentice (Middlesex Cnty. Ct. of Gen. Sess. of the Peace Files Aug. 1719) (transcribed by Author, originals available at the Massachusetts State Archives). For similar cases in which a midwife's testimony about a baby's prematurity successfully defended the parents from charges of fornication, *see also* Rex v. Jewett (Apr. 11, 1721), Rex v. Hoskins (Mar. 13, 1725); Rex v. Hills (Apr. 14, 1730) (mother was "hurt by fall"); Rex v. Fitts (Apr. 12, 1731); Rex v. Graves (Dec. 28, 1731) (child "came before its time"), *in* SANBORN, *supra* note 5, at 34, 41, 49, 50, 52.

[83] Rex v. Prentice (Middlesex Cnty. Ct. of Gen. Sess. of the Peace Files Aug. 1719) (transcribed by Author, originals available at the Massachusetts State Archives).

[84] *Id.*

custodians and caretakers of the body, believed they had a *right* to attend a childbirth in their community."[85]

Women's authenticating testimony proved crucial even in high-profile births. When James II's queen delivered a son in 1688, wild rumors circulated that the pregnancy had been staged and that the child had actually been smuggled into the birthing room—the cozily-named "Warming-Pan Scandal."[86] The Crown fired back by publishing a pamphlet including sworn testimony from the midwife and other women in attendance.[87] These women described the physical signs of the Queen's pregnancy—her swollen belly, milk leaking from her breasts—and provided eyewitness accounts of the birth.[88] Because of a royal birth's supreme political significance, it was a much more public event than most births, with veritable crowds of men as well as women in the delivery room. But it is significant that when it came time to persuade the apparently small percentage of England's population who had *not* attended the birth of the child's legitimacy, it was the testimony of women that made the case.

B. The Decline in Women's Testimony

By the mid-eighteenth century, however, there are tantalizing hints in the records that attitudes toward childbed testimony were evolving. In 1752, midwife Hannah Poule sued Jonathan Fox for exhibiting a document that he claimed was Poule's signed attestation of receiving childbed testimony.[89] This allegedly counterfeit statement named the Reverend Edward Jackson as the father of the child she delivered, whereby he "is brought into great Disgrace" and she "lyes exposed to a Prosecution from the sd Mr. Edward Jackson."[90] A JP found Fox guilty of defaming Jackson and damaging Poule, and a jury affirmed his verdict on appeal.[91] Apparently the sworn statement of a midwife was still taken seriously enough that a forged version of such a statement could prove extremely damaging to the man named and give rise to a defamation suit against her. Childbed testimony itself, on the other hand, occasioned so little interest to legal authorities that the court never even identified the name of the woman who had purportedly identified Reverend Jackson as a fornicator. Throughout the record, she is simply referred to as "that Woman."[92] And nowhere is it suggested that her words might constitute actionable defamation.[93] This is unlike the earlier case of John Fisher, who sued Mary Lake

---

[85] Pollock, *supra* note 52, at 301 (emphasis added).

[86] *At the Council-Chamber in Whitehall, Monday the 22 of October, 1688, in* EIGHTEENTH-CENTURY BRITISH MIDWIFERY, VOL. 1, at 169-187 (Pam Lieske ed., 2007).

[87] *Id.*

[88] *Id.*

[89] Poule v. Fox (Middlesex Cnty. Ct. of Gen. Sess. of the Peace Files Mar. 1752) (transcribed by Author, originals available at the Massachusetts State Archives).

[90] *Id.*

[91] *See id.*

[92] *See id.*

[93] *See id.*

for defamation when she accused him of being the father of her child—he lost both his suit against Lake and his defense to the paternity suit.[94]

In another case from the 1750s, it is evident that a woman's testimony about the father of her child is never entered into evidence and apparently does not matter. In 1758, Sarah Silver was accused of fornication with "a Negro," a crime in Massachusetts.[95] One might imagine that when she appeared in court to answer the charges against her that she would provide sworn statements about her childbed testimony, naming a white man as the baby's father in defense. But there is no mention of Silver ever saying a word; by this time, such testimony was legally significant only in the context of making a prima facie case for paternity and even then, only in a procedural rather than in a substantive sense. Instead, she brought the child of her reputedly illicit union to court with her. She was dismissed, the child "[a]ppearing too white to have been begot by a Negro."[96] This case marks a direct reversal of the *Wight v. Buck* case of 1736—in which a white man was named as the father of a mulatto child[97]—when women's testimony and the knowledge and judgment it represented outweighed the contradictory evidence before the Justices' own eyes. Now, the probative factor was an objective "fact" that the court could observe and evaluate for itself, in a procedure much more consistent with Enlightenment era, scientific standards of proof.[98]

The cases of Hannah Poule and Sarah Silver also affirm a sort of institutionalized skepticism about the value and veracity of women's words more generally, a skepticism that appears more and more commonly in legal records from the mid-eighteenth century. This attitude could sometimes work to women's benefit, as when Martha Winship was sued for defamation for saying that Ebenezer Perry had threatened another woman.[99] In her appeal, her lawyer argued that the verdict should not stand "Because the matters and things in said complaint contained are only on 'false storys fit for old women's tattle and not to be minded by any[one] else.'"[100] The court agreed that "the words in the complaint

---

[94] Fisher v. Lake (Bristol Cnty. Ct. of Gen. Sess. of the Peace Files 1720) (transcribed by Author, originals available at the Massachusetts State Archives). For a similar case, with a similar result, see Corning v. Presson (Essex Cnty. Ct. of Gen. Sess. of the Peace Files 1716) (transcribed by Author, originals available at the Massachusetts State Archives).

