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## Revealing Zion's Daughters: Women in Puritan Jurisprudence

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# Revealing Zion's Daughters: Women in Puritan Jurisprudence

## **Abstract**

The legal status of American women has consistently been portrayed as a linear progression flowing from a colonial jurisprudential repression and exclusion to a modern-day legal equity and a female influence within every aspect of justice. In this narrative of sequentially gained status, seventeenth-century Puritan law has stood as the exemplar of America's most repressive jurisprudential treatment of women. However, when its characteristics are triangulated and its subordination of women is juxtaposed with its inclusion of a female voice, a new conception of America's first legal system is seen. The notion of a linear progression is thus replaced with an understanding that the modern day equity enjoyed by women is a product of extensive legal fluctuation. Puritan women were clearly characterized as the subordinate gender and their secondary status evidenced in the symbolic silencing of heretical females and in legal coverture. However, stemming from the Puritan concept of a "Godly-society" attained through equitable legal status, New England women enjoyed liberal divorce laws and a significant presence within the court room when compared with contemporary England and the nineteenth century jurisprudence, which relegated women to the non-public sphere. Thus, as Laurel Thatcher Ulrich emphasizes, we "need to move from static concepts like "patriarchal New England society" to more intricate questions about the interplay of values and practice over time. Zion's daughters have for too long been hidden."

## **Keywords**

Puritan law, American women, legal status

# REVEALING ZION'S DAUGHTERS: WOMEN IN PURITAN JURISPRUDENCE



BRETT JACKSON

The legal status of American women has consistently been portrayed as a linear progression flowing from a colonial jurisprudential repression and exclusion to a modern-day legal equity and a female influence within every aspect of justice.<sup>1</sup> In this narrative of sequentially gained status, seventeenth-century Puritan law has stood as the exemplar of America's most repressive jurisprudential treatment of women. However, when its characteristics are triangulated and its subordination of women is juxtaposed with its inclusion of a female voice, a new conception of America's first legal system is seen. The notion of a linear progression is thus replaced with an understanding that the modern day equity enjoyed by women is a product of extensive legal fluctuation. Puritan women were clearly characterized as the subordinate gender and their secondary status evidenced in the symbolic silencing of heretical females and in legal coverture. However, stemming from the Puritan concept of a "Godly-society" attained through equitable legal status, New England women enjoyed liberal divorce laws and a significant presence within the court room when compared with contemporary England and the nineteenth century jurisprudence, which relegated women to the non-public sphere. Thus, as Laurel Thatcher Ulrich emphasizes, we "need to move from static concepts like "patriarchal New England society" to more intricate questions about the interplay of values and practice over time. Zion's daughters have for too long been hidden."<sup>2</sup>

The Puritans explicitly believed in female inferiority. Even as Protestants "in revolt against the male Catholic hierarchy and convinced of the equality of souls before God, they nevertheless insisted on women's proper subordination within the family."<sup>3</sup> John Calvin endorsed male-dominance in saying, "Let the woman be satisfied with her state of subjection, and not take it amiss that she is made inferior to the more distinguished sex."<sup>4</sup> Portrait renditions of the family reflected the polarization of gender before 1750, distinguishing a dominant group of men and breeched boys from the women and girls dressed in petticoats. Thus, as Mary Beth Norton wrote, "If a girl could be viewed as a miniature adult, the grown woman could be viewed

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<sup>1</sup> Jill K. Conway, *The Female Experience in Eighteenth and Nineteenth-Century America: A Guide to the History of American Women*, (New York: Garland Publishing, Inc, 1982), 39.

<sup>2</sup> Laurel Thatcher Ulrich, "Vertuous Women Found: New England Ministerial Literature, 1668-1735" in Nancy F. Cott and Elizabeth H. Pleck eds., *A Heritage of Her Own: Toward a New Social History of American Women* (New York: Simon and Schuster, 1979), 76.

<sup>3</sup> Sara M. Evans, *Born for Liberty: A History of Women in America* (New York: The Free Press, 1989), 22.

<sup>4</sup> *Ibid.*

as a more advanced child.”<sup>5</sup> While there was much variation in the colonies, “the civil code of the New England colonies embodied a concept of marital unity striking in its expression of the patriarchal ideal that women’s private interests had to be subordinated to the greater familial whole.”<sup>6</sup> The familial relationship most reflective of the patriarchy was a woman’s relationship to her husband. John Milton’s *Paradise Lost* defines this relation as “he for God only, she for God in him.”<sup>7</sup> Thus, the subjection of a woman to a man parallels that of a man to God and is indicative of the female role within society as a whole. Indeed, the church was essential in espousing the essentiality of women’s pious acquiescence to the will of the patriarchy.

