Abusing Hugh Davis: Determining the Crime in a Seventeenth-Century American Morality Case

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> September 17th, 1630: Hugh Davis to be soundly whipped, before an assembly of Negroes and others for abusing himself to the dishonor of God and shame of Christians, by defiling his body in lying with a negro; which fault he is to acknowledge next Sabbath day.[1]

On a fateful mid-September day in 1630, Hugh Davis found himself accused of a horrifying litany of crimes. He had shamed Christians. He had dishonored God. Moreover, he had abused himself. Davis had committed all of these crimes by lying with a Negro, and he paid a fearsome price for his transgression: the court ordered him to be flogged—publicly brutalized and humiliated—in front of an assembly of both whites and Africans. While Hugh Davis's life must have left other marks in the historical record, the court's sentence, a mere forty-three words long, is the only document about him to have survived.

Starting with Carter Woodson, who wrote in 1918, most historians have assigned the Davis case to the history of American race relations and particularly to the hostility toward miscegenation so prevalent in the seventeenth century.[2] If Davis committed fornication, then the case fits. Scholars have long recognized, as Jennifer M. Spear argues, that "throughout colonial

[1] William Waller Hening, *The Statutes at Large: Being a Collection of All the Laws of Virginia, from the First Session of the Legislature in the Year 1619* (New York: R. & W. & G. Bartow, 1823), 1:146.

[2] Carter G. Woodson, "The Beginnings of the Miscegenation of the Whites and Blacks," *Journal of Negro History* 3, no. 4 (1918): 342. The word "miscegenation" is somewhat anachronistic in discussions of the Davis case because it was not coined until 1863. Nevertheless, it is widely used in the literature surrounding the case. Since my essay is as much about the literature discussing the case as it is about the case itself, I have found it prudent to continue using "miscegenation." An early historical discussion of the anonymous pamphlet *Miscegenation: The Theory of the Blending of the Races, Applied to the American White Man and Negro,* which first introduced the word, appears in Sidney Kaplan, "The Miscegenation Issue in the Election of 1864," *Journal of Negro History* 34, no. 3 (1949): 274–343.

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North America it was often through the regulation of sex that racial categories were first defined and, by criminalizing interracial sex, efforts to maintain racial boundaries were made."[3] In his *Sexual Revolution in Early America*, Richard Godbeer argues that the English elite sought to "impose their blueprint for an orderly and virtuous society" and that "sexual mores took on additional significance in a colonial setting." Virginia's elite had to contend with the habits of not only the English settlers from the lower reaches of the social order but also the "apparently savage Indians and Africans, who threatened to contaminate the colonists and further compromise their civility."[4] Knowing that the elite's racial fears were expressed in sexual norms, it is hardly surprising that historians have cited the Davis case as a flashpoint in the creation of the colony's race-sex boundaries. Nevertheless, as Godbeer also notes, the extant court records indicate that no white man was flogged for a definitively heterosexual interracial sex crime.[5] Indeed, prior to 1662 Virginia's magistrates had not made legal distinctions between fornication cases based on the races of the offenders. Additionally, the fear of racial amalgamation did little to stop white men's sexual access to black women.[6] Hugh Davis, it seems, must have done something different from other white men who crossed the racial line for sexual gratification. Something about the Davis case must have brought together race and sex in a way that helped limn the race-sex boundaries of colonial America, but I will argue that it does not fit the antimiscegenation narrative into which it is so frequently forced.

In colonial Virginia, sentences for fornication—interracial or otherwise—typically involved penance, a fine, or both. Historians have cited the 1662 statute that mandated doubling the fine for fornication when an offending couple crossed the racial divide as evidence of a racial distinction in sexually related crimes.[7] Indeed, that act was the first in the colony to explicitly define interracial fornication as deserving of harsher punishment than fornication between two people of the same race, yet it did not impose corporal punishment for the crime, and it came thirty years after the court ordered Hugh Davis "soundly whipped." Such a stark difference in

[3] Jennifer M. Spear, "Race Matters in the Colonial South," *Journal of Southern History* 73, no. 3 (2007): 583.

[4] Richard Godbeer, *Sexual Revolution in Early America* (Baltimore, MD: Johns Hopkins University Press, 2002), 3–4, 10–11, 14, 22, 116, 151.

[5] Ibid., 383n31.

[6] Kenneth James Lay, "Sexual Racism: A Legacy of Slavery," *National Black Law Journal* 13, no. 1 (1993): 166–67, https://escholarship.org/uc/item/3qd7s83r (accessed 23 March 2018); Godbeer, *Sexual Revolution*, 201–3.

[7] Act XIII for 1662 reads: "WHEREAS some doubts have arrisen whether children got by any Englishman upon a negro woman should be slave or ffree, Be it therefore enacted and declared by this present grand assembly, that all children borne in this country shalbe held bond or free only according to the condition of the mother, And that if any christian shall committ ffornication with a negro man or woman, hee or shee soe offending shall pay double the ffines imposed by the former act" (Hening, *The Statutes at Large*, 2:170).

punishments led historians Lawrence J. Friedman and Arthur H. Shaffer to argue that "though it was no novelty to punish sexual offenses, this case was obviously different from the usual crimes of adultery and fornication."[8] Friedman and Shaffer made this argument in 1970, and it is unclear what they thought Davis and the unnamed African had done, but they clearly saw the case as a signal of Africans' "special status" in the colony. Only two years earlier Winthrop Jordan had speculated that Davis's partner "may not have been female" because the court used "negro" instead of "Negress" or "Negro wench."[9] That the crime might have been something other than a racial offense is also hinted at in Edmond Morgan's 1975 argument that it is difficult to cite "indisputably racist feeling about miscegenation" in early Virginia. Morgan called the Davis case "a famous incident, often cited," but proffered the ambiguous analysis that the sentence could "reflect religious rather than racial feeling: that a Christian should not lie with a heathen. Or it could be a case of sodomy rather than fornication."[10] Morgan, unfortunately, did not explore why it might have been one or the other. Similarly, judge and legal scholar A. Leon Higginbotham admitted that "the *Davis* case raises more issues than it answers," including the fact that "the decision notes that Davis's 'mate' was black, but the court does not disclose that person's sex or legal status."[11]

Writing in the 1980s, Paula Giddings and Thomas Morris proffered two possible explanations for why they believed Davis's partner was a woman. Giddings argued that "the tendency of court records to specify the given names of Black men leaves one to assume that the 'negro' in question was a woman."[12] However correct she may be about that tendency, both Jordan in 1968 and Godbeer in 2002 noted that those records also frequently specify "Negro woman," "Negro wench," or "Negress" for African women; unfortunately for historians, the Davis case fails to follow either tendency. Giddings's explanation, therefore, provides an insufficient basis for assuming Davis's partner was female. Thomas Morris's explanation was more substantive. He argued that the fact that Davis was flogged rather than executed indicates that this was not a case of sodomy. Although sodomy was

[8] Lawrence J. Friedman and Arthur H. Shaffer, "The Conway Robinson Notes and Seventeenth-Century Virginia," *Virginia Magazine of History and Biography* 78, no. 3 (1970): 265–66; and Godbeer, *Sexual Revolution*, 202–3.

[9] Winthrop Jordan, *White Over Black: American Attitudes toward the Negro, 1550–1812* (Chapel Hill: University of North Carolina Press, 1968), 78, 79n79.

[10] Edmond Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (New York: Norton, 1975), 333.

[11] A. Leon Higginbotham, *In the Matter of Color: The Colonial Period* (Oxford: Oxford University Press, 1980), 23–24.

[12] Paula Giddings, *When and Where I Enter: The Impact of Black Women on Race and Sex in America* (New York: William Morrow and Co., 1984), 36; Thomas D. Morris, "'Villeinage . . . as It Existed in England, Reflects but Little Light on Our Subject': The Problem of the 'Sources' of Southern Slave Law," *American Journal of Legal History* 32, no. 2 (1988): 102n34.

punishable by death, few defendants were actually executed for the crime, an issue that I will address in some detail below.[13] Thus a conundrum remains: the punishment meted out to Hugh Davis was far harsher than what was typical for interracial fornication, but it was seemingly too mild for a case of sodomy. Historians have typically tried to solve the conundrum by stressing the racial aspects of the case. Such arguments depend on the assumption that sodomy—perhaps especially interracial sodomy—would have generally been punished with execution, but they also require the Davis case to be the sole instance in which a white man faced corporal punishment for interracial fornication.

With the exception of Godbeer, whose footnote on the case raises the possibility of a same-sex encounter, no historian working since the 1990s has discussed the possibility that Hugh Davis's partner might have been male.[14] Higginbotham exemplifies the ascendancy of the heteronormative interpretations of the case. Having cautiously admitted in the 1980s that the sex of the unnamed African was unknown, by 1996, when he published *Shades of Freedom*, Higginbotham had dramatically changed his interpretation and was insisting that Davis's crime was heterosexual. "The only logical conclusion to be drawn from *Davis* and *Sweat* [the defendant in a 1640 case]," he argued, was that "the defendants were probably poor whites or servants who had managed to sleep with black women belonging to others." Higginbotham now claimed that "the very statement that Davis 'abused himself,' and that 'he defiled his body by lying with a negro' [*sic*] means that he engaged in sexual relations with someone inferior, someone less than human." But Higginbotham offered no analysis of the contemporary understanding of those phrases.[15]

Kathleen M. Brown published *Good Wives, Nasty Wenches, and Anxious Patriarchs* in the same year *Shades of Freedom* came out. Describing the Davis case as an anomaly, Brown noted the "stronger language than that normally used to describe the sexual offense of two English people" and the usage of the word "defiling." Her explanation focused on the interracial rather than the potentially homosexual nature of the case, though she also pointed out that blacks and whites could marry in early colonial Virginia if both were

[13] Morris, "'Villeinage,'" 102n34.

[14] Godbeer, *Sexual Revolution*, 383n31.

