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Introduction

"You are a Liar; you are no more fit for a Justice than the Devil! You are a Justice of a Fiend!" shouted yeoman Bildad Fowler at Justice Eldad Taylor in December of 1772. Several of the "good People" of Hampshire County witnessed Fowler's vituperative outburst at Justice Taylor, much to the disrepute of his "Office and Authority," as Taylor reported the incident to the next sitting of the county's Court of General Sessions of the Peace. In his report to the court, Taylor repeated Fowler's abusive statements, "all which Expressions," he told his fellow justices, he "apprehends to be Violations of those Rules of Decency and good Manners that every one ought to observe towards [each] of his Majesty's Justices of the peace [and] inconsistent with the good behavior the said Bildad ought to have maintained."[1]

Justice Taylor alleged no specific statutory violation in his complaint against Fowler. This in and of itself was not uncommon; alleged criminals in provincial Massachusetts were often tried for common law offenses as well as those enumerated by statute. However, the precise crimes that Taylor described were unknown to either common or statutory law. The "Rules of Decency and good Manners," while elaborated at great length in numerous conduct and courtesy books popular in eighteenth-century Anglo-America, were, after all, merely the reflection of certain cultural ideals held by the

[1] *Rex* v. *Fowler*, February 9, 1773, Hampshire County Court General Sessions of the Peace (GSP).

genteel and the would-be genteel. So how did Fowler's alleged violation of these ideals, however impolite, land him in court on charges of criminal activity? And why, given the context and content of these words, was he not charged instead with contempt or abuse or defamation, all established legal categories which could easily have accommodated Fowler's outburst?

These questions are important because this case is far from an isolated example; Bildad Fowler was one of hundreds of Massachusetts colonists who found themselves the subject of a criminal prosecution for their speech in the eighteenth century. Statutes outlawing criminal speech often framed these offenses as impolite and implicitly associated them with the "vulgar" sort of people. In many cases, court records explicitly describe speech crimes like Fowler's as violations of good manners.[2] In others, the records merely imply that the "rules of decency" had been broken. But the evidence from these cases and elsewhere overwhelmingly suggests that, during the eighteenth century, Massachusetts legal institutions began to enforce not only official legal rules and non-statutory codes of ethical conduct, as had traditionally been their purview, but also the rules of polite manners. In so doing, they also contributed to the public construction of new ideals of elite white masculinity.

To be sure, many varieties of speech were prosecuted in the seventeenth century as well. But before the institution of Massachusetts' Second Charter in 1691, neither the colony's statutes nor its actual records of prosecutions framed speech offenses as violations of the code of politeness.[3] Rather, like most other crimes, they were conceptualized as sinful, ungodly, and violations of divine

[2] See, e.g., *Rex* v. *Poivre, Poivre, and Cooke*, July 1697, Bristol County Court GSP (re. their "Erogular Actions and Provoking Speeches to Each other, Contrary to the Rules of Civillity & Good Manners"); *Rex* v. *Stetson*, September 1723, *Plymouth Court Records, 1686–1859*, Vols. 1–4, ed. David Thomas Konig, intro. William E. Nelson (Wilmington, DE: Michael Glazier in assoc. with the Pilgrim Society, 1978–1981) (re. "his rudeness and unmannerliness to the Court"); *Rex* v. *Gouge*, April 1704, Suffolk County Court GSP (re. "his open Contempt of the Court by his rude and unmannerly Carriage and Expressions"); *Rex* v. *Barrell*, October 1710, Suffolk County Court GSP (re. behaving "very Disrespectfully to the Court as well in words as Actions"); *Rex* v. *Kellaugh*, September 1724, Suffolk County Court GSP (re. behavior "against good manners and contrary to the Laws"); *Rex* v. *Lamb*, February 1733/34, Worcester County Court GSP (re. "behaving himself in a Rude & disorderly maner in ye Court").

[3] For the Second Charter, see Benjamin Labaree, *Colonial Massachusetts: A History* (Millwood, NY: KTO Press, 1979), 127.

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law, and offenses of which any community member could potentially be guilty.[4] John Porter, Jr.'s behavior toward his parents, for example, was described in his indictment as "profane, unnatural and abusive"; he later submitted an apology for his speech which was so "contrary to the very light of nature & much more contrary to the little light of the word of God."[5] Oaths were "wicked and profane"; slander "[broke] the ninth commandment"; and other "unruly speeches" were "sin."[6]

A close analysis of legal records reveals how the participants in the procedures of criminal justice began to define and enforce the ethos of politeness, in addition to as well as (sometimes) instead of traditional legal rules. Increasingly, Massachusetts legal institutions both reflected the growing preoccupation with how language and speaking style related to personal identity and social status, and translated the hierarchical rankings of speech and speakers into rankings of social power and privilege. This book argues that the criminalization, prosecution, and punishment of verbal offenses helped establish and legitimate an emerging social hierarchy based upon gentility, and in particular white masculine gentility, in eighteenth-century Massachusetts.

These ideals underlay social hierarchy, the allocation and exercise of power in colonial politics, and the construction and elaboration of empire itself. Rudeness and the rude were explicitly and implicitly excluded from the sinews of power – and, by their exclusion and othering, they defined in relief the imagined communities of power in colonial British America.[7] Polite speech did not constitute the entirety of an imperial social order premised upon "civility." However, it was an essential and exclusive practice for those who wished to craft an identity for themselves as genteel subjects of, and legitimate authorities within, that empire.

[4] Stephen Botein, *Early American Law and Society* (New York: Alfred A. Knopf, 1983), 24–27.

[5] Record of December 1661, Records and Files of the Quarterly Courts of Essex County, Massachusetts, Vol. 2 (Essex Institute, 1912), 335; Petition to the Court, ibid., 337.

[6] Prosecution of Dennes Kellam, March 1662–1663, Records and Files of the Quarterly Courts of Essex County, Massachusetts, Vol. 2 (Essex Institute, 1912), 408; Complaint of Andrew Mansfield against John Hathorne, March 1662–1663, ibid., 24; Acknowledgment of Edith Cravitt, November 1666, ibid., 386.

[7] See John Brewer, *The Sinews of Power: War, Money, and the English State, 1688–1783* (Cambridge, MA: Harvard University Press, 1990); Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London/New York: Verso, 1991).

The "refinement" of the British colonies in America, a process encompassing both material and behavioral aspects of eighteenth-century society, is now well-established in the historical literature.[8] The consumption of luxury goods, the construction of new public and private spaces, and the adoption of "polite" codes of conduct created a new cultural geography in which social and political power flowed to those who had distinguished themselves as "genteel," and in which the vulgar were expected to defer to the polite. The literature does not, however, address exactly how those social and cultural distinctions were to be achieved. Conduct and courtesy books certainly offered an idealized vision of the proper ordering of society according to the hierarchies of gentility, but this vision was merely prescriptive. The colonial elite demonstrably desired and expected the political perks of politeness, and the deferential behavior of the masses, but did anything make this more tangible than wishful thinking?[9]

Bildad Fowler's rude words to Justice Taylor would certainly seem to undercut this proposition. Scholars in the "deference debate" of early American history have asked similar questions, to the point where some now doubt whether the concept of deference is even still useful (a 2004 conference on the subject was subtitled "The Life and/or Death of an Historiographical Concept").[10] Part of the reason for this doubt is that scholars have defined deference in different ways, thus making it difficult

[8] See, e.g., Richard Bushman, *The Refinement of America: Persons, Houses, Cities* (New York: Alfred A. Knopf, 1992); C. Dallett Hemphill, *Bowing to Necessities: A History of Manners in America, 1620–1860* (New York: Oxford University Press, 1999); Kenneth A. Lockridge, "Colonial Self-Fashioning: Paradoxes and Pathologies in the Construction of Genteel Identity in Eighteenth-Century America," in *Through a Glass Darkly: Reflections on Personal Identity in Early America*, eds. Ronald Hoffman, Mechal Sobel, and Fredrika J. Teute (Chapel Hill: University of North Carolina Press, 1997); Mark A. Peterson, "Puritanism and Refinement in Early New England: Reflections on Communion Silver," *WMQ* 3rd ser., 58, no. 2 (April 2001): 307–346; Michal J. Rozbicki, *The Complete Colonial Gentleman: Cultural Legitimacy in Plantation America* (Charlottesville: University Press of Virginia, 1998).

[9] Michael Zuckerman is perhaps the strongest proponent for the argument that colonial Americans were only rarely and insincerely deferential. See, e.g., Michael Zuckerman, "Authority in Early America: The Decay of Deference on the Provincial Periphery," *Early American Studies: An Interdisciplinary Journal* 1, no. 2 (Fall 2003): 1–29, at 24–29.