Women’s subordinate legal status was bolstered by church sermons like Cotton Mather’s *Ornaments for the Daughters of Zion*. In this 1692 oration, he said:

As for her love to her husband, I may say, ‘Tis even strong as death, many waters cannot quench it; neither can the floods drown it. . . .When she reads that Prince Edward in his wars against the Turks, being stabbed with a poisoned knife, his princess did suck the poison out of his wonder with her own royal mouth; she finds in her own heart a principle disposing her to show her own husband as great a love. . . . But her love to her husband will also admit, yeah, and produce the fear of, a cautious diligence never to displease him. While she looks upon him as her guide, by the constitution of God . . . she does not fear his blows, yet she does fear his frowns, being loath in any way to grieve him, or cause a headache in the family by offending him. . . . In every lawful thing she submits her will and sense to his, where she cannot with calm reason convince him of inexpediences, and instead of grudging or captious contradiction, she acts as if there were but one mind in two bodies. . . . ‘tis by the kindness, the sweetness, the goodness of her expressions that she gives law unto him.<sup>8</sup>

Thus, Puritan women were directed by the church to honor their husbands and dutifully submit themselves to his will in order to ensure the health of the marriage and the efficiency of the household. As Thomas Gataker said in his 1620 *Marriage Duties*, “There can be no ordinary intercourse and commerce or conversing between person and person, but there must be a precedencie on the one part, and a yielding of it on the other.”<sup>9</sup> This familial hierarchy was analogized to the state writ small; the role of husband and wife represented a “litttle commonwealth.”<sup>10</sup> Robert Cleaver spoke of this in his *A Godlie Forme of Householde Government*, published in 1598 saying, “The governours of families . . . upon whom the charges

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<sup>5</sup> Mary Beth Norton, “The Evolution of White Women’s Experience in Early America,” *The American Historical Review*, 89 no. 3 (Jun., 1984): 604.

<sup>6</sup> *Ibid.*, 598.

<sup>7</sup> Sara M. Evans, *Born for Liberty*, 22.

<sup>8</sup> Sylvia R. Frey and Marian J. Morton, *New World, New Roles: A Documentary History of Women in Pre-Industrial America* (New York: Greenwood Press, 1935), 17.

<sup>9</sup> Thomas Gataker, *Marriage Duties* (London, 1620) in James T. Johnson, “The Covenant Idea and the Puritan View of Marriage,” *Journal of the History of Ideas* 32, no. 1 (Jan-Mar. 1971): 111.

<sup>10</sup> Mary Beth Norton, “The Evolution of White Women’s Experience in Early America,” 610.

of government lyeth, though unequally, are, first the Cheefe governour, which is the Husband, secondly a fellow helper, which is the Wife.”<sup>11</sup> Thus the wife’s role within the home was “to guide the house and not guide the husband.”<sup>12</sup> As a microcosm of the state-order, the relationship between married men and women modeled the social hierarchy.<sup>13</sup> Male-governance from husbands and the colonial patriarchy was fundamental in the maintenance of social order. In accordance with the family-state analogy, women were to be equally deferential to both their husbands and the colonial church-state, while maintaining a “goodness” and “sweetness” toward the larger community. The prosecution of female dissidents and accusations of witchcraft leveled at women who failed to fulfill their proscribed role demonstrates the male dominance of Puritan culture and its value of female conformity.

The church-state of the 17<sup>th</sup> century effectively prosecuted religious non-conformists as well as transgressors of civil law. While criminals of both genders were put on trial to exemplify the social castigation resulting from immorality, the punishment of female dissidents worked on another level to reinforce women’s subjugation to the authority of the patriarchal governance and to men as a group. Anne Hutchinson was “the most famous heretic of Massachusetts Bay Colony” and was banished for holding home lectures which promoted antinomianism to guests of both genders.<sup>14</sup> “Antinomianism stressed salvation through inner regeneration rather than through conformity to external rules imposed by church and state; this heresy threatened the stability of the Puritan community.”<sup>15</sup> By preaching this ideal, Hutchinson promoted the questioning of religious dogma while also challenging the assumption that women should be non-participants in church affairs. While her prosecution was based on theological heresy, her high-profile banishment rested on “her unprecedented demand that she, a woman, be permitted to think for herself about God and provoke others, women included, into doing the same.”<sup>16</sup> John Winthrop, governor of the Massachusetts Bay Colony labeled her “a woman of haughty and fierce carriage . . . of a nimble wit and active spirit, a very voluble tongue, more bold than a man, though in understanding and judgment inferior to many women.”<sup>17</sup> According to Eleanor Fitzpatrick, by “maintaining that an individual could commune directly with God, Mistress Hutchinson was claiming equality for herself and everybody else with the men who ruled.”<sup>18</sup> Hugh Peter, an additional interrogator told Hutchinson, “you have stept out of your place, you have rather bine a Husband than a Wife, and a preacher than a Hearer; and a Magistrate than a Subject.”<sup>19</sup> Her self-assertion had therefore threatened the male dominance in familial,