[15] A. Leon Higginbotham, *Shades of Freedom: Racial Politics and Presumptions of the American Legal Process* (New York: Oxford University Press, 1996), 25, 21. Higginbotham altered the quotation; the original is "by defiling his body in lying with a negro." See also Higginbotham, *In the Matter of Color*, 23–24; Higginbotham and Barbara Kopytoff, "Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia," *Georgetown Law Journal* 77 n. 6 (August 1989): 11n98. Werner Sollors included the Higginbotham and Kopytoff article in his collection, calling it a magisterial, in-depth survey and the most thoroughly researched analysis of the legal situation in Virginia up to the Civil War. Werner Sollors, ed., *Interracialism: Black-White Intermarriage in American History, Literature, and Law* (Oxford: Oxford University Press), 19–20.

free.[16] Subsequently, scholars have overwhelmingly assumed that Davis's partner was female, a situation that may have led to both Kevin Mumford and Steven Martinot incorrectly transcribing the document to represent Davis's partner as female. Mumford changed "negro" to "negress," while Martinot ended the quotation with the term "negro woman."[17] The belief, rarely explained or defended, that Davis had a heterosexual encounter with an African had thoroughly molded interpretations of the case by the time Rebecca Goetz published *The Baptism of Early Virginia* in 2012. She admitted that she found no particularly good explanation for why other defendants in interracial sex cases did not encounter "such hostile language" from the court, but she did not consider the possibility that Davis's partner might have been male.[18] By that time, Howard Bodenhorn and Ann Holder had joined Mumford and Martinot among the scholars assuming a heterosexual liaison.[19] Aricia Coleman followed the trend in her book about race relations in Virginia, published the next year.[20]

This key phrases in the judgment makes more sense, however, if we consider the possibility that Davis's partner was male but that the court nevertheless decided not to impose the death penalty. There are a variety of reasons why the court might have decided to spare Davis's life, including the value of his labor to the colony, the lack of specific evidence, or the distinction between popular and legal notions of sodomy. Popular notions of sodomy, buttressed by religious beliefs, covered almost any same-sex sexual activity, but apart from the short-lived New Haven colony, courts

[16] Kathleen M. Brown, *Good Wives, Nasty Wenches, and Anxious Patriarchs: Gender, Race, and Power in Colonial Virginia* (Chapel Hill: University of North Carolina Press, 1996), 195.

[17] Steven Martinot, "Motherhood and the Invention of Race," *Hypatia* 22, no. 2 (2007): 89; Kevin Mumford, "After Hugh: Statutory Race Segregation in Colonial America, 1630–1725," *American Journal of Legal History* 43, no. 3 (1999): 280, 284. Mumford's footnote for the Davis case reads: "*Laws of Virginia* (New York: Henry's Statutes, 1823), p. 146." It is unclear exactly what this footnote references, but it was probably volume 1 of Hening's *Statutes at Large*. The work, typically cited as having been published in 1823, actually appeared in several volumes beginning in 1809 and ending in 1823. It was published in New York, and a description of the Davis case appears on page 146. If that is the case, then the word should have been "negro," not "negress." I would like to thank both the reference staff at Northern Michigan University and the staff at the Harvard University Libraries for their assistance in attempting to track down Mumford's footnote.

[18] Rebecca Anne Goetz, *The Baptism of Early Virginia: How Christianity Created Race* (Baltimore, MD: Johns Hopkins University Press, 2012), 73.

[19] Ann S. Holder, "What's Sex Got to Do with It? Race, Power, Citizenship, and 'Intermediate Identities' in the Post-Emancipation United States," *Journal of African American History* 93, no. 2 (2008): 154; Howard Bodenhorn, "The Mulatto Advantage: The Biological Consequences of Complexion in Rural Antebellum Virginia," *Journal of Interdisciplinary History* 33, no. 1 (2002): 23–24.

[20] Aricia Coleman, *That the Blood Stay Pure: African Americans, Native Americans, and the Predicament of Race and Identity in Virginia* (Bloomington: Indiana University Press, 2013), 46.

abided by a legal definition that deemed only anal penetration to be punishable by death. Thus, while "lying with a Negro" clearly points toward sexual activity, Hugh Davis and the unnamed African may have engaged in anal sex, or they may have engaged in mutual masturbation, oral sex, or something else. Indeed, the Plymouth colony minister Charles Chauncy considered that "lying with" could indicate copulation or "other obscure acts preceding the same."[21] The other acts, whether they preceded penetration or were the entirety of the encounter, would fit popular notions of sodomy simply because they occurred between two men, but they would not meet the legal threshold for execution. Indeed, one of the more famous cases in colonial America involved Nicholas Sension. I will return to his case in more detail, but it is worth noting here that he was convicted of attempted sodomy for masturbating on one of his servants.[22] In this article, when I argue that Hugh Davis may well have been sentenced for sodomy, I am using this more expansive definition, which included a wide range of male-male sexual encounters.

That Davis's sexual encounter involved an African would have contributed to the belief that it was sodomy even if it did not involve anal penetration. According to Vincent Woodward in *The Delectable Negro*, Europeans categorized a wide range of West African sexual practices as sodomy, believing that Africans' sexual deviance was an innate outgrowth of their immorality and heathenism.[23] The case is somewhat peculiar, it seems, in that the assumption that Davis's partner was female has remained solidly intact despite a dramatic increase in scholarship on sexuality in early America showing considerable same-sex activity. Scholarship has also demonstrated the prevalence of early modern Europeans' prejudices against Africans as sexual deviants and sodomites who threatened to contaminate Europeans' Christian society.[24] A more detailed analysis of the Davis case in the legal and social context of early colonial Virginia shows, however, that the belief his partner was female rests on tenuous evidence at best.

My goal is to dissect the case and to explain why I find it more likely—though admittedly not definitive—that Hugh Davis's partner was actually male. I will do this by examining the specific language used by the court, as well as the legal, colonial, and Atlantic contexts in which the case

[21] Godbeer, *Sexual Revolution*, 109.

[22] Ibid., 106–9; and Godbeer and Douglas L. Winiarski, "The Sodomy Trial of Nicholas Sension, 1677: Documents and Teaching Guide," *Early American Studies* 12, no. 2 (2014): 411–17.

[23] Vincent Woodward, *The Delectable Negro: Human Consumption and Homoeroticism within US Slave Culture*, ed. Justin A. Joyce and Dwight A. McBride (New York: New York University Press, 2014), 78, 134, 228–37.

[24] Marc Epprecht, "The Making of 'African Sexuality': Early Sources, Current Debates," *History Compass* 8, no. 8 (2010): 770; Godbeer, *Sexual Revolution*, 109; Christopher Ellwood, "A Singular Example of the Wrath of God: The Use of Sodom in Sixteenth-Century Exegesis," *Harvard Theological Review* 98, no. 1 (2005): 67–93.

occurred. Finally, I consider the factors that may have led the colony to spare Davis's life, whether or not he had actually committed sodomy. Considering the possibility that Hugh Davis's partner might have been male instead of seeing the case as the starting point of antimiscegenation laws provides, I believe, a better reading of the case and its context.

The focus on Hugh Davis offers possibilities and poses problems. If, as Colin Talley claims, "the sexual behavior of people and the discursive sexual morality the elite truth-makers tried to construct through exhortations and statutes appear to be different things," then understanding what Davis actually did better helps us understand the "truth" the elite colonists were trying to create.[25] Looking at Davis from the perspective of a sodomy case does, however, limit any understanding of that "truth" to male behavior. That "truth" was also constructed in an era with no recognition of "homosexual" as an identity. As Anne G. Myles explained, the realm of the sexual was inseparable from other aspects of social life. Still, Davis challenged the colony's sense of order and naturalness, and knowing what he did is critical to understanding the colony's definition of an orderly society as well as orderly sexuality.[26]

As Clare Lyons argues, the case also came at a time when "understandings of same-sex sexual practices shifted dramatically" across the seventeenth and into the early eighteenth century, with more rigid legal definitions of sodomy emerging across Europe.[27] I would suggest that part of the impetus for those increasingly rigid definitions came from the colonies and the imperial project. The Davis case came a hundred years before the upsurge in prosecutions in the European capitals, but if it was a case of sodomy, then it offers insight into the elite's reaction when the sodomite fell outside the realm of the aristocratic rake who could both be hypermasculine and demand sexual favors from lower-class men. The case can also show a reaction to the perceived prevalence of sodomy. As Theo van der Meer shows in "Sodomy and Its Discontents," the Dutch shifted their approach to sodomy trials around 1730. Previously, trials and executions had been clandestine, and the crime was little discussed, but the Dutch authorities shifted their approach from this secretive method to one of maximum exposure of sodomites upon discovering pervasive and organized "sodomitical networks and subcultures."[28] I will show that even if colonial Virginia lacked the

[25] Colin Talley, "Gender and Male Same-Sex Erotic Behavior in British North America in the Seventeenth Century," *Journal of the History of Sexuality* 6, no. 3 (January 1996): 389.

[26] Anne G. Myles, "Queering the Study of Early American Sexuality," *William and Mary Quarterly* 60, no. 1 (January 2003): 199–200.

[27] Clare A. Lyons, "Mapping an Atlantic Sexual Culture: Homoeroticism in Eighteenth-Century Philadelphia," *William and Mary Quarterly* 60, no. 1 (2003): 119–54, quotation from 122.

[28] Theo van der Meer, "Sodomy and Its Discontents: Discourse, Desire, and the Rise of Same-Sex Proto-Something in the Early Modern Dutch Republic," *Historical Reflections / Réflexions Historiques* 33, no. 1 (Spring 2007): 48.

organized networks, its skewed sex ratios quite likely made sodomy fairly pervasive, and I believe the authorities capitalized on the interracial nature of Davis's infraction to make a public example condemning his behavior.

The Case Itself

The court's sentence for Hugh Davis appears in two collections, one edited by William Waller Hening, a lawyer and Virginia politician during the late eighteenth and early nineteenth centuries, and the other by antebellum court reporter Conway Robinson. The two renditions agree on the language used in September 1630. Both read: "Hugh Davis to be soundly whipped, before an assembly of Negroes and others for abusing himself to the dishonor of God and shame of Christians, by defiling his body in lying with a negro; which fault he is to acknowledge next Sabbath day."[29]

The Virginia court chose language strikingly similar to a passage in the recently completed King James Bible. This is no surprise. Virginia was an Anglican colony, and historians generally agree that the colony's laws were, in Goetz's words, "deeply rooted not only in the common law but also in biblical law."[30] As William Eskridge has observed, society, law, and religion are mutually constitutive, and people imbued the dominant understanding of biblical passages about race and sexuality with "primordial significance," even if later biblical scholars contested or even entirely rejected those interpretations. What is surprising is that historians' recognition of the importance of biblical language has not yet led to an investigation of that language in the Davis case.[31] A specific biblical example reinforces this point.

