

Women, legal rights and law courts

All offices belonge to the common weale be forbydden [women] by the lawes.
 ... It is not permitted to a woman, though she be very wise and prudent, to
 pleade a cause before a Juge, furthermore they be repelled in jurisdiction, in
 arbitrement, in adoption, in intercession, in procuracion, or to be gardeyns or
 tutors in causes testamentary and criminall.

Henricus Cornelius Agrippa,
Of the Nobilitie and Excellence of Womankynde
 (London, 1542)¹

HISTORIOGRAPHY

The past hundred years have witnessed a see-sawing of historians' perceptions of the legal status of women in early modern England. To Frederick Pollock and E.W. Maitland, writing in the final decades of the nineteenth century, the position was clear. By the time of Edward I, 'a sure instinct has already guided the law to a general rule which will endure until our own time. As regards private rights women are on the same level as men, though postponed in the canons of inheritance; but public functions they have none.'² Charlotte Carmichael Stopes, Alice Clark and other historians in the vanguard of feminist history in the late nineteenth and early twentieth centuries agreed that women enjoyed a degree of legal independence in England prior to the seventeenth century, under customary law at least. However, far from 'enduring until their own time', they suggested that the combined influences of capitalism, industrialisation, the emergence of the professions and the rise to supremacy of the common law steadily undermined any independence women had once enjoyed.³ Doris Stenton, writing in the 1950s, concurred. In *The English Woman in History* she described the rights

¹ Henricus Cornelius Agrippa, *Of the Nobilitie and Excellence of Womankynde*, trans. Thomas Clapham (London, 1542) (written 1509), sig. four; Agrippa was lamenting, rather than endorsing, the restrictions women suffered.

² Frederick Pollock and E.W. Maitland, *The History of English Law Before the Time of Edward I*, ed. S.F.C. Milsom, 2nd edn (Cambridge, 1968), vol. 1, p. 485.

³ Charlotte Stopes, *British Predecessors: Their Historical Privilege*, 3rd edn (London, 1907); Alice Clark, *Working Life of Women in the Seventeenth Century* (London and New York, 1902), pp. 236-7.

women, especially widows, enjoyed under custom and law during the Middle Ages. She gave examples of women appearing in court in the absence of their husbands, behaviour inconceivable under the common law, and concluded that among the native peasant stock of Lincolnshire, 'the ancient tradition of the rough equality between men and women had not yet been entirely forgotten'.⁴

Modern feminist historians are sceptical about the existence in the past of a 'Golden Age' of equality between men and women. Most believe that 'the ancient tradition of the rough equality between men and women' could not have been forgotten, because it never existed. As a group, English women have enjoyed fewer rights, fewer privileges, less wealth, less influence in spheres of power and less control over domestic affairs, than English men. As Judith Bennett has argued, with reference to employment conditions and opportunities, women's rights fluctuated and changed over time but their general position relative to men did not.⁵ In the words of Patricia Crawford, describing the continuity between 1500 and 1750 of the notion that women were weaker than men, 'it is fascinating to observe that although the reasons for women's necessary subordination might change, the axiomatic inferiority of women remained'.⁶

It is clear that legal institutions played a significant part in limiting women's freedom of opportunity, and researchers investigating disparities within the law between the rights of women and the corresponding rights of men have assembled a catalogue of the legal disabilities women endured in sixteenth and seventeenth century England.⁷ The law prevented women from becoming judges, from serving on juries, from standing for parliament or voting in elections. In inheritance, the doctrine of primogeniture privileged sons over daughters and directed real property away from women's hands. In marriage, the doctrine of coverture removed from a wife her very legal entity, making it impossible for married women, *femes covert*, to enter contracts or to assert or defend their rights in court, except with the consent and assistance of their husbands. A woman who married lost her surname, her right to choose where she lived, her right to legal protection against her husband (except in the most extreme cases) and her ability to own property.⁸ The moveable property (goods or chattels) she brought to marriage became her husband's forever.⁹ Control of any real property (land) she possessed, and the profits accruing from it, passed to her husband for the duration of the marriage. Property that fell in between, 'chattels real' like leases, became a husband's during marriage, though if they

⁴ Doris Stenton, *The English Woman in History* (London, 1957), p. 79.

⁵ Judith Bennett, 'History that stands still', *Feminist Studies*, 14 (1988), pp. 269-83.

⁶ Patricia Crawford, 'From the woman's view: pre-industrial England, 1500-1750', in Patricia Crawford, ed., *Exploring Women's Past* (Sydney, 1984), p. 63.

⁷ McIntyre, 'Legal attitudes towards women'; Leonore Glazov, 'The legal position of English women under the early Stuart Kings and the Interregnum' (Loyola University Ph.D. 1973).

⁸ McIntyre, 'Legal attitudes towards women', p. 84.

⁹ If any of her chattels remained unalienated when her husband died, a widow could retain them; Baker, *An Introduction to English Legal History*, p. 552.

remained intact at the conclusion of the marriage they returned to the wife or her heirs.¹⁰ A married woman could not independently inherit legacies, nor could she accept gifts, even from her husband. She could not make a will without her husband's agreement, and any existing will or testament became invalid on the day she married.¹¹ The doctrine of coverture epitomised the idea, and helped to sustain the belief, that men were, in Richard Hooker's words, 'Lords & lawfull Kings in their owne houses', by giving husbands power over the rights, property and bodies of their wives.¹²

Bias against women in English law can be found at every turn. In Elizabethan England a man who killed his wife was guilty of murder, but a woman who killed her husband was guilty of petty treason and could be burned at the stake.¹³ Adultery by the king's consort was full treason, as the fates of Anne Boleyn and Katherine Howard testify, while adultery by the king went unpunished.¹⁴ Other crimes generally associated with women, like witchcraft and infanticide, also attracted unusually severe penalties, and the option of claiming 'benefit of clergy' was refused to women until 1691.¹⁵ Wives found guilty of adultery forfeited their rights to dower, but unfaithful husbands retained their rights to the male equivalent, the 'Curtesy of England'.¹⁶ And so the list of examples goes on,

¹⁰ Peat Hogreife, 'Legal rights of Tudor women and the circumvention by men and women', *Sixteenth Century Journal*, 3 (1972), p. 100.

¹¹ The Statute of Wills (34 and 35 Henry VIII c. 5) permitted married women to make wills, but only with the permission of their husbands, unless they had duties to fulfil as executrices or administratrices: *Statutes of the Realm* (11 vols., London, 1810-28), vol. 3, pp. 901-4; Erickson, *Women and Property*, pp. 139-40; McIntyre, 'Legal attitudes towards women', p. 119.

¹² Richard Hooker, *Of the Lawes of Ecclesiastical Politie* (London, 1617), p. 26.

¹³ See Edward III's Statute of Treasons (25 Edward III stat. 5 c. 2), *Statutes of the Realm*, vol. 1, pp. 319-20; T.E., *The Lawes Resolutions of Womens Rights* (London, 1632), p. 208; W.S., Holdsworth, *A History of English Law*, 3rd edn (London, 1923), vol. 2, p. 449; Pollock and Maitland, *The History of English Law*, vol. 2, p. 484.

¹⁴ Henry VIII had Anne Boleyn condemned for adultery even though their marriage had been annulled, while Katherine Howard was condemned by Act of Attainder; Betty Travitsky, 'Husband-murder and petty treason in English Renaissance tragedy', *Renaissance Drama*, new series, 21 (1990), pp. 173, 188 n. 4; several of Katherine's confidants were also accused for treason for concealing her supposed crimes; Charles Wriothesley, *A Chronicle of England During the Reigns of the Tudors, from A.D. 1485 to 1559*, ed. William Hamilton, Camden Society, new series, vol. 11 (London, 1875), pp. 132-4.