[10] "Deference in Early America," a Mini-Conference at the McNeil Center for Early American Studies, 11 December 2004.

to compare directly their analyses and arguments. One group of historians has focused on voting behavior, without providing any description of the process by which deference was generated or manifested, and another group has provided detailed descriptions of behavior they identify as "deferential" or "non-deferential," without linking such behavior to the broader workings of social and political power. Moreover, most writing about deference purports to be about people's outlook or attitude, which, given its historical distance and innate interiority, is both "unverifiable *and* irrefutable."[11] Instead, historians need to examine behavior, more specifically "modes of political and cultural expression through which colonists articulated or rejected claims to authority."[12] In other words, scholars must search for social spaces in which colonists engaged in policing the low, or enforcing deference, in order to observe how gentility was constructed as the governing paradigm of social identity and hierarchy.

One such space was the colonial "speech economy" – essentially the rules governing who gets to speak publicly, with legitimacy and believability, and with authoritative and broadly accepted judgments. The speech economy contained the essential core of attitudes toward social authority; despite common rhetoric about the importance of lodging power in the people, most eighteenth-century commentators still agreed that the voice of the people was always susceptible to undue influence and therefore ought to be circumscribed. One approach to studying the speech economy is to analyze how it was constructed through battling discourses in the public prints, assessing how the language of "gentlemanliness" was employed as the basis of claims for social and political power.[13] Such an analysis can reveal how the regulation of discourse was closely tied to the constitution of cultural authority and the consolidation (and eventual disruption) of a genteel ruling class. In eighteenth-century Connecticut's speech economy, for example, "assumptions about social legitimacy, personal authority, and religious calling regulated

[11] This argument was made by John Smolenski in a paper originally written for the "Deference in Early America" conference, later published as "From Men of Property to Just Men: Deference, Masculinity, and the Evolution of Political Discourse in Early America," *Early American Studies* 3, no. 2 (Fall 2005).

[12] Smolenski, "From Men of Property." [13] Ibid.

who could speak or write to a general audience and anticipate its attention and respect."[14]

The cover image of this book is a visual representation of several elements of the Massachusetts speech economy. The embroiderer depicts Harvard Hall in the early eighteenth century, and adds two putti holding a busy beehive where the cupola should be. The slogan is a quotation from Virgil, roughly translating as "They keep out drones from these premises."[15] Drones were nonworker bees, of course, which signified the skiving and therefore expendable poor in a well-ordered society.[16] But "drone" could also refer to "a monotonous speaker; a person who speaks in a droning voice."[17] Harvard graduates performed public disputations as part of their commencement exercises, and, whether they were called to the pulpit or the bar, were expected to speak with eloquence and style.[18] As the untranslated slogan subtly implied, moreover, one had to possess proficiency in the classical languages to even gain entrance to Harvard. Once within "these premises," learned young men would be subject to college laws that forbade all manner of impolite and "offensive" speech.[19] Poignantly, this vivid yet subtle commentary on

[14] Christopher Grasso, *A Speaking Aristocracy: Transforming Public Discourse in Eighteenth-Century Connecticut* (Chapel Hill: University of North Carolina Press, 1999), 2.

[15] Samuel Eliot Morison, "Needlework Representing a Colonial College Building," *Old-Time New England* XXIV, no. 2 (1934): 67–72, at 68.

[16] In seventeenth-century England, bee colonies were admired for expelling drones once they had performed their sole contribution of mating with the queen, and held up as a model for a society bedeviled by the "strolling poor." Tammy Horn, *Bees in America: How the Honey Bee Shaped a Nation* (Lexington: University Press of Kentucky, 2005), 10–11. The slogan and prominent placement of the beehive perhaps suggested that no lazy scholars would be welcome at Harvard College.

[17] "drone, n.2." *OED Online*, June 2021. Oxford University Press. www-oed-com.ezproxy.alma.edu/view/Entry/57853?rskey=q8fwTD&result=2, accessed June 16, 2021.

[18] Albert Matthews, "Harvard Commencement Days, 1642–1916," *Publications of the Colonial Society of Massachusetts*, Vol. XVIII (Boston: 1917), 309–384.

[19] One early set of rules specified that "All students shall be slow to speak, & eschew and (as much as in them lies) shall take care that others may avoid all swearing, lying, cursing, needless asseverations, foolish talking, scurrility, babbling, filthy speaking, chiding, strife, railing, reproaching, abusive jesting, uncomely noise, uncertain rumors, divulging secrets, & all manner of troublesome & offensive gestures, as being they who should shine before others in exemplary life." William Bentinck-Smith, ed., *The Harvard Book: Selections from Three Centuries*, rev. ed. (Cambridge, MA: Harvard University Press, 1982), 157.

the speech ethos of Massachusetts was likely accomplished by Mary Leverett.[20] As a woman, she would never have been admitted to Harvard College and had few opportunities to speak legitimately upon matters of public concern.

Harvard might have been able to exclude unwanted speakers. However, we can gain a much fuller sense of how gentility was constructed and challenged by observing colonists' actual behavior and interactions in a very different social space: the courtroom. The records of prosecutions of speech crimes in eighteenth-century Massachusetts also show colonists negotiating and performing individual identities and social relationships more broadly. Thus, there is potential to connect the process of defining the self to that of defining the polity, just as recent intellectual and cultural histories of the American Revolution have been grounded in the practices and rituals of everyday colonial life.[21] Central to the project of creating a new nation, these scholars have argued, was defining the self and the citizenry; to these ends, Americans paid particular attention to which sorts of people were entitled to claim and practice a legitimate voice in the public sphere. In the new republic, the public prints and other cultural productions played a crucial constitutive role in defining and limiting political participation. Prior to the war for independence, however, formal legal procedures for prosecuting and punishing illicit speech provided spaces in which provincials could perform and negotiate the roles deemed appropriate for exercising a political voice.

Moreover, the significance of transgressive speech may have been more than local. Even in seventeenth-century New England, the legal regulation of speech demonstrates that the "work of 'governing the tongue' … was central to the work of governing families, neighborhoods, towns, and even empires."[22] As the era of salutary neglect ended and the British government sought to exercise more centralized control over its American colonies in the eighteenth

[20] Morison, "Needlework," 67–72.

[21] See Carolyn Eastman, *A Nation of Speechifiers: Making an American Public after the Revolution* (Chicago: University of Chicago Press, 2009); Sarah Knott, *Sensibility and the American Revolution* (Chapel Hill: University of North Carolina Press, 2009).

[22] Jane Kamensky, *Governing the Tongue: The Politics of Speech in Early New England* (New York: Oxford University Press, 1997), 9.

century, some of that control manifested as cultural influence: "While it is important to see that power is enacted in and through texts . . . it is also crucial to see power working through speech and gesture, in voices, bodies, forms of dress and comportment. . . . [T]he establishment of authority throughout the British Atlantic world depended upon establishing a social order based on an ill-defined but nevertheless powerful conception of 'civility.'"[23] Civility, as will be described, was a fundamental value of eighteenth-century Massachusetts criminal speech law.

In analyzing the speech economy of eighteenth-century Massachusetts, this study focuses primarily upon the law of speech itself – the statutes criminalizing specific speech acts, the prosecutions of illicit speech, and the courtroom performances and interactions that breathed life into doctrine. After all, the speech economy was not only constructed in the abstract realm of print culture; its rules were also negotiated, defined, and enforced in the physical space of the courtroom, through legal processes and procedures. Through a close reading of these records, we can hear our historical subjects curse, swear, threaten, insult, and lie; they deny, affirm, confess, order, and apologize; they excuse and exculpate, convict and condemn. They also gave voice to a new sort of speech economy, in which genteel masculinity – gentlemanliness – joined godliness as a central personal quality on which claims to social and cultural authority rested.

Methodology

In order to hear these voices – polite and impolite alike – I examined all available records pertaining to criminal speech prosecutions from nine Massachusetts counties (all whose records survive), plus seven years of records from one county in Maine, which was part of Massachusetts at the time.[24] Some of these instances include elaborate descriptions of

[23] Miles Ogborn, "Francis Williams's Bad Language: Historical Geography in a World of Practice," *Historical Geography* 37 (2009): 72–88, at 83 (internal quotations omitted).

[24] Barnstable County's records from the colonial era were destroyed by a fire in 1827. David H. Flaherty, "A Select Guide to the Manuscript Court Records of Colonial New England," *AJLH* 11, no. 2 (April 1967): 107–126, at 117.

the time and place of the offense, with witness testimony and exact transcriptions of the criminal words allegedly spoken. Others include a pretrial procession of writs and warrants, or a posttrial procession of appeals and sureties to appear. Most consist of terse entries noting a presentment or certifying a conviction. All told, however, I ultimately encountered more than 1,600 criminal misspeakers, plus many prosecutors, witnesses, and justices of the peace associated with their cases in the period from 1690 to 1776.[25]

The surviving evidence includes a variety of types of legal documents. All counties include "Records," essentially a basic description of the case and its disposition.[26] Records always identify the defendant (but not always his or her social status or occupation) and name the offense, sometimes describing the offensive speech with great detail. They occasionally identify the complainant and his or her status, and almost always provide the ultimate disposition of the case – although, rarely, a case ends with a frustratingly enigmatic "the court decides _____."

