

Patriarchy and Gender Law in Ancient Rome and Colonial America

John B Kamp

Although nearly 1,200 years apart, the social stereotypes of women and the roles appropriate for those of the female sex permeated both the legal worlds of Ancient Rome and Colonial America. Throughout history, women have lived their lives by restrictive laws that govern the social and political spheres of society. In Rome, notably from the Roman imperial period around 30 BCE to the fall of the Roman Empire in 476 CE, notions of womanly weakness, both in regards to mental and physical ability, and the *patria potestas* led to women's legal and social rights being severely limited. In Colonial American society, particularly from 1639 CE to 1789 CE, women saw their rights restricted on the patriarchal basis of a woman's "natural" role as pious homemaker. Roman and Colonial American gender law share a common misogyny; one rests in the *patria potestas* and the other in European patriarchal culture. There existed, between Roman antiquity and Colonial America, a similar legal and social discrimination on the basis of sex.

Roman and Puritan Notions of Womanly Weakness

Throughout Ancient Rome, the concept of the *pater familias*, referring to the male head of the Roman household, and the *patria potestas*, or the power of the father over his descendants, dominated Roman law and society. In fact, the *patria potestas* held such power that Gaius' Institutes, written in 161 CE, maintained that the *patria potestas* played a specialized role in Roman society, in that the power that Roman fathers had over their sons was unparalleled in

other empires.¹ Although Gaius explicitly cited power over sons, the *patria potestas* had sizable legal manifestations against women in Roman society around 450 BCE and beyond. For instance, this masculine power demanded that women could not act as their child's conservator if the husband preceded them in death.² This legal reality indicates that the granting of such power to Roman women over their children would too much resemble the masculine power reserved for Roman men. Further, the Code of Justinian explicitly stated that "administering a guardianship is a man's burden, and such a duty is beyond the sex of feminine weakness."³ Additionally, up until the third century CE (and then only by special permission), women could not legally adopt children, as this would require the adopted child to be subject to the power of the adopter, with such power being something women were not allowed to possess.⁴ Clearly, Roman law conceived of the female sex as too mentally weak, in comparison to Roman men, in that they were unfit to administer guardianships, leading Roman women to face blatant gender discrimination in regards to their access to adopting and raising their children.

This legal view of women as incapable of mental and physical independence from men was also clear in the Roman courtroom. In Ancient Rome, women were forbidden from bringing a case to court on behalf of someone else. For Ancient Roman jurists, it was understood that representing someone else in court was a responsibility reserved for men and far beyond the capabilities of a woman.⁵ Thus, by limiting a woman's ability to act legally under claims of womanly weakness, the *patria potestas* put women at a legal and social disadvantage. Such legal discrimination on the basis of sex can be understood as Roman means of upholding the *pater familias*, as a woman's success at such a task would challenge the Roman ideology behind the *pater familias*. Additionally, Roman law reflected the ways in which women were perceived as physically weak, as well as mentally weak. During the fourth century, many

¹ Richard Saller, "Patria Potestas and the Stereotype of the Roman Family," *Continuity and Change*, v.1 (1986): 7.

² Judith Evans Grubbs. *Women and the law in the Roman Empire*. (New York and London: Routledge, 2002), 21.

³ Judith Evans Grubbs. *Women and the law in the Roman Empire*. (New York and London: Routledge, 2002), 242.

⁴ Judith Evans Grubbs. *Women and the law in the Roman Empire*. (New York and London: Routledge, 2002), 21.

⁵ Judith Evans Grubbs. *Women and the law in the Roman Empire*. (New York and London: Routledge, 2002), 243.

laws were issued that required differing punishments on account of sex. For example, "Constantine called for distinctions in penalties for counterfeiting according not only to status but also to sex.... [and] Arcadius cited the 'weakness of their sex' as the reason for different penalties for daughters and sons of conspirators against the state."⁶ Roman law placed a heavy focus on social status, namely between that of free persons and slaves, as well as between Roman citizens and foreigners. Keeping in mind the importance that status held in Roman society, the imposing of a similar punishment to violations of laws regarding sex as to laws regarding status illustrates the persistence and weight of gender inequality both as a result of mental and physical conceptions of womanly weakness.