In his first letter to Corinth, Paul instructed the city's Christians: "Be not deceiued: neither fornicatours, nor idolaters, nor adulterers, nor effeminate, nor abusers of themselues with mankind" would be admitted into the Kingdom of God.[32] Even when scholars have noted that the vindictive

[29] Hening, *The Statutes at Large*, 1:146; H. R. McIlwaine, ed., *Minutes of the Council and General Court of Colonial Virginia, 1622–32, 1670–76, with Notes and Excerpts from Original Council and General Court Records, into 1683, Now Lost* (Richmond, VA, 1924), 479. The capitalization of "Negroes" and "negro" is inconsistent in the original. According to Marguerite Most and Michael Chiorazzi, "Of all the losses to Virginia's records over the years, the most dismaying is the almost complete disappearance of the decisions of the colony's general court and other central courts that were constituted from time to time." Most and Chiorazzi, eds., *Prestatehood Legal Materials: A Fifty-State Research Guide, Including New York City and the District of Columbia* (New York: Psychology Press of Rutledge, 2006), 2:1300.

[30] Goetz, *Baptism*, 47. See also John Ruston Pagan, *Anne Orthwood's Bastard: Sex and Law in Early Virginia* (New York: Oxford University Press, 2003), 121.

[31] William N. Eskridge Jr., "Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms," *Georgia Law Review* 45, no. 3 (Spring 2011): 716.

[32] The wording and spellings of the 1611 version of the King James Bible I use here are available at the Official King James Bible online: http://www.kingjamesbibleonline

language in Davis's sentence could suggest sodomy, they have not considered the symmetry between this biblical passage (1 Corinthians 6:9) and the court's use of the reflexive "abusing himself." The court did not use that particular reflexive phrase in the cases that show definitive evidence of interracial heterosexual acts.

The biblical language mirrored by the Virginia court likely emerged in the fifteenth century. John Wycliffe, whose translation of the Bible is typically dated to 1380, rendered the key portion of the passage as "nether letchouris ayen kynde, nether thei that doon letcheri with men," indicating a prohibition against homosexual activities. By the time William Tyndale undertook his translation of the Bible in the 1530s, the language had shifted; he rendered the key Corinthians passage as "nether whormongers nether weaklinges nether abusars of them selves with the mankynde."[33] The Geneva Bible, preferred by Calvinist English Puritans in the seventeenth century, used the word "buggerers" where the King James used "abusers of themselues with mankind" to convey the contemporary understanding of Paul's intent: a condemnation of same-sex sex acts. The King James translators intended to render the Bible in a manner accessible to congregations who would be listening to it read during services. Indeed, Alister McGrath pointed out in his study of the King James Bible, the translation team read each passage to panels of editors in their search for appropriate and accessible renderings of the ancient languages.[34] It seems reasonable, then, to believe that the phrase "abusers of themselves with mankind" would be identified as sodomites in the minds of many seventeenth-century English men and women.

Admittedly, common understandings of phrases can be difficult to pinpoint. Still, Virginia's courts did not use this phrasing in cases of interracial

.org/1611-Bible. On Corinth and the passage from 1 Corinthians 6, see David L. Balch, ed., *Homosexuality, Science, and the "Plain Sense" of Scripture* (Grand Rapids, MI: William B. Eerdmans, 2000), 218; and David F. Wright, "Homosexuals or Prostitutes? The Meaning of *ἀρσενοκοῖται* (1 Cor. 6:9, 1 Tim. 1:10)," *Vigiliae Christianae* 38, no. 2 (1984): 125–53.

[33] Both the Tyndale and Wycliffe translations of the Bible are available online at the Northwest Nazarene University's Wesley Center: http://wesley.nnu.edu. McGrath also discusses the Tyndale Bible at some length, as it provided the basis for much of the King James Bible. Alister E. McGrath, *In the Beginning: The Story of the King James Bible and How It Changed a Nation, a Language, and a Culture* (New York: Doubleday of Random House, 2001), 73–89. While McGrath argues that the King James Bible was formative, John N. King cites the Tyndale Bible as the true grounding of the emergent language, arguing that the KJV generally paralleled it. John N. King, "'The Light of Printing': William Tyndale, John Foxe, John Day, and Early Modern Print Culture," *Renaissance Quarterly* 54, no. 1 (2001): 53. Tyndale's translation also introduced into English the phrase "weaker vessel" as a way of referring to women. Anthony Fletcher, *Gender, Sex and Subordination in England 1500–1800* (New Haven, CT: Yale University Press, 1995), 60.

[34] Geneva Bible at http://www.genevabible.org. The full passage reads: "Know ye not that the unrighteous shall not inherit the kingdom of God? Be not deceived; neither fornicators, nor idolaters, nor adulterers, nor wantons, nor buggerers" (McGrath, *In the Beginning*, 187, 244–48).

sex that we can definitively identify as heterosexual. The colony did use similar phrasing once, in 1643, to describe a whole series of sexually related crimes that church vestries were supposed to report to the courts.[35] But when the assembly reissued the same mandate in 1651, it no longer used the phrase "abuse themselves."[36] I contend that reading "abusing himself" to suggest sodomy broadly construed rather than, as Higginbotham does, an indication that the court considered Davis's partner to be racially inferior more accurately reflects the use of the phrase in the early seventeenth century. At the very least, we know that the phrase was used contemporaneously with the court's decision to indicate male-male sexual activity, so we must accept the possibility that the court intended the same meaning. Along with the court's use of the word "Negro" instead of "Negress" or "Negro Wench," this raises serious doubts that Davis's crime was heterosexual. Considering, as I do next, how few African women were in the Virginia colony in 1630, these points become even more salient in understanding the case.

Contextualizing the Case

Even with gaps in the evidence, historians know more about the demographics of early colonial Virginia than they have applied to their interpretation of the Davis case. Fewer than thirty Africans lived in Virginia in 1625. In 1628 the ship *Fortune* landed some one hundred Angolans pirated from a Portuguese slave ship. Hence, the colony's African population immediately tripled, possibly even quadrupled, but no details about the sex or age of those aboard the *Fortune* survive. Some of those newly arrived Africans likely died before September 1630, and almost certainly some of the Africans counted in 1625 had died by then. Other Africans had probably arrived. Still, by 1640 the colony had only about three hundred Africans living among roughly fifteen thousand whites.[37]

We cannot firmly establish sex ratios among the colony's Africans for 1630, but in 1624 only nine or perhaps ten African women lived in the colony. Over 60 percent of the colony's Africans lived at two households, and the remainder all lived among the colony's most elite members. African women were concentrated in five households, with only Sir George Yardley having more African women (five) than African men (three) on his plantation, meaning only four or five African women lived elsewhere in the

[35] Hening, *Statutes at Large*, 1:240.

[36] Ibid., 2:52.

[37] Martha McCartney, *"Virginia's First Africans": Thomas Jefferson Wertenbaker, the Planters of Colonial Virginia* (Princeton, NJ: Princeton University Press, 1922), 124. An extended look at the demographics of seventeenth-century slavery is John C. Coombs, "The Phases of Conversion: A New Chronology for the Rise of Slavery in Early Virginia," *William and Mary Quarterly* 68, no. 3 (July 2011): 332–60.

colony.[38] Even though the colony was still small, mainly clustered along roughly 140 miles of the James River, most English colonists likely never actually encountered an African of either sex and were even less likely to encounter an African woman than an African man. Unfortunately, without exact data for 1630, we are left to make some conjectures. The number of Africans in the colony was almost certainly well below three hundred, the number recorded in 1640; indeed, the period from 1630 to 1640 saw a dramatic growth in the overall population of the colony. It also seems likely that African women were still concentrated among a very few households, while African men—though still few in number to be sure—remained less narrowly concentrated. Unfortunately, we do not know where Hugh Davis lived or if he happened to belong to one of the households where an African woman also resided.

These uncertainties have not prevented some scholars from using the Davis case as evidence for a turning point in the development of what Lewis Randolph and Gayle Tate call the "Jezebel thesis." That myth cast black women as sexual seductresses who tempted white men, while the men remained unaccountable for their transgressions.[39] David Smits claims that "the historical record suggests that by 1630 the Negro woman was replacing her Indian counterpart as a carnal temptress." Like Randolph and Tate, Smits argues that the myth originated with the Davis case. The argument has a certain appeal. The Jezebel myth did take hold in the American South, and Europeans certainly saw African women as particularly lascivious and as temptresses before 1630.[40] In 1614 Essex minister Reverend Samuel Purchas described the women of Guinea as "libidinous" and claimed that they "would boast of their filthiness." Purchas reported that they decorated themselves in order to pursue sexual pleasure with Dutch traders along the African coast.[41] As Anthony Fletcher noted, "Men's reading of women's bodies . . . attributed to them a voracious sexuality," but men's reading of women's minds left women without the necessary rationality to control their sexuality.[42] Non-European women were believed to have even less ability to control their sexual appetite. Yet the Davis case just does not fit within the development of the Jezebel thesis. In 1630 and for at least another decade,

[38] Irene W. D. Hecht, "The Virginia Muster of 1624/5 as a Source for Demographic History," *William and Mary Quarterly* 30, no. 1 (1973): 77–78, 82–83.

[39] Lewis A. Randolph and Gayle T. Tate, *Rights for a Season: The Politics of Race, Class, and Gender in Richmond, Virginia* (Knoxville: University of Tennessee Press, 2003), 43; Giddings, *When and Where I Enter*, 35.

[40] David D. Smits, "'Abominable Mixture': Toward the Repudiation of Anglo-Indian Intermarriage in Seventeenth-Century Virginia," *Virginia Magazine of History and Biography* 95, no. 2 (April 1987): 189–90.

[41] Samuel Purchas, *Purchas His Pilgrimage, or Relations of the World and the Religions Observed in All Ages and Places Discovered, from the Creation unto This Present,* 2nd ed. (London: William Stansby, 1614), 650, at the Boston Public Library: https://archive.org/details/purchashispilgri00purc (accessed 9 May 2018).

[42] Fletcher, *Gender, Sex and Subordination*, 74.