The records from Berkshire, Bristol, Hampshire, and Middlesex counties also include Files, an assortment of legal papers accompanying a case. These can include writs, complaints, depositions, warrants, grand jury presentments, appeals from individual justice of the peace decisions to General Sessions courts, summons for witnesses, and bonds (payments of money to guarantee good behavior or a future court appearance). While these papers do not provide information about the ultimate disposition of a case, they often contain biographical data about the defendant, the complainant, and any witnesses involved, such as social and marital status, occupation, age (if a minor), and town of residence. They also often provide rich detail about the offensive speech in question, describing the time and place of the alleged crime (and sometimes its volume), recounting any associated actions (such as violence), as well as quoting the alleged words spoken.

Also surviving for Suffolk County are its docket books, which are usually understood to record only the most basic chronological

[25] The total number of cases is 1,685. A few defendants were repeat offenders.

[26] I will use the capitalized form of "Records" here to distinguish this specific type of judicial document from the more general category of all legal records.

outlines of individual cases. However, in this instance they resemble Records, in that they include information about the complainant, the defendant, the witness testimony, and the ultimate disposition of the case.

Finally, totals include twelve individual justice of the peace record books from five separate counties. As noted elsewhere in the Introduction, justices of the peace heard complaints as individuals separately from the quarterly sittings of the General Sessions courts. (They recorded these cases in their record books and were supposed to later "certify" them to the General Sessions courts. However, the comparisons I have done between justice of the peace record books and the corresponding county General Sessions Court Records suggest that this process was haphazard, at best.) These twelve record books are, of course, but a fraction of the total number of record books that were created by Massachusetts justices of the peace over the course of the eighteenth century, but not many have been preserved or are accessible to researchers.

Most of the General Sessions Court Records are interspersed with Records of the county Court of Common Pleas, which heard matters of civil litigation. (The two courts were actually the same judicial body; the nomenclature change merely indicated jurisdiction, i.e., whether the court was hearing criminal or civil matters.) Moreover, the General Sessions Records are not indexed by type of offense. Therefore, the only way to identify prosecutions for speech offenses was to read every case throughout the entire record. Similarly, the Files are not organized or indexed by crime, so I needed to examine every document in order to identify which ones were potentially relevant to the study. I followed a similar procedure with the docket books and justice of the peace record books.

I identified cases as relevant to the study if they clearly involved prosecution for any act of speech or vocalization (e.g., verbal utterance or noise). Thus, I included any document that clearly specified verbal threats, menaces, contempt, rudeness, or abuse; profane cursing or swearing; all instances of noisy or clearly verbal disorderly conduct; lying, false reports, false stories, defamatory or fraudulent speech, or perjury. I did not include cases identified only as "breach of peace" or "abusive carriages," even when I suspected that such cases involved speech offenses, because I could not confirm beyond question that they

did. I recorded all information available that pertained to the identity and social status or occupation of both the complainant and the defendant, as well as the date of the prosecution (or complaint, or presentment, or appeal, depending upon the type of record in question). Additionally, I noted all procedural history of the case (e.g., defendant's request for a jury trial, defendant's plea, verdict, punishment, appeal, etc.).

For virtually every record I examined, I made an exact transcription of at least a portion of the record. With the exception of presentments for profane cursing and/or swearing, which tended to be terse and formulaic, I transcribed the descriptive portion of almost all grand jury presentments.[27] Similarly, whenever witness testimony about offensive speech was included as part of the Record, I also transcribed that testimony. I followed the same procedure whenever there was descriptive or non-boilerplate language in complaints, depositions, warrants, summons, appeals, or Records. This does not mean that there is a record of the alleged criminal speech itself in every case, but there is almost always a record of what others – the victim(s), other witnesses, clerks, and justices of the peace – were saying about the offensive speech and/or the speaker.

Often the records were straightforward in indicating the nature of the speech offense in question, as when a warrant referred to "menacing speeches" or a presentment described "profane speaking." At other times, they were slightly more opaque, as when a clerk summoned witnesses to give evidence as to whether they had ever heard a defendant "declare or threaten" to do something. But a reading of the full record revealed that this summons was part of a prosecution for threatening speech, so I recorded it in full along with the others.[28]

I counted each record as an individual case, with certain exceptions. If it corresponded with another record that clearly corresponded to the

[27] I did transcribe the occasional presentment for profane cursing or swearing that provided greater detail.

[28] Israel Williams, Clerk, summoned witnesses "to Give in Evidence of What they know Relating to ye Carriage and Behaviour of Nath.l Kentfield of s.d Northampton and particularly whether they have heard s.d Kentfield Declare or Threaten that he wou'd Take away or Deprive any Person or Persons of their Lawful Goods or Estate." Summons, December 5, 1732, Hampshire County Files, MSA.

same case – a warrant and a recognizance that both involved the same defendant and offense within a short period of time, for example – I counted the two records together as one. When multiple individuals were named as defendants in a single record, I counted each as a separate case.[29] And when a defendant was associated with multiple offenses in a single record, for example swearing and threats, or even both profane cursing and swearing, I counted the offenses separately. I did this based on evidence that Massachusetts jurists conceptualized and recorded them separately. For example, the presentment of Noah Brook originally included "Curse & Sware," but the clerk subsequently crossed these words out and wrote instead "Utter Menacing Speaches [*sic*]."[30]

Moreover, while profane cursing and swearing were associated, both in theory and in their commission, Massachusetts courts were also careful to distinguish between the two when prosecuting and punishing offenders. Justices of the peace consistently parsed out criminal profanities, as when Justice of the Peace Isaac Stratton recorded that he had convicted William Spencer of "Swearing Six Prophane Oaths and of uttering one prophane Curse."[31] I counted this case, and cases like it, as two offenses: swearing and cursing (I did not, however, count each individual instance of swearing and cursing separately, so long as they occurred at the same time). In another example of how these distinctions mattered, Justice of the Peace Josiah Chauncy certified to the Hampshire County General Sessions Court that he had convicted Isaac Davis of "Uttering two Profane ~~oaths~~ Curses."[32] Since eighteenth-century courts treated them as separate offenses, I did as well and counted them separately.

Three-hundred-year-old legal documents are silent. Archives are quiet. Yet much conversation and commotion surrounded the creation of these documents, all speech that they failed to capture.

[29] While contemporary prosecutorial practice would permit charging a defendant with multiple offenses when there are multiple victims, such as when a misspeaker insulted more than one person at once, eighteenth-century justices of the peace seemed to conceptualize these instances as a singular offense and so they have been counted accordingly.

[30] Presentment of Noah Brook, Third Tuesday of May, 1738, Hampshire County Files, MSA.

[31] *Commonwealth* v. *Spencer*, July 15, 1785, Bristol County Files, MSA.

[32] *Rex* v. *Davis*, November 13, 1769, Hampshire County Files, MSA.

Even a solitary justice of the peace, peremptorily noting his conviction of a neighbor in the justice's own home for "profanely swearing," would have often first heard a report of said swearing with the criminal words repeated aloud. A full trial for criminal speech at the Court of General Sessions of the Peace, whether held at the local tavern or at a purpose-built courthouse, would have also involved either hearing live witness testimony or reading a deposition – and, most importantly, there would have been an audience for such speech. Court days were community events, as neighbors concluded legal affairs, conducted business, socialized, and drank – and listened to witnesses and judges alike recount and describe allegedly criminal speech. Often, juries got to have their say as well.

As I go on here to describe and quantify the individual instances of criminal speech, I want to highlight that each one was embedded in a great deal of other speech – describing it, repeating it, contesting it, interpreting it, condemning it, excusing it. It was uttered in the context of live human interactions and relationships; it arose from and evoked real human emotions. Thus, even though the routines of judicial record-keeping often reduced all this speech, all these interactions, all this passion, to rather dry chronicles such as a defendant "profanely swore five oaths," sometimes life bursts through as when a clerk recorded courtroom testimony about a defendant bawling, "Cooley you're a devil you are." Such spicy testimony would have been spoken – and heard – regularly at Massachusetts General Sessions courts throughout the eighteenth century. Prosecuting and punishing impolite speech, and all the courtroom conversation that accompanied such prosecutions, constituted an integral element of defining and preserving the king's peace in provincial Massachusetts.

The records of Berkshire County, in western Massachusetts, begin with its founding in 1761 and include both General Sessions Court Records and Files. This study includes Records up to December 26, 1775 (after which there is a gap until April 10, 1781, perhaps because of dislocations related to the Revolutionary War) and Files from 1762 through 1786. Berkshire County totals also include cases from the record book of Justice of the Peace Elijah Dwight of Great Barrington, covering the years 1768–1772.[33] Taken together, Justice

[33] All originals are in the MSA.