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<sup>11</sup> Robert Cleaver, *A Godlie Forme of Household Government* (London, 1598) in James T. Johnson, “The Covenant Idea and the Puritan View of Marriage,” 111.

<sup>12</sup> Edmund S. Morgan, *The Puritan Family: Religion and Domestic Relations in Seventeenth-Century New England* (New York: Harper and Row, 1944), 43.

<sup>13</sup> Mary Beth Norton, “The Evolution of White Women’s Experience in Early America,” 610.

<sup>14</sup> Sylvia R. Frey and Marian J. Morton, *New World, New Roles*, 73.

<sup>15</sup> *Ibid.*, 73.

<sup>16</sup> Eleanor Flexner and Ellen Fitzpatrick, *Century of Struggle: The Woman’s Rights Movement in the United States* (Cambridge: The Belknap Press of Harvard University Press, 1996), 9.

<sup>17</sup> *Ibid.*, 10.

<sup>18</sup> *Ibid.*, 10.

<sup>19</sup> Sara M. Evans, *Born for Liberty*, 32.

religious and political spheres.<sup>20</sup> While the Puritans appreciated the midwifery of Hutchinson, they cited the Apostle Paul and condemned women who gained followers by “speaking things which they ought not.”<sup>21</sup> Frey and Morton conclude that “Hutchinson’s open questioning of the moral and intellectual qualifications of the political religious leadership threatened the male hegemony, especially since she herself had a wide and powerful following.”<sup>22</sup>

While trials like that of Anne Hutchinson worked to “silence women as political beings and religious leaders,” witchcraft allegations also surfaced in the 17<sup>th</sup> century to censure offensive or rebellious women and to purge the Puritan community of undesirables.<sup>23</sup> According to Cornelia Hughes Dayton, the Puritan community “unquestioningly cast women as witches and condoned a prosecutorial double standard for accused men and women such that twenty-eight women and only seven men were hanged for the crime of witchcraft.”<sup>24</sup> With a limited intellect and a lower-social status, a woman was thought to be more vulnerable to the Devil’s influence.<sup>25</sup> The trials in Salem, Massachusetts point to the conclusion that accused witches were overwhelmingly married or widowed women between the ages of forty-one and sixty, the age in which they were both at the height of their social power and on the verge of losing status with the onset of menopause.<sup>26</sup> Cotton Mather’s recording of a specter sighting by an afflicted girl attests to the conception of witches as older women: “What a dreadful Sight are You! An Old Woman, an Old Servant of the Divell!”<sup>27</sup> Many accused women had developed a reputation for petulant relations with neighbors and a poor rapport with the community as a whole. Mrs. Anne Hibbens who was known for her “unnatural crabbedness of...temper” was excommunicated following an argument with the town carpenters over their work on her home.<sup>28</sup> In 1656 after the death of her husband, who was a well-respected Bostonian, Hibbens was convicted and executed as a witch. It is thus evident that witchcraft allegations functioned within New England society as a mode of social control. The process operated in a straightforward manner on any individual who pondered action censured by the community. It was understood that if one carried out such a violation they would make themselves more vulnerable to the charge of witchcraft.<sup>29</sup> The fact that this control mechanism primarily affected women is congruent with the patriarchal nature of Puritan society.

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<sup>20</sup> Ibid.

<sup>21</sup> Laurel Thatcher Ulrich, *A Midwife’s Tale: The Life of Martha Ballard Based on Her Diary 1785-1812* (New York: Vintage Books, 1990), 46.

<sup>22</sup> Sylvia R. Frey and Marian J. Morton, *New World, New Roles*, 7.

<sup>23</sup> Cornelia Hughes Dayton, *Women Before the Bar: Gender, Law, and Society in Connecticut, 1639-1789* (Chapel Hill: University of North Carolina Press, 1995), 9.

<sup>24</sup> Ibid., 9.