¹⁵ McIntyre, 'Legal attitudes towards women', p. 15; in 1624 parliament extended benefit of clergy to women convicted of larceny of goods worth not more than 10s. (21 James I cap. 6); Cynthia Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth Century England* (Cambridge, 1987), p. 48, n. 8.

¹⁶ The right of curtesy gave to widowers a life interest in all of the lands that their wives died seised of, not merely one third, as with dower; provided the union had produced a child; T.E., *The Lawes Resolutions of Womens Rights*, p. 146; Edward Coke disagreed with Glanville's view that adulterous women forfeited rights to dower, so practice may have been different in the sixteenth and seventeenth centuries; Pollock and Maitland, *The History of English Law*, vol. 2, pp. 194-5, 414-20; Keith Thomas, 'The puritans and adultery: the act of 1630 reconsidered', in Donald Pennington and Keith Thomas, eds., *Puritans and Revolutionaries: Essays in Seventeenth Century History Presented to Christopher Hill* (Oxford, 1978), pp. 267-9, 273; for further examples of legal discrimination against women, see Keith Thomas, 'The double standard', *Journal of the History of Ideas*, 20 (1959), pp. 199-203.

a telling refutation of William Blackstone's often quoted assertion that, 'even the disabilities which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England.'¹⁷ Critics of English law have pointed out the failure of the crown, parliament and the judiciary to equip women with sufficient rights outside of the household, and their refusal to offer women adequate protection within the household.¹⁸ The resulting picture of women's relationship with the law is harsh and unremitting. Where Pollock and Maitland could write that 'private law with few exceptions puts women on a par with men', Antonia Fraser concluded ninety years later that, 'under the common law of England at the accession of King James I, no female had any rights at all (if some were allowed by custom)'.¹⁹

Concentration on the underlying philosophy of the English legal system has produced a bleak view of the position of women at law to stand against the outmoded interpretations of Blackstone in the eighteenth century and Pollock and Maitland in the late nineteenth century. But the see-saw of opinion about women and the law has yet to come to rest. Now that the bias within English law has been identified, and the prescriptive beliefs and assumptions held by many of its judges exposed, various historians are turning to investigate the practical effects of that bias and those assumptions on the lives of individual women. Scholars such as Susan Staves, Eileen Spring, Amy Erickson, Margot Finn and Laura Gowing have begun focusing on the precise make-up of different laws affecting women and examining women's experiences inside and outside the courtroom.²⁰ Through close readings of statutes and published case law and studies of the records of property ownership and litigation they have confirmed that a discriminatory ethos underpinned many areas of law. However, they have also shown that discrimination against women was neither even nor universal, and that women could use the law as well as fall victim to it. Taken together, their findings add rare flecks of light to the previously gloomy picture of women and the law.

The range of divergent interpretations of the status of women that historians have produced over the past hundred years is somewhat surprising within a subject as intent on certainty and precision as the law. The divergence stems, of course, from the different values and priorities of legal, social and feminist historians and the differing approaches each group has taken to the subject over the years. But historians have been able to reach such varying, and sometimes incompatible, conclusions about the same issues because of the vast size and

¹⁷ William Blackstone, *Commentaries on the Laws of England* (London, 1765), vol. 1, p. 433.

¹⁸ See for example, Nadine Taub and F.M. Schneider, 'Perspectives on women's subordination and the role of law', in David Kairys, ed., *The Politics of Law: A Progressive Critique* (New York, 1982), pp. 117–39.

¹⁹ Antonia Fraser, *The Weaker Vessel: Woman's Lot in Seventeenth-Century England* (London, 1985), p. 5.

²⁰ Finn, 'Women, consumption and coverture', pp. 703–22; the works of these other historians are referenced throughout this chapter.

complexity of early modern English law. The territory covered by 'the law' stretched from the highest royal decree to the humblest act of a local constable, from parliamentary legislation to the exercise of royal prerogative, from treason to debt, and from land tenures and property transfers to written indentures and bonds. In this vast and undulating landscape no single viewpoint can provide a complete and uninterrupted panorama of the whole, making premature generalisations dangerous.

Two aspects of the complexity of the law have particular bearing on evaluating women's legal lives. The first is the simple fact that the common law enjoyed no monopoly in sixteenth century England, even if at times it has monopolised the attention of historians of women's rights.²¹ Undue emphasis on this one area of law reflects the influence of legal historians, who have been inclined to take a developmental view of the law, concentrating their attention on studying 'winners', influential legal ideas and ultimately successful institutions, while paying less regard to the legal bodies and elements of law that have made little impact on subsequent law. During the period of this study the common law shared its legal stage with a gaggle of other jurisdictions. Edward Coke recognised sixteen – each of which provided women with distinct rights and remedies and opportunities for litigation.²² The existence of these alternatives means that bleak prognoses about women's legal position built around the doctrines of primogeniture and coverture need to be modified using news from other legal quarters. To illustrate this point, the following sections provide a brief survey of the more significant of those other quarters, namely equity, ecclesiastical law and custom, as well as the common law, and examine the second point highlighted by recent scholarship: the extent to which social and legal practice could differ markedly from legal theory.

EQUITY

Mary Beard, the author of *Woman as Force in History*, had no doubt that the alternative to the common law that offered the greatest benefit to women was equity; the body of principles applied and developed in the prerogative courts of Chancery, Requests, the equity side of Exchequer, and the equitable jurisdiction of the Palatine of Lancaster, with its own chancery in Lancaster and court of Duchy Chamber in London, and the Palatinates of Chester and Durham.²³ Maria Ciom agreed, observing in her 1975 study of Chancery:

²¹ As Ruth Kirtel has written, 'the study of women and the common law seems to have captured the interest of both legal and social historians'; Ruth Kirtel, 'Women under the law in medieval England 1066–1485', in Barbara Kanner, ed., *The Women of England from Anglo-Saxon Times to the Present: Interpretive Bibliographic Essays* (London, 1980), p. 129.

²² C.W. Brooks, 'The common lawyers in England, c. 1558–1642', in W.B. Prest, ed., *Lawyers in Early Modern Europe and America* (New York, 1981), p. 42.

²³ Mary Beard, *Woman as Force in History: A Study in Traditions and Realities* (New York, 1946), pp. 136–44, 198–204. Beard's primary interest was America in the nineteenth century.

Chancery laid the foundations for married women's property rights, gave security to women who held real and personal estates by means of future equitable interests not recognised at the common law, granted protection to the estate of the jointress and accorded a right to separated or divorced women to take a share of their husband's estate commensurate with the portion which they brought into marriage; that is, they were allowed 'equity of a settlement'.²⁴

The basis for Beard's and Cioni's optimism was the willingness of the judges in equity courts to allow exceptions to the doctrine of coverture. These men recognised the injustices that could flow from the common law fiction that a married woman had virtually no legal identity separate from her husband, and they oversaw the development of measures that allowed women to circumvent some of the restrictions that coverture imposed upon them. The chief of these measures was the doctrine of the 'separate estate'. In the latter half of the sixteenth century, equity benches were more at ease than their common law counterparts with the notion that the possession of property and the enjoyment of property (the two elements which together constituted full ownership of legal title) could be divided, and the interests of the person enjoying the property protected. One person could own the legal title to property, or have possession of property, while another could benefit from the 'use' of it.²⁵ This apparently simple concept lies at the heart of many of the most complex areas of early modern law, and indeed of modern law in the areas of trusts, succession and taxation. To the uninitiated, the mechanics of 'divided' and 'conjoined' uses, 'passive' and 'active' trusts, and the common law rules against perpetuities and against 'a use upon a use' are mystifying enough to induce an allergic reaction. Fortunately, it is not necessary to master the twists and turns associated with the principle of separating legal and equitable, or beneficial, ownership to be able to observe the benefits it could bestow on women.²⁶

Deft employment of trusts (or uses) theoretically allowed a married woman to retain independent control of property and keep it from becoming her husband's. She might transfer ownership of her title to property to a third party before marriage, thereby separating herself from any interest that could pass to her husband on marriage. Yet the third party who was now the legal owner of the property (either a 'feoffee to uses' or a trustee) was obligated 'by the trust in them bestowed' to act on behalf of the woman transferring the property. This might mean managing lands and passing on rents to the woman, or simply

²⁴ Cioni, *Women and Law*, p. 11, and see Maria Cioni, 'The Elizabethan Chancery'.