[95] Rex v. Silver (Essex Cnty. Ct. of Gen. Sess. of the Peace Files Dec. 26, 1758) (transcribed by Author, originals available at the Massachusetts State Archives).

[96] Fisher v. Lake (Bristol Cnty. Ct. of Gen. Sess. of the Peace Files 1720) (transcribed by Author, originals available at the Massachusetts State Archives).

[97] *See* Order of Notice on Liddel Bucks Petition to File an Appeal, Resolves, 1736, Ch. 51, *in* THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY, VOL. XII, at 283 (1904).

[98] *See* Fisher v. Lake (Bristol Cnty. Ct. of Gen. Sess. of the Peace Files 1720) (transcribed by Author, originals available at the Massachusetts State Archives). A later notation made in the court records, however, tells of a "Report" that Silver had "borrowed a white child at Andover and brought [him/her] to Court instead of her own, which was in truth the child of a Negro man." *Id.*

[99] Perry v. Winship (Middlesex Cnty. Ct. Gen. Sess. Of the Peace Files 1762-1827) (transcribed by Author, originals available at the Massachusetts State Archives).

[100] *Id.*

mentioned are insufficient in law" to sustain a claim of defamation, and quashed the entire proceedings.[101]

Disparaging her own remarks as merely "old women's tattle" might have been strategically savvy for women like Winship in the short term, but it did nothing to counteract the cultural trend toward impugning the value and meaning of all women's speech. During the seventeenth century, women's testimony had been accepted and even valued in court, as the then-dominant Puritan theology and worldview tended to categorize men as the gender with a greater proclivity to lying.[102] But by the second third of the eighteenth century, if not earlier, ideas about the words of women began to shift. Women, even elite women, were no longer entitled to the same presumption of truthfulness in their speech as before, nor was veracity a central component of their identity as it had become for elite men. While women were still permitted to testify in legal proceedings, they generally enjoyed a lesser degree of credibility than did men.[103]

These changing ideologies about gender and credibility were associated with more recently developed cultural conceptions of women as being more governed by their passions and less in control of their own speech and behavior than were men.[104] The declining credibility of women, at least in the judicial context, can perhaps also be attributed to the devaluation of feminine, experiential knowledge as unscientific and irrational.

Thus, it is unsurprising that in the first half of the century courts judging paternity suits relied upon ritualistic recitations from the laboring mother and sworn testimony regarding sensory perception from a panel of women, but beginning in the 1760s, Massachusetts magistrates begin to manifest some doubts about the use of childbed testimony. Even "steadfast accusations" were no longer always sufficient to determine fatherhood. In a practice that seems procedurally backwards, courts *first* heard witnesses and considered evidence from both plaintiff and defendant, if any; *then* they decided whether or not to permit plaintiff's own sworn testimony. That decision alone determined the outcome of the case.

For one example, in 1762, when Elizabeth Lewis was presented for fornication, she named David Bradley as the father of her child.[105] Upon his plea of not guilty,

> the Midwife & Several other Witnesses were Sworn & upon hearing their Evidence & also the Defence made by the said David Bradley, It was mov'd that the said Eliz. Lewis might be admitted to her Oath in this

---

[101] *Id.*

[102] DAYTON, *supra* note 5; *see also* TERRI L. SYNDER, BRABBLING WOMEN: DISORDERLY SPEECH AND THE LAW IN EARLY VIRGINIA 54-55 (2003).

[103] BARBARA J. SHAPIRO, A CULTURE OF FACT: ENGLAND, 1550-1720 16 (2003).

[104] RICHARD P. GILDRIE, THE PROFANE, THE CIVIL, & THE GODLY: THE REFORMATION OF MANNERS IN ORTHODOX NEW ENGLAND, 1679-1749 98 (1994).

[105] Lewis v. Bradley (Suffolk Cnty. Ct. of Gen. Sess. of the Peace Files 1762-1827) (transcribed by Author, originals available at the Massachusetts State Archives).

> matter, but the Court having considered thereof; are of opinion that sd Eliz. Lewis be not permi[tted—paper torn] to take her oath.[106]

Bradley was dismissed.[107] Similarly, after hearing sworn witnesses, JPs refused to admit Rebecca Whitaker to her oath, and defendant John Buchanan was dismissed;[108] the same procedure, with the same result, was followed in numerous other cases.[109] Perhaps the most telling example of this procedural shift is the 1767 case of *Niles v. Copeland*, in which after hearing witnesses for both parties, the court announced its "opinion that . . . Josiah Copeland is not the Father of said Child, & therefore refused to admit . . . Ann to her oath."[110] As the woman's sworn testimony would clearly contradict the decision the court had already made, it was moot.