African women were far too few in number and far too isolated on a very few plantations to have been available to most male colonists for illicit sexual liaisons, despite Smits's claim that they were "more proximate" than Native American women.[43] Furthermore, the Jezebel thesis forgave white men their transgression by ascribing unbridled—and, apparently, irresistible—sexual prowess to black women. That seems an unlikely descendant of a case in which the white male, Hugh Davis, was flogged for his transgression. The Jezebel myth served instead to justify white men's sexual access to black women, a privilege that became a key expression of racial domination that long outlived slavery.

Virginia's population in the first half of the seventeenth century was overwhelmingly male, creating a situation where same-sex relations were far more likely than in a population with a natural sex ratio. Godbeer argues that far more men were engaging in same-sex relations in early Virginia than were going to court on sodomy charges. He suggests that the local reaction to the execution of Richard Cornish on charges of sodomy just a few years before Davis's flogging might well have arisen from a general fear that "the veil of silence regarding sexual activity between men in the fledgling colony was being ripped away." Indeed, Godbeer notes that the colony "may have wanted to make an example of Cornish, both as a rapist and as a sodomite."[44] Colin Talley agrees that sodomy was far more frequent than were prosecutions for the crime. Talley suggests that in England the finality of the penalty, combined with people's general desire not to know or admit that such acts were taking place around them, limited prosecutions. Talley also notes that seventeenth-century moralists feared it was contagious: the idea of sodomy, once introduced, could infect a whole society.[45] Indeed, one reason sodomy was considered the sin "not to be named" was the fear that merely hearing it named could incite someone to pursue it.[46] It seems to me that the fears of such a contagion, brought on by an African and now infecting the white population in a colony with so skewed a sex ratio, might have led the court to make an example of Hugh Davis. A public flogging would have served this purpose in a case where an execution was not warranted. Furthermore, we should not overlook the gendered meaning of a public whipping. Clearly, it was both painful and humiliating, but we might follow Cassandra Pybus in arguing that public floggings in this era were also meant to be emasculating. The goal, she explains, was to reduce the criminal "to an insensible thing with no will to resist."[47]

[43] Smits, "'Abominable Mixture,'" 189.

[44] Godbeer, *Sexual Revolution*, 122–24.

[45] Talley, "Gender and Male Same-Sex Erotic Behavior," 386, 393.

[46] Van der Meer, "Sodomy and Its Discontents," 46–47.

[47] Cassandra Pybus, "Bound for Botany Bay: John Martin's Voyage to Australia," in *Many Middle Passages: Forced Migration and the Making of the Modern World*, ed. Emma Christopher, Cassandra Pybus, and Marcus Rediker (Berkeley: University of California Press, 2007), 105. See also van der Meer, "Sodomy and Its Discontents."

The court's phrasing and the colony's demographics should raise significant questions about the heterosexual presumption in analyses of the Davis case. Still, neither of these pieces of background offers definitive answers. To gain further insight into what Davis meant, historians have offered various comparisons to other seventeenth-century cases involving interracial sex, though some of these comparisons have been misleading. For example, Davis is commonly compared to a bastardy case from 1640 in which the Virginia court sentenced a man to penance for impregnating a Negro woman. Although the case is seemingly straightforward, historians immediately face the problem that the two extant descriptions of the case do not agree with each other. Hening reported the case with these words: "1640: Robert Sweet to do penance in church according to laws of England, for getting a negroe woman with child and the woman whipt."[48] Robinson's account offers considerably more information: "Oct. 17: 1640 *Whereas Robert Sweat* hath begotten with child a negro woman servant belonging unto Lieutenant *Sheppard, the court hath therefore ordered* that the said negro woman shall be whipt at the whipping post and that the said *Sweat* shall tomorrow in the forenoon do public penance for his offense at *James City* church in the time of divine service according to the laws of *England* in that case provided."[49]

While the two versions appear easily reconcilable, the discrepancy in the spelling of the defendant's last name creates an immediate but heretofore unexplored difficulty in understanding the case. Historians may choose, as Jordan has in *White over Black*, to accept Hening's spelling of "Sweet." That decision points toward Robert Sweet, an established gentleman who owned land and servants near Elizabeth City. Lieutenant Sheppard lived in the same region, contributing to the circumstantial possibility of Sweet's paternity. Jordan argued that the case may not have been about race, because Robert Sweet was a gentleman and, as such, his social class would have spared him the flogging Hugh Davis suffered. Virginia, like England, did not flog gentlemen.[50] Masters like Thomas Key, a member of the colony's governing House of Burgess from Denbigh who fathered a bastard with a slave woman in the same year Davis was flogged, and Sweet generally escaped punishment.[51] Indeed, in 1593 the English House of Commons had specifically exempted the gentry from whippings for producing bastards, thus effectively allowing them to sexually exploit their female servants, an accepted privilege of their status that carried across the

[48] Hening, *Statutes at Large*, 1:552.

[49] McIlwaine, *Minutes of the Council and General Court*, 477.

[50] Jordan cited both Hening and McIlwaine, so he was likely aware of the differences between the two renditions of the 1640 case; he did not explain why he believed the defendant was Sweet rather than Sweat or comment on the differences between the cases. Jordan, *White over Black*, 79, 79n80; Genealogy Filing Cabinet, http://www.genfiles.com/bynum/john-baynham-c1570-16289-of-jamestown/ (accessed 3 April 2012).

[51] Smits, "'Abominable Mixture,'" 189.

Atlantic. In England and in its colony, attitudes toward sex and class were intimately intertwined, and bastardy laws were primarily aimed at the poor, particularly poor women.[52]

Stronger evidence and logic, however, support using Robinson's spelling. Robert Sweat had been born about 1623 and arrived in Virginia in 1638 on the ship *Guiding Star*. Lieutenant Sheppard claimed a headright, a plot of land granted to him for bringing a laborer into the colony, in Sweat's name. This indicates that both Sweat and the female African servant belonged to Sheppard, providing Sweat with regular proximity to the woman, something Sweet did not have.[53] It also suggests that the defendants in 1630 and 1640 likely occupied the same social status; thus, class would not explain the differences between the cases.

Goetz speculates that the unnamed African woman may have been Margaret Cornish, an African servant belonging to Sheppard. In a colony with so few African women, the fact that Sheppard owned both Cornish and the woman Sweat impregnated substantially increases the likelihood that they were the same person. It also appears that Sweat had at least two children with Cornish, the first in 1640 and the second in 1642.[54] Yet that complicates matters even further, because Sweat only went to court—as far as we know—once. The court specifically sentenced Sweat for impregnating the woman. This fact raises the question: Was the court concerned primarily about race or about bastardy? Michael Guasco argues that the court was more concerned about bastardy and property laws than with keeping the races apart. If Sweat and the woman had been married or if the woman had belonged to Sweat, then the court, Guasco claims, would not have gotten involved.[55]

Higginbothamask, "[Was] public whipping the usual punishment for an unwed mother, white or black, and 'public penance' the usual punishment for an unwed father, revealing judicial prejudice against women in general rather than against blacks? Can we believe that if the races of the parties had been reversed, the white woman would have been whipped and the black impregnator let off with public penance?" Higginbotham concludes that "in all probability, *Sweat* symbolizes the burgeoning judicial tendency toward racially inspired disparities in the punishment of blacks and whites who had committed the same offense."[56] Yet Higginbotham's asking readers

[52] Fletcher, *Gender, Sex and Subordination*, 218–19.

[53] Paul Heinegg, "Free African Americans of Virginia, North Carolina, South Carolina, Maryland and Delaware," digitized from State Archives, http://www.freeafricanamericans.com/Stringer-Talbot.htm (accessed 3 April 2012). A list of immigrants from George Cable Greer's 1912 *Early Virginia Immigrants* is available at http://www.evmedia.com/virginia/ (accessed 20 February 2014).

[54] Goetz, *Baptism,* 119n34; Heinegg, "Free African Americans."

[55] Michael Guasco, *Slaves and Englishmen: Human Bondage in the Early Modern Atlantic World* (Philadelphia: University of Pennsylvania Press, 2014), 222.

[56] Higginbotham, *In the Matter of Color*, 24.

to imagine a case in which a white woman was whipped and the black man escaped corporal punishment presents a significant evidentiary problem. In the article he cowrote with Barbara Kopytoff later, they cited the case of Philip Mongum, a free African living on the Eastern Shore during the mid-seventeenth century who impregnated a white woman, Margery Tyler. The court fined Mongum for the "sin of adultery," requiring him to pay for the child. The white woman, Tyler, was sentenced to four lashes.[57] This fits with the English trend toward ever more severe punishments for poor women who bore illegitimate children. That carried over to Virginia, where, as Brown shows, whipping was a common punishment for poor white women who bore bastards.[58] Race, it would seem, had less to do with the sentence than class. Even planters who paid little attention to a servant's morals would be concerned about the lost labor; pregnancy and maternity interrupted labor, paternity did not.

Taken together, the cases against Hugh Davis, Philip Mongum, and Robert Sweat reflect the fact that the laws of England applied in the colony. Those laws criminalized bastardy and certainly sodomy but had no special injunction against interracial coupling. Antimiscegenation laws originated in the colonies, not in England, but they were not yet fully in place in the 1640s. They should not be forced into a narrative in which they do not fit.[59]

The Sweat case presents historians additional problems, particularly if Goetz is correct in assuming that the woman was Margaret Cornish and if Sweat and Cornish did have a second child together. Perhaps the couple avoided court in 1642 because they had married, meaning that their second child was not a bastard. Interracial marriages were certainly possible at the time. Randolph and Tate argue that the court's intent in the Davis case "was to signal a warning to both blacks and whites regarding the immorality of interracial cohabitation," but Godbeer considers interracial marriages "far from uncommon." Ira Berlin agrees with Godbeer and adds that "at least one male member of every prominent seventeenth-century free black family on the Eastern Shore of Virginia married a white woman."[60] Since

[57] Higginbotham and Kopytoff, "Racial Purity," 12. Breen and Innes offer details on the case. T. H. Breen and Stephen Innes, *Myne Own Ground: Race and Freedom on Virginia's Eastern Shore, 1640–1676* (New York: Oxford University Press, 1980), 106–7.

[58] Brown, *Goodwives*, 188–92. Margery Tyler's punishment may have been lighter in Virginia than it would have been in England. Anthony Fletcher notes that, at least in Essex, punishments for bastardy escalated from a few hours in the stocks in 1580, to being whipped "moderately" in 1588, to being whipped "until their backs were bloody" by 1600. Fletcher, *Gender, Sex and Subordination*, 277. For an extended examination of one bastardy case as well as the Virginia colony's approach to poor white women who bore bastards, see Pagan, *Anne Orthwood's Bastard*.