²⁵ The Statute of Uses (27 Henry VIII c. 10) exploded the fiction of the division of legal and beneficial ownership by deeming that legal title vested not in the trustee, or feoffee for uses, but in the beneficiary; *Statutes of the Realm*, vol. 3, pp. 539–42. As Neil Jones has persuasively argued, the statute applied to divided uses but not conjoined uses, which lived on after 1536 and increasingly became known as trusts; Neil Jones, 'Trusts: practice and doctrine, 1536–1660' (University of Cambridge Ph.D., 1994), pp. 8, 72–99.

²⁶ For analyses of the complexities of uses and trusts see Pollock and Maitland, *The History of English Law*, vol. 2, pp. 228–33; Jones, 'Trusts: practice and doctrine'.

retaining the interest for the duration of the marriage and then returning it to the woman or to her heirs. Couples often agreed the arrangement of separate estates and set down the details in marriage settlements, but many uses and trusts remained secret. Settlements could be as simple or as complicated as the parties desired, reserving to a wife a variety of different rights, for example the right to make a will of her separate property or of a specified proportion of joint property, or the ability to guarantee a portion for a daughter's marriage.²⁷

Equity courts helped to protect the interests a woman wished to keep separate from her husband. As Cioni points out, they also helped safeguard the rights of the jointress who did not seek to keep her property separate. Women who contributed portions to their marriage expected in return to be maintained should they be widowed. By the sixteenth century fewer and fewer wives put their faith in the common law right of dower, enshrined in Magna Carta. Dower could be difficult to define. It offered widows a life estate in one third of their husbands' lands, but did this mean a third of the lands they held at marriage, those in their possession when they died, or those they controlled in between? Moreover, the right only applied to lands held in fee, and therefore excluded lands held by copyhold or leasehold, lands subject to entails, or lands tied up in uses. Dower could also be difficult and time consuming to claim, often requiring the co-operation of the inheriting heir (and failing co-operation, legal proceedings), and in light of these complications it is not altogether surprising that many women opted to ensure a financially secure widowhood by arranging a jointure instead.²⁸ In early jointures married couples held interests in lands in their joint names (often lands bought for the purpose using women's portions or dowries) although men usually contributed to the purchase as well) with the intention that the survivor would enjoy a life interest in the profits accruing from them. Jointure lands were clearly identifiable and they (or more usually the right to rents from them) became a widow's on the day she was widowed, without the need for legal process. Later jointures specified a guaranteed annuity rather than specified lands, the amount often set down in a marriage settlement, and equity courts proved more willing than common law courts to enforce these arrangements.²⁹

Amy Frickson, 'Common law versus common practice: the use of marriage settlements in early modern England', *Economic History Review*, 2nd series, 43 (1990), pp. 21–49, especially p. 25, although see chapter 5 below for the theoretical and practical difficulties associated with enforcing arrangements in settlements.

²⁸ Baker, *Introduction to English Legal History*, p. 309; Staves, *Married Women's Separate Property*, pp. 95–130, especially p. 101; and see T.E., *The Lives Resolutions of Women's Rights*, pp. 179–80.

²⁹ Common law rules deemed that contracts a wife made with her husband before marriage became void on marriage; contracts a woman made with a third person were merely voidable; that is, a husband could choose whether or not they should remain in force; Holdsworth, *History of English Law*, vol. 3, pp. 528–30; vol. 5, p. 311; McIntyre, 'Legal attitudes towards women', p. 115, for further discussion of jointure and dower, see chapter 9 below.

As we shall see in later chapters, on rare occasions the judges and Masters in equity courts even permitted married women to sue their own husbands.³⁰ Through rights to 'paraphernalia', which let wives retain at least some rights of ownership of their personal belongings, equity also attempted to alleviate the indignity, and the practical difficulty, of the strict position at law where husbands owned and could sell the very clothes their wives stood up in.³¹ In light of these underminings of coverture, it is easy to see why Cioni and Beard saw courts of equity as women's allies. Allies they could be, but as later sections will argue it is misleading to represent equity as women's legal saviour, just as it is misleading to represent the common law as their legal downfall.³² The measures outlined here applied only to married women, and most were available only to women who had the resources, the access to legal advice and the foresight to establish uses or trusts, or to negotiate marriage settlements or jointures.

Where equity courts did benefit women more generally was in their procedures. In the language of maxims, common law looked to the cause, while equity looked to the person. Common law judges asked whether or not an individual had performed a certain act, whether they possessed good title to property, whether or not they had met the conditions of an agreement and so on. Answers to these questions lay in the hard evidence of bonds, title deeds, indentures, promissory notes and the like. Equity judges, by contrast, looked not simply at the actions individuals had or had not taken, but took account of their resources and the circumstances surrounding their actions. If a debtor had not repaid a debt in full by the agreed date, they were willing to listen to that debtor's excuses. If litigants lacked the bonds, title deeds, indentures or other proofs necessary to ground an action at common law, judges in equity courts would let them explain why they lacked these documents and perhaps make orders for their recovery. This could be particularly useful for women, who often had less access than men, through the operation of coverture or their exclusion from areas of public transaction, to deeds, leases, uncancelled bonds and other proofs.

The remedies that courts of equity offered could also be especially attractive to female litigants. Unlike their common law counterparts, who in most cases

³⁰ The ability of wives to sue their husbands is explored in detail in chapter 6 below.

³¹ The seventeenth-century Chancery deemed that a wife's 'paraphernalia', her clothes, jewels, bed linen and plate remained her property, if she survived her husband, and her heirs' property if she did not (as opposed to other moveable property which remained the property of her husband and his heirs). The right, which existed from medieval times, was originally recoverable in ecclesiastical courts; Erickson, *Women and Property*, pp. 62–3; Baker, *Introduction to English Legal History*, p. 552.

³² For criticisms of Beard's optimistic description of equity, see Gwen Gampel, 'The planter's wife revisited: equity law, and the Chancery court in seventeenth-century Maryland', in Barbara Harris and JoAnn McNamara, eds., *Women and the Structure of Society* (Duke, North Carolina, 1984), p. 20; Berenice Carroll, 'On Mary Beard's *Women as Force in History*: a critique', in Berenice Carroll, ed., *Liberating Women's History* (Ithaca, 1976).

restricted themselves to awarding damages to victorious litigants, judges in equity jurisdictions increasingly made use of injunctions, either preventing an activity from taking place (whether the sale of a farm, the committing of waste on a copyhold, or the bringing of an action at common law) or guaranteeing (at least temporarily) quiet occupation of an interest in land. As will be seen in chapter 4 on the workings of Requests, equity meant flexibility, and women often appreciated this flexibility more than men, due to the particular social and legal restrictions under which they laboured.