Since witness testimony is introduced in order for JPs to decide whether or not to allow the plaintiff to testify, it seems likely that witnesses for both sides would be in court to speak to her credibility. There is some evidence to support this inference, as in the case of Anna Andrews, an alleged "spinster," who complained to the Middlesex County general sessions court that Aaron Abbe refused to either support their child or marry her.[111] Upon his not guilty plea, the court proceeded with the sort of evidence-gathering that had become standard by the 1760s. The deposition of Stephen Clark is the next document folded in with this case bundle, and it contained a rather serious accusation against Abbe's father, identified as a "Gentleman":

> [O]n the 11 Day of September . . . Mr. Joseph Abbe of Hopkinston took me . . . aside and asked me Whether I could Not befriend him about the affair Concerning his Son and Anna Andrews for I understand you Courted her some when you were young and had carnal Knowledge of her & I told him I Never had and I Know nothing but she is as honest a Girl as Ever was & says . . . Abbe you [have] No need to be afraid says he for you may Swear you Knew a man that had Carnal Knowledge of her for said he I will Give considerable if you will befriend me and I told him I Could Not and so we parted.[112]

---

106 *Id.*

107 *Id.*

108 Whitaker v. Buchanan; How v. Price (Suffolk Cnty. Ct. of Gen. Sess. of the Peace Files 1762-1827) (transcribed by Author, originals available at the Massachusetts State Archives).

109 *See, e.g.*, Deen v. [illeg.]; Evereton v. Barnes; Gage v. Headley (Middlesex Cnty. Ct. of Gen. Sess. of the Peace Files 1762-1827) (transcribed by Author, originals available at the Massachusetts State Archives).

110 Niles v. Copeland (Suffolk Cnty. Ct. of Gen. Sess. of the Peace Files 1762-1827) (transcribed by Author, originals available at Massachusetts State Archives).

111 Andrews v. Abbe (Middlesex Cnty. Ct. of Gen. Sess. of the Peace Files 1762-1827) (transcribed by Author, originals available at the Massachusetts State Archives).

112 Deposition of Stephen Clark, Andrews v. Abbe (Middlesex Cnty. Ct. of Gen. Sess. of the Peace Files 1762-1827) (transcribed by Author, originals available at the Massachusetts State Archives).

On the reverse of the deposition, the clerk has noted, "Anna Andrews admitted to her oath & in open Court charges Aaron Abbe with being the Father of her bastard Child. Aaron Abbe adjudg'd the reputed Father."[113]

While the midwife's testimony might still have been necessary for the plaintiff to prevail in bastardy cases—and we have no indication that it was not—it certainly was no longer sufficient. The accusing woman's credibility had to be verified by external evidence *before* she took any courtroom oaths. Only when the court had already made its decision to name the defendant the "reputed father" of the bastard child and could be reasonably certain the plaintiff would not perjure herself would she be permitted to speak under oath.

III. CASE STUDY: *EASTON V. WILLIAMS*

An exceptionally detailed picture of these sorts of contests over the admission of plaintiffs to their oaths is provided in *Easton v. Williams*.[114] At the time of this case in 1784, bastardy suits in the Commonwealth of Massachusetts were still governed by the provisions of the 1692 statute, which stipulated three separate evidentiary requirements: the accusing woman had to be "constant in such accusation;" she had to be "examined upon oath" by one of the JPs; and "put upon the discovery of the truth in the time of her travail."[115] However, as previously discussed, courts in Massachusetts had already been granting much less credence to childbed testimony and also had been prohibiting women from testifying under oath in these cases.

Here, similarly, the central strategy of the defense was to keep Easton from being admitted to her courtroom oath, and the evidence and witnesses introduced by plaintiff and defendant alike all speak to this issue. To this end, the parties introduced conflicting witness testimony, mostly about the plaintiff's character.[116]

---

[113] *Id.*

[114] It should be noted here that, beyond the unusually complete records that have survived, this case is no ordinary bastardy suit. Lois Easton, mother of the child, was a member of a prominent Pittsfield family; her father, James Easton, served as a colonel in the colonial militia and accompanied Ethan Allen and Benedict Arnold in the assault on Fort Ticonderoga. He was also selected to serve in the Massachusetts Assembly in 1774. Easton worked as a builder and an innholder; records indicate that the meetings of the County Probate Court were held on the premises. J.E.A. SMITH, THE HISTORY OF PITTSFIELD, MASSACHUSETTS, VOL. 1 176,178 (1896). John Chandler Williams, although from relatively humble origins, became a leading citizen of Pittsfield, known as a merchant, lawyer, and devoted Federalist. *Id.* at 448-449. He also, coincidentally, purchased his home from Colonel Easton, who had built it but could not pay for it. Williams' lawyer in this case, Theodore Sedgwick, had previously represented Elizabeth Bett in the slavery-ending case *Brom & Bett v. Ashley*, and would go on to have an illustrious legal and political career. THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800 177 (Maeva Marcus ed., 2007); AFRICAN AMERICAN LIVES (Henry Louis Gates, Jr. and Evelyn Brooks Higginbothom eds., 2004). Thomas Gold, a Yale graduate, enjoyed a distinguished legal career and would become the first president of a Pittsfield Bank in 1818. *See* SMITH, *supra* note 114, at 170.