<sup>25</sup> Sara M. Evans, *Born for Liberty*, 23.

<sup>26</sup> John Demos, “Underlying Themes in the Witchcraft of New England,” in Stanley Katz, ed., *Essays in Politics and Social Development Colonial America* (Boston: Little Brown and Company, 1971), 118; Mary Beth Norton, “The Evolution of White Women’s Experience in Early America,” 611.

<sup>27</sup> Ibid., 124.

<sup>28</sup> John Demos, “Underlying Themes in the Witchcraft of New England,” 118; Nancy Cott, ed. “Church Trial of Mistress Anne Hibbens” in *Root of Bitterness: Documents of the Social History of American Women* (Boston: Northeastern University Press, 1986), 47.

<sup>29</sup> John Demos, “Underlying Themes in the Witchcraft of New England,” 124.

The most pervasive and effectual legal restraint placed on women in accordance with a Puritan patriarchy was the policy of coverture. Within a section of Cotton Mather's *Ornaments for the Daughters of Zion*, in which he defines the proper role for widows he bolds Isaiah 54.5: THY MAKER IS THEY HUSBAND.<sup>30</sup> It was through clerical bolstering such as this, that the common law practice of coverture retained such an extensive and enduring hold in America. Indeed, coverture for women remained fixed fifteen decades after the governor of Connecticut held the first pre-trial examinations for the New Haven court in 1639. As William Blackstone explained this legal status years later, "The very being or legal existence of the woman is suspended during the marriage, or at least is... consolidated into that of the husband: under whose wing, protection and cover, she performs every thing...in our law ...her condition...is called coverture."<sup>31</sup> England described the policy in *The Lawes Resolution for Women's Rights* of 1632: "A woman as soon as she is married, is a covert, in Latin, nupta, that is, veild, as it were, clouded and overshadowed, she hath lost her streame . . . To a married woman, her new self is her superior, her companion, her master."<sup>32</sup> Puritans adopted this foundational doctrine of English common law, also known as "civil death," because they understood it as religiously significant. Civil death rested on Genesis 2:22-23: "And Adam said this is now bone of my bones, and flesh of my flesh; she shall be called Woman, because she was taken out of man. Therefore shall a man leave his father and his mother, and shall cleave unto his wife and they shall be one flesh."<sup>33</sup> Thus, the relationship between a "feme covert" and her husband was accepted as mirroring that of a vassal to a lord.<sup>34</sup>

In accordance with the Puritan conception religious civil society, the legal diction in *The Lawes Resolution of Women's Rights* describing coverture was flavored with a moral and religious tone. Women's subordinate status was a punishment for Eve's seduction of Adam:

exiled from the Garden of Eden, enjoined to labor, Eve because she had helped to seduce her husband has inflicted on her a especial bane. In sorrow shall thou bring fourth thy children, thy desires shall be subject to they husband, and he shall rule over thee . . . See here the reason . . . that women have no voice in Parliament, they make no laws, the consent to none, they abrogate none. All of them are understood either married or to be married and their desires are subject to their husband . . .<sup>35</sup>

This explanation of coverture was adopted throughout New England and the policy ensured a husband's dominion over wife as she was prohibited thereafter from "alienating property, entering into contracts, bringing lawsuits, or making a will without the consent and,

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<sup>30</sup> Sylvia R. Frey and Marian J. Morton, *New World, New Roles*, 31.

<sup>31</sup> Cornelia Hughes Dayton, *Women before the Bar*, 20.

<sup>32</sup> Eleanor Flexner and Ellen Fitzpatrick, *Century of Struggle: The Woman's Rights Movement in the United States*, 7.

<sup>33</sup> Sylvia R. Frey and Marian J. Morton, *New World, New Roles*, 92.

<sup>34</sup> *Ibid.*, 92.

<sup>35</sup> *Ibid.*, 94.