ECCLESIASTICAL LAW

The ecclesiastical jurisdiction was extensive but eclectic. As Martin Ingram has shown, it is possible to divide the operations of the church courts into three broad yet overlapping categories of business, 'record', 'office' and 'instance'; what modern critics might identify as administrative acts, criminal or disciplinary prosecutions and civil suits between parties. Administrative duties included overseeing the collection of tithes and church rates, regulating the formation of marriages and issuing marriage licences, and dealing with probate matters and intestate succession.³³ The ecclesiastical law of 'thirds' divided the moveable goods or possessions of someone who died without leaving a will into three, or into two. In London and York the customary rule of 'reasonable parts' applied up until the turn of the eighteenth century, even to those who had made a will, guaranteeing a widow who lived in these dioceses one third of her late husband's moveable goods on his death, or one half if the couple had no children, regardless of the provisions he might have made in his will (lower, it will be remembered, gave a one third interest in land).³⁴

The second interest of ecclesiastical authorities, their concern with the moral well-being of communities, led them to initiate prosecutions of a range of offences including fornication, bigamy, bastardy, drunkenness and failure to observe religious observances.³⁵ Women were regularly presented for sexual offences, but in the context of this study it is law suits between parties that are of interest. These included matrimonial suits, in which spouses sought a divorce *a vinculo* (the dissolving of the marriage bond, by establishing that the marriage had been invalid from the outset) or a separation *a mensa et thoro* (separation from bed and board without the option of remarriage, in response to proven accusations of adultery or cruelty) and defamation actions. As Ingram, J.A. Sharpe and Laura Gowing have all shown, the willingness of church courts to entertain these types of suits was particularly important for women. Where equity courts recognised exceptions to the doctrine of coverture, the church

³³ Martin Ingram, *Church Courts, Sex and Marriage in England, 1570–1640* (Cambridge, 1997), p. 43.

³⁴ Erickson, *Women and Property*, p. 28.

³⁵ See Ingram, *Church Courts, Sex and Marriage*, pp. 219–91.

courts all but ignored the doctrine, and allowed married women to sue in their own names without their husbands. As a result, women predominated in certain church court actions to an extent they never achieved in other jurisdictions. As will be seen later in this chapter, the outstanding example of this is defamation, where women came to outnumber men as plaintiffs and defendants and to approach their number as witnesses.³⁶ Gowing suggests that women used church court actions, just as they used the insults of slander themselves, not simply to attack the sexual reputation of others or to defend their own reputations, but to settle older scores and to shape relations between neighbours. It is wrong, therefore, to see women merely as victims of these regulatory systems, for some individuals clearly used the power of language and the power of the courts to settle long-standing disputes and to manipulate community hierarchies.³⁷

CUSTOM

The common law was national custom, customary law 'common' to all. However, in many localities the grassroots of the English legal system remained local custom, the traditional law of the manor and of the borough. Landholders and tenants who held their lands by customary tenures attended courts to enrol their interests or to serve on juries of copyholders. In larger towns inheritance and property rights were often governed by borough customs. In areas where it persisted, customary law was the law with which local inhabitants were most familiar, and it offered men and women yet more alternatives to the common law.³⁸ It is difficult to generalise about custom because it was local, differing from town to town, manor to manor, and sometimes even from tenement to tenement. However, one of the most widely observed customary rights was the right of widows of customary tenants to inherit their husbands' holdings. A widow's right to 'freebench' or 'widow's estate' was similar in concept to dower, but in most instances it was more generous. In many localities widows were entitled to a life interest in *all* of their husbands' holdings, not simply a third. Widow's estate on some manors was for life, but more often the right was extinguished if a woman remarried, and, as Barbara Todd has shown, in practice widows rarely enjoyed full control of their interest if they had sons who came of age and married.³⁹

³⁶ Gowing, *Domestic Dangers*, p. 12; J. A. Sharpe, *Defamation and Sexual Slander in Early Modern England: The Church Courts at York*, Borthwick papers no. 58 (York, 1980), pp. 15, 27–8; Ingram, *Church Courts, Sex and Marriage*, p. 302.

³⁷ Laura Gowing, 'Language, power and the law: women's slander litigation in early modern London', in Jenny Kermode and Garthine Walker, eds., *Women, Crime and the Courts in Early Modern England* (London, 1994); and see Peter Rushton, 'Women, witchcraft and slander in early modern England: cases from the church courts of Durham, 1560–1675', *Northern History*, 18 (1982), pp. 116–32.

³⁸ Brooks, *Pettyfoggers*, pp. 34, 39, 71–4.
³⁹ Barbara Todd, 'Freebench and free entrenchment: widows and their property in two Berkshire villages', in John Chartres and David Hey, eds., *English Rural Society, 1500–1800: Essays in Honour of Joan Thirk* (Cambridge, 1960), pp. 188, 191.

The nature of customary law and the uses widows made of its provisions in rural areas are discussed at length in chapter 7 below. For now it is sufficient merely to recognise the broad range of assistance custom might offer to women, and the number of customs which sanctioned behaviour that was impossible at common law. Edward Coke described how a married woman could purchase a copyhold ('untill her husband disagreeeth'), how a husband could pass a copyhold estate to his wife by surrender, and how a 'speciall Custome' allowed a wife to pass a copyhold to her husband during marriage, although he added that 'this Custome hath bene much impugned, therefore I dare not justifie the validity of it'.⁴⁰ In certain boroughs tradition allowed married women to run businesses in their own names and to trade, become indebted and appear in court as if they were *femes sole* rather than *femes covert*, although it is unclear how widespread these customs remained by Elizabeth's reign.⁴¹ Under the customary law of Gavelkind in Kent, wives of convicted felons could receive their dower third after their husbands were executed. In York, custom allowed a man to convey land to his wife by deed during marriage, and in Taunton there was a custom that the survivor of a marriage, whether wife or husband, should inherit all of their partner's freehold land.⁴² The list of variations is almost endless, and it is important to note that customs could also be more restrictive than the common law, especially when it came to the rights of husbands to alienate their wives' property during marriage.⁴³ With the incomplete survival of court rolls and borough records, the full range of customs affecting women across England may never be known. However, customary law demonstrates better than any other system of regulation the degree to which women's rights and legal options depended not just on their marital status, but on where they lived, on the types of property they controlled and the tenures by which they held that property.

COMMON LAW

Historians writing the history of women's rights in England regularly cast the common law as the villain of the piece. The foregoing discussion of rival jurisdictions commits the same sin, through its focus on the alternative rules women might use to mitigate the undeniable harshness of the common law. It is important, however, not to take this denigration of the common law too far. Certainly, the common law was guilty of denying some rights to women, particularly married women, but it never denied them rights altogether. It allowed single women and widows to sue, contract and write wills without restriction, and it gave married women dower rights if they outlived their husbands. In her book

⁴⁰ Edward Coke, *The Complete Copyholder* (London, 1641), pp. 94–5.

⁴¹ Mary Bateson, *Borough Customs*, Selden Society vol. 21 (London, 1906), pp. cxi–cxiii.

⁴² *A Briefe Discourse, Declaring and Approving the Necessarie and Inevitable Maintenance of the Lawful Customs of London* (London, 1584), pp. 26–8.

⁴³ Bateson, *Borough Customs*, p. cii.

Law, Land and Family: Aristocratic Inheritance in England 1300 to 1800, Eileen Spring turns the orthodox feminist view of women's legal rights on its head. She argues that the history of aristocratic inheritance is one of male elites attempting to circumvent common law rules because they were too *favorable* to women, not too harsh, due to the regularity with which they allowed control of property to fall into women's hands. Under the rules of intestate succession eldest sons inherited real property, but in the absence of any sons, daughters inherited. In the average elite family in Tudor and Stuart England this meant that daughters were eligible to inherit in between 20 and 25 per cent of cases. Yet figures for the seventeenth century suggest that daughters of the elites inherited estates in only 5 per cent of cases. The inference is that anxious landowners who were determined to keep power and prestige in male hands managed to bypass daughters in favour of uncles or other collateral males. And landowners achieved this through provisions in wills and marriage settlements, and in particular through the development of so-called 'strict settlements'. In other words, they used courts like Chancery to *defeat* common law rules that were advantageous to potential heiresses, not to circumvent rules that discriminated against these women.