Dwight and the entire Berkshire County Court of General Sessions adjudicated seventy-three individual instances of criminal speech.[34]

Bristol County's General Sessions Records are some of the most complete of any county for the eighteenth century, beginning in 1697 and continuing through 1777. The Files are voluminous; I examined those records (with some sampling) from 1691 through 1730. The record books of three justices of the peace are included with Bristol County: Timothy Fales, Jr. (1724–1742), Benjamin Church (1714), and George Godfrey, Jr. (1739–1796).[35] Criminal misspeakers appeared before these individual justices and the Bristol County General Sessions Court 176 times.[36]

I examined Dukes County Court of General Sessions of the Peace Records from 1722 through 1776 (excluding 1737–1741, when records are missing). Over forty-nine years, this court heard twenty-seven individual cases of criminal speech.[37] In Essex County, I examined Records for the Court of General Sessions of the Peace from 1692 through 1776.[38] One hundred sixteen times, this court heard allegedly criminal speech recounted before it.

The General Sessions Records for Hampshire County are also quite complete; I examined all of them from 1690 through 1774 (there is a gap in the records from that year until 1781). I also reviewed all available Hampshire County Files, identified as spanning the period from 1721 through 1776 (although there do not seem to be records for

[34] These totals reflect fourteen years of General Sessions Records and twenty-four years of Files.

[35] Although this record book is included in the Papers of George Godfrey, all the entries up until December 14, 1763 are signed "John Godfrey." Moreover, the post-1763 entries signed "George Godfrey" are in a much steadier and more even hand. It seems likely that the earlier cases were in fact heard by George Godfrey's father, John, who was appointed to the Bristol County Court of Common Pleas in August 1749. See William H. Whitmore, comp., *The Massachusetts Civil List for the Colonial and Provincial Periods, 1630–1774* (Albany: 1870), 102.

[36] General Sessions court totals include eighty years of Records and twenty sampled years of Files. The total number of years of justice of the peace records was calculated by adding eighteen years from Timothy Fales, Jr., one year from Benjamin Church, and forty-four years from John Godfrey and George Godfrey, reflecting the time from when John was appointed in 1749 until when George died in 1793. All of these records are in the MSA, except for George Godfrey's record book, which is at the Harvard Law School Library

[37] Microfilm held by the MSA.

[38] These Records have been microfilmed by the Genealogical Society of Utah.

all of 1775–1776 and most of 1774). At least 218 colonists accused of speech crimes appeared before Hampshire County General Sessions courts in those years.[39] Also in Hampshire County, Justices of the Peace Eldad Taylor (whose record book spans 1762–1774) and William Pynchon (whose record book I surveyed for the years 1690–1702) heard an additional twenty-one criminal speech cases.[40]

I examined Middlesex County Court of General Sessions of the Peace Records from 1690 through 1776, in addition to the Middlesex County Files as organized by box: 1737–1745, 1750, 1760, 1765, 1770, 1774–1776, and 1780.[41] The Records and Files together provide documentation of more than 191 criminal speech cases, while the records of Justices of the Peace Richard Dana (1746–1748), Nathaniel Harris (1734–1761), Benjamin Prescott (1729–1733), and Jonas Prescott (1729–1733) add another 131 cases, for a total of 322 instances of reported criminal speech in Middlesex County.[42]

In Nantucket County, the General Sessions Records from 1721 through 1764 yield only fourteen instances of criminal speech, a low number compared to other counties.[43] The General Sessions of the

[39] I say "at least" because one case involving a riotous, noisy assault on Jacob Adams, whose complaint amounted to a claim of defamation, named "A Great number of other Persons unknown to your Complainant" in addition to the six named defendants. *Rex* v. *Donaghy et al.*, June 23, 1747, Hampshire County Files, MSA.

[40] Hampshire County Records have been microfilmed by the Genealogical Society of Utah, and Hampshire County Files are archived at the MSA. Eldad Taylor's record book is in the Harvard Law School Library, while William Pynchon's diary has been published as *Colonial Justice in Western Massachusetts (1639–1702): The Pynchon Court Record, An Original Judges' Diary of the Administration of Justice in the Springfield Courts in the Massachusetts Bay Colony*, ed. with intro. by Joseph H. Smith (Cambridge, MA: Harvard University Press, 1961).

[41] The Middlesex County Records have been microfilmed by the Genealogical Society of Utah; Middlesex County Files are archived at the MSA.

[42] I say "more than" because some cases involved additional, unspecified defendants, as when Robert White complained "against George Courtney & others." *Rex* v. *Courtney et al.*, December 22, 1731, Middlesex County GSP (microfilmed by the Genealogical Society of Utah, Salt Lake City, 1972) [film 0892252]. Dana Papers, Massachusetts Historical Society (MHS); *Records of the Court of Nathaniel Harris, One of His Majesty's Justices of the Peace Within and for the County of Middlesex, Holden at Watertown From 1734 to 1761*, ed. with intro. by F. E. Crawford (Historical Society of Watertown, 1893); Groton Papers, MHS.

[43] The Nantucket General Sessions Records are on microfilm at the MSA. Although they are listed in the MSA inventory as GSP 1721–1816, there is a gap from 1764 to 1783. It is impossible to know whether the comparatively lower number of prosecutions in

Peace Records from Plymouth County, 1686–1776, include 146 criminal speech cases.[44] In Suffolk County, Records from 1702 through 1776 and selected years of minute books from 1737 through 1776 yield more than 196 instances of criminal speech.[45] Suffolk County Justices of the Peace Henry Adams and Daniel Cushing heard an additional ten cases.[46] Between 1731 and 1776, the justices of the Worcester County General Sessions Court Record books adjudicated a remarkable 327 instances of criminal speech.[47] And, finally, the Records of York County, Maine from 1711 through 1718 provide evidence of thirty-nine individual criminal speech prosecutions.[48]

As previously mentioned, I transcribed for further analysis any language from these cases that was not strictly formulaic. I did so for a couple of reasons. First, it was in the conversation about criminal speech, not in the bland numbers of prosecution and punishment, that one could hear explicit anxieties about impoliteness. The descriptors attached to defendants and their language, the notations of place of offense, and even the relative lack of commentary about gentlemanly speech all spoke volumes, as it were, about the cultural and legal definitions and meanings of impolite speech and its relationship to social order.

Nantucket County reflects a correspondingly lower incidence of criminal speech. If so, it is tempting to speculate that the island's large Quaker population, with its distinct ethos of speech, might have committed fewer speech offenses – but this would be only speculation. For Quaker speech ideologies, see Richard Bauman, *Let Your Words Be Few: Symbolism of Speaking and Silence among Seventeenth-Century Quakers* (Cambridge: Cambridge University Press, 1983).

[44] *Plymouth Court Records, 1686–1859*, Vols. 1–4, ed. David Thomas Konig, intro. William E. Nelson (Wilmington, DE: Michael Glazier in assoc. with the Pilgrim Society, 1978–1981).

[45] Suffolk County Records have been microfilmed by the Genealogical Society of Utah. One volume is held by the Harvard Law School Library; see Massachusetts Court of General Sessions of the Peace, *Notes on Cases before the Court, 1749–1767*, 1749. Minute Books are archived at the MSA.

[46] Adams-Morse Papers and Cushing Papers, MHS.

[47] *Records of the Court of General Sessions of the Peace for the County of Worcester, Massachusetts, From 1731 to 1737*, ed. Franklin P. Rice (Worcester, MA: Worcester Society of Antiquity, 1882); Records of the Court of General Sessions of the Peace, Worcester County, 1731–1757, 1768–1780, Genealogical Society of Utah.

[48] *Province and Court Records of Maine, Vol. V, The Court Records of York County, Maine, Province of Massachusetts Bay, April 1711–October 1718*, ed. Neal W. Allen, Jr. (Portland: Maine Historical Society, 1964).

Second, it was not always immediately apparent how to classify some of these prosecutions. As in the prosecution of Bildad Fowler that begins this book, in which Justice Eldad Taylor characterized Fowler's words as violations of "Rules of Decency and good Manners," sometimes no statutory or common law offense precisely encompassed the nature of the transgression as described. It would be only later, after reading and thinking about many more cases, that I could more confidently classify this case as a prosecution for criminal defamation (essentially for giving him the lie), and an example more broadly of a violation of the polite value of credibility. Similarly, the presentments for "publishing a lie" defied easy categorization under either statutory or common law, and even exceeded the bounds of what was described in contemporary justice of the peace manuals. Before I could accurately analyze these prosecutions, I needed to better understand how and why Massachusetts elites were adopting the ethos of politeness, changing ideas about the function of speech in defining personal identity and social relationships, and the role of the criminal law in creating and maintaining social order.

Speech and the Law

Massachusetts legislators thought a great deal about speech, and said quite a lot about both legitimate and transgressive speech. Over the course of the (long) eighteenth century, they made it illegal to "profanely swear or curse" (in 1692, 1734, and 1746) or "blaspheme the holy name of God" (1697).[49] Licensed innholders were required to be "persons of sober conversation" (1712) and were not to tolerate the aforesaid "profane swearers or cursers" (1698) or any "singing . . . or revelling" (1712) in their taverns.[50] It was also criminal to "make or publish any lie or libel, tending to the defamation or damage of any particular person" (1692), "make or spread any false news or reports, with intent to abuse and deceive others" (1692), or "wilfully and corruptly commit any manner of wilful perjury" (1692).[51] Also

[49] *Acts and Resolves of Massachusetts*, 1692, Ch. 18, Sect. 1; 1734, Ch. 13; 1746, Ch. 17, Sect. 1; *The Charters and General Laws of the Colony and Province of Massachusetts Bay* (Boston: T.B. Wait & Co., 1814), 1697, Ch. 47.

