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Hawthorne’s ‘spectacle of guilt and shame’ and the law of adultery in Puritan New England: 1631-1694.
The dynamic tension between 17th century Massachusetts capital laws prescribing death for adultery and the court’s rare use of it resulted in disparate development of common and statutory law. A unique punishment for the crime of adultery that Nathaniel Hawthorne refers to as ‘the spectacle of guilt and shame’ was the result of this disparate development. This unique punishment did not exist in the historic period that served as the setting of Hawthorne’s novel *The Scarlet Letter*. Rather, it developed in the common law of Massachusetts Bay Colony over the second half of the seventeenth century. The development of this spectacle as punishment culminated in recodification of adultery laws during the first session of the Massachusetts Bay Province General Court to accord with Massachusetts Bay and Plymouth Colony common law.

Under the new law, the penalty for adultery was changed from the death to the full fruition of the ‘spectacle of guilt and shame’: wearing a hangman’s noose for an hour on the gallows; making the walk of shame to the pillory in the center of the marketplace; public mutilation usually in the form of whipping; and thereafter wearing the adulterer’s badge of ignominy on the front of the clothes as we are all familiar with from the fictional trial of Hester Prynne.

A brief discussion of the seventeenth century Massachusetts Bay Colony colonial legal system is needed as context for the discussion of common and statutory law that will follow. From its inception, Massachusetts Bay Colony developed and maintained a three level court system composed of: the General Court; the Court of Assistants; and local magistrates. The 1629 royal charter established the General Court composed of all freemen of the colony met every quarter-year to establish law and governance for the colony. Every year, the General Court chose the governor and the eighteen members of the Court of Assistants. Individual members of the Court
of Assistants handled most minor civil and criminal matters as magistrates in their communities at the quarter courts. In more serious cases involving large sums of money or life and death, all eighteen magistrates met with the governor, deputy governor, and freemen to adjudicate the case. In capital cases, a grand jury or grand jury of freemen was impaneled to decide whether the court would issue an indictment and a separate jury of life and death decided the fate of the accused. On occasions when the General Court was in doubt, it sought advisory opinions from ministers and elders of the Bay Colony. After the Massachusetts Bay Colony charter was revoked in 1684 and was merged with Plymouth Colony and the surrounding area, the new colony lost much of its independence, but the legal system remained largely the same. Under the 1691 charter for the Massachusetts Bay Province, the Governor and vice-governor were appointed by the crown while the governor’s council, General Court, and Court of Assistants members were still elected by freemen. For these reasons, the discussion of the disparate development of the seventeenth century common law and statutory law will focus on records of the Court of Assistants and General Court.

The issue of whether or not the death penalty should be imposed for the crime of adultery was dealt with as an issue of first impression by the Bay Colony Court of Assistants in September 1631 when John Dawe was tried for “tempting the chastity of an Indian woman”. In this case, the court propounded the question whether adultery should be punished with death to the next court and ordered that Dawe “shall be severely whipped for intiseing an Indian woman to lye wth him.” The next month, the Court of Assistants ordered that, “if any man shall have carnall copulacion with another mans wife be she Englishe or Indian they shalbe punished by death.”
According to a handwritten note penned in the Court of Assistants records by Increase Noweil, this order was confirmed in 1637 or 1638 after the trials of John Hathaway, Margaret Seale, and Rob’t Allen.  

The above issue was again addressed by the Court of Assistants in the 1637 trials of John Hathaway, Margaret Seale, and Rob’t Allen. In these trials, both the male defendants were accused of having relations with the female defendant. Margaret and Rob’t confessed their crime to the court unlike John. John Hathaway did not confess before the open court but two witnesses, James Peii & Samuell Cole testified that he confessed the adultery to them. On these confessions and testimony, the grandiury found the indictment to be true, and the jury of life and death found the defendants guilty. Since the court was unsure how to proceed with punishment, it ordered the defendants imprisoned until such a time as a decision could be reached. In 1638, a committee of elders, church leaders, and magistrates found that if, “The law had been sufficiently published, they ought to be put to death.” The court’s decision indicates that there had been some confusion over whether there was a law in force prescribing death for the crime of adultery. The court concluded that there was no such law, holding that, “These three persons should be whipped and banished; and the law was confirmed and published.” An order from the General Court and its ruling in the sedition and adultery trials of Captain John Underhill clarifies the ambiguities of the Dawes and Hathaway rulings in relation to the 1631 order of the Court of Assistants.
The General Court disagreed with the council of elders in *Hathaway* as it reaffirmed the 1631 Court of Assistants order the next year, “The Law against adultery made by the […] Court in October, 1631, is confirmed, that whosoever lyeth with another man’s wife, both shalbee punished by death; & this to bee pmulgated.” 19 This order stood in effect in the Bay Colony for less than ten years. It was nullified when the General Court ruled on the adultery and sedition cases of the soldier Captain John Underhill in 1640 out of deference to his service to the colony. 20 In order to fully understand this order and the General Court’s motivations for issuance it is necessary to discuss Captain John Underhill’s previous trials in the Court of Assistants.