often, the joint action of her husband.”<sup>36</sup> In contrast to married *femes covert*, single women and widows held the status of “*femes sole*,” legal persons free of male-control. Single women over eighteen and widowed women had status within the legal system as individuals. They could sue under their own name, write wills, and bequeath property. Coverture ensured that the funds and property belonging to a woman would be subsumed under the ownership of her husband. Henrietta East Caine, who had owned a profitable millinery shop located on Boston’s Marlborough Street lamented that “her Friends will not supply her with Goods to carry on her business as before,” because she was still under a marriage contract to her bigamist, deserter husband.<sup>37</sup> A woman with a large savings was at risk of becoming destitute due to her husband’s fiscal mismanagement; Mary Hunt of Boston was impoverished when her husband spent her fortune of fifteen hundred pounds before deserting her and her small children.<sup>38</sup> Thus, Henrietta and Mary were powerless to conduct business to their own economic benefit while still married. As Nancy Cott suggests, the wives’ “adherence to the norm of economic dependence resulted in their own economic powerlessness.”<sup>39</sup> While a widow, a *feme sole*, was entitled to dower rights over one-third of her husband’s land, her claim over his larger estate upon her death was void and the land bequeathed to her husband’s male heirs. Thus, the patriarchy was sustained as “wealth, most frequently defined as land, was transmitted from one generation of men to another.”<sup>40</sup> Indeed, a father’s will usually granted a daughter only one-half of the inheritance reserved for her brothers, and she usually gained personal property rather than real-estate.<sup>41</sup>

Coverture ensured women’s non-connection with property, since married women legally owned none. Contemporary wills attest to this fact. As a legal entity, women could only write wills with their husband’s consent. Widows or women who had gained permission to write a will could bequeath their own property, usually amounting to household goods and clothes, and possibly livestock. Anne Burt, a Massachusetts resident wrote a will in 1664 in which, after granting livestock to her children stipulated a beneficiary for each of her possessions, listing:

I give to Elizabeth basset a new feather bed A boulster and a pillow and a pillow beare A blankit and a Rouge and i give to Sarah bassit my ould feather bed a boulster and pillow . . . A tapsterri Covering and i give to meriam bassit A Copper ketel, A table Cltoh and half A doson of napkins and a ew shep, han toweland I give to mary bassit my biggest eiorn pot.<sup>42</sup>

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<sup>36</sup> Cornelia Hughes Dayton, *Women Before the Bar*, 19.

<sup>37</sup> Nancy Cott, “Eighteenth-Century Family and Social Life Revealed in Massachusetts Divorce Records,” in Nancy Cott and Elizabeth H. Pleck, eds., *A Heritage of Her Own: Toward a New Social History of American Women* (New York: Simon and Schuster, 1979), 120.

<sup>38</sup> *Ibid.*, 121.

<sup>39</sup> *Ibid.*

<sup>40</sup> Paula A. Treckel, *To Comfort the Heart: Women in Seventeenth Century America* (New York: Twayne Publishers, 1996), 24.

<sup>41</sup> Mary Beth Norton, “The Evolution of White Women’s Experience in Early America,” 603.

<sup>42</sup> Nancy Woloch, *Early American Women: A Documentary History 1600-1900* (Boston: McGraw-Hill, 2002), 87.

Women's coverture had remarkable longevity, only in mid-nineteenth century as state legislatures began to enact married women's property rights, did "the edifice of coverture start to crumble."<sup>43</sup> Its legacy was an effective suppression of female legal action long after symbolic silencing of maleficent women as witches became outmoded. The wholesale acceptance of coverture within Puritan society demonstrates that New England's legal liberalities regarding women did not flow from an abandonment of British patriarchy. Indeed, the social ascendancy of the husband according to James Johnson was "but a bow to social condition in seventeenth century England."<sup>44</sup>

The New England Puritans, while implementing the British common law as blueprint for their jurisprudence, exhibited a significant departure from English legal doctrine by sanctioning divorce within their colonies. As their contemporaries in England were "locked into marital vows for life," women in New England were granted this considerable legal advantage.<sup>45</sup> The conception of law in the New World was heavily influenced by the Protestant Reformation which denied the sacramental identity of marriage. Within English common law, marriage as a sacrament was an indissoluble contract. Annulments through ecclesiastical courts or special acts of Parliament were reserved only for the wealthy.<sup>46</sup> American colonies founded with an Anglican majority adhered to the sacramental concept of England, and within their jurisdiction a consummated marriage was not to be broken.<sup>47</sup> More liberally, Puritan New England introduced marriage as a civil contract and divorces were an option in cases of desertion, prolonged absence, adultery, or bigamy, with the injured party retaining the right to remarry. Divorce proceedings were heard in secular courts, and the proceedings were based on Luther's reasoning as explained by Dayton: "as with any other contract the gross misbehavior of one spouse in breaking the terms, notably through neglect or infidelity should abrogate the contract and free the aggrieved party to remarry."<sup>48</sup> New England provided for "absolute" divorce, or divorce *a vinculo*, in contrast to Anglican colonies which limited divorce to a legal separation with no right of either party to remarry.<sup>49</sup> In addition to their doctrinal dissent regarding Anglican sacrament, New England lawmakers favored liberal divorce policies in order to curtail the widespread bigamy they saw in England and in colonies in which divorce was forbidden. Upon witnessing abandoned wives living in destitution because their coverture prevented them from engaging in commerce and lawsuits in pursuit of self-sufficiency, Puritan leaders saw a social benefit in freeing them from their precarious position. According to Nancy Woloch, "Such arrangements satisfied the Puritan desire to ensure family harmony, prevent destitution, and keep deserted wives and families off the public dole."<sup>50</sup> Thus, just as Puritan religious leaders had argued for

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<sup>43</sup> *Ibid.*, 70.