In early New England, from roughly 1639 CE to 1789 CE, the societal notion of domestic work as women's work, or being women's primary role, was largely revealed in the legally prescribed role for women within the Puritan society. Women's roles in society, which included homemaking and devoting themselves to piety, can be seen at the center of the laws governing women's lives, particularly during the later portion of this period. The disapproving social attitudes toward women's control of property, as well as the belief that it was not appropriate for women to take part in local business or legal matters can be seen in various cases and laws during this era.⁷ For instance, the testimony of Abigail White, a Puritan woman, detailed a business interaction she had with a man and she indicated that "when Manning [the man] had her sign the first receipt, he surprised her and she being a weak woman agreed to it."⁸ Such testimony brings insight not only to the social conceptions of women's roles, but also that of the legal expectations of women in early New England and reflects a similar notion of womanly weakness from Roman law and society.

The laws in Puritan society that governed women's lives focused on promoting piety and limiting sexual misbehavior. This is exhibited in that there were two crimes for which women were tried more often than men: "absence

⁶ Judith Evans Grubbs. *Women and the law in the Roman Empire*. (New York and London: Routledge, 2002), 52.

⁷ C. Dallett Hemphill, "Women in Court: Sex-Role Differentiation in Salem, Massachusetts, 1636 to 1683." *The William and Mary Quarterly* 39, no. 1 (1982): 173.

⁸ C. Dallett Hemphill, "Women in Court: Sex-Role Differentiation in Salem, Massachusetts, 1636 to 1683." *The William and Mary Quarterly* 39, no. 1 (1982): 173.

from church and sexual offenses.”⁹ Thus, Puritan society’s legal emphasis on women in the realms of religion and sex seem to indicate a need to cater their laws and legal decisions to a “natural weakness” that was perceived in women. Further, an examination of the legal decisions and social impacts of both areas of Puritan women’s lives may reveal deeper social understandings of sex discrimination in early New England.

Marriage

In Roman marriage, *manus* was considered to be the marital equivalent of the *patria potestas*, in which the Roman wife was completely under her husband’s legal control. Not only does such a norm reflect the widespread misogyny of Roman society, but also the legal and social limits that marriage placed on Roman women. For instance, most of the marriage law in Ancient Rome enacted prohibitions of unions based on status, such as that of social status and state of freedom.

Roman society placed heavy emphasis on the importance of social status, and this was no less relevant in the case of marriage and marriage law. As a result, unions between freed persons and slaves or non-citizens were heavily frowned upon and, while not penalized, were not considered legal marriages.¹⁰ Further, while the union between a freedman and a slave woman was stigmatized, the union between freedwomen and slave men was both socially and financially considered problematic. This likely stemmed from the Roman conceptions of gender and proper social order, in which women were expected to remain socially inferior to their husbands.¹¹ Additionally, as social status was descended from the status of the mother, the offspring of such a union would result in freeborn children and would probably be seen, in Roman eyes, as a loss of slave supply. Thus, as a result of both economic and social gendered conceptions, the non-legal unions between freedwomen and slave men were further stigmatized and considered more problematic than those between

⁹C. Dallett Hemphill, "Women in Court: Sex-Role Differentiation in Salem, Massachusetts, 1636 to 1683." *The William and Mary Quarterly* 39, no. 1 (1982): 165.

¹⁰Judith Evans Grubbs. *Women and the law in the Roman Empire*. (New York and London: Routledge, 2002), 145.

¹¹Judith Evans Grubbs. *Women and the law in the Roman Empire*. (New York and London: Routledge, 2002), 145.

freedmen and slave women, reflecting a discriminatory impact toward Roman women, specifically those of senatorial status.