[115] An Act for the Punishment of Criminal Offenders, Province Laws, 1692, Ch. XVIII, § 5, ACTS AND RESOLVES, VOL. I., at 52 (1869).

[116] Easton v. Williams (Berkshire Cnty. Ct. Gen. Sess. of the Peace Files 1784) (transcribed by Author, originals available at the Massachusetts State Archives).

Williams's attorney, Theodore Sedgwick, readily conceded that Easton had accused him while in travail. "Yet, nevertheless," he continued, he stood "in opposition to the admission of the said Lois to be Sworn to the truth of the . . . charge."[117] She had allegedly declared at various times throughout her pregnancy that "divers other men had carnal knowledge of her body" around the time of the child's conception, thereby raising the procedural problem that she had not "continued constant in her accusation," as she was legally required to do in order to recover in a paternity suit.[118] Moreover, Sedgwick alleged that these statements were in fact true—that she had indeed had intercourse with several men around the same time, making it "impossible for the said Lois to know who did in fact beget the said child."[119] Last, Sedgwick averred that Easton specifically stated that his client was not the father of her child—another example of not being constant in her accusation.[120]

His first and primary allegation, however, pertained to Lois Easton's character. "Lois," Sedgwick proclaimed, "is a person regardless of veracity."[121] He offered to prove that

> within the course of a few months, during the time of her pregnancy, [Easton] did so conduct herself, that some of the young women did say, she did not regard the truth, that she made much mischief in telling stories, & that there was a great deal of talk of her telling falsehoods.[122]

By making multiple contradictory statements about who might be the father of her child, Sedgwick went on, "she hath utterly destroyed her own credibility."[123] Moreover, when Easton was informed by her sister that rumors of her pregnancy were circulating in Pittsfield and in Boston, she had reportedly replied, "'if I am with child & was like some girls, I would lay the child to Williams . . . of purpose to plague him.'"[124] Such a scheme of malicious mendacity, if credited by the court, could do nothing to strengthen her credibility.

More importantly, her alleged practice of naming men other than Williams as the father of her child meant that she had not been "constant in her accusation," which Williams's lawyer maintained "is one integral essential part of the evidence" under the relevant statute.[125] In fact, according to Sedgwick, the court of general sessions was powerless to name anyone as the reputed father or assess child support

---

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] Easton v. Williams (Berkshire Cnty. Ct. Gen. Sess. of the Peace Files 1784) (transcribed by Author, originals available at the Massachusetts State Archives).

[123] *Id.*

[124] *Id.*

[125] *Id.*

payments if the accusing woman had not met this essential evidentiary requirement; therefore, it would be "nugatory & vain to admit . . . Lois to be sworn."[126]

Then, after this lengthy and learned disquisition about the court's jurisdiction under the relevant statute, Sedgwick invoked more emotional, visceral language for his summation, remonstrating with the court that

> it is a vile prostitution of the dignity of the name of the almighty, for so common a prostitute to take his name into her lips, &, by her oath, charge the maintenance of a bastard child, on a man in such circumstances, it being impossible to determine who begat such child, concerning which tis not possible for a woman living in the indulgence of promiscuous lust to have any certain knowledge.[127]

Powerful images of a polluted female body and uncontrolled female sexuality pervade Sedgwick's rhetoric; he was clearly aware of the relevant cultural tropes of veracity and trustworthiness and expected the judges would be, too. Truthfulness, for late eighteenth-century Anglo-American elite, was associated with dispassion and self-control, with genteel bearing, and with masculinity. Women, like children and all members of the lower orders, were perceived as deficient in the realm of sensory perception; they could not be trusted to make accurate observations, much less report them. These groups were believed to suffer from "delusionary tendencies" and were "constitutionally prone to undisciplined and inaccurate perceptions." [128] The emotional, the lustful, those who were governed by their passions, as Lois Easton so clearly was, could lay no claim to public credibility—which, as a precondition to the privilege of entering sworn testimony, now had to be assessed *before* she was admitted to her oath.

Easton's lawyer, Thomas Gold, did not even attempt to rebut Sedgwick's allegations or rehabilitate his client's reputation.[129] Rather, he cited the law and appealed to the JPs' pocketbooks, arguing that the 1692 statute governing bastardy suits provided that "a common courtezan may be admitted to such oath" since the parish or town "ought not to be charged with the maintenance of such bastard children."[130] He went on to imply that the procedure for ascertaining paternity was entirely formulaic without any substantive inquiry into, or evaluation of, the accusing woman's credibility: it is "the law aforesaid" that "makes her capable for that purpose of charging the father of such child."[131] In truth, the 1692 bastardy

---

126 *Id.*

127 *Id.*

128 SHAPIN, *supra* note 6, at 77. Barbara Shapiro criticizes Shapin's assertion that "the common people were perceived as 'perceptually unreliable' during the early modern period," arguing that "there is nothing in the legal literature to support such a claim." Her objection is well taken, as it applies to the specific body of legal sources, but Shapin's generalization still seems a fair one. Shapiro, *supra* note 103, at 26.