[50] *The Charters and General Laws*, 1712, Ch. 105, Sect. 2; 1698, Ch. 54, Sect. 4.

[51] *The Charters and General Laws*, 1692, Ch. 11, Sect. 7, Sect. 9.

forbidden was "begging … feigning … knowledge in physiognomy, palmistry, or pretending that they can tell destinies or fortunes, or discover where lost or stolen goods may be found" (1699).[52]

"Wanton and lascivious persons either in speech or behavior," "common railers or brawlers" (1699), anyone who dared to "utter any menaces or threatening speeches" (1692), and any persons "making a disturbance, or committing any rudeness" (1712) in a public place were liable to prosecution.[53] One statute was specifically targeted at offenders who had reputedly been "abusing and insulting the inhabitants [of Boston], and demanding and exacting money by menaces and abusive language" (1752).[54] In case of a riot, any number of law enforcement officials were empowered to come among the rioters and "command silence" (1751).[55] No one was to, "by word, writing or message, challenge another to fight a duel" (1719) or in "any ways abet, prompt, encourage or seduce any person to fight a duel, or to challenge another to fight" (1730).[56]

In the realm of permissible and even required speech, Quakers were empowered to substitute their "solemn affirmation" (1758) for sworn oaths, which their religious convictions forbade them from taking.[57] In 1777, Massachusetts representatives crafted an "oath of fidelity and allegiance" to the newly established United States of America, and required anyone of unclear loyalties to swear it ("or affirm, as the case may be").[58] And common law prosecutions for other types of transgressive speech, such as contempt, ill manners, and being a common scold, continued throughout this period. Thus, colonists in Massachusetts were prosecuted for all the statutory speech crimes named above and more. Between 1690 and 1776, there were more than 1,600 cases of criminal speech, falling into the following categories: more than 500 prosecutions for various types of abusive language;

[52] *The Charters and General Laws*, 1699, Ch. 63, Sect. 2.
[53] *The Charters and General Laws*, 1699, Ch. 63, Sect. 2; 1692, Ch. 11, Sect. 6; 1712, Ch. 15, Sect. 6.
[54] *The Charters and General Laws*, 1752, Ch. 251.
[55] *The Charters and General Laws*, 1751, Ch. 239, Sect. 1.
[56] *The Charters and General Laws*, 1719, Ch. 131, Sect. 2; 1730, Ch. 172, Sect. 1.
[57] *The Charters and General Laws*, 1759, Ch. 38.
[58] *The Charters and General Laws*, 1777, Ch.335. As this study focuses exclusively on criminal prosecutions for speech, this list does not include any of the civil speech laws that enabled individuals to sue each other for speech – e.g., slander.

more than 150 prosecutions for criminal defamation; nearly 900 prosecutions for profane cursing and/or swearing; and more still for blasphemy, sedition, lies, perjury, false news, and other verbal offenses.[59]

Given the incomplete state of court records from this period, it is impossible to provide precise estimates of what percentage of criminal prosecutions involved speech offenses. One study of Hampshire and Worcester counties has concluded that more than half of eighteenth-century prosecutions there were for fornication, with speech offenses such as defamation and profanity constituting a much smaller percentage of the total.[60] By the end of the eighteenth century, if not before, moreover, Massachusetts courts as a whole prosecuted many more property-related offenses than other types of crime.[61] And yet, given the historical literature stressing a wholesale shift away from a legal regime designed to promote and enforce specifically Puritan mores of personal conduct to a new, more secular property-oriented regime, these more than 1,600 cases, and the multiple statutes outlawing various forms of speech, are unexpected finds.[62]

What to make of these finds is another matter entirely. Are all these laws and criminal prosecutions merely historical stragglers, the Puritan crime-as-sin construct limping along into the eighteenth century? Or perhaps do they signify something quite different? The robust public discourse about the evils of transgressive speech, the ongoing legislative preoccupation with regulating speech, and the enthusiastic community participation in punishing criminal speech all suggest that speech offenses continued to loom large in colonists' construction of

[59] Criminal defamation was distinct from civil suits for slander; see Chapter 4.

[60] Ronald Kingman Snell, "The County Magistracy in Eighteenth-Century Massachusetts: 1692–1750" (Ph.D. diss., Princeton University, 1970), 166.

[61] William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830* (Cambridge, MA: Harvard University Press, 1975).

[62] See, e.g., Nelson, *Americanization of the Common Law*; Hendrik Hartog, "The Public Law of a County Court: Judicial Government in Eighteenth Century Massachusetts," *AJLH* 20, no. 4 (October 1976): 282–329. Hartog argues that the shift toward property offenses occurred earlier, before the Revolution. Analyzing the Superior Court of Judicature rather than the General Sessions courts, Linda Kealey finds the punishments for property offenses becoming increasingly harsh over the eighteenth century. See Linda Kealey, "Patterns of Punishment: Massachusetts in the Eighteenth Century," *AJLH* 30, no. 2 (April 1986): 163–186.

social order. Indeed, a "Letter from London" that was printed in the *Boston Evening Post* in 1735 directly correlated an epidemic of transgressive speech with the precarious state of the polity, contending that "it is a Wonder that we are yet a Nation ... Lying, Swearing, Stealing, Killing, committing Adultery, and cursing." The anonymous author concluded this parade of horribles with a designed-to-shock flourish: "The dreadful Word DAMN is in almost every Body's Mouth."[63]

Moreover, a close reading of how legislators, witnesses, defendants, justices of the peace, and, yes, ministers spoke about transgressive speech reveals that concerns about speech as sin were joined by, and often superseded by, concerns about speech as fundamentally *impolite*. Thus, the criminalization, prosecution, and punishment of speech became part of the process of refining provincial society, and of reallocating social and political power according to the tenets of politeness.

Judges and others derived their understandings about the definition and significance of deviant speech from both history and contemporary culture. The "rules for right speaking" in this period were not only inherited from their Puritan forebears but also absorbed from conduct and courtesy literature, imported periodicals, and personal interaction with fellow members of the transatlantic mercantile elite.[64] Conduct and courtesy literature provided guidelines for all manner of behavior, but it paid particular attention to the rules of speech. This literature prescribed basic rules of deference for the lower and middling sorts to manifest toward their betters, more elaborate rules of courtesy for behavior of the elite toward each other, and hardly any rules at all for how the lower orders ought to speak among themselves.[65] Correspondingly, General Sessions courts in eighteenth-century Massachusetts most frequently prosecuted violations in the first two categories, and hardly any in the last (this is especially true in defamation cases).[66]

[63] Letter from London, December 8, 1735, *Boston Evening Post* (*BEP*).

[64] For a list of works available in New England in the seventeenth century, see Hemphill, *Bowing to Necessities*, 231, n. 8. For works available in the eighteenth century, see Hemphill, 69 (at least seventy-five such works were printed or imported in colonies between 1738 and 1820).

[65] Hemphill, *Bowing to Necessities*.

[66] See Chapter 5. A laborer who felt he had been wronged by another's speech could, of course, always proceed with a civil suit.

To better understand this process, a brief discussion of provincial courts, criminal procedure, and the major participants in the justice system is necessary. Criminal procedure in eighteenth-century Massachusetts was relatively simple and flexible (at least for non-felony offenses, which most speech offenses were), with considerable discretion built into nearly every stage of the process for nearly every participant in it. Widespread community participation and the discretion available to nearly all participants are two of the specific features of criminal law and legal procedure that helped facilitate its role as an arena for genteel self-fashioning and the consolidation of elite social and political dominance. The initiating event was, of course, an incident of potentially offensive or transgressive speech. In addition to the existing statutory proscriptions on certain kinds of speech, transgression was in the ear of the beholder; even utterances not specifically addressed in legal codes could still be considered illegal under the common law.

Either the victim of an alleged speech crime or a local official (a constable, selectman, or grand juror, e.g.) reported the offense to a justice of the peace; very occasionally, the justice himself was the reporting witness. Although these justices would have been familiar with the law and legal procedure (many would have also written statutes as members of the House of Representatives), they were hardly legal luminaries; most had little to no formal training in the law. The majority could not even boast having a liberal education, although it was certainly more than the general population (approximately 33 percent of justices of the peace in Suffolk County and 27 percent in Hampshire County for the period 1692–1750). On the whole, they also tended to be men of property who had proven themselves suitable for judgeship by previous military service or in elective office.[67] They often chose as their clerks recent Harvard graduates, usually from "important local families," who also had some familiarity with the law.[68]

The justice of the peace noted the offense in his records, sometimes taking depositions of witnesses, then summoned the accused to appear before the proper legal authority, often the grand jury. Each local grand jury consisted of individuals elected annually from the town.[69]

[67] Snell, "The County Magistracy," 74–75. [68] Ibid., 139, 141. [69] Ibid., 142–145.