In his first Bay Colony trial, Captain Underhill was indicted for sedition due to his involvement with a heretical sect that challenged the theocratic rule of the Bay Colony. 21 Captain Underhill was exonerated, but ordered to stand for looking upon Miriam Wilbore lustfully. 22 Though Captain Underhill did not admit to lusting after Miriam, he admitted to looking upon her. 23 For this transgression, Captain Underhill was banished and excommunicated as, “Whoso looketh on a woman to lust after her, hath already committed adulterie with her in his heart.” 24 In reaction to this unfavorable result, Captain Underhill offered a tearful and theatrical apology and submission to the authority of Massachusetts Bay Colony at the general assembly, but was ultimately banished and excommunicated for his repentance was found to be less than sincere. 25 Thereafter, Captain Underhill departed for England for the span of a year. On his return, Captain Underhill was indicted for adultery and sedition a second time.

In his second trial, John Underhill was accused of adultery with Fabre’s wife and sedition surrounding a conversation with a woman that transpired during his voyage from England to the
colony. In this conversation, a witness testified that Mr. Underhill stated he, “Could get no assurance, till, at length, he was taking a pipe of tobacco, the Spirit set home an absolute promise of free grace…though he should fall into sin.”, this was taken by the court as a retraction of his earlier effective apology and submission.\textsuperscript{26} Captain Underhill was banished and excommunicated from Massachusetts Bay Colony and the church for his sedition alone as the adultery indictment was insufficiently proved.

The first and second adultery and sedition trials of Captain John Underhill serve as context for his third trial in 1640 which ultimately invalidated the Court of Assistants 1631 order and 1637 Hathaway ruling. This trial also illustrates an important connection between elements of sedition and adultery punishments in the Bay Colony that I will return to in my discussion of the trial of James Brittaine and Mary Latham. Before turning to the third Underhill case, a couple of interim cases and a major event in the legal history of the Bay Colony need to be discussed.

While Captain Underhill was in exile, an adultery case was heard by a Court of Assistants magistrate in his local jurisdiction of Sacoe in the matter of an official of the town of Bristol’s indiscretions.\textsuperscript{27} The magistrate ruling on this case also failed to apply the Court of Assistants orders following the Dawes ruling. The case of Mr. Burdett in brief narrative form illustrates this point. Thomas Gorge arrived in Somersetshire in 1640 with a commission for the governance of his kinsman Ferdinand Gorge’s province with intent to reform and encountered the complaints of the incumbent official’s behavior. The record states that, “He found all out of order, for Mr. Burdett ruled all, and had let loose the reigns of liberty to his lusts, that he grew very notorious for his pride and adultery.”\textsuperscript{28} For these crimes, Mr. Burdett was laid hold of and bound to appear
before the court at Sacoe where the jury found him guilty of adultery and other crimes fining him less than £30. Mr. Burdett’s case is an example of the courts application of variable sentencing based on social factors that will be discussed in more detail by the General Court in debates over the role of the judicial discretion in relation to God’s law.

The next year at quarter court held at Boston, the Court of Assistants heard another adultery case in the matter of Thomas Owen. In this case the court held that, “For adulterous practices censured to bee sent to the gallows wth a rope about his neck and to sit upon the lather an houre the roapes end throwen over the gallows and so to returne to prison.” The sentence of public shaming and imprisonment imposed by the Court of Assistants was consistent with the Hathaway ruling and shows the Court of Assistants refusal to follow the General Court’s 1638 order mandating death for the crime of adultery.

In October 1641, after a decade of strife and unease over which form of legal system should be in place in Massachusetts Bay Colony and after repeated attempts from the British to revoke the royal charter, the General Court passed a new statutory body of law based on liberties which blended Mosaic Law with religious leadership and common law with representative leadership. This Body of Liberties made adultery a crime punishable by death and was accompanied with references to the books of Leviticus and Deuteronomy.

The enumeration of adultery as a capital crime in the Body of Liberties was made in accordance with the Law of Moses, it read, “If any person committeth Adultery with a maried or espoused
wife, the Adulterer and Adulteresse shall surely be put to death.” 32 The cited passage from Leviticus 20.11 reads, “And the man that committeth adulterie with another mans wife, because he hath comitted adulterie with his neighbourswife, the adulterer and the adulteresse shall die the death.” 33 The relevant section from Deuteronomy essentially restates the law from Leviticus, “If a man be found lying with a woman marryed to a man, then they shall dye euen both twaine: to wit, the man that lay with the wife, and the wife: so thou shalt put away euil from Israel.” 34

The disparity between the enumeration of adultery as a capital offence in the Body of Liberties and its rare application by the Court of Assistants and General Court is described by Governor Winthrop in the 1641 entry in his History of New England as a conflict over the relationship between God’s law and its application. In response to a call for setting inflexible punishments for certain crimes including lying and swearing by a General Court member, Mr. Hawthorne charged his associate with, “Seeking to have the government arbitrary.” 35 This argument grew so heated that nothing more was said on the matter and the General Court was adjourned so that the magistrates might come up with reasons why the courts should have discretion to vary punishments enumerated in the Body of Liberties. The magistrates returned with a main proposition supported by three arguments.

The argument that the magistrates returned to the General Court with was: “The scope of these reasons was to make good this proposition, (…) All punishments, except such as are made certain in the law of God, or are not subject to variation by merit of circumstances, ought to be left arbitrary to the wisdom of the judges.” 36 This key proposition is supported with three reasons. First, so few punishments have an express punishment under the law of God and of
these the punishment varies with the circumstances. To illustrate this point, Governor Winthrop discusses the variation of punishments for failure to attend a royal proclamation from the Book of Judges and the Book of Ezra, “So that which was capital in the men of Jabesh Gilead, Judges [xxi. 10] in not coming up to the princes upon proclamation, was but confiscation of goods, etc., in Ezra 10.8.”