<sup>44</sup> James T. Johnson, "The Covenant Idea and the Puritan View of Marriage," 11.

<sup>45</sup> K. Kelly Weisberg, "Under Greet Temptations Heer" Women and Divorce in Puritan Massachusetts," *Feminist Studies* 2 (1975): 190.

<sup>46</sup> *Ibid.*, 69.

<sup>47</sup> Sylvia R. Frey and Marian J. Morton, *New World, New Roles*, 94.

<sup>48</sup> Cornelia Hughes Dayton, *Women before the Bar*, 109.

<sup>49</sup> Nancy Woloch, *Early American Women*, 69.

<sup>50</sup> *Ibid.*

a promotion of equal punishment for sexual transgression in 17<sup>th</sup> century England, they also espoused gender-equality in divorce petitioning. Divorce requests filed by women were heard in Connecticut and Massachusetts Bay as early as the 1630's, but comparable hearings would not occur in England until 1857.<sup>51</sup>

Massachusetts and Connecticut as Puritan colonies both allowed for divorce a vinculo and Massachusetts courts between 1639 and 1692, granted some 27 divorces.<sup>52</sup> It was not until 1677, after divorces had been granted for over 22 years, that Connecticut finally quietly passed a statute listing justifiable reasons for suit: adultery, fraudulent contract, willful desertion, or seven years' absence.<sup>53</sup> The codification of this law translated into a greater freedom for colonial women, the gender most likely to file for divorce. Indeed, the most common recipient of a Connecticut divorce was the deserted wife. Men who wished to escape a spouse or children without legal grounds for divorce would often vanish and possibly remarry in a new community.<sup>54</sup> Even before the Connecticut Divorce Law was enacted in 1677, abandoned women brought suit in order to throw off their coverture and the memory of their husband. Examples from 1660 and 1676 reveal much about the rulings of the Connecticut courts when deserted women stood before the bar:

This Court orders that in case Sarah north hear not of her husband by that seventh year be expired (he haveing bene absent six, already) that then she shal be free from her conjugal bonds. (1660)

Upon the petition of Sarah Towle whoe hath been dserted by her husband above six years, without any care or provision made for supply of her or her child's maintenance by her husband, this Court declares that in case the said Twole shall have opportunity to joyner herself in marriage with another man, she is left at liberty soe to doe without offence to the law or this Court. (1676)<sup>55</sup>

Divorce petitions reflect the presence of women within colonial jurisprudence. In the inclusion of a female voice within New England courts and the promulgation of equitable, gender neutral morality law, Puritan law can be seen as more inclusive than that of England. The seventeenth century courtroom was community-focused and broad in its representation. Its activities centered on "maintaining harmonious neighborly relations, ensuring equitable local trading, and monitoring sexual and moral conduct," all embraced the essentiality of the female perspective. The presence of women as witnesses, plaintiffs, and defendants reflects the informal role of women as "guardians of communal morality."<sup>56</sup> In opposition to the English

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<sup>51</sup> K.Kelly Weisberg, "Under Greet Temprations Heer," 184.

<sup>52</sup> *Ibid.*, 69.

<sup>53</sup> *Ibid.*, 69.

<sup>54</sup> Carol Berkin and Leslie Horowitz, eds., *Women's Voices, Women's Lives: Documents in Early American History* (Boston: Northeastern University Press, 1998), 60.

<sup>55</sup> Nancy Woloach, *Early American Women*, 73.

<sup>56</sup> Sara M. Evans, *Born for Liberty*, 31.

jurisprudential tradition, women's access to courts in Puritan New England was advanced by the colonies' prohibition against lawyers, their simple procedural rules, and the magistrates' idea that God would guide their decisions.<sup>57</sup> The Puritans adopted the English practice of prosecuting moral lapses, yet they rejected ecclesiastical courts in favor of a layman judiciary over a professionalized bar. The early abandonment of more formalistic constructs of English common law thus allowed for a significant female presence in court. While women were not allowed to be lawyers or judges, they were granted considerable credibility both in bringing petitions and on the witness stand due to the Puritan ambition for achieving a "Godly-society."