Because they had been chosen by their neighbors to help administer the law, it is probably safe to assume that they were generally respected in the community. A sheriff or constable served the summons and, when it was required, collected bond for appearance.[70] Grand jurors heard complaints against defendants and then decided whether their case ought to proceed to trial; if so, it was recorded as a grand jury "presentment" and defendants often had to post a bond and sureties (a sort of third-party bond) to guarantee their appearance at trial and their good behavior in the meantime. Although a presentment was not a finding of guilt, the use of bonds and sureties incentivized a reformation of behavior, at least temporarily.

The trial took place before a single justice of the peace, often in his residence, or before the entire county Court of General Sessions of the Peace, meeting either in a local tavern or in a more refined courtroom setting. If the defendant was tried at the quarterly Sessions court, every aspect of the proceedings save the jury deliberations took place before an audience: others who had court business, tavern patrons, and the merely curious. There, a justice of the peace read the charges aloud, and the victim or king's attorney presented the prosecution's case. Sometimes defendants requested, and received, a jury trial, as was their right as English subjects. The trial jury, referred to as the *petit* or *petty jury*, played a different role from the grand jury, in that its function was to determine defendants' guilt or innocence. Petty juries were not often required at early-eighteenth-century Sessions courts, and some counties chose their petty jurors from the larger pool of grand jurymen.[71]

Prosecution witnesses, if there were any, provided their testimony. The defendant usually said little; he could neither testify under oath nor summon sworn witnesses on his behalf.[72] Defense attorneys were rare.

[70] Smith, intro. to *Colonial Justice in Western Massachusetts (1639–1702), The Pynchon Court Record*, 129. A summons was a written order for an alleged offender to appear before a court or an individual justice of the peace, and a warrant was a written order for a constable or sheriff to apprehend an alleged offender and bring him or her to appear.

[71] Snell, "The County Magistracy," 145–146.

[72] I use the masculine gender purposefully; the vast majority of individuals charged with speech crimes in eighteenth-century Massachusetts were male. Defendants could not testify under oath until the mid-nineteenth century, when states began enacting statutes that removed the common law prohibition against doing so. Mary

The defendant entered a plea: guilty, not guilty, or *nolo contendere* (essentially an acceptance of responsibility without admitting guilt). On rare occasions, he or his attorney sought to quash the proceedings or exclude witness testimony on technical grounds; these attempts were not usually successful. The judge (or, less commonly, the jury) issued a ruling after just a few minutes of deliberation. For a guilty verdict, sentence was imposed; occasionally, the convicted defendant appealed his conviction to a superior court. In most cases, however, some sort of monetary or corporal punishment was executed with the assistance of a sheriff or constable. Most convicted speech offenders were fined, set in the stocks, or publicly whipped. Some who were convicted of relatively minor offenses were often required merely to post a bond and provide sureties to ensure their future good behavior. Whether the defendant was pronounced guilty or not guilty, he was liable for court costs, which could easily exceed the actual fine. If he could not pay, he could be sold into service.[73]

(Im)politeness and the Law

The simplicity and, to modern eyes, astonishing brevity of criminal procedure, however, belies the nearly infinite number of variables inherent in a system that relied so heavily upon the participation of a substantial segment of the community, as well as the profound cultural significance of an institution that was perhaps the central public arena for performing individual social identity as well as for changing social hierarchies. The exact workings of law as a mechanism of social change have been the subject of some dispute. Many historians have argued strongly for law's central role in constituting power and authority in eighteenth-century Anglo-America. While some scholars have argued that the law's true efficacy lay in its

B. Hammerman, "Criminal Defendant's Constitutional Right to Testify—The Implications of *United States ex rel. Wilcox v. Johnson,*" *Vill. L. Rev.* 23 (1977): 678–687, at 681.

[73] Snell, "The County Magistracy," 102–104 (corporal punishments and bonds), 108–110, 148 (court costs), 135 (being sold into service). Jail sentences were not common, mostly because jails in eighteenth-century Massachusetts were usually simple sheds or extra rooms in the sheriff's home, where the accused were held while awaiting trial; such facilities were not designed for long-term incarcerations. Ibid, 133–134.

symbolic power, its ability to shame offenders and represent their crimes as truly reprehensible, others contend that the law's very real power to punish was more significant than its symbolism, by adding force to abstract ideas.[74] We should be cautious, however, in describing the law as a raw instrument of elite power. For one thing, such an argument is premised upon certain unprovable assumptions about intentionality. Moreover, it ignores the flexibility of criminal procedure and the potential for creativity for nearly every individual participating in that procedure.

Other scholars are more circumspect, concluding that the criminal law was less a tool to impose hegemonic elite rule than it was "an arena of struggle, negotiation, and accommodation in which eighteenth-century social relations were forged, and in which its reciprocities and fissures were reflected."[75] The colonial courtroom was not merely a venue for law enforcement. Rather, "execution of the law was widely understood as a key site of participation and consent, a place for substantive rather than instrumental action." The opportunities, even necessity, for widespread participation in the legal system helped make courts part of the "'common ground' of colonial politics."[76] Observing and participating in court day rituals enmeshed ordinary individuals in articulating and enforcing social rules of conduct and also taught them about the "organization of authority" itself.[77]

Outlining the general rules for how criminal prosecutions of speech *ought* to proceed is, of course, only the first step in understanding how

[74] See, e.g., for the symbolic power of law, Arthur M. Schlesinger, *Learning How to Behave: A Historical Study of American Etiquette Books* (New York: Cooper Square, 1968), 2; and Frank McLynn, *Crime and Punishment in Eighteenth-Century England* (New York: Routledge, 1989), 281; and, for the physical power of law, Peter King, *Crime, Justice, and Discretion in England 1740–1820* (Oxford: Oxford University Press, 2000), 372–373; and Andy Wood, *Riot, Rebellion and Popular Politics in Early Modern England* (New York: Palgrave, 2002), 35.

[75] King, *Crime, Justice*, 4. King compares each stage of eighteenth-century legal procedure to a "room," in which a specific set of individuals could appear and choose from a variety of options for action, and in which the accused often had multiple opportunities for escaping punishment. King, *Crime, Justice*, passim.

[76] Barbara Clark Smith, "Beyond the Vote" (paper presented at the "Deference in Early America" conference, Philadelphia, PA, December 11, 2004), 51.

[77] Rhys Isaac, *The Transformation of Virginia, 1740–1790* (Chapel Hill: University of North Carolina Press, 1982), 92–93.

different actors in this performance – from the alleged offender to the justice of the peace to the courtroom spectators – evaluated distinct speech acts, chose to perform their roles, and responded to the performances of others. After all, newly imported legal rules and officials were little more than scaffolding for the living performance of the law. In the absence of any organized police force or intensively centralized state apparatus, colonists still maintained a considerable amount of discretion in how they participated in the criminal justice system. The system depended upon them in order to function, after all, and thus necessarily had to accommodate a certain amount of individual creativity and contributions within the conversation of legal procedure. Thus, while justices of the peace perceived their own role not as reforming society but as keeping the king's peace, many other community members – complainants, witnesses, jurors, and so on – were able to help define what kinds of speech, and what sorts of speakers, violated the peace.[78]

With so many members of the community helping to define "the peace," the motivations for initiating criminal speech prosecutions might have been diffuse. However, only specific speech acts, committed by specific individuals, in specific places and at specific times, ultimately were designated and punished as criminal. Justices of the peace – as the persons who heard complaints, issued warrants, took depositions, determined admissibility of testimony and other evidence, made judgment or gave jury instructions, imposed sentence, and (if they had no clerk) made record of all their actions – exercised significant influence over how defendants were rhetorically represented in court and in the official legal record, and even over which defendants were ultimately convicted. And they were interested, deeply so; General Sessions Records and the records of individual justices indicate that they took great care with these criminal speech cases, often adding editorial commentary beyond legal boilerplate and fastidiously distinguishing between "profane cursing" and "profane swearing," an apparently meaningless distinction to contemporary eyes.

[78] Snell, "The County Magistracy," 156; see also Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: University of North Carolina Press, 2009), 7–8, 12.

But why? Why this care and interest – in fact, why prosecute at all what, in many cases, were essentially victimless crimes? Threats, abuse, and contempt clearly endangered individuals as well as the broader social order, but where was the harm in swearing, if its primary significance was evidence of a lack of refinement? In other words, why not just let the vulgar be vulgar?[79] It turns out that the criminal prosecution of speech served an important role in the refinement of Massachusetts in the eighteenth century. Publicly naming certain kinds of speech and certain kinds of individual as criminally vulgar, ill-mannered, and so on also enhanced distinctions between them and the politer sort. The aspiring elites of provincial Massachusetts actually *needed* the vulgar, or, to be more precise, needed others to be perceived as vulgar, not to mention unmasculine. The vulgar and feminine presence cast the contrasting refinement of the better masculine sort into high relief, and made a much better comparison than placing themselves next to the metropolitan elite, who had already achieved a standard of material and behavioral refinement that was simply inaccessible to the colonial gentleman.[80]

Of course, this legitimation might have been weakened if the campaign against profane swearing had ever been completely successful. For, once the lower orders learned to speak like their betters, it was not so easy to keep these important social distinctions clear.[81] As much as the elite may have urged their social inferiors not to

[79] I am grateful to Bill Novak for raising this question at the Legal History Workshop at the University of Michigan Law School, and to Tom Green for hosting the workshop.