The variable biblical punishment for failure to attend royal proclamation presented by Winthrop supports his argument that the court should have discretion in adjudication of crimes with such ambiguous biblical precedent. Second, as all punishment ought to be just, it should vary given varying circumstances and transgressors; therefore, it would be unjust to punish the greatest and the least equally. Third, every case must be heard before it is judged; this cannot be if the punishment and sentence is determined beforehand.

Although the General Court heard its first adultery case the year that the Body of Liberties passed the General Court, it is important to note that the law did not take immediate effect throughout Massachusetts Bay Colony. It was not until eleven months later in September of 1642 that the new code was published at public charge and made available to the quarter courts.

The General Court heard its first adultery case under the Body of Liberties capital laws that same year when Captain John Underhill returned to Massachusetts Bay Colony from exile in England under the auspices of the governor, elders, and one member of the council. The General Court effectively pardoned Captain Underhill’s crimes, released him from banishment and excommunication from the colony after he made a second theatrical self-abasement and public confession of his sins and transgressions. John Underhill appeared before the General Court worn with sorrow donning his humblest clothes and a filthy linen cap to confess his wicked
deeds. In this humble attire he declared, “What power Satan had of him since the casting out of the church; how his presumptuous laying hold of God’s mercy and pardon (...) did then fail him when the terrors of God came upon him.”

The holding of the 1641 General Court in the matter of Captain John Underhill is of particular interest because it invalidated the 1631 Court of Assistants order that first promulgated death for the crime of adultery in Massachusetts Bay Colony,

“But for his adultery they could not pardon that for example sake, nor would restore him to freedom, though they released his banishment, and declared the former law against adultery to be of no force, so as there was no law to touch his life.”

There was no law to touch Captain Underhill’s life because the General Court nullified the 1631 Court of Assistants order that made adultery a capital crime. This order stated, “The first law against adultery, made by the Courte of Assistants [in] 1631, is declared to bee abrogated; but the other [...] made, 1637 or 1638, by the Generall Court, to stand in force.”

In this way, the General Court’s order was an effective pardon for Captain Underhill’s adultery occurring between 1631 and 1637.

Not all of the officials at Captain Underhill’s trial were convinced of the sincerity of his theatrical confession and submission. In the 1641 entry of his History, Governor Winthrop wrote of the decision, “So easily may a magistrate be misled on the right hand by the secret whisperings of such as pretend a zeal of justice and the punishment of sin.” Governor Winthrop felt so strongly that the court’s sparing Captain Underhill’s life amounted to an implicit pardon for his adultery that he ordered a new trial at the next court. At his second trial, Captain
Underhill was acquitted by proclamation.\textsuperscript{45} The court’s rulings in the Underhill matter vacated the Court of Assistants 1631 order prescribing death as the punishment for the crime of adultery and also limited the reach of the Body of Liberties capital laws to offences committed after its adoption by the General Court.

Just a few years after the Body of Liberties became the law of Massachusetts Bay Colony, the question of whether adultery shall be punished with death was again presented to the Court of Assistants in, “The Sad Case of Mary Latham.”\textsuperscript{46} Like Underhill, this case also contains a principal adultery indictment, elements of sedition against theocratic rule of Massachusetts Bay Colony, and a theatrical apology to the community and admonishment to not be led astray by momentary passions. Mary Latham and James Brittaine were the only people executed under the adultery capital laws of the \textit{Body of Liberties} in Massachusetts Bay Colony and were two of three such executions across 17\textsuperscript{th} century New England.\textsuperscript{47} The narrative of Mary Latham’s trial illustrates three principal reasons why the Court of Assistants only imposed the penalty of death for the crime of adultery on the occasion of her and James Brittaine’s trial: the special problem of witnesses in capital trials under the \textit{Body Of Liberties}; and the explicit and implicit elements of sedition against the theocratic rule of Massachusetts Bay Colony. In the case of Mary and James alone all three of the above elements are present. For this reason, the court failed to impose a capital penalty for a similar crime ever again.

Governor Winthrop depicted Mary Latham’s narrative as a fall from a state of grace borne of good breeding in a god fearing home precipitated by the occasion when she was rejected by the
young man that held her affection. Despondent, Mary vowed to marry the first man that came to her. Notwithstanding her friends’ and families’ disapproval, Mary married the next man who turned out to be a rather unsuitable old dottard purportedly lacking honesty and ability. Soon after the wedding, Mary was succumbed to temptation when, “Divers young men solicited her chastity and drawing her into bad company, and giving her wine and gifts, easily prevailed with her, and among [twelve] others this Britton.” Mary was living in Plymouth Colony when the Massachusetts Bay Colony Court of Assistants started its action against her for her transgressions. Subsequently, Mary was sent to the Court of Assistants at Boston by a Plymouth Colony magistrate over an alleged occurrence outside James Brittaine’s house witnessed by two or more people testifying before the court.