129 Easton v. Williams (Berkshire Cnty. Ct. Gen. Sess. of the Peace Files 1784) (transcribed by Author, originals available at the Massachusetts State Archives).

130 *Id.*

131 *Id.*

statute said nothing about "courtezans," and if Gold meant to suggest that shifting the costs of bastard children was the only principle involved in admitting an accusing woman to her oath, he was being disingenuous; the law explicitly refered to the woman's "constant accusation" and her testimony "in the time of her travail."[132] These two factors, moreover, were listed in conjunction with—not as prerequisites for—her examination "upon oath" regarding the reputed father of her child.[133]

Gold's next tactical move was to shift the court's attention from what Easton had said and done to Williams's speech and actions. He "had owned," Gold asserted, "that he had then [around the time of the child's conception] ~~been intimate~~ had to do with the said Lois," and there was evidence that he had "had to do with" her again in November.[134] Moreover, in January of 1783, Williams spoke to Easton's father, telling him "that if the child came in nine months from the time on which she said it was begotten, he would maintain it," and in August of that same year, Gold alleged that Williams offered a local couple money to raise the child.[135] Williams's lawyer responded, predictably, that the *only* evidence relevant in the proceedings was that of the accusing woman's oath—to which, he reminded the court, she ought not be permitted to testify.[136] Evidence pertaining to any purported sexual encounters between Williams and Easton after the purported date of conception, September 23, "[could] have no tendency unless to inveigle the justices of the said court."[137] Sedgwick apparently meant that such evidence reflects only on the character of the accused man, which—unlike the character of the accused woman in such cases—was of no relevance to the question of paternity.[138]

Finally, Sedgwick argued, Gold had taken Williams' words to Easton's father out of context. In the conversation in which Williams had promised to support the child if it were born nine months from the date of its alleged conception, he had first announced, "'I consider myself [an] injured man; the world thinks so; nobody in Pittsfield believes twas begotten in this town, nay more, I am willing to risque the maths on this issue . . . .'"[139] In other words, his promise to support was not a sincere pledge; rather, it was uttered in the spirit of a gamble that Easton would not in fact deliver within the time that could place him as the father. While hardly a

---

[132] An Act for the Punishment of Criminal Offenders, Province Laws, 1692, Ch. XVIII, § 5, ACTS AND RESOLVES, VOL. I., at 52 (1869).

[133] *Id.*

[134] Easton v. Williams (Berkshire Cnty. Ct. Gen. Sess. of the Peace Files 1784) (transcribed by Author, originals available at the Massachusetts State Archives) (words crossed out in the original).

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

denial of intimate relations, Williams' flippant "promise" reflected his confidence that the child Easton would bear was not his.

In response, Easton's lawyer returned to his point that the law, properly interpreted, demanded that she be admitted to her oath. It is here that he stressed Easton's "severe travail" and her midwife's pressing her to be truthful in her accusation.[140] Strictly speaking, these facts were, if not irrelevant, certainly superfluous to the issue of whether or not she accused Williams steadfastly throughout her travail. Nowhere does the statute indicate, nor did Gold expressly claim, that the justices ought to evaluate the likely truthfulness of her childbed testimony; it is *res ipsa loquitor*. Or is it? Is there something about an especially severe travail that lends authenticity to any associated accusations of paternity? Williams apparently thought so, for Gold then told the court that the reputed father allegedly visited the local midwife, a Mrs. Allen, before Easton's delivery, gave her "a fee" and explained that "he wished her to be strict in her questioning of . . . who was the father of the said bastard child" during Easton's travail.[141] Was Williams merely seeking to inflict greater torture on a laboring Easton? Or did he, too, place some faith in the truth-revealing powers of an especially "strict" examination of a laboring woman? If Easton's account of Mrs. Allen's questioning was accurate, it would seem that Williams got his money's worth, at least as far as torture goes, if not in terms of the actual content of Easton's childbed testimony.

As to stories about Easton told by Lovina Noble and others, Gold claimed that Noble herself dismissed the tales as "just talk" and not as factual reporting based on actual knowledge.[142] And then Gold turned the court's attention back to Williams again by introducing evidence from a witness, Aaron Wood, who testified that Williams told him he had planned to have Easton "conveyed out of the way by her friends" if she had indeed turned out to be pregnant—presumably to deliver the child out of the parish and possibly thereby to conceal its birth.[143]

Immediately, the matter of personal credibility was resurrected, as Sedgwick protested against the admission of Wood's testimony; Wood "so far as he . . . is considered by a greater number of those acquainted with him as a man regardless of veracity than as a man of truth."[144] While the records do not indicate whether or not the court permitted Wood's sworn testimony, we do know their decision about Lois Easton: she was allowed to swear an oath and to testify as to the reputed father of her child.[145] The justices found "that the credibility of the said Lois . . . [was] not destroyed by the contradictory accusations aforesaid."[146] She had a right to

---

[140] Easton v. Williams (Berkshire Cnty. Ct. Gen. Sess. of the Peace Files 1784) (transcribed by Author, originals available at the Massachusetts State Archives).