[59] See Werner Sollors, *Interracialism: Black-White Intermarriage in American History, Literature, and Law* (Oxford: Oxford University Press, 2000), 8; and Lay, "Sexual Racism," 165.

[60] Randolph and Tate, *Rights for a Season* p. 43; Godbeer, *Sexual Revolution* p203; Ira Berlin, "From Creole to African: Atlantic Creoles and the Origins of African-American Society in Mainland North America," *William and Mary Quarterly* 53, no. 2 (April 1996): 287.

interracial marriages were at least tolerated through the middle of the 1600s, using the Davis case as an example of an early insistence on racial separation is, at best, problematic. We may never know with certainty if Margaret Cornish was the woman whipped in 1640 or if she and Robert Sweat ever formally married. Nevertheless, we can be certain of one thing: Sweat and Davis both engaged in sexual activity across the color line, but the court dealt with them very differently. This has important implications for how we understand Davis.

In *Shades of Freedom* Higginbotham attempted to minimize the differences between the two cases. When Higginbotham published *In the Matter of Color* in 1980, he merely concluded that Davis and his partner had committed a crime that "was more than an infraction of colonial codes" and noted that "their behavior was contrary to that allowed by the church," leaving open the possibility of a myriad of sexual crimes.[61] As late as 1989, in the article about interracial sex in colonial Virginia coauthored with Kopytoff, Higginbotham remained uncertain about Davis. In a footnote regarding the Davis case, the authors noted: "We also cannot tell the gender of the Negro. The extremely strong language may have reflected the Council's revulsion at a homosexual relationship."[62] Yet by 1996, when he wrote *Shades of Freedom*, Higginbotham's views had changed dramatically. He had become convinced that Hugh Davis's partner was female. The vitriolic language that had once led Higginbotham to consider the possibility that the Davis case was about sodomy now indicated to him that Davis had sexual relations with "someone less than human"—Higginbotham's words, not the court's. He concluded, "Davis's crime was not fornication, but bestiality." Higginbotham does not point to any contemporaneous use of the court's phrases to buttress his claim, but he still determined that "the only logical conclusion" regarding the actions of Davis and Sweat is that they had both had sexual relations with African women who belonged—either as slaves or as servants—to other men. While it is certainly true that Africans faced a multifaceted attack on their humanity and that Europeans' stigmatization of them as sexual deviants helped to intensify this attack, Higginbotham read evidence that only applied to Davis into his interpretation of the Sweat case in order to substantiate his argument.[63]

Higginbotham had become so sure that Davis and Sweat committed the same crime—interracial fornication—that he read the vindictive language used against Davis into the Sweat case. He wrote: "Sweat 'defiled his body' and shamed God by sleeping with someone less than human." He also determined that "the woman defiled society by sleeping with her superior," causing her to be sentenced to a whipping. Higginbotham cites the Conway Robinson collection of colonial laws, but no extant record of

[61] Higginbotham, *In the Matter of Color,* 23–24, 487.
[62] Higginbotham and Kopytoff, "Racial Purity," 11n98.
[63] Higginbotham, *Shades of Freedom*, 21, 25.

the Sweat case mentions defilement or the shaming of God. Higginbotham transposed the vitriolic language used against Hugh Davis onto the Sweat case, but the Virginia court had used quite different language to describe the cases and demanded substantively different punishments.[64] If the issue had been race, if Davis had a female partner whom the court considered "less than human" because she was African, we might well expect the court to lecture and punish Sweat similarly, since he definitively had a black female partner. It did not.

Furthermore, Sweat was hardly alone in escaping both legal sermonizing and corporal punishment for interracial fornication. In 1649 William Watts and Mary, a white man and a black woman, were required to stand before a congregation in Lower Norfolk County clad in white sheets as a punishment for their illicit relations. Jordan notes that such a "punishment was sometimes used in ordinary cases of fornication between two whites." Edmund Morgan, George Fredrickson, and, more recently, Kathleen Brown all refer to the case of Watts and Mary when they agree with Jordan that Virginia's courts frequently punished fornication similarly, regardless of the racial composition of the couple.[65] These scholars could have cited other cases that Higginbotham and Kopytoff, along with Goetz, noted. In 1657 the court sentenced Thomas Twine—a case Brown does cite—to do penance for interracial fornication. The following year the court fined Charles Cummell for having committed "Elicit Fornication with a Negro woman of Mr. Michael," the same fine it levied on John Oever, who in 1663 committed fornication with a white woman. Even John Johnson, a free black, avoided the lash for fornicating with a white woman, Hannah Leach, in 1663.[66] Thus, Sweat, Watts, Cummell, Twine, and Johnson all committed interracial fornication and faced similar punishments. Their punishments mirrored those of white men who fornicated with white women. None were accused of dishonoring God or shaming Christians. None were accused of abusing themselves. None were whipped. All committed interracial fornication, but they were not treated as harshly as Hugh Davis.

These other cases force historians seeking to place Davis within the context of reactions to interracial fornication to make strained comparisons. Kevin Mumford has argued that "it is not by random chance but rather

[64] Ibid., 22.

[65] Morgan, *American Slavery,* 333; George Fredrickson, *White Supremacy: A Comparative Study in American and South African History* (New York: Oxford University Press, 1981), 100; and Brown, *Good Wives*, 131, 195. Fredrickson suggests that the problem was the African's having been a heathen and does not comment on the individual's sex. Brown discusses the case of William Watts, but she offers no explanation as to why the court would accuse Davis but not Watts of defilement. For Jordon's take on this issue, see Winthrop D. Jordan, "Modern Tensions and the Origins of American Slavery," *Journal of Southern History* 28, no. 1 (1962): 28; and Jordan, *White over Black*, 79.

[66] Goetz, *Baptism*, 77; Higginbotham and Kopytoff, "Racial Purity," 11; Brown, *Goodwives*, 132.

a kind of historic regularity that the first extant documents such as Hugh and Sweat that mention race, they are cases of miscegenation."[67] Davis and Sweat both clearly mention race, but neither is necessarily about miscegenation. One may have been about sodomy and the other about bastardy. The other cases of interracial fornication that I have described certainly suggest that we need to understand Davis within the context of other relevant court decisions. Indeed, if Davis was about a same-sex encounter, then the claim that early Virginia held a special dread for heterosexual interracial sex seems in need of some reconsideration. As Godbeer notes, contradicting Higginbotham, early Virginia magistrates "do not appear to have discriminated between interracial and intraracial couplings. It was only later in the century that legislators began to codify racial distinctions in sexual as in other matters."[68] The status of progeny posed a problem, to be sure, but the solution to that problem—assigning children's status based on their mother's status—did not necessitate banning interracial sex.[69]

The colonial elite brought English fears of the poor and their sexual improprieties with them to the New World, and they were certainly concerned that bastards might end up on the public dole. Between 1576 and 1624 legislation in England regulating bastardy specifically targeted the poor in what Anthony Fletcher calls a "moral panic characteristic of particular historical moments when widespread fears and anxieties can become articulated and concentrated in terms of a moral crises."[70] Similarly, as Mimi Abramovitz, who expressly identifies Hugh Davis's partner as a woman, argues that "the main goal in white bastardy cases was to prevent fatherless children and unwed mothers from becoming town charges." In Virginia, these worries about the economic burden of bastards were compounded by fears about the progeny of mixed-race relationships.[71] The court faced this problem directly in August 1662, when Bartholomew Hoskins petitioned for a ruling on the status of his African servant's child.[72] The resulting statute, passed that same year, did increase the fine for fornication if the couple were interracial, but, far more importantly, it mandated the matrilineal inheritance of slavery to provide a solution to the problem of defining the status of mixed-race children. If ending interracial sex had been the colony's goal, the legislation was a spectacular failure. White men's sexual access to often unwilling black women continued, and even rapists frequently owned

[67] Mumford, "After Hugh," 284.

[68] Godbeer, *Sexual Revolution,* 202.

[69] Rebecca Goetz offers considerable details about several cases but concludes that "it is impossible to discern a pattern of accusation, conviction, and punishment" when it came to early Virginia morality cases. Goetz, *Baptism*, 71.

[70] Fletcher, *Gender, Sex and Subordination*, 275, 276–78. See also Godbeer, *Sexual Revolution*, 151; and Pagan, *Anne Orthwood's Bastard.*

[71] Mimi Abramovitz, *Regulating the Lives of Women: Social Welfare Policy from Colonial Times to the Present* (Boston: South End Press, 1988), 96.

[72] Brown, *Goodwives*, 132.

the progeny, meaning that they had enhanced their own material wealth. Indeed, white men's sexual domination of blacks, both male and female, became a cornerstone of their gendered and racialized power and centuries of white supremacy.[73]

Scholars have clearly documented the sexual abuse of black women—and increasingly of black men—as fundamental to slavery and white supremacy. On their surface, antimiscegenation rhetoric and laws vilified and criminalized all interracial sex, but in practice only relationships between black men and white women were condemned. Kenneth James Lay notes, "Anti-miscegenation laws were an American legal innovation used in the colonies to ensure the sexual separation of White women and Black men."[74] Godbeer agrees, noting that although the 1662 statute covered all interracial coupling, the far-reaching and more stringent law passed in 1691. While only part of that law directly addressed sexual relations, it specifically singled out relationships between white women and black men and, unlike its predecessor, explicitly forbade interracial marriage. The statute also specifically punished white women for bearing mixed-race bastards.[75] Morgan notes that women were still scarce in Virginia in 1691, and he

[73] Paul Finkelman, "Crimes of Love, Misdemeanors of Passion: The Regulation of Race and Sex in the Colonial South," in *The Devil's Lane: Sex and Race in the Early South*, ed. Catherine Clinton and Michele Gillespie (New York: Oxford University Press, 1997), 129; Hening, *Statutes at Large*, 2:170. The relevant portion of Act XVI of 1691 reads: "And for prevention of that abominable mixture and spurious issue which hereafter may encrease in this dominion, as well by negroes, mulattoes, and Indians intermarrying with English, or other white women, as by their unlawfull accompanying with one another, Be it enacted by the authoritie aforesaid, and it is hereby enacted, that for the time to come, whatsoever English or other white man or woman being free shall intermarry with a negroe, mulatto, or Indian man or woman bond or free shall within three months after such marriage be banished and removed from this dominion forever, and that the justices of each respective countie within this dominion make it their perticular care that this act be put in effectuall execution. And be it further enacted by the authoritie aforesaid, and it is hereby enacted, That if any English woman being free shall have a bastard child by any negro or mulatto, she pay the sume of fifteen pounds sterling, within one moneth after such bastard child be born, to the Church wardens of the parish where she shall be delivered of such child, and in default of such payment she shall be taken into the possession of the said Church wardens and disposed of for five yeares, and the said fine of fifteen pounds, or whatever the woman shall be disposed of for, shall be paid, one third part to their majesties for and towards the support of the government and the contingent charges thereof, and one other third part to the use of the parish where the offence is committed, and the other third part to the informer, and that such bastard child be bound out as a servant by the said Church wardens untill he or she shall attaine the age of thirty yeares, and in case such English woman that shall have such bastard child be a servant, she shall be sold by the said church wardens, (after her time is expired that she ought by law to serve her master) for five yeares, and the money she shall be sold for divided as is before appointed, and the child to serve as aforesaid" (Henning, *Statutes at Large*, 3:86–88.