The special problem of witnesses in capital cases under the *Body of Liberties* is highlighted in Mary Latham and James Brittaine’s case and continued to trouble the Bay Colony courts thereafter. The *Body of Liberties* required that, “No man shall be put to death without the testimony of two or three witnesses or that which is equivalent thereunto.” On the night in question, two or more testifying witnesses saw James and Mary laying together on the ground in his yard. Upon questioning, Mary confessed to having adulterous relations with eleven men and attempting but not succeeding in having relations with James Brittaine. Of these twelve, five of Mary’s partners were brought in but failed to confess and were acquitted as their charge rested solely on the word of the condemned. When James Brittaine was brought in, he confessed to attempting to have relations with Mary but ultimately failing due to drunkenness. One of the justices of the court wondered if the testimony of two indirect witnesses was sufficient to satisfy
the *Body of Liberties* requirement but the jury of life and death concluded that the testimony was sufficient and condemned Mary Latham and James Brittaine to die. Like *Underhill*, the trial and sentencing of James Brittaine contained in Winthrop’s history also contains elements of explicit sedition against the church and civil government of Massachusetts Bay Colony.

Governor Winthrop described James Brittaine standing trial for adultery as, “A man ill affected both to our church discipline and civil government.” In this entry, Governor Winthrop was referring to James’ 1639 indictment and conviction for speaking against the theocratic rule of the Massachusetts Bay Colony by the General Court. Unlike Captain Underhill, James Brittaine was not effectively pardoned by the General Court through invalidation of laws that might have touched his life. This is perhaps because though James Brittaine did make a theatrical public apology and admonition for his adulterous activities with Mary Latham, he made no such apology for casting aspersions against the Bay Colony and there were witnesses to his crime that testified before the court. Furthermore, James Brittaine lacked notoriety that helped to secure implicit pardon like Captain Underhill.

Although sedition was not expressly an element of Mary Latham’s crime and punishment, it was implied as her transgressions cast aspersions against the Massachusetts Bay Colony in ways similar to the acts of James Brittaine and Captain Underhill. Ultimately, Mary Latham was put to death for her crime for two reasons. First, the special witness rule in capital cases was satisfied. Second, her and all adultery was offensive to the Bay Colony fundamental structures of family, marriage, and community.
In marrying William Latham against the wishes of her family, Mary Latham offended the seventeenth century Puritan social structure of the family. The fifth commandment from the book of Ephesians reads, “Children, obey your parents in the Lord: for this is right. Honour thy father and mother (which is the first commandement with promise) That it may be well with thee, and that thou mayst liue long on earth.”\textsuperscript{56} This important biblical passage contains a message that honoring one’s mother and father leads to an increase in economic utility which also appears in many colonial era Puritan sermons. In his late 17\textsuperscript{th} century sermon on the fifth commandment \textit{Duties of Children to Their Parents}, Cotton Mather admonishes children to obey and honor their parents; opening with, “Come, Ye Children, Hearken to me; I will tell you, what you shall do, that your Parents may be Happy in you, and that your own Happiness may be secured and increased.”\textsuperscript{57} This message of increased happiness had an economic component in Massachusetts Bay Colony and throughout early colonial America as the family was the self-sustaining primary economic unit.\textsuperscript{58} The price of disobeying and dishonoring one’s family as Mary and others of her kind did was large. Mather wrote that, “The heavy Curse of God, Will fall upon those Children, That make Light of their Parents.”\textsuperscript{59}

Mary Latham’s adulterous acts went against the fundamental Bay Colony structure of marriage. As discussed above, the family was the primary economic unit in the seventeenth century Bay Colony with its principal unit being the married couple, producing and consuming both goods and labor with the husband as head. The puritans of Massachusetts Bay Colony viewed marriage as a god given covenant, the violation of which is repugnant to the laws of god and man. The
formulaic adultery indictment from the Court of Assistants against Mark McGee an alleged lover of Mary illustrates this point, “Not having the fear of god in his heart, but being led by Satan, and did in sinful lust[…] unlawfully, and adulterously comfort, and of the body of the said Mary did have carnall knowledge[…] against the laws of god, and against the laws […] established.”

The McGee indictment also includes a formulaic statement of the adultery charge against Mary Latham in more forceful terms that involve breech of the covenant of marriage,

“being a married woman not having the fear of god in her heart, nor regarding the Covenant of marriage, but giving place to the temptations of Satan […] did sinfully prostitute her body to the said Mark McGee.”

The Court of Assistants cast its formulaic adultery charge against Mary Latham in such forceful terms because the husband or father in a marriage was the head of the family in both economic and religious terms in the Bay Colony. Thus a wife’s failure to obey and honor her husband was repugnant to the fundamental structures of both family and marriage in the Bay Colony.

The same ideal that equates a wife’s duty to honor and obey her husband with filial piety is reflected in the passage immediately preceding the fifth commandment in Ephesians, “Therefore every one of you, doe ye so: let every one loue his wife, euen as him selfe, and let the wife see that shee feare her husband.” Mary Latham not only committed adultery repeatedly, but failed her societal and biblical duty to honor and obey her husband. Governor Winthrop described this failure as, “She did frequently abuse her husband, setting a knife to his breast and threatening to kill him, calling him old rogue and cuckold, and said she would make him wear horns as big as a bull.” Mary Latham’s actions also rose to the level of sedition against the fundamental structure
of the Bay Colony community as her actions cast aspersions against its economic and religious components.