In New England, the concept of marriage was entirely patriarchal. Entering a marriage in Puritan New England “meant that the husband owned his wife’s labor and controlled her property; he enjoyed wide discretion to punish her corporally; and he could collect damages from any person who injured or seduced her.”¹² In many ways, women were a kind of pseudo-property from the moment after they said their vows. Further, being a Puritan wife meant “providing services: household management, primary care of children, [and] sexual access to her body.”¹³ These expectations placed upon early New England women reflect the duty and submission expected of wives under the *manus* of Roman law. Additionally, Puritan law and social attitudes toward gender in marriage utilized economic and psychological means to further the patriarchal system. To push Puritan women to “accept their dependence on men, many women were psychologically, not just materially, handcuffed to vain hopes that their husband’s behavior would improve.”¹⁴ Such a condition, while not explicitly caused by law, was exploited to uphold the social superiority of men through such social and legal expectations for women in seventeenth and eighteenth century New England.

Divorce

In later Roman divorce law, there were little grounds for women to obtain a divorce. In early classical Rome, there was “a very liberal divorce policy, in that women who were not married with *manus* had the right to divorce..., and eventually the same right was enjoyed by women married with *manus*.”¹⁵ However, by the Justinian period, “there were considerable restrictions on the right of either partner, especially the wife, to divorce unilaterally, and on the

¹² Cornelia Hughes Dayton. *Women Before the Bar Gender, Law, and Society in Connecticut, 1639-1789*. 3rd ed. (Chapel Hill and London: University of North Carolina Press, 1995), 114.

¹³ Cornelia Hughes Dayton. *Women Before the Bar Gender, Law, and Society in Connecticut, 1639-1789*. 3rd ed. (Chapel Hill and London: University of North Carolina Press, 1995), 115.

¹⁴ Cornelia Hughes Dayton. *Women Before the Bar Gender, Law, and Society in Connecticut, 1639-1789*. 3rd ed. (Chapel Hill and London: University of North Carolina Press, 1995), 137.

¹⁵ Judith Evans Grubbs. *Women and the law in the Roman Empire*. (New York and London: Routledge, 2002), 187.

right to remarry someone else.”¹⁶ Legal grounds for divorce also differed on the basis of sex. During the fifth century, most of the acceptable reasons for divorcing one’s wife were in regard to poor morality and lack of virtue, while acceptable reasons for divorcing one’s husband focused on history of criminal activity and violence against others.¹⁷ As a result of the limits set on women’s right to such divorce petitions, Roman divorce law, as well as the later mentioned Puritan divorce laws, reflect a fear of independent wives in treatment of women’s petitions.

The influence of the *patria potestas* in divorce highlight the elevated role of the father’s and husband’s privileges in divorce cases. According to classical Roman law, the father had the right to break up his children’s marriages.¹⁸ As a result of women typically marrying at a much younger age than men (women typically married around 12 years old, while men married in their later twenties), daughters were more likely to still have a living *pater familias* and fall under their father’s control when they wed. In contrast, mothers had no such power over their children’s marriages.¹⁹ This lack of power, in the face of the *patria potestas* and *pater familias*, indicates the lack of legal and social power that women held in ancient Rome in comparison to their male counterparts.

Later, as Rome transitioned to Christianity in the early fourth century, such discriminatory laws still largely existed as a result of Christian condemnation of divorce. For instance, many of the divorce laws enacted by Constantine, the first emperor to convert to Christianity, in early 300 CE were much harsher on women than men, with one such 331 CE law limiting women’s ability to send notice of a divorce or have her dowry returned unless she could prove her husband was homicidal.²⁰ While much of the laws during late Roman antiquity reflected the tendency of Christian doctrine to hold men and women to the

¹⁶ Judith Evans Grubbs. *Women and the law in the Roman Empire*. (New York and London: Routledge, 2002), 187.

¹⁷ Judith Evans Grubbs. *Women and the law in the Roman Empire*. (New York and London: Routledge, 2002), 210.

¹⁸ Judith Evans Grubbs. *Women and the law in the Roman Empire*. (New York and London: Routledge, 2002), 195.

¹⁹ Judith Evans Grubbs. *Women and the law in the Roman Empire*. (New York and London: Routledge, 2002), 197.