Spring outlines a similar pattern with respect to dower. She argues that the shift away from common law dower to jointure did not necessarily benefit widows. While dower promised a woman the profits from one third of her husband's interests in land for the duration of her widowhood, regardless of the dowry or portion she had contributed at marriage, the value of jointures was linked directly to the value of women's portions. Later jointures usually guaranteed a widow an annual income equal to a set proportion of her dowry, commonly one tenth. This meant that a widow had to outlive her husband by ten years simply to break even on her, or more usually her family's, investment. Spring concludes that if the value of family estates is taken into account, jointures did not come close to equalling the value of dower thirds.⁴¹ As Susan Staves has remarked about the eighteenth century (and in the context of the development of a doctrine of 'equitable jointure' that circumvented many of the requirements for jointure laid down in the Statute of Uses): 'A widow's entitlement to a life estate in land was transformed by equity into an entitlement to a jointure that could be a smaller estate in less secure personal property for less than the term of her life'.⁴² Many of Spring's arguments have yet to be conclusively established empirically. However, the logic of her approach is compelling, and it serves as an important reminder that the flexibility offered by rival jurisdictions to the common law could be used to thwart women's entitlements as well as to protect or extend them. For aristocratic women at least, the common law could sometimes be the lesser of two evils.

The common law's bad press arises from its restriction of women's rights in marriage and in inheritance. But as the chapters that follow show, female liti-

⁴¹ Eileen Spring, *Law, Land, & Family: Aristocratic Inheritance in England, 1300 to 1800* (Chapel Hill and London, 1993), pp. 42–65.

⁴² Staves, *Married Women's Separate Property*, p. 99.

gants went to court over other matters besides marriage and inheritance. In many, perhaps most, instances they pursued litigation not as women asserting women's rights, but as creditors, debtors, executrixes, administratrixes, leaseholders, tenants, midwives, servants or traders seeking redress for wrongs. In these guises the common law courts were often the most helpful organs of justice for women, more helpful at times than equity courts, as estimates of female participation in litigation set down in the final section of this chapter will demonstrate.

The law encompassed a range of different jurisdictions, including criminal, civil and ecclesiastical, customary, prerogative, conciliar and common law. Each of the non-criminal jurisdictions presented women with distinct rights and the mechanisms for exercising those rights. The choice of jurisdiction was in many cases out of litigants' control, determined by the nature of their suits, the nature and value of their interests, and the village, manor, town, city, diocese or county in which they and their opponents lived. However, in other cases litigants and their lawyers were able to select the jurisdictions they thought would be most beneficial to their cause and then do their best to manipulate proceedings to their advantage. Consequently, the legal system needs to be considered in its complex entirety, even if the only way to unlock its secrets is by examining its constituent parts. Not only do all of the available jurisdictions need to be understood, it is important to realise how informal or rough and ready certain arrangements could be; how often different jurisdictions might overlap and contradict each other; how they might co-operate at the same time as they competed for business and power; and how the best laid plans of lawmakers, judges and jurists could go awry.

LEGAL THEORY VERSUS PRACTICE

Susan Staves, the author of *Married Women's Separate Property in England, 1660–1833*, is just one of many historians to observe that 'in early modern English law, the gulf between obvious statutory and judge-made rules, on the one hand, and practice, on the other hand, appears to have been very wide indeed'.⁴⁶ Examples of the width of this gulf are plentiful, and not, of course, restricted to activities involving women. In the criminal law, debate still rages over why there was such a wide gap in this period between the harshness of legislation and the extent of known crime, on the one hand, and the dearth of successful convictions, on the other. Douglas Hay suggested in *Albion's Fatal Tree* that this gap represented a conscious use of discretion by the judiciary, in league, or at least in sympathy, with parliament.⁴⁷ His arguments challenged the

⁴⁶ Staves, *Married Women's Separate Property*, p. 206.

⁴⁷ Douglas Hay, 'Property, authority and the criminal law', in Douglas Hay, Peter Linebaugh, John Rule, E.P. Thompson and C.J. Winslow, eds., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London, 1975), pp. 17–63.

view that this gap represented no more than the inefficiency of the English justice system, and they stand in marked contrast to interpretations that stress the participatory nature of this system prior to the nineteenth and twentieth centuries, reliant as it was on the co-operation and participation of local inhabitants serving as informers, witnesses, jurors, churchwardens, constables, sheriffs and magistrates.⁴⁸ Whether the result of 'cock-up' or 'conspiracy', all parties to this debate concede the existence of this gap between intention and practice. Students of women and crime have shown that this gap could be particularly acute where female offenders were concerned.⁴⁹ Early modern parliaments showed little sympathy for female criminals. As already mentioned, crimes associated with women, such as witchcraft, infanticide and husband murdering, attracted particularly severe penalties, reflecting the horror with which legislators regarded these offences and their desire to deter potential offenders from committing them.⁵⁰ However, these crimes apart, women rarely figured in the statistics of prosecuted felons; they were far less likely than men to be accused of a felony at assizes or quarter sessions (unless the offence was witchcraft or infanticide), and according to one estimate only one fifth of convicted women suffered the full legal penalty.⁵¹

Discrepancies of this kind reflect one of the more visible paradoxes of the age, a paradox inherent in the simultaneous perception of women as being weak and impotent, yet capable of wielding mysterious power and posing a threat to those around them.⁵² Lawmakers and pamphlet writers regarded criminal women as a fearsome and dangerous class.⁵³ The idea of women committing crimes that threatened household or social order outraged legislators, and some of those the courts convicted suffered horrific punishments and were

⁴⁸ Herrup, *The Common Peace*; Cynthia Herrup, 'Law and morality in seventeenth-century England', *Past and Present*, 106 (1983), pp. 102–4; see also V.A.C. Gatrell, *The Hanging Tree: Execution and the English People 1770–1868* (Oxford, 1996), p. vi.

⁴⁹ Herrup, *The Common Peace*, pp. 173, 175; on the reluctance of juries to convict for infanticide, see Susan Amussen, *An Ordered Society: Gender and Class in Early Modern England* (Oxford, 1988), p. 114.

⁵⁰ For the misogyny and double standards within the judiciary concerning women's testimony as accused witches or as victims of rape, see G. Geis, 'Lord Hale, witches and rape', *British Journal of Law and Society*, 5 (1978), pp. 26–44; see also Clive Holmes, 'Women, witnesses and witches', *Past and Present*, 140 (1993), pp. 45–78.

⁵¹ J.M. Beattie, *Crime and the Courts in England 1660–1800* (Princeton, 1986), p. 438.

⁵² J.A. Sharpe, 'Witchcraft and women in seventeenth-century England: some northern evidence', *Continuity and Change*, 6 (1991), pp. 185–6; Jan de Bruyn, 'The ideal lady and the rise of feminism in seventeenth-century England', *Mosaic*, 17 (1984), p. 20; for examples that reveal the supposed mysterious powers of women, see Robert Burton, *The Anatomy of Melancholy* (Oxford, 1621), pp. 84, 190; Edward Jordan, *A Disease Called the Suffocation of the Mother* (London, 1603), p. 19.