[80] Cynthia Dallett Hemphill argues that the better sort attempted to monopolize polite behavior and its attendant social benefits simply by withholding elaborate instruction in civility from their social inferiors, and that legal sanctions for impolite speech served as a crude sort of education. However, I would argue that criminalizing and punishing such speech actually helped clarify and publicize the distinctions between the vulgar and the polite, and that therefore the better sort actually benefited from acts of criminal speech. See Hemphill, *Bowing to Necessities*, 1–64.

[81] Theoretically, such a thing was possible; eighteenth-century conduct books implicitly suggested that their lessons on speech and deportment were capable of implementation by anyone who carefully studied and practiced them. But, as some scholars have pointed out, eighteenth-century literature tended to slam the door on that suggestion, by portraying upwardly mobile characters who, although by all appearances are genteel, ultimately betray themselves by their non-genteel speech. See Adam Potkay, *The Fate of Eloquence in the Age of Hume* (Ithaca, NY: Cornell University Press, 1994), 88; Wayne A. Rebhorn, *Foxes and Lions: Machiavelli's Confidence Men* (Ithaca, NY: Cornell University Press, 1988), 32.

swear profanely, and as much as they may have advocated the stern enforcement of anti-swearing legislation, they actually benefited from such speech. It provided powerful evidence that the lower orders lacked the self-restraint and the independence from the passions that were considered crucial to any position of social or political authority, and showed that their speech was little more than nonsensical vitriol, hardly rising to the standards of rhetoric that facilitated the communication and mutual understanding so important to the eighteenth-century Anglo-American polity. As a component of the criminal law, the rules of polite speech helped secure civil order by allocating trust and credibility among individuals, according to their ability to conform to the cultural norms of the transatlantic British elite.[82]

Enforcing these rules by prosecuting and punishing those who violated them in the name of the king's peace rooted polite speech in the maintenance of local order and also projected it in the manifestation of imperial rule over "barbarous" peoples and lands. Both locally and more broadly, civil order relied upon defining and excluding the unrefined, impolite "other."[83] This "othering" process has only been expanded by the modern state, which has attempted to stamp out, yet perversely relied upon, the ungenteel behavior of the lower orders, "largely because these populations were also treasured as reservoirs of uncivilized persons who defined by contrast the civility of the elite. The state both did and did not want all its people civilized."[84] If the practice of swearing assailed elite privilege, then the criminal definition and prosecution of swearing protected it. This is not to say that the Massachusetts elite never spoke impolitely, or even that they were never caught. Quite the contrary; we know from diaries, letters, and other evidence that they did and they were. But they were rarely held accountable publicly by the criminal law for such illicit speech; it was not believed to implicate civil order, on either the local or the imperial scale, in the way that impolite speech by the lower and middling sorts did. And the fact that the elite could lie, threaten, abuse, curse, swear, and condemn with relative impunity (if not approval) only further enacted and displayed their power.

[82] For an analysis of the relation between the development of the criminal law and civil order, see Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford: Oxford University Press, 2016), 1–7, 299–301.

[83] Ibid., 119–120, 300. [84] Lockridge, "Colonial Self-Fashioning," 279.

In fact, the criminal prosecution of speech crimes committed by the lower and middling sorts not only protected elite identity but helped to construct it. Participation in the legal system itself became more and more exclusively male during the eighteenth century in Massachusetts. The construction of white male identity was predicated in part upon the exclusion of the other from public spaces like courtrooms, and by shaping these settings as polite, well-ordered public spaces. Moreover, the construction of *elite* male identity was predicated upon a legal discourse (including statutory, procedural, formulaic, and spontaneous language in the courtroom) which framed certain speech acts as both vulgar and criminal. This framing is critical; while the law can provide "a place to contest relations of power," it "also determines the terms of the contest."[85] When legislative acts, witness testimony, and judicial statements all used the language of politeness and refinement to describe criminal speech, it virtually guaranteed that courtroom conversations about such speech would also be conversations about genteel masculinity – how it was defined, who demonstrated it, and who did not.

It is not so easy to listen to, for example, a criminal contempt prosecution and hear a conversation about gentility and manhood. "New notions of maleness are always difficult to discern; then, as now, contemporaries universalized the male."[86] It helps to listen to

[85] Sally Engle Merry, "Resistance and the Cultural Power of Law," *Law & Society Review* 29, no. 1 (1995): 11–25, at 20.

[86] Hemphill, *Bowing to Necessities*, 106. Historians have generated multiple typologies of eighteenth-century manhood, suggesting models such as "communal manhood," "self-made manhood," "aristocratic manhood," "republican manhood," and the "genteel patriarch." See, e.g., E. Anthony Rotundo, *American Manhood: Transformations in Masculinity from the Revolution to the Modern Era* (New York: Basic Books, 1993), 10–25; Mark E. Kann, *A Republic of Men: The American Founders, Gendered Language, and Patriarchal Politics* (New York: New York University Press, 1998), 12–14; Michael Kimmel, *Manhood in America: A Cultural History* (New York: Free Press, 1996), 15–30. See also Anne G. Myles, "Elegiac Patriarchs: Crevecoeur, Revolution, and the Conflict of Masculinities" (paper presented at the Society of Early Americanists, Norfolk, VA, March 9, 2001) for an analysis of "loyalist masculinity." Toby Ditz has criticized typologies that focus exclusively on relationships among men, noting that men's relative status often depended upon their relationships to, and control over, women and their labor. Toby L. Ditz, "The New Men's History and the Peculiar Absence of Gendered Power: Some Remedies from Early American Gender History," *Gender & History* 16, no. 1 (April 2004): 1–35, at 15.

hundreds of such prosecutions, cross-referenced with contemporary conduct and courtesy books, which provided "the most extensive advice on proper male behavior,"[87] along with sermons, newspapers, diaries, periodicals, pamphlets, and House journals. Eventually, "that carefully wrought, smooth surface that our colonial gentlemen have presented to us" emerges as an "artifact."[88] This artifact has been constructed, in part by carefully delineating who was *not* a gentleman, by distinguishing the "other."[89] And, for white male colonists, the "other" was most profoundly one who was dependent or unfree in some fashion, or one who lacked gentility: "the main markers of identity for men were, not white and black, but rather free versus unfree and genteel versus common."[90]

Thus, it is essential to assess how criminal prosecutions of speech actually *did* proceed. This study analyzes the context and language of the statutes themselves, to parse out what sorts of values and assumptions underlay the criminalization of specific speech acts. It also investigates the records of prosecutions, listening to the voices of witnesses, defendants, accusers, and judges, to learn how beliefs were put into practice – how certain language from certain sorts of individuals was either excused or punished, celebrated or condemned. Drawing on the contemporary concept of sensibility, according to which truly refined individuals perceived and received aesthetic and moral truths, Richard Steele recommended the theater as "the most agreeable and easy method of making a polite and moral gentry"; seeing politeness performed, he argued, would automatically instill it in gentle hearts.[91] As a performative space, court sessions and rituals served a similar purpose in colonial America. Just as the ceremonials of court business in eighteenth-century Virginia served to "teach men the very nature and forms of government," communicate

[87] Hemphill, *Bowing to Necessities*, 48.
[88] Lockridge, "Colonial Self-Fashioning," 338.
[89] In Lockridge's largely literary sources, the "other" is women. Misogynistic descriptions of their ostensible credulity and sottish corporeality limned more clearly the genteel masculinity of independent judgment and self-management. Lockridge, "Colonial Self-Fashioning," passim.
[90] David Waldstreicher, "Reading the Runaways: Self-Fashioning, Print Culture, and Confidence in Slavery in the Eighteenth-Century Mid-Atlantic," *WMQ* 3rd ser., 56 (April 1999): 243–272, at 264.
[91] Richard Steele, *The Tatler*, no. 8 (Tuesday, April 28, 1709), 83.

forms of power, and convey cultural values, criminal speech prosecutions in Massachusetts taught not only the codes of polite speech but also how mastery of those codes was associated with cultural and social capital.[92]

In the records of individual cases, idiosyncratic word choices beyond legal boilerplate reveal how speakers and speech were characterized. In the aggregate, cases show patterns of prosecution and punishment that also reveal widely shared cultural ideals about right speaking. Indeed, whether the cases were prosecuted in a county on the eastern coast or on the western frontier, in towns or in rural areas, in areas primarily commercial or agricultural, a common set of values and beliefs about speech and persons emerges. As it turns out, every county in the province was occupied by men who aspired to social and cultural preeminence, and they all aspired in similar style. Self-fashioners throughout the province drew on a common well of inspiration for defining legitimate speech, the parameters of which were coextensive with emerging definitions of elite white masculinity. Chapter 2, A Politer Peace, describes the emergence of this new mercantile elite in eighteenth-century Massachusetts, the embrace of politeness as a core cultural ethos, and the development of novel theories of speech and language.