²⁰ Judith Evans Grubbs. *Women and the law in the Roman Empire*. (New York and London: Routledge, 2002), 202-203.

same moral standard, divorce law remained highly discriminatory on the basis of sex in application.

Legal grounds for divorce in Colonial America did not include physical or mental abuse. Reflecting the existence of limits to divorce for women in Roman law, the absence of cruelty as grounds for divorce reflected, in Puritan law, “an unwillingness to cede to women a significant measure of power in determining the limits to male authority in marriage,” as well as in greater patriarchal society.²¹ Most often, women were judged the offender of a divorce, rather than their male counterparts. Reflecting the Roman use of male custody to persuade women away from pursuing divorce, this tendency to put women at fault for divorce placed an undue burden on women in colonial society, as well as exacerbated the legal repercussions of women leaving unhealthy relationships. Thus, such discriminatory laws and customs resulted in many Puritan women being forced to stay in harmful and undesirable unions.

A patriarchal attitude toward divorce also existed within the legal system of Colonial America. Many legal professionals, most often judges, were uncomfortable intervening in disputes regarding a husband’s exercise of authority, specifically in cases of abuse or cruelty.²² This occurred often enough that a husband had to publicly confirm his unfaithfulness or abuse for Puritan legal authorities to believe that a woman’s story merited a divorce.²³ This reluctance to intervene originated as a result of the extreme piousness of the Puritan society, leading New England authorities to resist adjudicating what they saw to be a private issue regarding how a man chose to discipline his wife, as was his God-given right. For, in the highly religious expectations of Puritan society, “female submission to a husband’s brutal correction could be a model for Christian resignation to earthly woes.”²⁴ Still, such laws and tendencies of

²¹ Cornelia Hughes Dayton. *Women Before the Bar Gender, Law, and Society in Connecticut, 1639-1789*. 3rd ed. (Chapel Hill and London: University of North Carolina Press, 1995), 115.

²² Cornelia Hughes Dayton. *Women Before the Bar Gender, Law, and Society in Connecticut, 1639-1789*. 3rd ed. (Chapel Hill and London: University of North Carolina Press, 1995), 136.

²³ Cornelia Hughes Dayton. *Women Before the Bar Gender, Law, and Society in Connecticut, 1639-1789*. 3rd ed. (Chapel Hill and London: University of North Carolina Press, 1995), 106.

²⁴ Cornelia Hughes Dayton. *Women Before the Bar Gender, Law, and Society in Connecticut, 1639-1789*. 3rd ed. (Chapel Hill and London: University of North Carolina Press, 1995), 137.

legal officials indicate to the deep rooted misogyny at the heart of early New England law. As a result of such a custom of restraint in hearing women's claims in abuse disputes, "the notion that middle-class white men had proprietary rights to women's bodies became more deeply entrenched as an unspoken assumption of gender relations and legal culture."²⁵ This inaction on the part of Puritan judges and legal officials illustrates the patriarchal means by which gender discrimination was upheld in Puritan New England during the seventeenth and eighteenth centuries.

Custody and Guardianship

In regard to custody in the case of a divorce, the *patria potestas* still won out, with the father having primary custodial claim over his children. Roman law decided that the father was to be given custody of descendants born out of wedlock, as well as in the case of a divorce or any other means of a broken marriage.²⁶ Such a custom seems to indicate the importance of patriarchal lineage in Roman society and was born out of a desire to keep father's descendants close for inheritance purposes. Additionally, Roman women who sought a divorce often risked the possibility of never seeing her children again, and as a result, the gendered discrimination in the granting of custody acted as an efficient dissuasion for women who may have been considering divorce.²⁷ Such a legal consequence on women highlights the way in which the Roman legal system often exploited Roman women's inferior social status as means of gender discrimination in the law.

As was tradition in Roman law, custody in the case of divorce followed the father in Puritan New England. In one custody case in the mid 1700's, "the judges in effect announced that the eighteenth century would be an era when male property rights and men's absolute common law rights to their children

²⁵ Cornelia Hughes Dayton. *Women Before the Bar Gender, Law, and Society in Connecticut, 1639-1789*. 3rd ed. (Chapel Hill and London: University of North Carolina Press, 1995), 234.