⁵³ Frances Dolan has detected in literary representations, 'an anxiety about murderous wives in inverse proportion to the actual threat they posed'; Frances Dolan, *Dangerous Familiar: Representations of Domestic Crime in England 1550–1700* (Ithaca and London, 1994), pp. 26, 89 and *passim*.

represented in pamphlets as evil personified.⁵⁴ However, the living, breathing culprits (or alleged culprits) who appeared in criminal courts did not always inspire fear, sometimes they attracted a measure of sympathy, sincere or paternal, from judges, magistrates and juries who avoided convicting them of crimes to which brutal penalties attached. This paradox suggests that the more general gap discernible within the criminal law can partly be explained by the differing functions and perspectives of parliament and judiciary. Parliaments in Tudor and Stuart England, as today, sought to govern the future behaviour of broad classes of, as yet, anonymous people. When governing entailed controlling or deterring aberrant or socially destructive behaviour, they were regularly authoritarian, setting severe penalties. Judges and juries, meanwhile, had to pass judgment on the acts of actual individuals. One group dealt with the future behaviour of many people, and could afford to be rigid in their approach, the other dealt with the past behaviour of a few, and had more regular need to exercise discretion or to show compassion.⁵⁵ Margaret Cavendish mocked court gallants in her diary by telling them 'be sure you rail of all Women generally, but praise every particular one', but her sentiments might describe parliaments who 'railed against all women generally' with repressive legislation, and constables, judges and juries who showed leniency towards 'particular' women.⁵⁶

In civil law, discrepancies between rules and the implementation of rules could be wider still. Amy Erickson has found evidence in wills and probate documents of the gulf between theory and practice in the field of women's property rights. Noting how a concentration on the common law doctrines of primogeniture and coverture can produce an impression of 'relentless female subjugation', she reveals that will-makers below the level of the gentry in Yorkshire, Lincolnshire and Sussex did not strictly follow the practice of primogeniture. Consequently, it was not unusual for daughters to inherit real property, or more often moveable property, on a surprisingly equitable basis with their brothers. Similarly, not everyone observed or sought to enforce the doctrine of coverture. For reasons of practical convenience wives accepted gifts,

⁵⁴ The attitudes of lawmakers can be inferred from two extraordinary statutes: the infanticide statute of 1624 (which made concealment of a stillbirth by an unmarried mother a felony, and represents a rare reversal of the traditional burden of proof) and the 1650 ordinance that made adultery a capital felony for married women but not for married men; Sharpe, *Crime in Early Modern England*, p. 61; Thomas, 'The puritans and adultery', pp. 257–8, 261.

⁵⁵ This is reflected in the common practice of devaluing stolen goods to turn grand larceny into petty larceny, the extensive use of 'benefit of clergy' for men, and pregnancy for women, to have death sentences commuted, and in the relatively high rates of acquittals in English felony trials; see Sharpe, *Crime in Early Modern England*, pp. 65–9; Herrup, *The Common Peace*, pp. 165–6 and *passim*.

⁵⁶ As quoted in Sara Mendelson, *The Mental World of Stuart Women. Three Studies* (Brighton, 1987), p. 17; Beattie, *Crime and the Courts*, pp. 436–9; Herrup, *The Common Peace*, pp. 149–50, 153; Thomas, 'The puritans and adultery', pp. 257–8, 261, 278–9, 280.

engaged in financial transactions and treated as their own various items of personal property which strict law decreed belonged to their husbands.⁵⁷ Mary Prior has shown that married women, including labourers' and husbandmen's wives, made wills in Elizabethan Oxfordshire. Most had the consent of their husbands, either given at the time of writing or according to the terms of an agreement made on marriage, or they made wills in their capacity as executrices or administratrixes, however a few appear to have made a will without gaining permission from their husbands. Others made bequests in their wills of freehold land, in direct contravention of statute. As Prior reflects, 'it would be quite impossible by induction from the wills themselves to reconstruct the law which governed their making', a sentiment that is valid for most manuscript records of the workings of coverture in practice.⁵⁸ These reflections do not prove that the prohibitions of coverture were ineffectual – whenever a husband felt threatened or vindictive, he could enforce them – they merely emphasise that while husbands could enforce the doctrine of coverture, that does not mean that every husband did enforce the doctrine.⁵⁹

The relationship within the law between elite expectation and common experience, like the relationship between moralists' advice to women and women's response to that advice, was complex and defies over-simplification. It can be tempting, given the foregoing examples of primogeniture and coverture, to characterise the common law as being restrictive and repressive towards women in principle, but freer and more tolerant or realistic in practice. Fynes Moryson, for example, in his *Itinerary*, published in English in 1617, marvelled at the tolerance and respect husbands showed their wives in practice, 'notwithstanding all their privilegedges', by which he meant the power the law gave to married men.⁶⁰ However, for other areas of the law the exact opposite seems to have been true. In many cases, as Pollock and Maitland rightly pointed out, the common law appeared to offer women the same rights and opportunities as men, or was simply ambivalent about distinguishing rights according to sex. Yet social pressure regularly intervened to ensure that women were excluded from,

⁵⁷ Erickson, *Women and Property*, p. 19 and *passim*; and see chapter 6 below.

⁵⁸ 34 & 35 Henry VIII c. 5, *Statutes of the Realm*, vol. 3, pp. 901–4. Mary Prior, 'Wives and wills 1558–1700', in Chartres and Hey, eds., *English Rural Society*, pp. 201, 213; William Gouge 1558–1700', in Chartres and Hey, eds., *English Rural Society*, pp. 201, 213; William Gouge acknowledged in his dedication to *Of Domesticall Duties* that his Blackfriars parishioners took 'much exception' to his statement that a wife had no freedom to dispose of family property 'without, or against, her husband's consent'; William Gouge, *Of Domesticall Duties* (London, 1622) (facsimile edn; Amsterdam, 1976), pp. 3–4.

⁵⁹ For a fuller discussion of coverture, see chapter 6 below.

⁶⁰ Fynes Moryson, *An Itinerary Written by Fynes Moryson Gent. First in the Latine Tongue, and then Translated by Him into English* (London, 1617) (facsimile edn; Amsterdam, 1971), part 3, p. 221; Moryson went on to say of English husbands that 'no people in the World, that ever I did see' bore more scorned indignities, and injuries, from the pampered sort of Women, then they doe'. Whereas German husbands, he argued, kept their wives firmly under control, despite enjoying less powers at law than English husbands.

or simply not encouraged to avail themselves of, those rights or opportunities. Examples of this abound in the public sphere, where nothing in the law prevented women from becoming justices of the peace, churchwardens or overseers of the poor, but in practice very few found their way into these positions.⁶¹ A reader at Gray's Inn explained in 1622 that although women were not forbidden in law from serving as overseers, they were nevertheless unsuitable candidates because of the 'weakness of their sex', which made them 'unfit to travel', and because they were 'for the most part incapable of learning to direct in matters of Judicature'.⁶² With respect to women appearing on customary homages, Edward Coke observed that 'a woman may be a free suitor to the Courts of the Lord, but though it be generally said that the free suiters be Judges in these Courts, it is intended of men and not of women'.⁶³

Another reason why the historiography of women and the law is uncertain is because early modern law was uncertain, by today's standards at least. The boundaries between different jurisdictions were often blurred. The consistory court in York, for example, heard actions for defamation which technically should have been heard as slander at common law.⁶⁴ Moreover, consistency within jurisdictions was never universal. To give one example, it was accepted in the court of Chancery that wives could not appear as witnesses in cases involving their husbands, yet a manuscript commentary which stressed this exclusion also described various cases where wives' testimony was taken. In one, *Hleydon v. Yark* (1576), the reason given was that the wife 'wore the Breeches'.⁶⁵

Inconsistency such as this can be obscured if a lawyer's approach to the history of courts is taken, one which strives to construct a coherent story by pulling single strands of doctrine from tangled skeins of litigation. Legal doctrine deals with generalities, and tracing its development can never embrace the breadth of possibilities produced by individual actions and circumstances. Furthermore, in an age when law reporting was in its infancy, when a host of courts operated side by side, and individual judges in those courts dealt with countless differently placed litigants arguing different fact situations, many questions of legal doctrine were neither fixed nor clear. Precedent was a loose concept indeed, invoked more commonly in terms of the deterrence of similar behaviour in the future, than in terms of consistency with similar decisions in the past, and it would be hard to argue that Elizabethan judges observed anything resembling the later

[H.] Baker, ed., *The Notebook of Sir John Port*, Selden Society vol. 102 (London, 1986), p. 111, Stopes, *British Freewomen*, p. 63.

⁶¹ As quoted in Glanville, 'The legal position of English women', p. 112.

