

2009

## Categorizing Zipporah's Petition

William E. Nelson

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/hlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Nelson, William E. (2009) "Categorizing Zipporah's Petition," *Hofstra Law Review*: Vol. 38: Iss. 1, Article 8.

Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol38/iss1/8>

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact [lawcls@hofstra.edu](mailto:lawcls@hofstra.edu).

## CATEGORIZING ZIPPORAH'S PETITION

*William E. Nelson\**

Let me begin by expressing how much I enjoyed reading and hearing Melinde Sanborn's fascinating essay on Zipporah's case. I cannot emphasize enough how valuable work like Sanborn's is to historians such as myself who try to write synthetic histories of colonial American law or colonial society more generally. We need to have access to as much archival material as possible in situations where considerations of time and resources make travel to every extant archive unfeasible.

Three months ago I received an e-mail requesting that I "write . . . a few short pages on the context and significance of the case," as well as "verify the legal statements of the author, who is not a lawyer, and to suggest any relevant historical sources . . . (specifically including your own) that should be cited." So here goes.

I begin with what I take to be the fundamental lesson of legal realism and of the first year of law school: that one cannot confidently extract law from a single statute or from a reading of a single case. Ambiguities always lurk in the interstices of statutes. To resolve those ambiguities and thereby determine the complete meaning of a statute, a lawyer needs to examine how the statute has been applied in a range of subsequent cases. Similarly, although a reading of a single case will show how the court decided that case and will offer a prediction about how judges will resolve analogous cases in the future, it will not reveal what constitutes an analogous case. The likeness of cases can be apprehended only by examining a range of cases, including both those which courts find analogous to a first case and those which they find distinguishable.

I can express the same lesson in a different fashion. The law will almost never encompass and simply mirror a clear principle of either right or wrong. Rather the law will demarcate a line between right and

---

\* Weinfeld Professor of Law, New York University School of Law.

wrong—between the permissible and the impermissible—a line riddled with twists and turns and exceptions. There is a reason why this is so—namely, that it is typically impossible to articulate a principle of right or wrong except in the context of background norms, and once one articulates a principle in such a manner, line-drawing is inevitable.

Melinde Sanborn may not be a lawyer, but she understands the nature of law extraordinarily well. Thus, she has been extremely careful not to draw large conclusions on the basis of the one case she has presented to us. But she does raise important questions, and her essay offers at least implicit suggestions about what some answers might be. What I hope to do is focus on her questions and suggestions and thereby examine how Zipporah's case fits into the larger pattern of Massachusetts Bay legal development as I have portrayed it in my own work.

The largest question Sanborn raises concerns the treatment of African Americans in seventeenth-century Massachusetts. She offers some evidence that the status of blacks in Massachusetts had begun to decline as early as 1656, just as it did around that time in Virginia, and suggests that Zipporah's case further evidences that decline.<sup>1</sup> I am not convinced. The fact that Zipporah was arrested on a charge of fornication is not surprising; arrest was the usual form of process in criminal cases. There is no direct evidence why she remained in jail, but conceivably it was because she failed to make bail; she probably lacked sufficient resources of her own, and no one else likely came to her aid. The Parker family, by which she was employed,<sup>2</sup> would have been the most likely source of bail, but the Parkers had every reason to keep her imprisoned. If they had tried to obtain bail for her, their effort might only have resulted in a new arrest for infanticide, a nonbailable, capital offense. If, as Sanborn suggests, the Parkers were trying to protect their nephew Jonathan,<sup>3</sup> they had every reason not to want Zipporah accused of killing his bastard child.

But Zipporah's interests were not those of the Parkers. She wanted to get out of jail, and she accordingly petitioned the county court before

---

1. Melinde Lutz Sanborn, *The Case of the Headless Baby: Did Interracial Sex in the Massachusetts Bay Colony Lead to Infanticide and the Earliest Habeas Corpus Petition in America?*, 38 HOFSTRA L. REV. 255, 262 (2009).

2. I am relying here on Sanborn's conclusion, which I believe to be correct, that Zipporah was a servant in the Parker household. Several of the documents in Sanborn's appendix indicate she was the servant of Mrs. Manning, but document 4, part I indicates that Mrs. Manning was the daughter of the Parkers. I assume she and her husband were living with the Parkers. *See id.* app. at 273-74, document 4, pt. I.

3. *Id.* at 264-65.

which she was charged to proceed with her case, so that she could receive her punishment for fornication, either a fine or a whipping, and be freed.<sup>4</sup> Her petition forced authorities to confront the issue of infanticide, and they did.<sup>5</sup> An indictment for infanticide was prepared, but the grand jury refused to find a true bill, and Zipporah was released from jail.<sup>6</sup> Thereafter she lived in Boston for four decades as a sufficiently respected member of the community to own, buy, and sell real property.<sup>7</sup>

The above reading of the facts suggests nothing to me in the way of discrimination. Zipporah was not imprisoned for an extraordinary length of time—probably less than three months, and the court treated her the same as it would have treated a white defendant charged with fornication and suspected of infanticide.<sup>8</sup> The grand jury, fairly evaluating the evidence against her, refused to indict her for the serious crime. Subsequently, the community abided by the grand jury's decision and accepted Zipporah as one of its members.

