

## Introduction: 'When Women goe to Law, the Devill is full of Businesse'

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In the Jacobean tragicomedy *The Devil's Law-Case: or When Women goe to Law, the Devill is full of Businesse* (1623), the widow Leonora takes her son, Romelio, to court. Her design was ostensibly to deprive Romelio of his inheritance in favour of her daughter, whom she much preferred over her son. When her servant Winifred tries to persuade her to settle her family business privately, out of the public eye, Leonora retorts: 'Privacie? It shall be given him / In open Court, Ile make him swallow it / Before the Judges face.'<sup>1</sup> According to her critics in the play, widow Leonora had too much power and independence, reflected in her ability to bequeath the family property to her daughter rather than her son, and her transgression of patriarchal laws of inheritance. She had overstepped the boundaries of patriarchy by using the law as a mode of female empowerment, a move that contravened the social order ordained by God and upheld by man. One character in the play reviles Leonora for her litigious behaviour, saying that such women 'have more need / Of a Physician then a Lawyer', and that their frivolous 'vile suits / Disgrace our Courts'.<sup>2</sup> Though playwright John Webster set the play in Spain, the trope of the overly bold, independent and litigious widow would have resonated with English audiences. Webster and other seventeenth-century playwrights consistently depicted women as remarkably tenacious defenders of their interests in the law courts. Far from being excluded from the courtroom, women occupied central roles in litigation concerning property and inheritance.<sup>3</sup>

The litigious women depicted in seventeenth-century dramas had a basis in reality. From the 1580s onwards, more women entered the courtroom than ever before as they prosecuted cases, presented petitions or testified on behalf of another party. The rising number of women appearing before the courts in England was part of the growing litigiousness of English society as a whole. Between the 1580s and 1670s, the number

of cases heard in the central courts of Common Pleas and King's Bench more than doubled.<sup>4</sup> Women comprised an increasing percentage of litigants before the courts: during the reign of Elizabeth I, 17 per cent of all plaintiffs in the English Court of Chancery were female, a number which rose to 26 per cent in the early seventeenth century.<sup>5</sup> In the English Court of Requests, the percentage of female litigants rose from about 12 per cent in 1562 to 18 per cent in 1624.<sup>6</sup> The ecclesiastical courts also saw an increasing number of female litigants. While female plaintiffs brought a little over half of defamation actions in the York Consistory Court in the 1590s, by the 1690s this number had risen to 76 per cent.<sup>7</sup> The same was true of ecclesiastical courts in the south-east. Based on a sampling of cases between 1630 and 1699 from the court of the Archdeaconry of Essex, the Diocese of London Commissary Court and the London Consistory Court, women accounted for 84 per cent of the plaintiffs named in slander cases before the courts, and 52 per cent of the plaintiffs named in inheritance litigation.<sup>8</sup>

This rising volume of litigation, and women's participation in it, indicates the increasing role played by law and legal institutions in the everyday lives of English women and men. Over the course of the seventeenth and eighteenth centuries, more and more people turned to the law to arbitrate disputes that they could not resolve outside of the courtroom. Since legal suits involving women frequently concerned disputes between family members, especially over inheritance and marriage agreements, the law often pierced right into the heart of the patriarchal family itself. Legal suits between mothers and sons, sisters and brothers, and even between husbands and wives reflected that the patriarchal ideals of reciprocity and mutual obligation sometimes failed to provide adequate remedies for both men and women.

### Women and the law in a period of transition

The centuries between the founding of Britain's North American colonies and the dissolution of the empire after the success of the American Revolution was a period dominated by momentous changes in nearly every aspect of life. In England, bitter political and religious disputes led to a bloody civil war in the 1640s and the temporary dissolution of the monarchy in the 1650s. It was, in fact, during these years that men, women and children left England in droves, seeking to escape the political turbulence they faced at home and establish new communities in a vast and remote land.

The English monarchy was restored in 1660 but was not yet capable of exercising full control over the empire actively taking shape in North

America. The constitutional and political crises of the second half of the seventeenth century barred any consistent attempts by the Crown to bring the colonies under a single, uniform system of English law and religion. As a result, the colonies were left to fend for themselves, and developed in ways that served the interests and preferences of the colonists rather than the English government. The eighteenth century brought a reassertion of royal power and a more intentional approach by the Crown to colonial administration in North America. After the Glorious Revolution of 1688 the English government implemented new fiscal policies that increased royal revenue and helped to build a strong military that safeguarded the expanding empire. Concurrently with this process, a new commercial economy took shape; trade knitted Britain and its Atlantic colonies together more closely than ever before.<sup>9</sup>

These momentous changes between the years 1600 and 1800 had a profound impact on the history of Britain and America, and on the legal status of women in the Anglo-American world. The lack of royal oversight during the seventeenth century meant that the legal regimes of the American colonies took different trajectories, the southern colonies falling more in line with the multi-jurisdictional English example and the northern colonies privileging the common law jurisdiction. The legal systems in England and the southern colonies generally supported women's ability to inherit property, and the expansion of the equity jurisdiction in these areas gave married women increasing financial independence. The legal culture of the New England colonies, however, provided no such independence for women. New England patriarchs upheld the right of men, whether fathers, husbands, sons or brothers, to own and manage property; even widows, who under common law could own property outright, had to seek the permission of magistrates before selling or bequeathing family property.