⁶² Edward Coke, *The Second Part of the Institutes of the Laws of England*, 1608, p. 119, and see Stopes, *British Freewomen*, p. 81.

⁶³ Sharpe, *Defamation and Sexual Slander*, p. 11.

⁶⁴ Holdsworth, *History of English Law*, vol. 9, pp. 197–8; C.U.L. Cog. 2.31, fol. 590, and see fols 231, 447, 464.

principle of *stare decisis*.⁶⁶ In this climate doctrine did not develop as smoothly and was not as representative, especially in equity courts, as some historians suggest when they speak of gradual and even increases or decreases in women's legal status.⁶⁷ In his book on the Elizabethan Chancery, W.J. Jones cautioned legal researchers to retain a healthy scepticism about the course of law in the sixteenth century. As he wrote: 'The temptation is to think in terms of a developing law, but often the law just did not develop. Instead it happened.'⁶⁸ Amy Erickson has pointed out how the willingness of legal institutions to recognise and enforce separate estates and marriage settlements that allowed wives to retain control of their personal and real property during marriage was somewhat haphazard. She notes, as W.S. Holdsworth noted before her, that Chancery decisions protecting separate estates for women were sometimes inconsistent, and the development of equitable rights was not a uniform process.⁶⁹ All of these examples underline the need to examine all facets of women's dealings with the law, and in particular the variety of their day to day experiences in different courts within Westminster and throughout the rest of the country.

NUMBERS OF FEMALE LITIGANTS

Women, especially if they were *femes sole*, theoretically enjoyed a number of rights, but how many exercised or defended those rights in courts of law? As mentioned in the introduction, it is presently impossible to determine with accuracy the contributions women made to national patterns of litigation, because national patterns have yet to be fully identified. Furthermore, quantifying totals and calculating percentages on the basis of information recorded by individuals and institutions uninterested in such details is a risky endeavour, made worse by the haphazard survival of relevant records. Nevertheless, it is useful to estimate the general scale of women's involvement in litigation by making a quick count of samples in select Westminster courts and comparing these with the few existing figures that record the participation of female litigants in litigation totals.

⁶⁶ The principle of *stare decisis* demands that judges should be bound by, not just guided by, the previous decisions of higher courts in similar cases, unless the case before them is clearly distinguishable on its facts. Maria Cioni suggested that the Chancellor and Masters of Chancery were observing this principle in Elizabeth's reign, but D.E.C. Yale has argued that modern ideas about precedent cannot really be dated before the time of Lord Nottingham; Cioni, *Women and Law*, p. 12, n. 1; Edward Hake, *Epitaphia: A Dialogue on Equity in Three Parts*, ed. D.E.C. Yale (New Haven, 1953), p. xxxvii.

⁶⁷ Maria Cioni believed women's legal rights improved steadily from at least the mid sixteenth century onwards. Alice Clark and Charlotte Stoppes suggested that women's rights declined over the same period. For further details and references, see chapter 9 below.

⁶⁸ Jones, *Chancery*, p. 2.

⁶⁹ Erickson, *Women and Property*, chapter 6, especially p. 151; Holdsworth, *History of English Law*, vol. 5, p. 311.

The court most frequently associated with women in this period is the Westminster court of Chancery. Maria Cioni gave no indication in her work of levels of women's participation (her interest was more in the courts' procedures, remedies and general outlook) except to suggest that numbers were increasing during the reign of Elizabeth.⁷⁰ Amy Erickson has verified this impression by taking samples from the manuscript calendars of Chancery proceedings. She found that during Elizabeth's reign women appeared, as plaintiffs or defendants, in a quarter of all suits commenced in the court, and judging by a sample taken by Wilfrid Prest, this proportion rose to 40 per cent during the reign of James I. The proportion of women plaintiffs commencing suits (on their own or with others) rose over this period from 17 per cent of cases during Elizabeth's reign to almost 26 per cent of cases during the period 1615–1715.⁷¹

Requests presents a similar, but slightly different picture. Women appeared as litigants in almost one third of cases commenced during Elizabeth's reign.⁷² They appeared as plaintiffs in 20 per cent of cases, and as defendants in 16 per cent of cases.⁷³ Unlike in Chancery, where the proportion of women appears to have risen significantly, the proportion of women in Requests rose only slightly over the course of Elizabeth's reign. In 1562 they made up 12.4 per cent of the total litigant population (based on samples of cases in advanced stages), rising to 13.6 per cent in 1603.⁷⁴ By 1624 women were involved in more than a third of cases in the court, and they made up 18 per cent of litigants.⁷⁵ Women never litigated in the prerogative courts on the same scale as men, and those who did sue often appeared with others – of the 17 per cent of cases in which women appeared in Chancery as plaintiffs, just under 10 per cent involved wives appearing with their husbands – but women took part in the expansion of litigation in the central equity courts, and were familiar figures within the hubbub of Westminster Hall and the White Hall.

The involvement of women in common law courts is assumed by most historians to be negligible. The only published figures that exist for common law jurisdictions (for non-criminal law) are C.W. Brooks' estimates for the

⁷⁰ Cioni, 'The Elizabethan Chancery', p. 159.

⁷¹ Erickson, 'Common law versus common practice', p. 28; Prest, 'Law and women's rights', p. 182.

⁷² Six hundred and thirty five case files, out of a sample of 2,000 from the manuscript calendars of the Requests archive, involve at least one woman (31.8 per cent); PRO 9 vol. 93 (Requests proceedings' piece numbers 1571–1673) (excluding incomplete entries; 157429–467, 158196–208, 159159–175, 1601–).

⁷³ Women occasionally sued other women, which explains why the percentages of female plaintiffs and defendants exceed the total percentages of cases involving women.

⁷⁴ In Hillary and Easter terms 4 Elizabeth I, women made up 139 out of 1,120 litigants (12.4 per cent); and in Hillary term 45 Elizabeth I, they made up 313 out of 2,308 (13.6 per cent); PRO Reg 111; PRO Reg 121.

⁷⁵ In Hillary term 22 James I, women made up ninety six out of 551 litigants (18.1 per cent) and were involved in eighty three out of 220 actions (37.7 per cent); PRO Reg 132, pp. 109–428, 449–506.

participation of widows in the two largest courts in the land, Queen's Bench and Common Pleas. His figures, based on an analysis of the given status of litigants in cases in advanced stages, indicate that widows made up only 6 per cent of litigants in Queen's Bench and Common Pleas in 1560. By 1606 this figure had fallen to 2 per cent for King's Bench and 3 per cent for Common Pleas. In 1640, the figure for King's Bench rose slightly, and widows made up 3 per cent of litigants in both courts.⁷⁶ At first sight these percentages seem relatively low, when compared with the positions in Chancery and Requests, yet they actually conceal relatively high levels of overall participation by women. These estimates for the participation of widows, especially the 1560 figure of 6 per cent, compare favourably with the equivalent estimates for Requests and Chancery. In Requests in 1562, 5 per cent of litigants with cases in advanced stages were widows (in 1603 the figure was 6 per cent, by 1624 it had fallen to 4.5 per cent) and in Chancery widows accounted for less than 2 per cent of the 17 per cent of plaintiffs who were women.⁷⁷ The suspicion that a considerable number of single women and married women as well as widows were named in common law actions can be confirmed by re-examining the rolls of warrants of attorneys that Brooks used in his general study of litigant status. A quick sample of the rolls for 1560 reveals that women were named in forty six out of 150 actions in Common Pleas (31 per cent) and made up over 13 per cent of all litigants in that court.⁷⁸ In Queen's Bench they were named in seventeen out of seventy six actions (22 per cent) and constituted almost 10 per cent of the litigant population.⁷⁹ These samples are small, but the results are provocative, suggesting that women were as likely to litigate in courts of common law as in conciliar courts of equity during the early years of Elizabeth's reign; and logic suggests that in terms of numbers they were *more* likely, given the large size of both of these courts. Moreover, even in the central court with the smallest female presence, Star Chamber, women took part in just over 10 per cent of actions in Elizabeth's reign, falling to just under 9 per cent of actions in the reign of James I.⁸⁰

⁷⁶ Brooks, *Pettyfoggers*, pp. 281–3.