Mary Latham’s crimes were impliedly seditious toward the community of seventeenth century Bay Colony for two reasons: first, because of the economic need for the individual to be subsumed by the collective; second, because of and the uniquely Puritan view of sin. First, the Bay Colony community depended on individuals in order to thrive and survive; facing lack of man-power, increased competition from neighboring colonies for resources, and the ever-present threat of Native hostility. Because the economic need of the community was so important, activities that broke down its parts were viewed as especially egregious. Second, the Puritan view of sin as a reflection of the entire community cast individual crimes such as adultery as aspersions on the collective spiritual welfare. The Puritans believed that people are depraved and tainted with the mark of original sin and must work throughout every moment to resist the ever-present temptations of Satan. Because all people in the community are more or less equally marked and depraved, facing incessant temptation, the sins of any one member reflect the sins of the entire community.

In order to address harms done against the marriage and family and thus the community, the transgressor often engaged in a spirited gallows confession and admonishment. Through public display of this spirit by an individual, the dramatic cycle of sin, temptation, yielding to temptation, contrition, repentance and finally grace works to reinforce the community over the individual in religious and economic terms. The tearful public confessions and admonishments of Mary Latham and James Brittaine reinforced the economic and religious values of community
over the individual and worked to allay the collective guilt of the community over the shared crime of original sin.

The gallows confession of Mary Latham is of particular interest in light of its value as a public theatrical display of the cycle of individual repentance serving to place the contrite transgressor and the community in a state of grace. In her confession, Mary not only expresses sorrow at her transgressions but also admonishes other young women to not be led into adultery as implied sedition against the Bay Colony social order, exhorting all young women in attendance to, “be obedient to their parents, and take heed of evil company.”65 This shows the social and religious aspects of the gallows confession and their influence on sentencing.

Governor Winthrop characterizes Mary’s chances for pardon through the blood of Jesus as probable because she has confessed to her sin, admonished others not to follow her example, and accepted that she must die to satisfy the laws of the Bay Colony and God.66 James Brittaine’s chances of pardon are not described in such glowing terms as Mary’s because although James confessed his sin, he did not accept his punishment.67 In response to James questioning, the Court of Assistants found that adultery was punishable with death under the laws of God and the Bay Colony and sentenced James and Mary to execution by hanging.68

James Brittaine and Mary Latham were the only two persons in Massachusetts Bay Colony to be executed under the 1641 capital laws against adultery because their case was the only adultery action that contained: elements of express sedition against the colony; elements of implied sedition against the colony; and two or more witness gave testimony to satisfy capital statutory
requirements. After Latham’s case, the Court of Assistants punished adulterers with public shaming and mutilation consistent with Governor Winthrop’s argument made during the formulation of the Body of Liberties stressing the importance of discretion in sentencing respecting inconsistencies in the law of God and the social station of the offender. 69 This type of discretionary punishment aimed at healing wounds to the social body dealt by the Court of Assistants over the royal charter period is characterized in Nathaniel Hawthorne’s novel set in mid-seventeenth century Boston, The Scarlet Letter. However, there is an inconsistency in Hester Prynne’s punishment by Hawthorne’s Court of Assistants. This inconsistency is found in the 1694 Massachusetts Bay Province session laws prescribing compulsory wearing of an adulterers’ badge of ignominy. This unique punishment was a development in the law of colonial Massachusetts that was not to come to fruition until the first session laws of the Massachusetts Bay Province. Nathaniel Hawthorne, being a descendent of the framer of the 1641 Bay Colony Body of Liberties must have known of the above inconsistency but the way he illustrated the courts and laws made for a dramatic punishment and also provided a powerful symbol for the tension between the Bay Colony law requiring death for the crime of adultery and the court’s insistence on using its discretion to impose a punishment aimed at shaming the transgressor and healing wounds done to the social body.

Nathaniel Hawthorne’s novel set in the early 1640’s following the Bay Colony General Courts’ adoption of The Body of Liberties is particularly illustrative of the tension between the Bay Colony Court of Assistants’ reluctance to impose the death penalty for the crime of adultery and statutory law that requires such a penalty. This type of discretionary adjudication of adultery utilizing the ‘spectacle of guilt and shame’ to publicly humiliate the adulterer in Hawthorne’s
novel characterizes the adjudication of such matters by the Court of Assistants in seventeenth century Bay Colony. For these reasons, Hester Prynne’s crime and punishment in *The Scarlet Letter* will serve as a framework for discussion of Court of Assistants’ adjudication of adultery matters following the *Latham* case until the capital laws were changed to reflect their application by the courts in the first session laws the Massachusetts Bay Province.

Hawthorne opens his novel with the spectacle of the adultery trial of Hester Prynne set in Boston in the years following the adoption of The Body of Liberties. Prynne is standing trial for adultery as her husband has been out to sea for a period of more than nine months and she was beginning to show physical signs of being with child who was born in the dungeon. A throng of townspeople surrounding the prison house at Boston await the verdict of the council of magistrates. Although Hester Prynne has acted in an impliedly seditious manner casting aspersions on the theocratic social structure of the fictional Bay Colony, the gathering crowd seems to know that the council of magistrates will publicly shame her instead of imposing the death penalty as required by statute and God’s law. The discussion of Prynne’s pending punishment among the gathering throng shows some of the tensions inherent in the decision.