Just consider, in comparison, how Americans today might treat an accused, but acquitted child molester. Or how eighteenth-century South Carolina punished murder—the death penalty if the victim was white but a £700 fine if the victim was black and only half that amount “if the killing occurred in ‘a sudden heat or passion, or by undue correction.’”<sup>9</sup>

A second large question that Melinde Sanborn raises concerns the degree of formalism in 1660s' Massachusetts law. I read her, perhaps incorrectly, as assuming that the Bay Colony had rules that were more fixed<sup>10</sup> than I believe it had. In volume one of *The Common Law in Colonial America*,<sup>11</sup> I concluded that the leaders of mid-seventeenth-century Massachusetts recognized the inevitability of discretion in any

---

4. *Id.* at 263-64; *see also* THE LAWS AND LIBERTIES OF MASSACHUSETTS 23 (Max Farrand ed., Harvard Univ. Press, photo. reprint 1929) (1648) (“[I]f any man shall commit [f]ornication with any single woman, they shall be punished either by enjo[i]ning to [m]arriage, or [f]ine, or corporal[] punishment, or all or any of these as the [j]udges in the courts of Assistants shall appoint most agreeable to the word of God.”).

5. Sanborn, *supra* note 1, at 267.

6. *Id.* at 268.

7. *Id.*

8. *See id.* at 263-64.

9. William E. Nelson, *The Height of Sophistication: Law and Professionalism in the City-State of Charleston, South Carolina, 1670-1775*, 61 S.C. L. REV. 1, 47 (2009) (quoting Act for the Better Ordering and Governing Negroes and Other Slaves in this Province, No. 670 § 37 (1740), *reprinted in* 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 411 (David J. McCord ed., Columbia, A.S. Johnston 1840)).

10. *See* Sanborn, *supra* note 1, at 259-61.

11. 1 WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA: THE CHESAPEAKE AND NEW ENGLAND, 1607-1660* (2008).

legal system; they sought to limit judges' exercise of discretion not by establishing formal rules of law but by conferring that inevitable discretion, whenever possible, either on juries or on the General Court.<sup>12</sup> It was only in the decades after 1660 that the Bay Colony, in response to pressures from the restored Crown in England, began to modify its legal system in ways, including the adoption of formalisms, which would enable its officials to claim that in resisting the Crown they were merely adhering to the common law.<sup>13</sup> I find it impossible to know how far Massachusetts had proceeded on the path toward formalism by 1663, and hence I am inclined to draw no conclusions about how fornication was "usually punished" in that year or about the consequences of "[f]ailure to complete . . . required steps."<sup>14</sup>

Sanborn's essay raises two further, smaller issues. Was Zipporah's application to the county court the earliest habeas corpus petition in America? Or was it merely a motion before a court that already possessed jurisdiction over a case to proceed in a timely fashion to judgment? I am inclined to think it was the latter, but I am uncertain. I have found thousands of habeas corpus writs in colonial court records and, as far as I can recall, all of them involved an effort by a litigant to transfer jurisdiction over a case from a court in which the case was pending to a different court with supervisory jurisdiction. I have also seen thousands of motions to expedite judicial proceedings. Zipporah's application looks more like the latter than the former, but it also looks far more like a twenty-first-century habeas corpus case than nearly all seventeenth- and eighteenth-century writs do. Hence my uncertainty.

Finally, was Zipporah guilty of infanticide? And, who was the father of her child? I have the good fortune every year, or perhaps it is the misfortune, of discussing in my legal ethics course the prosecution against O.J. Simpson for murdering his wife. The issue I seek to analyze concerns the behavior of Johnny Cochran, Simpson's attorney. I find that nearly every student determines whether Cochran's behavior was ethical or unethical on the basis of his or her decision whether Simpson was guilty or not guilty. I always argue, unsuccessfully, that the jury found Simpson not guilty, and that we must accept that finding, and adjudicate Cochran's behavior on the basis thereof. For similar reasons I conclude that Zipporah was not guilty.

---

12. *Id.* at 73, 77.

13. See William E. Nelson, *The Utopian Legal Order of the Massachusetts Bay Colony, 1630-1686*, 47 AM. J. LEGAL HIST. 183, 195, 201 (2005).

14. Sanborn, *supra* note 1, at 259.

But I wonder what you, the audience, think. Do you have difficulty accepting the judgment of the contemporary fact-finder? Why? Might it be that in all three cases, you cannot keep race—that of Simpson, Cochran, and Zipporah—out of your mind? That certainly is true of my students: students of color nearly all find Simpson innocent and Cochran's behavior ethical, while most white students reach the opposite conclusion. Might they, and along with them, we, be more racist than the people of seventeenth-century Boston, who appear to have readily accepted the jury's verdict?

Melinde Sanborn's essay can render an enormous service in making all of us—privately and in our own souls—confront this greatest of questions.

\*\*\*