A close examination of criminal speech prosecutions also reveals clear patterns in which the most culturally legitimate speech, like the most polite and godly gentleman himself, was measured by matrices of sensibility, civility, and credibility. Thus, it is these three concepts that structure Chapters 3–5, and organize the analysis of the hundreds of cases I unearthed in Massachusetts legal records. Each of these values incorporated older Puritan values of godliness; each also was infused with notions of masculinity. And each encompassed a significant behavioral component of the ongoing "refinement of America." Sensibility, for eighteenth-century Americans, signified personal qualities, capabilities, and interests. A sensible man was understood to possess a refined taste in material items and artistic endeavors, but this was no superficial aesthetic perception. Rather, his ability to perceive and appreciate beauty had real moral significance. Like virtue and honesty, sensibility was a quality of individual character;

[92] Isaac, *The Transformation of Virginia*, 92–94, 332–337.

some New England ministers went so far in reconciling gentility and godliness as to make "good taste an attribute of God."[93] Sensibility demonstrated not only refined management of exterior manners but an elevation of interior spirituality, and distinguished its possessors from those who lacked this genteel quality.

Or perhaps it is more accurate to say that those lacking sensibility – those designated as "low," "base," or "vulgar" – actually helped define the sensible. This othering process is particularly evident in the records of criminal speech prosecutions, where the insensible were speakers who were "noisy," "roaring," or "profane." At the other end of the spectrum were "effeminate bachelors," often singled out by newspaper commentaries for their ostensibly overflowery or noisy speech, but who likewise demonstrated the lack of self-management so crucial to masculine sensibility.[94] Prosecutions for speech defined as passionate, profane, or abusive marked offenders as outside the realm of normative white masculinity, "stressing public role and self-mastery" as well as "evangelical manhood requiring resignation to the control and will of God."[95]

Civility, meanwhile, largely had to do with relationships between the self and others, how one behaved in society. As in the case of sensibility, civility was often defined in the negative; the boundaries of civility were limned by incivility. Massachusetts law and legal institutions, then, described a gentleman's civil speech by way of contrast with the uncivil speech of the lower orders: profane cursers, vulgar defamers, and crude threateners, abusers, and insulters. Not all insulters and defamers were vulgar; witty bon mots in the Augustan style, issued in private spaces of sociability, constituted mere raillery. And defamation which was written in the fashionable literary genre of satire was considered both civil and legal. Like other elements of gentility, civility was also a central value of the Puritan ethos, albeit for different reasons. For Puritans, civil speech was an essential pillar of the divinely-ordained social order, honoring the authority of

[93] Bushman, *The Refinement of America*, 327–329.

[94] Thomas A. Foster, *Sex and the Eighteenth-Century Man: Massachusetts and the History of Sexuality in America* (Boston: Beacon Press, 2006), 115.

[95] Brian D. Carroll, "'I Indulged My Desire Too Freely': Sexuality, Spirituality, and the Sin of Self-Pollution in the Diary of Joseph Moody, 1720–1724," *WMQ* 3rd ser., 60, no. 1, Sexuality in Early America (January 2003): 155–170, at 160.

mothers and fathers over children, men over women, and godliness over sin. Leading voices such as Cotton Mather, significantly, believed that enforcing civility was properly within the purview of civil magistrates; ministers like himself would manage godliness.[96]

Civility as a constituent of gentility emphasized pleasurable sociability. And while some reformers might have perceived civility as a superficial adherence to the tenets of godliness for merely selfish purposes, others saw it as an essential demonstration of one's genuine regard for others.[97] This regard for others – or at least the appearance of it – ironically undergirded a system of elite masculine authority developing throughout the British Atlantic world.[98] Civil speech demonstrated the proper deference to one's social superiors as well as the appropriate condescension to one's inferiors, thus maintaining stable hierarchies of power. Speech defined and prosecuted as "uncivil," by contrast, challenged the status quo and destabilized the appearance of regard for others. Contempt, cursing, and defamation – or, to be more precise, speech that became legally characterized that way – were all language that undermined the regime of civility.

Credibility constituted the appearance of truthfulness, the cornerstone of gentlemanly identity. The Puritans certainly valued honesty and considered lying a sin. Credibility, significantly, was more about what others believed about one's truthfulness; it could be premised upon actual honesty, but, fundamentally, credit and credibility were about reputation and believability. They were also supremely important for the transmission of knowledge of public significance. In provincial knowledge networks, the personal identity and reputation of an information source provided "credit" for its authenticity; in this way, certain pieces of information or types of knowledge gained more traction in the public sphere than did others.

Just as truth-telling was critical to establishing gentlemanly identity and relationships of sociability and trust, lying or other kinds of deceptive speech necessarily denied anyone a claim to that elite identity and excluded them from those relationships. Statutes and

[96] Richard P. Gildrie, *The Profane, the Civil, and the Godly: The Reformation of Manners in Orthodox New England, 1679–1749* (University Park: Pennsylvania State University Press, 1994), 29.

[97] Ibid., 3–15.

[98] See Ogborn, "Francis Williams' Bad Language," 83 (citing Michael Braddick).

prosecutions in provincial Massachusetts defined the incredible as perjurers, defamers of the better sort (who frequently did so by impugning their credibility), spreaders of false news and liars, and mumpers (who undermined polite speech itself in a number of ways).[99] Prosecutions of deceptive speakers could strip them of credibility, affirm the veracity of elite victims of defamation, and restrict control over officially sanctioned channels of information. They could also expose the inherent contradictions in the ethos of gentility, by revealing how successfully pretenders (the aforenamed mumpers) could undermine the ostensibly superior judgment of elite white men.

The legal treatment of speech (including statutes as well as prosecutions) was structured primarily around these three central concerns. Each concern can be seen operating in the writing of statutes themselves, in the prosecution of offenders (from complaint through trial), and in the verdicts rendered and any subsequent punishment inflicted. Reading the legal records reveals the value of polite literature and/or conduct books in operation, and how these had real effects on people, rather than just existing as behavioral prescriptions. Manners matter, as many sociologists, anthropologists, and historians have shown us; in provincial Massachusetts as elsewhere, they were used to claim and communicate elite status and power.[100] Criminal prosecution made the rules of polite speech real for people who would never read Castiglione or the *Tatler* or visit the politer coffeehouses of London (or Boston, for that matter). Moreover, the incorporation of polite standards of speech into the regime of criminal prosecution served to naturalize those standards and the social hierarchies which they undergirded. Distinctions among people based upon accent, tone, volume, or emotion of speech were (and are) inherently political, but looked less so in a participatory community institution like the General Sessions courts.[101]

[99] "Mumpers" is the eighteenth-century term for what would later be called "confidence men." See Chapter 5.

[100] See, e.g., Bushman, *The Refinement of America*, 27–50; Lorinda B. R. Goodwin, *An Archaeology of Manners: The Polite World of the Merchant Elite of Colonial Massachusetts* (New York: Kluwer Academic/Plenum, 1999), 11–13, 44–48; Hemphill, *Bowing to Necessities*, 16–19.

[101] For an analogous method of legitimating social distinctions based upon ostensibly "natural" personal qualities, see Michael Zakim, *Ready-Made Democracy:*

The story of how Massachusetts criminal law and legal systems came to enforce the rules of polite speech, in addition to the rules of godly speech, is not easily organized by time period. There are few specific identifiable turning points, except when statutory definitions of offenses change; these are noted in the text as relevant. Subtler rhetorical shifts in the language used to describe various acts of transgressive speech can be identified, as in sermon or periodical literature; these, too, are noted. There may have been statistically relevant shifts in patterns of prosecutions, but individual justices' idiosyncratic recording preferences and the inconsistent survival of records have probably obscured any such patterns. It is likely that change occurred unevenly and at a different pace, depending upon whether the scene was an eastern port, such as Boston or Salem, or a small rural community in Worcester County.

What is abundantly clear is the contrast between the seventeenth-century regime of speech regulation, which overwhelmingly focused on punishing speech as sin as a means of maintaining a covenanted Puritan community, and what prevailed by the dawn of the American Revolution: a legal order of speech rooted in the rules of "decency and good manners," as Justice Eldad Taylor put it, as a means of constructing and preserving a genteel social order.[102] Chapter 6, Cacophony, describes how the protests and resistance activities of the 1760s and 1770s fundamentally challenged this genteel social order. Chapter 7, Respectability, traces how the outbreak of war with Great Britain would totally transform it, and disrupt the courts that helped sustain it. Ultimately, it was the social and political turmoil of the late eighteenth century – and not the noisy liars, defamers, and cursers whom authorities had for so long sought to prosecute and punish – that dissolved the glue that held together the world of the polite gentlemen of provincial Massachusetts.

A History of Men's Dress in the American Republic, 1760–1860 (Chicago: University of Chicago Press, 2003), 9–10.

[102] Kamensky, *Governing the Tongue*.