[74] Lay, "Sexual Racism," 166–67.

[75] Anthony S. Parent Jr., *Foul Means: The Formation of Slave Society in Virginia, 1660–1740* (Chapel Hill: University of North Carolina Press, 2003), 116–17.

argues that the law aimed "at confining the affection of these rare white women to white men."[76] Whatever Hugh Davis did, his case *does not* fit into an antimiscegenation narrative that privileged white men's power over women, both black and white. If he committed fornication, then it survives as an anomaly in the pattern. If he committed sodomy, then it falls outside the bounds of miscegenation. Historians, nevertheless, have long used the case to begin the story of antimiscegenation in America.

The Davis case, I would argue, should be seen as part of the Virginia magistrates' efforts to enforce orderly English sexuality in the colony by applying English beliefs about civilized Christian gender roles and sexuality as well as their assumptions about African sexuality. Brown argued, "The English incorporated gender discourse about patriarchal authority and female domesticity into a distinctive national identity, separating themselves from the Gaelic Irish they met," over the prior century, and they applied that experience to their efforts to distinguish themselves from Native Americans and Africans. This, however, required legal enforcement, and these colonial relationships motivated the state to begin punishing sexual crimes that, prior to the sixteenth century, would have been left to the community to enforce.[77]

The case of Thomas(ine) Hall, an English servant who refused to identify as either male or female, demonstrates the court's involvement in cases of gender identity and presentation. In disagreement with Hall's master, who hoped to have Hall declared female, thereby exempting the master of the responsibility to pay a tithe on Hall, the court determined that Hall was indeed both male and female. The court ordered Hall to wear men's clothing but to also don an apron and to have his/her hair coiffed as a woman's.[78] With this ruling, Fletcher argues, the Virginia court declared that "setting gender clarification was its business." Fletcher views this judgment as a logical extension of broader shifts in the definitions of masculinity, indeed of male and female, were causing English society at the time. As "men were struggling with enforcing patriarchy on the basis of outward gender significations," Fletcher explains, "male control had to be seen to rest upon a firm and decisive identification of sexual identity, even where that identification was not actually decisive. Only this could give maleness a sense of privilege and a sense of visible differentiation." Public presentations of gender mattered so much in English society that in 1620, King James I himself commanded that the clergy preach against cross-dressing—particularly against women dressing as men—to combat a perceived threat to public order.[79]

[76] Morgan, *American Freedom*, 336.

[77] Brown, *Goodwives*, 16, 33.

[78] Kathleen Brown, "'Changed . . . into the Fashion of a Man': The Politics of Sexual Difference in a Seventeenth-Century Anglo-American Settlement," *Journal of the History of Sexuality* 6, no. 2 (1995): 171–93.

[79] Fletcher, *Gender, Sex and Subordination*, 83–85.

The Atlantic Context

In 1630 Hugh Davis committed a crime with an African in an English colony in the Americas. The Virginia court faced a daunting task. The court had to determine what it meant for an Englishman, defined as Christian, to engage in sexual activity with an African, defined as heathen and deviant, in a vulnerable colony perched on the edge of a hostile wilderness, and the court had to do so at a time of broad changes in the understanding of biological sex itself. Shifting ideas about sex and about masculinity combined with anxieties about patriarchy narrowed the range of acceptable male sexual behaviors. Fletcher agrees that the very understanding of sex changed dramatically as Europeans gained more accurate knowledge of anatomy across the sixteenth century. Most importantly, by 1600 it was generally accepted that the vagina is unique to women and is not an inverted, malformed penis. Karen Harvey suggests that the patriarchy became more secure as women were defined as a wholly separate sex rather than as imperfect men. Fletcher disagrees, arguing that this newfound knowledge may have exacerbated rather than assuaged anxieties about sex, gender, and patriarchy in the early seventeenth century.[80] As understandings of biology changed, so too did understandings about sexual acts.

Like many of his peers, legendary English jurist Sir Edward Coke considered sodomy a "detestable, and abominable sin, amongst Christians not to be named," but he also held to a strict standard that deemed penetration essential to making sodomy a capital crime. Coke further believed that good Englishmen would never engage in the "shameful sin of sodomy" and directly blamed the Lombards for introducing it to the realm.[81] Reverend Samuel Purchas, whose massive work *Purchas His Pilgrimage, or Relations of the World* appeared in its second edition in 1614, identified the Moroccan city of Azamur (Azzemmour) as "exceedingly addicted to Sodomie." Yet Purchas made the intriguing note that not all of Africa was so addicted. Indeed, in his discussion of the Christian kingdom of Ethiopia, he noted that "some Italians had beene found guiltie of the sinne against Nature, a thing for which the Ethiopians . . . had no lawe, as not thinking any would

[80] Karen Harvey, "The History of Masculinity, circa 1650–1800," *Journal of British Studies* 44, no. 2 (2005): 305; Fletcher, *Sex, Gender and Subordination*, 28, 34.

[81] Sir Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason and Other Pleas of the Crown and Criminal Causes* (London: E. and R. Brooke, 1797), 58; Godbeer, *Sexual Revolution*, 109; William Holdsworth, "Sir Edward Coke," *Cambridge Law Journal* 5, no. 3 (1935): 332–46; Harold J. Berman, "The Origins of Historical Jurisprudence: Coke, Selden, Hale," *Yale Law Journal* 103, no. 7 (1994): 1677–80. Part of the association of sodomy with Lombards and others from the Italian peninsula rose during the Protestant Reformation when no less a figure than Martin Luther associated Rome and the papacy with sodomy. Christopher Ellwood, "A Singular Example of the Wrath of God: The Use of Sodom in Sixteenth-Century Exegesis," *Harvard Theological Review* 98, no. 1 (2005): 67–93.

so farre degenerate."[82] The implication of all of these arguments was that sodomy was the habit of particular peoples and societies, but it could be spread to the previously unafflicted.

Seventeenth-century English moralists saw evidence that the contagion had taken root in their society. In 1622 Sir Simonds D'Ewes warned parents of would-be students that Oxford and Cambridge were infested with the vice of sodomy.[83] Virginia shared the university towns' skewed sex ratios that so worried D'Ewes. While students at Oxford or Cambridge at least had the option of finding sexual partners among the lower classes, few of Virginia's colonists had that option, given the relative shortage of white women of any class. As Godbeer notes, even Native American women were largely unavailable to the average colonist in early Virginia, as the colony restricted interaction in hopes of avoiding military conflict. Virginia's men faced a quandary. The nearness of perceived savagery demanded that men perform English masculinity for the sake of the colony's survival; indeed, that nearness demanded an even clearer, more rigid standard of Christian and English masculinity. Conversely, demographics, particularly the scarcity of white women in the colony, however, meant that few colonists could live up to that standard.[84]

Encounters with the broader world and the association of sexual propriety with European civilization and Christendom cast nonnormative sexual practices in Europe and by Europeans in the colonies into sharper relief. Carmen Nocentelli argues that across the sixteenth and seventeenth centuries "the racialization of 'deviant' practices and behaviors" consolidated an emerging discourse on sexual behaviors and race that prioritized patriarchal heterosexual relationships and white, particularly male, privilege. She notes that "sodomy became so intertwined with 'foreignness' that European travelers abroad felt more compelled to explain its absence than its presence."[85] Africans were a particular target of the racialization of sexual deviance, as Mumford argues: "Europeans simianized African bodies and projected an exaggerated fecundity and sexuality upon them."[86] One Andrew Battle,

[82] Purchas, *Purchas His Pilgrimage*, 635, 681. Purchas offered particularly sympathetic views of the Christian kingdom of Ethiopia, though he argued that it was probably not the kingdom of the fabled Prester John (664–71). This, perhaps, explains why he did not view Ethiopians as sexual deviants and instead blamed the Italians for bringing sodomy to that society. See also Epprecht, "The Making," 770.

[83] Cynthia B. Herrup, *A House in Gross Disorder: Sex, Law, and the 2nd Earl of Castlehaven* (New York: Oxford University Press, 1999), 27.

[84] Godbeer, *Sexual Revolution*, 122.

[85] Carmen Nocentelli, "The Erotics of Mercantile Imperialism: Cross-Cultural Requitedness in the Early Modern Period," *Journal for Early Modern Cultural Studies* 8, no. 1 (2008): 143, 147.

[86] Mumford, "After Hugh," 281. Mumford notes that same-sex behavior among Philadelphia's black population may have arisen from the shortage of black women in the city, but he does not consider the skewed sex ratios of 1630 Virginia in his assessment of the Davis case. Ibid., 304.

who had been captured by the Portuguese and lived in Angola in 1590s, later reported to Purchas that the people of the region "are beastly in their living, for they have men in women's apparel whom they keepe among their wives."[87] Such stories, as Woodward argues, led Europeans to lump a variety of West African sexual practices under the label "sodomy."[88]

Thomas Foster also emphasizes that Europeans eroticized Africans, and he points out that "the sexual exploitation of enslaved black men took place within a cultural context that fixated on black male bodies with both desire and horror." Black men had a reputation—imputed to them by Europeans—as being "particularly virile, promiscuous, and lusty." Foster admits that the documentary evidence is limited, but he remains certain that the sexual abuse of male slaves was prevalent even when it went unrecorded.[89] Similarly, Woodward notes that the European colonists' imposition of the label "sodomite" on Africans served the broader "political end that involved furthering the goals of empire building and chaining the African body to a framework of spiritual and corporal taint."[90] This interweaving of the sexual and racial other into the image of the savage embedded itself into the fabric of the colony, which was surrounded by Native Americans and which was already, if irregularly, importing Africans directly into its territory in 1630.