The exchange outside the prison that follows between a group of goodwives and a man of the throng highlights Hawthorne’s vision of the tensions among the Bay Colony community over the scandal of adultery itself and three key ways the courts handle such matters: mutilation, badges of ignominy, and public shaming at the gallows outside the prison. In the gathering crowd, a matron of fifty comments that if the malefactress Hester Prynne faced the judgment of upright women of the community, then she would face a more severe penalty than that she is to face
from the council of magistrates. In response to this, another aged matron suggests that Prynne should be branded on the forehead at least as she would be able to cover a scarlet badge of ignominy with some improper ornament to further draw attention to herself in the streets. A young goodwife with a small child comments that whatever mark Prynne is sentenced to wear, be it a brand or an adulteress’ badge, she will ever feel it within her. The ugliest of the aged matrons then states that Prynne should die, asking, “Is there no law for it? Truly there is both in the Scripture and the statute book. Then let the magistrates, who have made it to no effect, thank themselves if their own wives and daughters go astray.” To this, a surprised man of the crowd states, “Mercy on us goodwives […] is there no virtue in woman save what springs from a wholesome fear of the gallows?” The discussion among the characters in the throng outside the prison house awaiting Hester’s punishment parallel the tensions that were to develop in the Bay Colony community over the years following adoption of The Body of Liberties prescribing adultery as a capital crime as a result of the court’s use of discretion in punishment for the same. Consistent with Bay Colony Court of Assistant adultery rulings after Latham, the magistrates sentenced Hester Prynne with wearing badge of ignominy as a mark of her sin and standing at the gallows for a few hours displaying it and her bastard child to the community.

Although Prynne did not confess her crime and submit to the theocratic rule of the Bay Colony on the pillory as Underhill, Latham, and Brittaine did, her transgressions were viewed by her piers as injuries to the community. The autumnal matron that called for Prynne’s death stated that, “This woman has brought shame upon us all and ought to die.” Hester Prynne’s public shaming served to allay a communal sense of guilt over original sin and played an important role in the religious drama of Hawthorne’s vision of the Puritan worldview. Hawthorne’s description
of Hester’s badge of ignominy is of interest because it parallels Court of Assistants rulings in adultery matters in the years following the Latham case, “On the breast of her gown, in fine red cloth, surrounded with an elaborate embroidery and fantastic flourishes of gold thread, appeared the letter A.”

Hawthorne’s description brings to light two distinct components of shame and humiliation inherent in wearing such a fanciful ornament by a personage of little means in mid-seventeenth century Bay Colony that is codified in the sumptuary laws adopted by the General Court just a few years after the Latham case. These components are: Puritan ideal of the sinfulness of economic waste; and, the distinctions drawn by sumptuary law visually supporting the socioeconomic structure of the Bay Colony.

The sentence the magistrates gave to Hester Prynne was particularly shameful as she was forced to visually violate the socioeconomic structure of Hawthorne’s Bay Colony by wearing fanciful ornamentation publicly. Hawthorne describes Prynne’s badge of ignominy as the latter A, “In fine red cloth, surrounded with an elaborate embroidery and fantastic flourishes of gold thread [...] greatly beyond what was allowed by the sumptuary regulations of the colony.” The laws Hawthorne is referring came into being almost contemporaneously with the fictitious trial of Hester Prynne.

In 1651, General Court adopted sumptuary laws prescribing what types of clothing and ornamentation, particularly lace persons within the Bay Colony of may wear. The sumptuary laws begin with,
“We cannot but to our grief take notice that intolerable excess and bravery have crept in upon us, and especially among people of mean condition, to the dishonor of God […] yet we cannot but account it our duty to commend unto all sorts of persons the sober and moderate use of those blessings which […] the Lord has been pleased to afford unto us in this wilderness.”

On its face, this regulation was made for the purpose of preventing sinful waste and visually separating those with means from those without based on income with the dividing line at £200. This line and regulation served to both support the Bay Colony socioeconomic structure and reinforce the Puritan view of the inherent sinfulness of economic waste. The 1651 sumptuary law specifically limits wearing gold and silver lace and buttons to those Bay Colony citizens with means over the statutory threshold, including, “Gold or silver lace, or gold and silver buttons, or any bone lace above 2s. per yard, or silk hoods, or scarves.” For these reasons, the sentence of wearing a fanciful badge of shame or ignominy was particularly shame-inducing and is illustrative of the interchange between social, economic, and religious factors in seventeenth century Bay Colony jurisprudence of adultery.

This type of discretionary adjudication of adultery by the magistrates in The Scarlet Letter served to transform the gallows from a symbol of the rigidness of the Puritan code based on the law of God into, “The very ideal of ignominy […] made manifest in this contrivance of wood and iron.” The Bay Colony courts made similar use of such discretion in adjudicating adultery matters resorting to ignominious public sentences instead of the statutory requirement of death until they were changed at the close of the seventeenth century in the first session of the General Court of the Province of Massachusetts Bay.
The same year that the Court of Assistants ruled on the Latham case, it heard another case that also included a married woman accused of having adulterous relations while her husband was out of the Bay Colony and an ignominious punishment at the gallows in the matter of Anne Hudson and Henry Dawson. In this case, the Court of Assistants once again struggled with the two witness rule for a capital case and also questioned the biblical justification for ignominious punishments. However, in this case, the court sentenced the defendants with mutilation in addition to public shaming.

The narrative of this action begins when Mr. Hudson left the Bay Colony to serve in the English Parliament for two years and left the care of his estate to a trusted fellow-churchgoer, Henry Dawson. During Mr. Hudson’s absence, Henry and Anne were seen by servants going into the same bedchamber together. The servants informed Mr. Hudson of what they witnessed upon his return to the colony and he commenced the adultery action. Anne and Henry confessed to lying abed together before the jury of life and death but denied having carnal knowledge of one another.