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] Easton v. Williams (Berkshire Cnty. Ct. Gen. Sess. of the Peace Files 1784) (transcribed by

"prove" her complaint against John Chandler Williams, "which she [then] on oath declare[d] to be true."[147]

The case should have ended there. The court should have announced John Chandler Williams to be the reputed father of Lois Easton's bastard child and assessed him maintenance. Yet Sedgwick renewed his objection that Easton had not been "constant in her accusation," thereby arguing that the court had no jurisdiction to either name Williams the father or to assign child support.[148] It is tempting to read a note of exasperation in the court's response, that

> the premises being seen & fully ~~heard~~ understood by the justices here, & mature deliberation being thereupon had, for that it seems to the justices here that the said Lois had been constant in her accusation aforesaid it is considered & adjudged that . . . John Chandler [Williams] is the reputed ~~father of the said bastard child~~.[149]

The final six words of the court's decision were subsequently crossed out, as were the following two paragraphs pertaining to a request from Gold for a written copy of the defense's exceptions.[150] In the margin, a notation reads, "see the rider."[151]

On a separate sheet of paper folded in with the trial record, presumably the aforementioned "rider" is, at last, the disposition of the case. Easton's counsel moved for a final judgment naming Williams the reputed father—and on this question the justices were "equally divided."[152] Williams' attorney pounced on the division, requesting an immediate dismissal of all charges against his client, and despite Gold's protests and reiteration of Easton's satisfaction of all statutory requirements, the court granted the defense's motion: Williams was discharged, leaving Easton to support her child on her own.[153]

CONCLUSION: FEMALE KNOWLEDGE, FEMALE BODIES, & THE LAW

What, in the end, does this case and its precursors stand for? In some regards, it seems to punctuate a long trend toward the devaluation of women's words. Despite the midwife's oath, Easton's childbed testimony and constant accusation, and even her sworn courtroom testimony, the accused father was found not guilty. Even her own lawyer strategically introduced a characterization of women's stories about Easton as "just talk."[154] On the other hand, Easton's credibility was impeached most often *precisely* through the testimony of other

---

Author, originals available at the Massachusetts State Archives).

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.*

152 Easton v. Williams (Berkshire Cnty. Ct. Gen. Sess. of the Peace Files 1784) (transcribed by Author, originals available at the Massachusetts State Archives).

153 *Id.*

154 *Id.*

women—what "some of the young women did say" about Easton telling "false stories."[155] It was also young women, perhaps the same ones, who testified as to Easton's provocative behavior one night in Pittsfield about eight and a half months before the birth of her child, when "in a frolic," she "threw one of the men on the floor, & . . . lay down on the floor with him," then followed him into a bedroom, where she made "noise" indicating that the couple had "carnal knowledge of each other."[156] And it was "a young woman" who sought to verify the rumor that Easton was pregnant by attempting to "feel the belly of Lois, as the witness had been told Mrs. Knowles had felt."[157] Finally, there was Mrs. Allen's, the midwife's, testimony, as to the severity of Easton's labor and the strictness of her examination, as well as Easton's childbed testimony.[158] It is clearly not the case that truthfulness and veracity were wholly gendered male or that white women were considered incapable of having such qualities. When it came to matters of women's bodies, sexual behavior, and the character of other women, at least, some women were still considered reliable truth-tellers in court. But how much did that sort of knowledge even matter anymore?

We see in other kinds of cases, as well as in non-legal writings from the period, that information about private conduct and immorality, traditionally women's bailiwick, was indeed becoming less socially and legally important than knowledge about other matters: public news, knowledge of conduct and courtesy books, and familiarity with the law and legal procedures. Thus, the subjects on which women were most likely to testify shrank in significance, and their testimony was probative in fewer sorts of legal proceedings. Knowledge about extramarital or premarital sexual activity that did not result in pregnancy, for example, usually carried little legal significance. To be sure, the devaluation of women's knowledge in the eighteenth century cut both ways. During this period, women were prosecuted less and less frequently than either their male peers or their female forbears for their illicit words: false news, or being a common scold, gossiping, or criminal defamation.[159]

If women were appearing in court less frequently on charges of illicit speech, they were also appearing less frequently in cases involving contracts, debt, and other financial matters. As legal instruments and procedures alike became more complex, only those with specialized knowledge in these areas were qualified to testify.[160] A new realm of legal and financial knowledge was emerging, a realm

---

155 *Id.*

156 *Id.*

157 *Id.*

158 Easton v. Williams (Berkshire Cnty. Ct. Gen. Sess. of the Peace Files 1784) (transcribed by Author, originals available at the Massachusetts State Archives).