As the English sought to project their world into the wilderness, Goetz suggests, "settlers came to fear the danger of reverting into heathenism even more than death."[91] Indeed, Godbeer describes how officials across the colonies lamented that "preserving even the fundamentals of English 'civility' could not be taken for granted in a 'wilderness' where 'savage' inhabitants threatened to 'corrupt' and 'debase' English settlers."[92] Nor could this civility be taken for granted when the colony continuously imported servants from the lower echelons of English society. The poor, according to their social betters in England, were "the vile and brutish part of mankind," and the colonial elite believed that both Native Americans and Africans were debauched and immoral. In the eyes of the colonists, such people served to "confirm by negative example the notion that sexual restraint was an essential ingredient of godliness and civility," and their presence necessitated enforcement of English sexual morality.[93] In other

[87] Samuel Purchas, *Hakluytus Posthumus or Purchas, His Pilgrims* (1625; Glasgow: James MacLehose, 1906), 6:376.

[88] Woodward, *The Delectable Negro,* 228–37.

[89] Thomas A. Foster, "The Sexual Abuse of Black Men under American Slavery," *Journal of the History of Sexuality* 20, no. 3 (September 2011): 447–49.

[90] Woodward, *The Delectable Negro*, 228.

[91] Goetz, *The Baptism*, 44.

[92] Godbeer, *Sexual Revolution*, 116, 157. The Spanish also viewed Amerindians as persistent perpetrators of the dual vices of sodomy and cannibalism. David Tavárez, *The Invisible War: Indigenous Devotions, Discipline, and Dissent in Colonial Mexico* (Palo Alto, CA: Stanford University Press, 2011), 33.

[93] Morgan, *American Freedom*, 325; Godbeer, *Sexual Revolution*, 116, 157.

words, Virginians were conditioned to see the poor as immoral and African men as sodomites. A sexual encounter between a poor English servant and an African man would be an abomination.

The social demands for well-performed English masculinity would also have been heightened during the time of the Davis case because of the threat to English settlements posed by the Powhatan Confederacy, a group of roughly thirty Algonquian-speaking Native American tribes who were organized by Powhatan shortly before Jamestown was founded in 1607. Peace treaties with the Powhatan had been declared void in January 1629, and open warfare resumed. One report argued that more Native Americans had been killed in 1630 "since the great massacre" of 1622, though historian Alfred Cave has insisted that this claim is impossible to verify.[94] Such an existential threat likely increased the authorities' anxiety about perceived sexual deviants. In *The Missing Myth,* Gilles Herrada cited the prevalent belief that "the sodomite is, by definition, a weak individual and a traitor" who undermines the natural order of things. Herrada argues that the association of sodomy with Lombards, as well as with Moors and Turks, connected the sin to "indefinably soft and hardly manly" foreigners in a society that "hypervalorize[d] the masculine." The colony could hardly tolerate such a person while under attack by people perceived as savages.[95]

If Hugh Davis transgressed English and Christian sexual boundaries by engaging in sodomy with an African while the colony was under heightened alert, then his case would represent a most egregious succumbing to savagery, and the public spectacle of his punishment would make sense. Martinot assumes Davis's partner was a woman but still reads the flogging as "an instrumentalization of Africans for the purpose of keeping the English in line, reconstituting English social identity as a form of social control."[96] His argument, I would suggest, applies even better if Davis's partner was a man. By crossing racial boundaries to commit a crime that must have been occurring with some frequency (given the skewed sex ratios), Davis offered the Virginia court an opportunity to make an unusually clear statement about the evils of sodomy while drawing upon the prevalent myths of Africans as inherently sexually deviant. Caught in the crossfire of changing standards and peculiar circumstances, Hugh Davis had severely limited opportunities for forming respectable relationships and strayed—as many must have—into the realm of illicit sex. He committed his act in a

[94] Alfred A. Cave, *Lethal Encounters: Englishmen and Indians in Colonial Virginia* (Santa Barbara, CA: Praeger, 2011), 129.

[95] Gilles Herrada, *The Missing Myth: A New Vision of Save-Sex Love* (New York: Select Books, 2013), 169, 196. Herrada notes that "softness and sexual passivity" cast suspicion upon men's civic loyalty in societies from ancient Rome through the modern United States, as exemplified by McCarthyism and the fight over "Don't Ask, Don't Tell" in the 1990s. Ibid., 129.

[96] Martinot, "Motherhood," 89–90.

vulnerable colony, and the racial nature of his crime presented authorities with an opportunity to turn him into a public spectacle and thus a warning to others. Yet, as we shall see, his lowly status as a servant, a unit of labor, quite possibly also saved him from execution. Davis, I would suggest, represents the Virginian elite's application of English law in the colony, their abhorrence of sexual deviance, their fear of a degeneration into savagery, and their insistence on maintaining the patriarchy and English identity in the wilderness. The narrow reading given to the case by historians like Aricia Coleman, who saw the case as reflecting early Virginia's "obsession with racial purity and proscriptions against interracial sex and marriage," I think reads the demand for the sexual separation of the races back to early in the colony's history and overlooks the complicated race-sex dynamics that persisted at least into the early 1660s.[97]

Davis and Death

In making the case that Hugh Davis committed sodomy, one unavoidable fact must be confronted: sodomy was punishable by death, but Hugh Davis was merely flogged. Indeed, my analysis of the threat posed by African sexuality, the changing nature of sexuality, and the threats facing the colony might suggest that execution would have been even more likely for Davis's crime if his partner had been male. Yet a number of factors mitigate against that conclusion. Morris determines that it was "very unlikely" that Davis had a male partner, because sodomy was a capital offense and Davis was not executed. Yet even confirmed cases of sodomy failed to result in executions in colonial America. Morris was primarily referring to the execution of Richard Cornish for sodomy in 1624 as the basis for his reasoning.[98] Virginia executed Cornish after his alleged victim, his white servant, accused him of forcible sodomy and testified against him. Even if the unnamed African had been a victim of Davis's unwanted advances, it is likely that the court would have prohibited his or her testimony if he or she were not Christian. Furthermore, assumptions about African sexuality would have made the court far less likely to accept the idea that Davis had raped him or her even if that was in fact what had happened. Still, the Cornish case itself is not as clear-cut as it appears. Historian Robert F. Oaks suggests that the entire case against Cornish may have been trumped up to rid the colony of a difficult individual, raising the possibility that that case was more about politics than sex.[99] Though Godbeer does not expressly share Oaks's suspicions, he argues that the case against Cornish fell short of accepted evidentiary

[97] Coleman, *That the Blood Stay Pure*, 46.

[98] Morris, "'Villeinage,'" 102n34.

[99] Robert F. Oaks, "'Things Fearful to Name': Sodomy and Buggery in Seventeenth-Century New England," *Journal of Social History* 12, no. 2 (1978): 270.

standards for capital cases, particularly since no witness corroborated the accusations of the purported victim.[100]

Although historians have good reason to believe that same-sex activity was common, especially in colonies with highly skewed sex ratios, very few cases of sodomy seem to have resulted in execution in colonial North America. Louis Crompton found only two confirmed cases of executions for sodomy in the English-speaking colonies, including Cornish, and another two from mid-seventeenth-century Dutch New York.[101] The New Haven colony executed William Plaine in 1646 for masturbating with "a great part of the youth of Gilford—above 100 times." Plaine was suspected of having committed sodomy in England, and that may have contributed to the decision to execute him. Godbeer also cites New Haven's execution of John Knight in 1655, a case Crompton did not note. Knight had been convicted of "a sodomitical attempt" upon a teenage boy, but his having been found guilty of other attempts and having shown no remorse earned him the death penalty.[102] Evaluating the cases against Plaine and Knight, as well as a similar case against Nicholas Sension, who was charged with sodomy in Connecticut in 1677, can inform our understanding of Davis in important ways. Plaine's case provides an example of the common perception that sodomy could be contagious and could infect the youth of the colony. Additionally, neither Plaine nor Knight appears to have engaged in anal sex, though doing so may well have been Knight's intention. The court convicted them of sodomy and ordered them executed for engaging in masturbation with other males and for pursuing but not engaging in anal sex. New Haven's laws against sodomy were the broadest and harshest in North America, while the Connecticut colony was more typical of other jurisdictions. The Connecticut court punished but did not execute Nicholas Sension after finding him guilty of attempted sodomy for having masturbated on one of his male servants. By the time he went to trial in 1677, Sension gained had a reputation for pursuing sex with other men, sometimes quite aggressively. His relatively high social status and the lack of evidence that penetration had occurred seem to have combined to shield him from capital punishment. Sension's offense, masturbating on another man, was widely considered sodomy, but it was not legally punishable by death.[103]

Even cases of sodomy that clearly met the legal standard for execution under existing law did not necessarily result in a death sentence. In 1637

[100] Godbeer, *Sexual Revolution*, 123.

[101] Louis Crompton, "Homosexuals and the Death Penalty in Colonial America," *Journal of Homosexuality* 1 (1976): 288. One of the cases, from the New Netherlands in 1646, involved Jan Creoli and Manuel Congo. Vincent Woodward argues that Creoli, at least, was cast as "condemned of God . . . as an abomination" and that the Dutch explained the execution as preserving Christian morals and values. Manuel Congo was whipped, not executed, possibly because he was only ten years old. See Woodward, *The Delectable Negro*, 134.

[102] Godbeer, *Sexual Revolution*, 110–11.