The magistrates of the Court of Assistants thought the case suitable for the death penalty as the confessions were sufficient and the requirement that at least two witnesses come forward was waived as, “Circumstances may amount to testimony against a person, where the fact is evident.” However, the jury of life and death disagreed with the magistrates. The jury found Anne and Henry innocent of adultery as, “Neither God’s law nor ours doth make suspicion of adultery […] to be death; whereupon the case being doubtful to the jury, they judged it safest
The jury found Anne and Henry guilty of adulterous behavior and sentenced them to stand at the gallows for one hour with nooses about their necks and be whipped or alternately pay 20£.

In the *Hudson* case, the court questions the legal and biblical justification for ignominious punishments. The magistrates conclude that though there is a biblical justification for whipping someone guilty of adulterous behavior, there is none for enforced standing at the gallows with a halter about the neck for a span of time. The Court of Assistants continued to struggle to adjudicate matters of adultery when two witnesses are not available but the circumstances make guilt plain in the years following *Hudson*.

As a result of this struggle, two years later the General Court issued an order concerning matters when spouses are out of the colony and the remaining spouse is having adulterous relations. This order compelled those individuals described to repair to their families by the soonest ship or give the Court of Assistants good cause why this cannot be done on pain of a 20 shilling fine. Unfortunately, the 1647 order did not satisfactorily solve the Court of Assistants struggle, so it certified the question of whether circumstances could stand as witness against an adulteress to the General Court. The question asked if in those circumstances, “Whither heere be two witnisses, or that which is aequiipolent to it, to convict the sai’d woman of adulteiy.” The General Court resolved the question in the negative, stating that such circumstances cannot stand as witness against an adulteress in a capital adultery case.
Shortly after the Bay Colony General Court republished the 1641 capital laws, the Court of Assistants heard another adultery case and provided further clarification over the question of whether that a married woman and a man laying abed together is adulterous behavior or adultery. In this case, Bethiah Bullione and Elizabeth Hudson were both accused of separately lying in bed with Peter Turpin and committing adultery. The special verdict in both cases reads, “If by law, [the accused] lieinge in Bed with Peter Turpin be aultery we f ind her Guilty. If by law, [the accused] lieinge in Bed with Peter Turpin be not adultery we fi nd her not guilty.” The final verdict of the jury in both cases shows that a married woman lying abed with a man that is not her husband is not legally adultery by Bay Colony law, rather it is adulterous behavior. The court sentenced Elizabeth and Bethiah to an ignominious punishment similar to that of Anne Hudson. Hudson and company were to stand at the, “Gallowes & there by ye executioner set on the ladder & with a roape about ye neck to stand on the Gallowes one halfe hower & then brought downe & brought to the market place & be seuerly whipt with tenn stripes or pay the sume of tenn pounds.”

The court record of the Bullione case mentions the nearness of the marketplace in relation to the gallows in mid-seventeenth century Boston as Hawthorne does. This highlights the ignominious nature of both the punishment of standing at the gallows and the walk of shame the transgressor made from the gallows to the marketplace where he or she faces the scorn of the community and often public mutilation. This is illustrative of the interchange between social, economic, and religious factors in seventeenth century Bay Colony jurisprudence of adultery. Though Hester Prynne did not face whipping in the marketplace as Bethiah and Elizabeth did, Hawthorne described this portion of her ordeal as particularly painful, characterizing her experience as, “An
agony from every footstep of those that thronged around her, as if her heart had been flung into the street for them to spurn and trample upon.” Notwithstanding the Hudson magistrates’ questioning its biblical precedent, The Court of Assistants continued to utilize this ‘spectacle of shame’ in the years following the General Court’s renewal of the capital laws in 1672, expanding it to include sentencing of adulterous behavior and adultery as well.

The year after the General Court renewed the capital laws, the Court of Assistants expanded the use of the ‘spectacle of shame’ to include cases of adultery when there are no confessions and no witnesses. In this case, Ruth Read left her husband for a four year period to live with Augustin Lyndon. During this period, Ruth and Augustin assumed the names Rebeckah and John Rogers and had a child. When Ruth returned to the Bay Colony and her husband after a four year absence with a two year bastard child named after his father’s assumed name, he commenced an adultery action against her. The Court of Assistants record makes no mention of the two witness rule in this case but it appears that the court found that the circumstances of this case sufficient to stand witness to Ruth’s adultery and the jury found her guilty. Instead of sentencing Ruth to death like in *Latham*, the court warned Ruth that if she is found in the Bay Colony two months hence, she must twice stand, “In the marketplace on a stoole for one hower wth a paper on hir breast wth ye inscription THVS I STAND FOR MY ADVLTEROUS AND WHORISH CARRIAGE […] and then be seuerely whipt with thirty stripes.” This sentence is of particular interest as it represents a move within the Court of Assistants adjudication of adultery matters toward the use of literal badges of ignominy like Hawthorne describes in *The Scarlet Letter*; and, more importantly, toward the law adopted by the Massachusetts Bay Province General Court
prescribing compelled wearing of the adulterer’s badge of ignominy in 1694 as an alternative to the death penalty.

From 1675 to the merger of the Bay Colony with the Massachusetts Bay Province, the Court of Assistants only heard a small amount of adultery cases. Of these cases, there were no confessions and not enough witnesses to satisfy the two witness rule. Additionally, none of these cases included facts that could stand as witness against the accused like in Hudson and Read. It does not come as a surprise that when the evidence was not completely lacking, the court found the accused guilty of filthy carriage or behavior tending to adultery and utilized the ‘spectacle of guilt and shame’ as punishment as it is above described: including elements of public shame at the gallows and public mutilation at the marketplace. These cases and those that came before them made way for the change in capital law to accord with the common law at the first session of the Massachusetts Bay Province General Court.