²⁶ Judith Evans Grubbs. *Women and the law in the Roman Empire*. (New York and London: Routledge, 2002), 199.

²⁷ Judith Evans Grubbs. *Women and the law in the Roman Empire*. (New York and London: Routledge, 2002), 199.

would be kept inviolate.”²⁸ This inherent disadvantage women faced in obtaining custody illustrates not only the patriarchal means by which Puritan divorce law operated, but also a similarity between European patriarchy and Roman notion of *pater familias*. Further, such legal implications highlight the importance of certain paternal bloodlines in early New England, in contrast to those of the mother.

Adultery, Rape, and Sexual Deviation

Adultery in Rome was considered a woman’s crime, and thus carried consequences that disproportionately affected the lives of Roman women. In accordance with Roman law, a Roman man was required either to enact a public divorce in the case of an adulterous wife, or he would face charges of *lenocinium*, which entailed the keeping of female slaves for prostitution. In Roman society and law, adultery was defined as affair between married women and man who was not her husband. As a result, this codified adultery as a woman’s crime, leading a husband’s affair with a slave or prostitute to not be considered legitimate grounds for divorce or legal action.²⁹ These norms of Roman law and society “applied a double standard and always judged women’s sexual misbehavior more harshly than men’s.”³⁰ For example, “under Augustus’ law, adultery... was subject to criminal penalties, and in late antiquity, such penalties could even include death.”³¹ Considering the preference of Roman law for a monetary or correctional punishment as opposed to corporal punishment, the inclusion of death as punishment should indicate a profound importance. Following from such a lethal double standard in the case of adultery, wives could not charge their husbands, as sexual intercourse with a married man was not legally coded as adultery.

Another form of sexual and gender deviation which resulted in gender discrimination in Roman law is homosexuality. In Roman antiquity, the

²⁸ Cornelia Hughes Dayton. *Women Before the Bar Gender, Law, and Society in Connecticut, 1639-1789*. 3rd ed. (Chapel Hill and London: University of North Carolina Press, 1995), 61.

²⁹ Judith Evans Grubbs. *Women and the law in the Roman Empire*. (New York and London: Routledge, 2002), 203.

³⁰ Judith Evans Grubbs. *Women and the law in the Roman Empire*. (New York and London: Routledge, 2002), 210.

³¹ Judith Evans Grubbs. *Women and the law in the Roman Empire*. (New York and London: Routledge, 2002), 210.

modern concept of homosexuality, or sexual same-sex relationships, did not exist. Further, Romans did not divide sexual activity into same sex relations being bad and different sex relationships being good.³² Rather, Romans considered relations between men and boys to be acceptable and relations between two adult men to be bad.³³ This understanding, on the basis of status and age as opposed to gender, may indicate to a potential lack of gendered consideration in regards to Roman attitudes toward homosexual activity. However, such attitudes toward the role of the individual in a homosexual act was heavily gendered. In Ancient Rome, the act of being penetrated (or passive homosexuality), was considered “feminine” and condemned on account of divergence from the hyper-masculinity of the *pater familias*. As a result, engagement in passive homosexual acts was more strictly punished in the praetor’s edict than other forms of non-heterosexual sex acts, as passive homosexuality reversed the sexual roles prescribed to men (as dominant) and women (as submissive), challenging the notion of the *pater familias*.³⁴ Known for their affinity for nicknames, many common names created in Ancient Rome were meant to highlight the effeminacy of men who engaged in passive homosexuality. Some examples include “*mollis*” (soft), “*tener*” (dainty), “*debilis*” (weak), and “*morbosus*” (sick).³⁵ The use of feminine adjectives, most of which insinuate weakness, to describe Roman men who engage in passive homosexual acts indicate that within Roman society, passive homosexuality, like that of femininity, were regarded as inferior and undesirable. As a result, these feminine adjectives indicate an association between, specifically, passive homosexuality and gender discrimination in Roman society.