159 *See, e.g.*, JANE KAMENSKY, GOVERNING THE TONGUE: THE POLITICS OF SPEECH IN EARLY NEW ENGLAND (1999); DAYTON, *supra* note 5; TERRI L. SNYDER, BRABBLING WOMEN: DISORDERLY SPEECH AND THE LAW IN EARLY VIRGINIA (2003).

160 DAYTON, *supra* note 5.

which was almost exclusively male in its membership. Conversely, the formerly exclusively female realm of knowledge about matters of sexuality, reproduction, and women's anatomy was by the end of the century becoming less exclusive. As early as the 1740s, when a group of adolescent boys in Northampton, Massachusetts had somehow obtained two "bad books" about reproduction and female anatomy, they used their newfound knowledge to harass and intimidate their female peers.[161] They boasted of knowing "as much about ye as you, and more too," and made graphic comments to prove their point.[162] Northampton's minister, Jonathan Edwards, sought to sanction them for their "filthy speech," but got little traction among the community at large for this campaign.[163] Moreover, this evidence of increased male access to formerly "female" knowledge came at the same time that male-midwives and doctors began to muscle female midwives out of the delivery room, usually on the grounds that female practitioners were ignorant, ill-trained—their knowledge came only from experience was one criticism—and positively dangerous for laboring women. Male physicians began to attend childbirths in northeastern American cities in the 1760s.[164] Meanwhile, in European dissection rooms, the "secrets of life" began to be revealed, demystified, and publicized to an audience of mostly men.[165]

And it was not only the *substance* of women's knowledge that was deemed special and unique, it was also its *epistemology*. Feminine "ways of knowing" in seventeenth- and eighteenth-century Anglo-America were commonly understood as experiential and subjective, particularly in contrast with the scientific and objective epistemology associated with masculinity.[166] These were separate spheres of knowledge, and each valued in its own right, for its own purposes. Female anatomy, sexuality, reproduction, fertility—all were proper subjects of expertise for women, accordingly to womanly means of apprehension. The female compurgators' method of knowing was shrouded in mystery, particularly to male eyes. Pregnancy and childbirth, even in the ostensibly enlightened eighteenth century, remained the objects of great mystery and speculation. After all, this is the era in which much of England, including many of London's most prominent medical men, was completely, albeit temporarily, taken in by Mary Toft's claim to have given birth to more than seventeen *rabbits*.[167]

---

[161] Ava Chamberlain, *Bad Books and Bad Boys: The Transformation of Gender in Eighteenth Century Northampton, Massachusetts*, 75 NEW ENG. Q. 179, 191 (2002).

[162] *Id.*

[163] *Id.*

[164] JUDITH WALZER LEAVITT, BROUGHT TO BED: CHILDBEARING IN AMERICA 1750 TO 1950 38-39 (1986).

[165] *See* EVELYN FOX KELLER, SECRETS OF LIFE, SECRETS OF DEATH: ESSAYS ON LANGUAGE, GENDER, AND SCIENCE (1992) (discussing the gendered dimensions of knowledge and language).

[166] *Id.*

[167] EIGHTEENTH-CENTURY BRITISH MIDWIFERY, VOL. 2, THE MARY TOFT AFFAIR x-xi (Pam Lieske ed., 2007).

Correspondingly, this relatively exclusively female realm of knowledge was generally *not* considered to include subjects suitable for male inquiry, resulting in their common designation as "secret" matters—although it should be noted that a realm of knowledge accessible to over half the population is secret only in relative terms. It is true that the words a woman uttered during childbirth, the words her midwife used to report to the court, and the perceptual abilities of attending women all constituted a special form of knowledge which was specifically gendered as female. Yet many historians have also often conflated "feminine" in this era with "private," both in terms of actual physical spaces—for example, the birthing room—and in terms of realms of knowledge.[168] It is true that birthing rooms usually excluded men—but that hardly meant they were private. In fact, provincial laws provided incentives for unmarried women *not* to have private births; if she delivered in secret she would be fined, and without testimony from a midwife or other woman that a dead child was stillborn, she would be liable to prosecution for infanticide.[169] And if knowledge is classified as "private" only because it is not generally accessible to men, then the realm of men's knowledge is arbitrarily established as "public" and normative.

This trend also played out in *Easton v. Williams*. There, it was men who collected and introduced the evidence pertaining to both Lois Easton's and John Williams's reputation and behavior. "[I]t was the report that she told many false stories," Williams told the court, and he offered to prove that "a certain man, other than [himself], lay with . . . Lois, & . . . had carnal knowledge of [her] body."[170] Williams himself had heard in Boston "all about the town" that Easton was pregnant. Meanwhile, Easton's attorney brought Aaron Wood to testify about what Williams had said to him.[171] This sort of evidence by no means proves that women no longer possessed particular access to knowledge about women's bodies, sexuality, or reproduction. But it does suggest that the boundaries of these formerly exclusive realms of knowledge were becoming increasingly porous.