The 1694 first session laws of the Massachusetts Bay Province codified the ‘spectacle of guilt and shame’ as a punishment for the crime of adultery developed over the charter period of Massachusetts Bay Colony common law. It expressly states in the preamble the sentiment expressed in the statement of the charge of adultery against Mary Latham in the indictment of Mark McGhee that the act of adultery violates the basic Puritan social structure of the family and marriage, “Whereas the violation of the marriage covenant is highly provoking to God, and destructive to families.” The 1694 province law also separately codifies the crime of filthy carriage or activities tending to adultery in accord with Bay Colony decisions such as Hudson and Dawes, “If any man be found with another man’s wife, [they] shall be severely whipt, not
exceeding thirty stripes.” The codification of the crime and punishment for adultery under the 1694 as a non-capital crime rid the system of the special problem of witnesses the colonial courts struggled with during the seventeenth century and marked the full fruition of the ‘spectacle of shame’ developed in the colonial common law into the powerful symbol of the adulterer’s badge of ignominy that lies at the core of Hawthorne’s *The Scarlet Letter*. It read,

> “And if any man shall commit adultery, the man and woman […] shall be set upon the gallows by the space of an hour, with a rope about their neck, and the other end cast over the gallows, and in the way from thence to the common gaol shall be severely whipt, not exceeding fourty stripes each.”

The unique punishment for the crime of adultery described in Hawthorne’s novel did not exist in the historic period of mid-seventeenth century Massachusetts Bay Colony as he characterizes it. This ‘spectacle of guilt and shame’ grew out of the dynamic tension that existed between the Court of Assistants use of its discretion to punish the crime of adultery focusing on saving the soul of the transgressor and healing wounds done to the Puritan social body by symbolically placing both in a state of grace and the statutory law prescribing adultery as a capital crime. This tension between Bay Colony statutory and common law made way for recodification of adultery during the first session of the Massachusetts Bay Province. This new law prescribed the punishment for the crime of adultery that forced the transgressor to stand at the gallows with a rope around his or her neck for a span of time, make the walk of shame from the gallows to the pillory at the center of the marketplace to be tied prostrate before the community and then mutilated, thereafter to wear the adulterers badge of ignominy in addition to the stripes of the whip. The private stripes of the whip and the public adulterer’s badge of ignominy provided powerful symbols for the movement from a state of sin to a state of grace for individual and the
community. The 1694 law marked a shift in the law away from the Old Testament code of Moses in the Body of Liberites to a different approach focused on redeeming the transgressor and the community together, transforming the gallows from a symbol of the rigidity of the Puritan code into, “The very ideal of ignominy […] made manifest in this contrivance of wood and iron.”99
The common law of Plymouth Colony evolved in the same direction as that of its neighboring colony, starting out with codification of the crime of adultery as a capital offense in the 1620’s, the courts refusing to impose death as a penalty for the crime, and then the recodification of adultery to accord with the common law in the 1650’s. That being said, the focus of this work is the law of Massachusetts Bay Colony because of the centrality of it in the work of Hawthorne and the length of time that the statutory and common law were disparate on the issue of adjudication of the crime of adultery.


6. Ibid.

7. Ibid.


12. Ibid.

13. Ibid.


17. Ibid.

18. Ibid.


20. Captain Underhill loomed large in the 17th century Puritan and Pilgrim religious narrative of coming to America as return to the biblical promised land of Cannan surrounded by hostile terrain and enemies during the fear and doubt of the 1637 Pequot War.

21. The Antimorian hearsay.


23. Ibid.

24. Ibid.

25. Ibid, 357.


27. Ibid, 330.


29. Ibid.

30. Noble, Records of the Court of Assistants of the Colony of Massachusetts Bay vol.II. 108.


34. Ibid., Deuteronomy 22.22.

35. Dunn, The Journal of John Winthrop, 381.

36. Ibid, 382.

37. Ibid.

38. Ibid.
41 Ibid, 335-336.
42 Ibid.
43 Ibid, 365.
44 Ibid.
45 Ibid.
46 Ibid, ix.
49 Ibid.
52 Ibid, 500 n.99.
53 Ibid, 500.
54 Ibid, 500 n.99
55 See note 20.
59 Bell, *From the Library of Charles Spurgeon*, 58.
60 *Indictment of Mark McGee*, Massachusetts Archive Collection vol. 38B, 39.
61 Ibid.
66 Ibid.
67 Ibid.
68 Francis Dow, *Every Day Life in the Massachusetts Bay Colony*, 211.
70 Hawthorne, *The Scarlet Letter*, 64.
71 Ibid.
72 Ibid.
73 Ibid.
75 Ibid, 66.
77 Ibid.
81 Ibid.
82 Ibid.
83 Ibid.
84 Ibid.
85 Ibid.
87 Ibid., vol. V, 212-213.
88 Ibid.
89 Ibid.  
91 Ibid, 192.  
92 Ibid.  
94 Noble, *Records of the Court of Assistants of the Colony of Massachusetts Bay* vol. I, 10.  
95 Ibid.  
97 Ibid.  
98 Ibid.  