Legal discrimination on the basis of sex was largely manifested from social discrimination. In later antiquity, “a man who voluntarily submitted to a homosexual act lost half his property and the capacity to make a will. In the

³² Amy Richlin, “Not before Homosexuality: The Materiality of the Cinaedus and the Roman Law against Love between Men,” *Journal of the History of Sexuality* 3, no. 4 (1993): 525.

³³ Amy Richlin, “Not before Homosexuality: The Materiality of the Cinaedus and the Roman Law against Love between Men,” *Journal of the History of Sexuality* 3, no. 4 (1993): 525

³⁴ Jane Gardner, “Sexing a Roman: Imperfect Men in Roman Law,” *When Men Were Men: Masculinity, Power, and Identity in Classical Antiquity*, (1998): 147.

³⁵ Amy Richlin, “Not before Homosexuality: The Materiality of the Cinaedus and the Roman Law against Love between Men,” *Journal of the History of Sexuality* 3, no. 4 (1993): 531.

Christian empire, the penalty for catamites was death by burning.”³⁶ In the face of such harsh punishments for male passive homosexuality, very little is known about the existence of lesbianism in Ancient Rome. However, this lack of evidence should not be taken to indicate that homosexual acts and relationships did not exist.³⁷ Of such a lack of evidence, one might wonder what this may indicate regarding the Roman conception of women’s sexuality and sexual agency, or possible lack thereof.

Roman law and social expectations revolved around conceptions of masculinity and domination of the feminine. With masculinity largely not a legal issue in and of itself, “the difficulties arose rather with the ascription of distinctive legal capacities on the basis of biological maleness.”³⁸ These ascriptions can be seen in Roman attitudes toward transsexuals, now referred to as transgender, in addition to homosexuals. In Roman society, gender presentation, in addition to sexuality, was a mode in which gender discrimination manifested itself. For a Roman man “deliberately to imitate the behavior of the opposite sex was not merely unbecoming, it was self-degradation. Transvestism as such, however, was no crime; it formed the subject of a joke.”³⁹ Although not considered a crime, the consideration of a male-to-female gender identity as nothing more than a joke indicates that some level of social gender discrimination existed and inhibited the lives of transgender, homosexual, and gender non-conforming Romans.

In Puritan New England, as in Roman law, adultery was legally defined as a sexual affair between married women and a man who is not her husband. Thus, such a definition provided a loophole for married men with unmarried women. The most unyielding limitation that Puritans placed on sexual relations is that it should not interfere with religion.⁴⁰ Adultery, considered a crime not only in the eyes of the law but also a crime against the Church, was punishable

³⁶ Jane Gardner, “Sexing a Roman: Imperfect Men in Roman Law,” *When Men Were Men: Masculinity, Power, and Identity in Classical Antiquity*, (1998): 146.

³⁷ Amy Richlin, “Not before Homosexuality: The Materiality of the Cinaedus and the Roman Law against Love between Men,” *Journal of the History of Sexuality* 3, no. 4 (1993): 533.

³⁸ Jane Gardner, “Sexing a Roman: Imperfect Men in Roman Law,” *When Men Were Men: Masculinity, Power, and Identity in Classical Antiquity*, (1998): 136.

³⁹ Jane Gardner, “Sexing a Roman: Imperfect Men in Roman Law,” *When Men Were Men: Masculinity, Power, and Identity in Classical Antiquity*, (1998): 147.

⁴⁰ Edmund Morgan, “The Puritans and Sex,” *The New England Quarterly* 15, no. 4 (1942): 593.

by death until 1672 CE, at which point the punishment was reduced to whipping and having to wear an A (for “adulterer”), as well as wear a halter.⁴¹ Such a punishment highlights the difference between Puritan and Roman preferences in punishment. In Roman law, a monetary or remedial punishment is preferred over corporal punishment. In contrast, Puritan law often opted for corporal punishments for crimes. Still, both Roman and Puritan definitions of adultery exhibit misogynistic attitudes and uphold a double standard that enables men to have active sex lives while women are denied the same sexual freedoms.