The Puritan's attempt at equity stemmed from their belief that a God-fearing and pious society required equal punishments for a comprehensive elimination of sin and vice. As Cornelia Hughes Dayton says, Puritan judges in New Haven strove to enact a single gender neutral standard for moral offenses due to their "strongly held belief that godly behavior should be the measure for all inhabitants."<sup>58</sup> "Hence sinners, whether women or men, servants or wealthy church members, could expect to be lectured from the bench to follow "the rule" of neighborly kindness, to refrain from "wicked" "uncleanness," or to emulate such familiar biblical figures as "Micaell the Archangell."<sup>59</sup> Thus, as Dayton explains, women who brought charges of sexual assault "had good reason to believe that their voices would not be ignored and that the men elected to the bench would not reflexively use whatever skeptical views they harbored of women's nature to shield accused men from exposure and penalty."<sup>60</sup> After Mercy Payne explained "a large relation" of her efforts to resist John Frost's advances, the magistrates challenged Frost's denials saying "What temptation should shee bee under to bring sucha thing out to her owne shame?"<sup>61</sup> In cases such as this, and those concerning rape, domestic violence, and premarital sex, the court openly accepted female testimony and severely punished the accused men. The central Puritan dogma that the individual was to be obedient to God's law ensured that men would be punished for sinful behavior. While a double standard of sexual morality did develop, de jure equality was a Puritan ambition and, as Dayton states, "policies that were intended to create the most God-fearing society possible operated to reduce the near-absolute power that English men by law wielded over their wives, to undercut men's sense of sexual entitlement to women's bodies, and to relieve women in some situations from their extreme dependency on men."<sup>62</sup>

Thus the lay-judiciary, informal procedure, and the focus on morality prosecutions allowed for a significant female presence within the early New England courtroom. The exclusion of women from a fraternal-type jurisprudence was not a Puritan construct, but rather a product of the increasing secularization of New England starting in the 18<sup>th</sup> century. While secularization

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<sup>57</sup> Cornelia Hughes Dayton, *Women Before the Bar*, 10.

<sup>58</sup> *Ibid.*, 31.

<sup>59</sup> *Ibid.*

<sup>60</sup> Cornelia Hughes Dayton, *Women Before the Bar*, 32.

<sup>61</sup> *Ibid.*, 32

<sup>62</sup> *Ibid.*

has typically been thought of as a force for widening the legal status of women, it was this process which effectively shelved the doctrine of moral equity and suppressed the female voice within New England courts until women were relegated to a domestic sphere removed from easy access to the legal realm.<sup>63</sup> Secularization was fueled by the increasing religious diversity stemming from an influx of Dutch, Scottish, German, and Quaker immigrants and the increasing dominance of American-born Puritan generations. However, increasing colonial commercialization was the central development leading toward secularization. New Englanders began to engage in maritime trade, “thus introducing alien commercial elements into the Bible commonwealths.”<sup>64</sup> As the 18<sup>th</sup> century dawned, colonial courts increasingly shifted in facilitation of the expanding economy and the court’s constituency became limited to propertied men active in this blossoming capitalism.<sup>65</sup> While judges and lawmakers made no concerted effort to curtail the courtroom presence of women, the rise of the professional bar and the increased adherence to English common law and rules of evidence raised barriers which would prevent equal court access for women.

As the court-room became increasingly defined as a male arena, the church began to see a rise in female influence. The late 17<sup>th</sup> century declension was defined by a decrease in male church membership due to a consuming focus on commercial opportunities.<sup>66</sup> Contemporary men understood that “the goals of religion-to create a godly society-often conflicted with the goals of commerce,” and within this time period, “commerce usually won.”<sup>67</sup> Fewer men in the church resulted in a loss of clerical power over the community. The church was pushed to the margins of political life just as women were beginning to wield increasing influence within its confines. Thus, while the colonial legal system increasingly shifted away from moralistic prosecutions in order to focus on commercial adjudication, the church began to make “the passive female a symbol of Christian virtues, and associate men and manliness with the materialistic and competitive world of trade.”<sup>68</sup> Although passivity had always been a characteristic valued in females, as evidenced by the prosecution of vocal dissidents like Ann Hutchinson, the association of women with spirituality and men with secular concerns signaled a divergence from the Puritan ideal of spiritual equality. Thus, the church was defining women as the protectors of spirituality at the same time that the court was adopting common law principles facilitating the shift from court-enforced social morality towards commercial law. In this way the concept of women as moral arbiters hardened and worked in concert with the formalization of courtroom procedure to virtually eliminate the female familiarity with colonial courts. As Laurel Thatcher Ulrich explains in *A Midwife’s Tale*, “for most women, attending court was more than “inconvenient, It was venture into an alien world.”<sup>69</sup>

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<sup>63</sup> Conway, 40.