Meanwhile, what to make of the trend, beginning in the 1760s, of excluding women from their oath if the justices of the peace had reason to doubt their credibility? Perhaps this exclusion of women's testimony from bastardy and fornication cases is an example of the Anglicization of colonial law and procedure. When John Williams, via his attorney Theodore Sedgwick, repeatedly beseeched the court to prohibit Lois Easton from testifying upon oath,[172] he was merely

---

168 *Id.*

169 An Act for the Punishing of Capital Offenders, Ch. 19, §7, Province Laws 1692-93 (1692), *in* ACTS AND RESOLVES, *supra* note 38, at 55; An Act to Prevent the Destroying and Murthering of Bastard Children, Ch. 11, Province Laws 1696 (1696), *in* ACTS AND RESOLVES, *supra* note 38, at 255; An Act to Prevent the Destroying and Murdering of Bastard Children, Ch. 42 (1784), in ACTS AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 123-124 (1884) (hereinafter ACTS AND LAWS).

170 Easton v. Williams (Berkshire Cnty. Ct. Gen. Sess. of the Peace Files 1784) (transcribed by Author, originals available at the Massachusetts State Archives).

171 *Id.*

172 *Id.*

asking them to conform to the competency rules that had been developing in England for over a century. If considered as products of an early modern taste for magic and ritual, childbed testimony—and midwives' attestations to such testimony—would seem to have had no place in an increasingly rationalized, Anglicized legal regime.[173]

The English competency rules, as George Fisher has pointed out, proliferated even as the defendant's ability to introduce sworn testimony in his own behalf expanded in order to avoid the untenable situation of mutually contradictory sworn testimony.[174] Such obvious instances of perjury undermined the legitimacy not only of the oath itself but of the entire legal apparatus. Moreover, the competency rules prevented juries from having to evaluate the credibility of witnesses, a role with which the arbiters of the legal system did not entirely trust them.[175]

Massachusetts lawmakers did not explicitly leave the question of the woman's credibility in bastardy cases to *any* legal decision maker until 1785, when they granted it not to JPs, as might be expected, but to jurors. Legislators also directly imported an English competency rule regarding the proper circumstances for excluding the woman's testimony, a rule which preserved the jury from making credibility determinations in some cases, and therefore limited its discretion.[176] In this new law, the pre-trial examination by a JP, the constant accusation, and the childbed testimony all endured as essential elements of a successful bastardy complaint.[177] An accusing woman, having satisfied all these requirements, was still to be admitted to her oath in the courtroom itself.[178]

However, once she was "admitted as a competent witness," her "credibility [was] to be left to the Jury"—a significant alteration in procedure in bastardy cases. The bar to being admitted to her oath had been lowered—and simultaneously, the bar to winning the case had been raised. Being admitted to her oath no longer would decide the case in her favor; a woman seeking child support still had to convince the jurors of her truthfulness, a determination in which they had precious little statutory guidance. They could rely on the fact that she had not previously been convicted of a crime which would disqualify her from taking an oath; otherwise, according to the statute, she could not give sworn testimony in a

---

[173] *See* John M. Murrin, *The Legal Transformation: The Bench and Bart of Eighteenth-Century Massachusetts, in* COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT 540 (Stanley N. Katz & John M. Murrin eds., 3rd ed. 1983).

[174] *See* Fisher, *supra* note 69.

[175] *Id.* at 580, 624, 626.

[176] An Act for the Punishment of Fornication, and for the Maintenance of Bastard Children, Ch. 66 (1785) ACTS AND LAWS, at 560. This statute was also more explicit about how the man could mount a defense—not, significantly, through his own denial, which it was assumed he would make out of self-interest and have no disincentive to do so since he could not legally testify in his own defense under oath anyway.

[177] *See id.*

[178] *Id.*

bastardy case.[179] Besides this fairly minimal guarantee of credibility, however, the jurors were left to weigh her story against the "pleas and proofs made . . . on the behalf of the man so accused, and other circumstances . . . ."[180]

To contemporary eyes, this procedure hardly seems more fair or rational than the procedure it replaced. For the authors of this legislation, however, what was considered "fair" in paternity accusations was probably quite variable and case-specific. It depended upon such factors as financial burden likely to be imposed on the community, the sexual reputation of the mother, and community sentiments about which men "ought" to be assessed child support, in addition to the question of who was in fact the father, as nearly as could be determined. It is likely that each of these factors played a role—even if not explicitly acknowledged—in assessing paternity. It is also likely that some combination of these factors continued to influence how male jurors would decide bastardy cases. The significant distinction here lies in the shift from a time when Massachusetts communities were apparently untroubled by women passing public and enforceable judgments against men to a time when women's judgments carried very little legal weight.

So while the mother of a bastard child still needed the corroboration of other women to bring her case against the putative father, this corroboration would no longer be enough. Now male jurors had virtually unfettered discretion to judge the mother, the accused father, and the situation more broadly. Whether this change assumed that women no longer had such exclusive access to information about sexual matters, that jurors' decisions constituted a more accurate reflection of community sentiment, or both, simply cannot be determined. Either way, the effect was the same: women would no longer have their judgments about men—and other women—translated into public, legal determinations and corresponding obligations imposed on men.

---

179 *Id.*

180 An Act for the Punishment of Fornication, *supra* note 176, at 560.