Initially, Puritan law treated women’s claims of rape as truth. However, over time, women’s claims of rape were more often rejected in the courtroom as lies and falsehoods. A double standard, not unlike the one noted in Roman law and society, also permeated Puritan conceptions of rape. In Puritan law, the misbelief in women’s testimony during sexual assault cases only buttressed the precept that “male sexual license and assertions of entitlement to women’s bodies would generally be condoned, but women’s sexual behavior would continue to be regulated.”⁴² For instance, “if a woman’s response was to flirt, tarry, or quietly submit, then she lost her claim to being free from corrupting sin, and she was perceived to merit some measure of punishment, even though the more aggressive man was typically penalized more severely.”⁴³ Thus, anything less than adamant visible protest or resistance to sexual intercourse was deemed consensual, placing culpability of rape on the actions and inactions of Puritan women.

In contrast, interracial sex required no such resistance from women to be deemed rape and necessitated no punishment for women. Mirroring Roman attitudes regarding status dynamics in sexual and matrimonial matches, Puritan attitudes toward interracial sex also indicate gender discrimination. During the seventeenth and eighteenth centuries of Puritan America, “magistrates could

⁴¹ Cornelia Hughes Dayton. *Women Before the Bar Gender, Law, and Society in Connecticut, 1639-1789*. 3rd ed. (Chapel Hill and London: University of North Carolina Press, 1995), 163-164.

⁴² Cornelia Hughes Dayton. *Women Before the Bar Gender, Law, and Society in Connecticut, 1639-1789*. 3rd ed. (Chapel Hill and London: University of North Carolina Press, 1995), 61.

⁴³ Cornelia Hughes Dayton. *Women Before the Bar Gender, Law, and Society in Connecticut, 1639-1789*. 3rd ed. (Chapel Hill and London: University of North Carolina Press, 1995), 242.

conceive of interracial sexual relations only as coercive.”⁴⁴ Thus, in the eyes of Early Colonial law, women inherently lacked full consent in cases of interracial sex. Such a conception of women’s lack of agency in regards to their sexual choices either reflects a misogyny which alleges that women were not intelligent enough to consent to (or refuse) intercourse with men of another race, or indicates a racial conception of sexual desire, in that no white woman would ever desire intercourse with a man of another race. Whether the answer is found in misogyny, racism, or both, the legal punishment for non-white males in rape cases were more severe than punishment for white males convicted of rape. In one such case of a non-white man on trial for rape, the judges authorized “a more severe whipping than that meted out to white fornicators,” that punishment being a severe whipping on “the naked back not exceeding 40 stripes.”⁴⁵

In addition to Roman attitudes, Puritan attitudes toward homosexuality and its legal consequences were influenced by gender. In seventeenth and eighteenth century New England, the concept of religiosity and Christianity dominated social expectations and attitudes, as well as permeated the legal system. In the eyes of the Church, homosexual acts and relationships were sacrilegious and considered an expression of depravity.⁴⁶ With the clergy providing the lens through which the public viewed sodomy and other homosexual acts, Puritan laws heavily reflected the religious teachings on the matter. A sermon by Samuel Danforth, a Puritan minister in 1674, revealed such influence, in which he condemned the biblical Sodomites as “wicked,” as well as cited the practices of condemnation of sodomy by other societies through history:

Sodomy, filthiness committed between parties of the same Sex: when Males with Males, and Females with Females work wickedness... This sin raged amongst the *Sodomites*, and to their perpetual Infamy, it is called *Sodomy*. Against this wickedness, no indignation is sufficient. The *Athenians* put such to death.

⁴⁴ Cornelia Hughes Dayton. *Women Before the Bar Gender, Law, and Society in Connecticut, 1639-1789*. 3rd ed. (Chapel Hill and London: University of North Carolina Press, 1995), 242.

⁴⁵ Cornelia Hughes Dayton. *Women Before the Bar Gender, Law, and Society in Connecticut, 1639-1789*. 3rd ed. (Chapel Hill and London: University of North Carolina Press, 1995), 243.