⁷⁷ Source, PRO Reg 1/11 (4 Elizabeth I) and PRO Reg 1/21 (45 Elizabeth I) James I; in the Elizabethan Chancery, widows made up forty four out of a sample of 2446 plaintiffs (1.7%); Erickson, *Women and Property*, tables 7.1, 7.2, p. 115.

⁷⁸ The first 150 entries (ignoring double entries) on the first four membranes of the roll of warrants of attorneys for Easter term 2 Elizabeth I include six spinsters, twenty nine wives and twenty three widows out of a total of 431 named litigants (13.5 per cent); PRO CP40:1187.

⁷⁹ The names of three spinsters, seven wives and ten widows appear among the names of 204 litigants (9.8 per cent) in the roll of warrants of attorneys for Easter term 2 Elizabeth I; PRO KB 27/1194.

⁸⁰ A sample of calendar entries for Star Chamber suits initiated by individuals (as opposed to royal officials) reveals that women were involved in thirty six out of 346 suits (10.4 per cent); although women made up less than 5 per cent of all litigants listed (sixty six out of at least 1377); unpublished PRO calendar Star Chamber Proceedings Elizabeth I, vol. 4 (shelf no. 9.600); for the Jacobean period 657 of the 7,715 surviving records of person against person suits (as opposed to those initiated by royal officials) include the names of women (8.5 per cent); 8278 bills survive

For courts that operated outside Westminster few figures exist. In his study of the King's Lynn Guildhall court, Craig Muldrew calculated that 9 per cent of plaintiffs and 6 per cent of defendants in the mid to late seventeenth century were women appearing on their own.⁸¹ The Lynn court dealt overwhelmingly with actions for debt, and Muldrew concluded that women did not play a significant part in the world of credit relations and business transactions which spawned actions in the local court, and that widows in Lynn rarely acted as moneylenders.⁸² If women did not feature prominently in debt litigation, they did have a heavy involvement in litigation concerned with defamation of character.⁸³ J.A. Sharpe discovered, in his study of defamation causes in the York consistory court, that female plaintiffs brought just over half (51 per cent) of the 1,638 defamation actions which entered the court during the 1590s. In the 1690s, this number rose to 76 per cent.⁸⁴ Gowing has found that in the period 1572–1640, women brought between 70 and 75 per cent of the defamation suits entered in London's consistory court, and almost 85 per cent of suits from urban parishes. Women brought 31 per cent of all actions in the court in 1590, rising to 54 per cent by 1633.⁸⁵

Viewing the available statistics from a range of different courts, it appears that the numbers of women active in litigation (expressed in percentages) were high, given the social and legal restraints women suffered during this period, but nevertheless disappointing for a group that made up at least half of the population. As Sharpe points out, 'apart from a few peculiar matters', women were unlikely to be involved as frequently as men in litigation.⁸⁶ However, when analysing women's involvement with the law during the sixteenth and seventeenth centuries it is worth looking not just at percentages, but at the numbers on which those percentages are based. The increase in litigation at this time was extraordinary, far outstripping the rise in population, with many courts inside and outside London more than doubling their business between 1550 and 1600. The York consistory court heard 213 causes in 1561–2, rising to 357 in 1591–2,

overall; T.G. Burnes, *List and Index to the Proceedings in Star Chamber for the Reign of James I 1603–1625*, in the *Public Record Office, London Class STAC.8* (Chicago, 1975), vol. 1; see also Barnes, 'Star Chamber litigants', p. 9.

⁸¹ These figures therefore do not include wives who appeared in this court with their husbands; Muldrew, 'Credit, market relations and debt litigation', p. 69; and see chapter 9 below.

⁸² Litigation is not necessarily a good indicator of women's involvement in moneylending and credit networks; see William Chester Jordan, *Women and Credit in Pre-Industrial and Developing Societies* (Philadelphia, 1993), especially pp. 59–78; for examples of women moneylenders in Requests records, see chapter 5, n. 54 below.

⁸³ C.A. Haigh, 'Slander and the church courts in the sixteenth century', *Transactions of the Lancashire and Cheshire Antiquarian Society*, 78 (1975), pp. 1–13; Ingram, *Church Courts, Sex and Marriage*, ch. 10; Gowing, *Domestic Dangers*; Gowing, 'Gender and the language of insult'; Sharpe, *Defamation and Sexual Slander*.

⁸⁴ Sharpe, *Defamation and Sexual Slander*, pp. 27, 28.

⁸⁵ Gowing, *Domestic Dangers*, table 2, p. 35, and see table 3, p. 37.

⁸⁶ Sharpe, 'The people and the law', p. 249.

while the York Chancery increased its business from twenty seven actions in 1571–2, to 134 actions in 1599–1600.⁸⁷ In Westminster, the court of Exchequer received an average of 84 bills of complaint each year between 1558 and 1587, and an average of 334 bills each year between 1587 and 1603. The point is that with levels of litigation on the increase, static percentages represent rises in actual numbers. Even the apparent decline in the number of widows appearing in Common Pleas and Queen's Bench, suggested by the fall in the percentage figures given by Brooks, from 6 per cent in 1560 to between 2 or 3 per cent in 1606 (see above), represented not a decrease, but a slight *increase* in the actual number of widows who entered these courts: the 6 per cent figure for 1560 represents 142 widows who appeared in Queen's Bench and Common Pleas in Easter term 1560 while the 2 to 3 per cent figure for 1606 represents 160 widows.

If the rates of increase were significantly high, total volumes of business were higher still. By the close of Elizabeth's reign, Common Pleas and Queen's Bench were dealing with well over 20,000 suits a year, and by 1640 this figure had climbed to over 28,000.⁸⁸ At this time, W.J. Jones has estimated, Chancery was hearing 1,600 cases per annum that reached advanced stages.⁸⁹ Calculating the exact volume of business in Requests is virtually impossible (as chapter 4 will show) but the records of between 16,000 and 19,000 suits that survive for Elizabeth's reign provide an indication of the minimum number of actions commenced during that forty five year period. C.W. Brooks' speculative estimate of 54,075 causes commenced in the central courts in 1606 gives some indication at least of the remarkable scale of legal activity among the larger courts in Westminster.⁹⁰ Even taking a conservative estimate of women's overall participation in central litigation of 8 per cent, this would still mean that at least 8,000 women connected themselves with actions in these courts in this year. As stressed in the introduction, the number of actions litigated in local courts was higher still, and whichever percentages are used it is clear that women went to law in England not in their hundreds, but in their thousands. These estimates bear witness to a steady stream of women participating in civil litigation in a variety of different courts, and the next chapter examines the responses of judges, moralists, satirists and playwrights to both the idea and the reality of women involving themselves in the processes of law.

⁸⁷ Ronald Marchant, *The Church Under the Law: Justice, Administration and Discipline in the Diocese of York, 1560–1640* (Cambridge, 1969), table 8, p. 62; table 9, p. 68; the number of actions in the Bishop of Chester's Consistory court doubled between 1544 and 1594; Haigh, 'Slander and the church courts', p. 2.

⁸⁸ Brooks, *Pettyfoggers*, appendix, pp. 281–2, table 4.1, p. 51; Brooks' figures are for cases in advanced stages, so the total volume of business was almost certainly higher.

⁸⁹ Jones, *Chancery*, p. 304, n. 1.

⁹⁰ Common Pleas, King's Bench, Chancery Requests, Star Chamber, Wards, and the equity and common law sides of Exchequer; Brooks, *Pettyfoggers*, table 5.1, p. 78.