[103] Oaks, "'Things Fearful to Name,'" 269–70.

officials in Plymouth whipped and banished John Alexander for committing sodomy with Thomas Roberts, an English servant. Roberts was whipped, returned to his master, and forbidden from ever owning land in the colony. Neither man received the recently adopted death penalty for sodomy despite evidence that they had committed the crime and despite the fact that Alexander, at least, was "notoriously guilty that way."[104]

Sodomy was a notoriously difficult charge to prove. In considering Davis, it seems quite possible that in the absence of direct evidence of penetration or other male-male sexual activity, the court convicted Hugh Davis of attempted sodomy, as the Connecticut court had done with Sension. Godbeer and Douglas L. Winiarski argue that in New England, "those accused of crimes that carried the death penalty were mostly whipped or fined for either suspicious behavior or an attempted crime."[105] Likewise, John Murrin, who examined records from the later seventeenth to the end of the eighteenth century, found that in England people convicted of attempted sodomy were "certainly considered infamous" but generally not executed. "A common sentence was an hour in the pillory," Murrin notes.[106] The difference between death and flogging in sodomy cases was often the presence or absence of very specific evidence, which frequently worked in the defendant's favor. For the English of the time, those guilty of attempted sodomy still violated the expected performance of English and Christian masculinity, still posed the threat of contagion, and deserved severe punishment for their crimes.[107]

Hugh Davis's status as a servant may also have helped spare his life even if he committed a capital offense. Fundamentally, he provided labor for the colony. According to Douglas Greenberg, the labor shortage was the most salient factor in mitigating the strict imposition of the harshest penalties of the criminal code in the Chesapeake colonies.[108] Davis likely worked in the household of a Virginia gentleman whose connections to burgesses and judges in the colony might have saved him from the penalty.

Another possibility, while perhaps less likely than those listed above, could have been that Hugh Davis was not yet an adult when he was caught. Both Stephen Robertson and Louis Crompton point out that the colonies appear not to have executed youths under the age of fourteen or fifteen for even the most heinous of capital crimes.[109] Murrin's survey of sodomy cases across

[104] Ibid.

[105] Godbeer and Winiarski, "The Sodomy Trial," 407.

[106] John Murrin, "'Things Fearful to Name': Bestiality in Colonial America," *Pennsylvania History* 65 (1998): 9.

[107] Godbeer and Winiarski, "The Sodomy Trial," 407; and Godbeer, *Sexual Revolution*, 87, 105.

[108] Douglas Greenberg, "Crime, Law Enforcement and Social Control in Colonial America," *American Journal of Legal History* 26, no. 4 (1982): 303.

[109] Stephen Robertson, "Shifting the Scene of the Crime: Sodomy and the American History of Sexual Violence," *Journal of the History of Sexuality* 19, no. 2 (May 2010): 233; Crompton, "Homosexuals," 280, 282.

the colonies includes the whipping of six youths in New Haven. In 1653 the New Haven court convicted the youths committing "much wickedness in a filthy corrupting way one w[th] another," but their age saved them from hanging.[110] Since the court did not record Davis's age, we cannot be certain whether it was a factor. But whichever of the various possible justifications for leniency that I have outlined might have led the court to spare Davis's life, it is clear that the fact that he was flogged rather than executed cannot be taken as definitive evidence that his crime was heterosexual in nature.

The Final Salvo

In 2008 Ann Holder wrote: "Historians have long, and inconclusively, debated the *racial* meaning of the infamous 1630 judicial sentence against Hugh Davis for 'defiling his body in lying with a Negro.'" She argues that by the middle of the seventeenth century a racial hierarchy was in the making that was inseparable from emerging laws governing indentured servants and slaves. She was right about the historical debate as it has proceeded since the 1900s. Yet, reflecting that scholarship, Holder said nothing about the Davis case's potential meanings in terms of colonial anxieties over gender, particularly masculinity, or deviant sexuality. Instead, she assumed it was a heterosexual encounter and used it to demonstrate the use of heterosexual sex and sexuality in establishing racial boundaries.[111] Even those scholars who have acknowledged that the case could have been about sodomy have not fully explored the implications of this possibility. The way that Davis has been used to highlight the antimiscegenation narrative has remained essentially the same in the century between 1918, when Carter Woodson wrote, and the early twenty-first century, when Howard Bodenhorn called the case the "opening salvo in a long battle against miscegenation."[112] Despite a few historians' willingness to point out the shaky foundations of the assumption that Davis referred to a heterosexual act, those assumptions continue to dominate interpretations and, thus, the broader historical uses of the case.

The status of same-sex couples and the civil rights of sexual minorities have become "hot-button" issues in twenty-first-century America, but the debates have not brought forth a reconsideration of Davis in a way analogous to how the civil rights movement inspired a reconsideration of the historical trajectory of antimiscegenation laws in America. The legal position against interracial sex tentatively instituted in 1662 was clearly outdated three hundred years later. As *Loving v. Virginia* (1967), a case in which a mixed-race couple challenged Virginia's law barring interracial marriage, worked its way through the courts, Walter Wadlington traced the fears of

[110] Murrin, "Things Fearful to Name," 21.
[111] Holder, "What's Sex Got to Do with It," 154, italics in original.
[112] Bodenhorn, "The Mulatto Advantage," 23–24.

miscegenation in America, and Virginia, to Davis, not to the 1662 law, and the US Supreme Court cited him in its majority opinion declaring all such laws unconstitutional.[113] A half century later, as the rights of same-sex couples became a key political issue in the United States, Davis has been ignored. The borders of Americanness may well have moved to include same-sex couples to claim full membership in the society, as signaled by the Supreme Court's ruling in *Obergfell v. Hodges* (2015), but negative reactions to *Obergfell* show the persistence of an alternative vision of Americanness, one in which same-sex couples are still excluded from full participation in civil society.[114]

Phoebe C. Godfrey compared the conservative reactions to the Supreme Court ruling declaring racial segregation in schools unconstitutional in *Brown v. Board of Education* (1954) and its ruling that antisodomy laws are unconstitutional in *Lawrence v. Texas* (2003). She found that "racism and homophobia have been sanctified in pleas to 'save the children' from supposed 'moral contamination,' even as the larger goal is linked to maintaining the white ruling classes' political, social, and economic dominance." In her view of patriarchal white supremacy, "the connections between race, sexuality and morality were fundamental" to how segregationist whites saw themselves and saw blacks during the civil rights movement. For ministers, the ruling in *Lawrence* and "legalizing homosexual sex is akin to insulting God and engaging in idolatry, leaving our nation open [to] a loss of God's favor."[115] The idea that homosexual relations dishonor God, it appears, has a long history in America. So, too, does the belief in blacks' aggressive sexuality. As school segregation came under attack in the 1950s, James J. Kilpatrick, editor of the *Richmond (VA) News Leader* warned that integration would pave the way for blacks to organize interracial sex clubs in the schools.[116] Similarly, the belief that homosexuality is a contagion that can infect society has led some people to find any discussion of homosexuality

[113] Walter Wadlington, "The Loving Case: Virginia's Anti-miscegenation Statute in Historical Perspective," *Virginia Law Review* 52, no. 7 (1966): 1191. See also Cyrus E. Phillips IV, "Miscegenation: The Courts and the Constitution," *William and Mary Law Review* 8 (1966): 133; and *Loving v. Virginia* (1967), Cornell University Law School, Legal Information Institute, http://www.law.cornell.edu/supct/html/historics/USSC_CR_0388_0001_ZO.html#388_US_1n6 (accessed 16 May 2012).

[114] Robert R. Reilly, *Making Gay OK: How Rationalizing Homosexual Behavior Is Changing Everything* (San Francisco: Ignatius Press, 2014). A more favorable view of *Obergfell* cast in the history of marriage can be found at David M. Perry, "A New Right Grounded in the Long History of Marriage," *Atlantic*, June 26, 2015, https://www.theatlantic.com/politics/archive/2015/06/history-marriage-supreme-court/396443/ (accessed 28 April 2017).

[115] Phoebe C. Godfrey, "Eschatological Sexuality: Miscegenation and the 'Homosexual Agenda' from *Brown vs Board of Education* (1954) to *Lawrence vs Texas* (2003)," *Race, Gender, & Class* 19, no. 3/4 (2012): 143–60, quoted from 153.

[116] James J. Kilpatrick, *The Southern Case for School Segregation* (New York: Crowell-Collier Press, 1962), 58–65.

to be a promotion of the supposed "homosexual agenda" and threat to children.[117] In other words, despite enormous changes in our understanding of race and human sexuality, fears of black sexuality and the idea that homosexuality is "contagious" have survived.

My analysis of the Davis case suggests that it is time to reconsider the case's place in history and within the historiography on race and sexuality in early America. At the very least, historians need to take seriously the possibility that the unnamed African was a man. It seems clear that the authorities in early colonial Virginia often treated heterosexual interracial contact rather prosaically, especially when it involved white men and black women. When considering the prejudices against interracial sex, which no doubt existed, historians should differentiate between prevailing belief systems and legal enforcement. Legally, bastardy and the status of mixed-race offspring were concerns, to be sure, but efforts to stop interracial fornication remained weak at best, and—unless my theories about Hugh Davis are incorrect—the colony never saw fit to flog a white man for having sex with a black woman.

On the other hand, the skewed sex ratios undoubtedly increased both the prevalence of and the authorities' anxiety about same-sex relations. The precarious status of the colony heightened the English fear of disorderly sexuality at the same time that the sexualized views of race ascribed sodomy to the savage and heathen other. Thus, reconsidering the Davis case offers an opportunity to further explore the multiple ways authorities used the racial other to reinforce sexual boundaries and the sexual other to reinforce racial boundaries. The colony's elite, I would suggest, used the racial-sexual other, buttressed by readily available myths about African sexual deviance, to solidify the colony's English and Christian identity while it was not only surrounded by but also importing people it deemed savages and heathens directly into its corpus. Indeed, the case suggests that some of the European concerns about public presentations of masculinity and disorderly manhood may have arisen in the colonies and spread from there to the metropole.

Davis continues to entice historians, and the court's forty-three-word diatribe has become the sole basis for using, and abusing, an incident in the life of one unlucky colonist to understand the racial and sexual climate of colonial Virginia. Both the racial and sexual worlds were in flux when Hugh Davis drove the colonial court to a vindictive frenzy. However much we may wish the court had simply told us the sex of the unnamed African or the exact crime Davis committed, it did not. We have a puzzle with missing pieces, but the pieces we do have fit better if we abandon the assumption that Davis participated in a heterosexual encounter and consider the possibility that he instead engaged in sexual activity with an African male.

[117] Didi Harmon, *The Antigay Agenda: Orthodox Vision and the Christian Right* (Chicago: University of Chicago Press, 1997), 61–90.

About the Author

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