⁴⁶ Richard Godbeer, ""The Cry of Sodom": Discourse, Intercourse, and Desire in Colonial New England," *The William and Mary Quarterly* 52, no. 2 (1995): 261.

Theodosius and *Arcadius* adjudged such to be Burnt. Amongst the *Romans*, it was lawful for a man to kill him that made such an assault upon him.⁴⁷

Further, much of Puritan law focused more heavily on punishing male same-sex acts than that of female same-sex acts. For instance, a Rhode Island law defined sodomy as “a vile affection, whereby men given up thereto leave the natural use of woman and burn in their lusts one toward another, and so men with men work that which is unseemly.”⁴⁸ Such language indicates not only the intensity with which Puritan leaders punished homosexuality, but also the gendered understanding within the Puritan world of homosexual acts. As much of Puritan law punished male homosexuality by death, between individual colonies, lesbianism ranged between a capital crime and being unaddressed.

Conclusion

Discriminatory conceptions of the proper role of women in both Ancient Roman and Colonial American times, because of social conceptions as the *pater familias* and patriarchal notions, manifested in the existence of deep-rooted gender discrimination. Roman society, from 30 BCE to 476 CE, utilized the notion of womanly weakness, both in regard to mental and physical ability, and the masculine-centered *patria potestas* to limit women’s legal and social rights. In addition, Puritan society from 1639 CE to 1789 CE restricted the rights of women at the behest of the Church and the patriarchal conception of a woman’s inferiority in the legal, economic, and social realms. As a result of their shared roots in misogynistic social norms, both Roman antiquity and Colonial America exhibited a similar legal discrimination on the basis of sex. These similar norms should aid in understanding not only historical conceptions of gender rights during Roman antiquity and Puritan America, but also in considering the impacts that these legal understandings of gender have had on subsequent eras of gender law.

⁴⁷ Samuel Danforth, “The Cry of Sodom Enquired Into” (sermon, Cambridge, Massachusetts, 1674), 5.

⁴⁸ Richard Godbeer, ““The Cry of Sodom”: Discourse, Intercourse, and Desire in Colonial New England,” *The William and Mary Quarterly* 52, no. 2 (1995): 267.

Bibliography

- Danforth, Samuel. "The Cry of Sodom Enquired Into." Sermon, Cambridge, Massachusetts, 1674.
- Dayton, Cornelia Hughes. *Women Before the Bar Gender, Law, and Society in Connecticut, 1639-1789*. 3rd ed. Chapel Hill and London: University of North Carolina Press, 1995.
- Gardner, Jane F. "Sexing a Roman: Imperfect Men in Roman Law." In *When Men Were Men: Masculinity, Power, and Identity in Classical Antiquity*, edited by Lin Foxhall and John Salmon, 136-164. *Leicester-Nottingham Studies in Ancient Society*; v.8. London; New York: Routledge, 1998.
- Godbeer, Richard. "'The Cry of Sodom': Discourse, Intercourse, and Desire in Colonial New England." *The William and Mary Quarterly* 52, no. 2 (1995): 259-86. Accessed February 26, 2020. www.jstor.org/stable/2946975.
- Grubbs, Judith Evans. *Women and the law in the Roman Empire*. New York and London: Routledge, 2002.
- Hemphill, C. Dallett. "Women in Court: Sex-Role Differentiation in Salem, Massachusetts, 1636 to 1683." *The William and Mary Quarterly* 39, no. 1 (1982): 164-75. Accessed April 17, 2020. doi:10.2307/1923422.
- Morgan, Edmund S. "The Puritans and Sex." *The New England Quarterly* 15, no. 4 (1942): 591-607. Accessed April 17, 2020. doi:10.2307/361501.
- Richlin, Amy. "Not before Homosexuality: The Materiality of the Cinaedus and the Roman Law against Love between Men." *Journal of the History of Sexuality* 3, no. 4 (1993): 523-73. Accessed April 14, 2020. www.jstor.org/stable/3704392
- Saller, Richard. "Patria Potestas and the Stereotype of the Roman Family." *Continuity and Change*, v.1 (1986): 7-22. <https://doi.org/10.1017/S0268416000000059>.