<sup>64</sup> Mary Beth Norton, “The Evolution of White Women’s Experience in Early America,” 601.

<sup>65</sup> Cornelia Hughes Dayton, *Women Before the Bar*, 9.

<sup>66</sup> Mary Beth Norton, “The Evolution of White Women’s Experience in Early America,” 606; Sara M. Evans, *Born for Liberty*, 40.

<sup>67</sup> Sara M. Evans, *Born for Liberty*, 40.

<sup>68</sup> *Ibid.*

<sup>69</sup> Laurel Thatcher Ulrich, *A Midwife’s Tale*, 111.

As men and women became encapsulated in narrowing and polarizing social roles, the Puritan commitment to moral equity began to fade. Economics, trade, and an emerging sense of privacy led to a decreased focus on the moral health of the community. The patriarchal legal culture began to abandon the Puritan-style court confessions of moral crimes such as slander, pre-marital sex, and drunkenness. The moral upkeep of the town elites, as was an early Puritan ambition, was abandoned as American law came to mirror the common law. The middle class was increasingly sheltered from public ignominy and punishment as the court began to target impoverished and marginal women when prosecuting sexual deviancy. The legal shift away from prosecutions of moral lapses in an increasingly male-dominated system “introduced skeptical attitudes toward the reliability of women’s charges of male abuse.”<sup>70</sup> This suspicion is evidenced through contemporary newspapers and almanacs which demonstrated an increasing “toleration of misogynist, anti-matrimonial, and bawdy themes,” previously censored by Puritan purists. This environment not only prevented many women from participating in the legal culture, but it also raised the burden of proof placed upon any woman to secure recompense for an accusation she ventured to bring before the bar. Consequently, not only did divorces become more difficult to obtain, but “the stricter the rules of evidence, the more difficult it was to win a case that required juries to accept the word of a woman against the word of a man, unless he happened to belong to a stigmatized group.”<sup>71</sup> As Ulrich explores a rape case in *A Midwife’s Tale* she discovers that they frequently became “a contest between the men involved, the husband or father, the accused, the judges and jury rather a judgment of the events themselves.”<sup>72</sup> Therefore, in response to a rapidly commercializing society and an increasing secularism, within the 18<sup>th</sup> century the “collective commitment to upholding a God-fearing society through the courts had been abandoned and Puritan resistance to the technicalities of English common law practice had faded,” and gender-specific spheres had hardened when “a new public life emerged from which women were excluded.”<sup>73</sup>

The 18<sup>th</sup> century legal formalization and mirroring of common-law procedure within New England not only increasingly isolated women from court, but it also “foreshadowed the more explicit nineteenth-century ideology that reserved the public realms of commerce, law and politics to men and gave white women moral dominion over privatized families.”<sup>74</sup> Thus, women’s legal subordination was augmented as Puritan jurisprudence was replaced in America. While the Puritan prosecuted heretical females and retained a coverture policy in order to clearly define women as the subordinate sex, their focus on Godly equality and maintaining moral order translated into liberal divorce laws and a significant female presence within the colonial courtroom. When Puritan law is viewed in this multidimensional manner, it can no longer be

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<sup>70</sup> Cornelia Hughes Dayton, *Women Before the Bar*, 11.

<sup>71</sup> Laurel Thatcher Ulrich, *A Midwife’s Tale*, 121.

<sup>72</sup> *Ibid.*

<sup>73</sup> Cornelia Hughes Dayton, *Women Before the Bar*, 11; Sara M. Evans, *Born for Liberty*, 21.

<sup>74</sup> *Ibid.*, 9.

simplified in accordance with its traditional classification as America's ultimate jurisprudential repression of women. Indeed, as Cornelia Hughes Dayton concludes, "if Puritan approaches to the law, such as simplifying civil procedure, punishing men and women equally, and receiving women's stories of abuse supportively had been retained as permanent fixtures of the evolving American legal system, the result would have been a less patriarchal society in the long run."<sup>75</sup>

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<sup>75</sup> *Ibid.*, 33.