During the eighteenth century, women's roles in the legal regimes of Anglo-America changed as they contributed to the expansion of the commercial economy as traders, borrowers, lenders, rentiers and financiers; these roles inevitably drew them into the courtroom as they prosecuted and defended legal suits concerning debt, mortgages, inheritance and property. New developments in English equity law underpinned this expansion of the market economy through the creation of principles that ensured the payment of creditors and the equitable protection of borrowers. At the same time, the English Chancery adopted new principles that expanded married women's ability to own property separately from their husbands. Colonies with strong equity jurisdictions, such as Maryland, Virginia and South Carolina, adopted these principles; as a result, women

appeared frequently in the equity courts as they prosecuted and defended cases concerning their property.

One of the reasons the English legal system was effective at home and worthy of emulation in the colonies is that it had the capability to meet the needs of different populations. It provided a number of different avenues for legal recourse for the rich and the poor, for men and women, and operated at both national and local levels. While there is no doubt that the English legal system was complex, costly and sometimes dilatory, it was at the same time a remarkably effective tool for the promotion of social order and the administration of justice. The common law, embodied in the central royal courts in London and in the local administration of justice by Justices of the Peace, had jurisdiction over criminal matters involving life and limb, as well as civil actions concerning debt, trespass and *assumpsit*.

Operating alongside the common law, the ecclesiastical courts possessed jurisdiction in a wide range of spiritual and temporal affairs, including the important task of probating wills. Equity law provided a further avenue for legal redress. The High Court of Chancery in London and the lower equity courts throughout the country had special jurisdiction over performance of contract, the deployment of trusts and uses, and marriage settlements. Complex though it was, the English legal system functioned extraordinarily well and garnered wide support across English society.<sup>10</sup>

The colonists who emigrated from England to America in the seventeenth century had been steeped in this English legal tradition. In the 1630s and 1640s, newly arrived colonists quickly founded courts and laws modelled on the English legal system. These courts were the foundation of law and order in fledgling colonial societies, and magistrates were the sanctioned arbiters of civil disputes between parties and the enforcers of punishments for criminal offenders from the earliest days of settlement. Even in Puritan Massachusetts Bay, where a communal, harmonious society was the ideal, colonists resorted to the law in ever-increasing numbers throughout the seventeenth century.<sup>11</sup> The religious diversity of other colonies such as Maryland, which included Catholics, Anglicans, Quakers and Puritans, made the establishment of legal courts necessary to ensure some degree of religious toleration and social cohesion.<sup>12</sup> The women and men who emigrated from England to America in the seventeenth century would thus have found colonial laws and legal institutions to be familiar.

Yet the adoption of English legal principles and procedures in the colonies was uneven and irregular; some colonies attempted to replicate

English courts, principles and procedures as closely as frontier conditions would allow.<sup>13</sup> The southern colonies of Maryland, Virginia and South Carolina adopted common law principles and procedures, and also established strong jurisdictions in equity law that became pivotal in protecting women's ability to own and control property. Other colonies were more selective, adopting certain features of English law while eschewing others. The legal systems of Massachusetts and Connecticut embraced the common law almost exclusively: while New England magistrates had the authority to dispense justice according to the principles of equity, the equity jurisdiction itself was never embodied in a permanent court structure. None of the American colonies established ecclesiastical courts, although for different reasons. Puritans in New England viewed the ecclesiastical courts as a distasteful relic from England's days as a Catholic country. In the southern colonies, a high degree of religious diversity made common adherence to canon law nearly impossible. This piecemeal adoption of different aspects of English law throughout the colonies had a profound impact on colonial women's legal rights and status under the law.

The English legal system, composed of a variety of legal jurisdictions, offered women more varied and robust avenues for pursuing legal redress than the legal systems of the colonies. The advantage of this system for English women was that the law of coverture, which applied only in courts of common law, could be circumvented or even ignored in other legal jurisdictions. Coverture mandated that women surrendered their legal independence when they married: unlike single women and widows, a married woman could not initiate or defend a suit in a common law court unless her husband appeared as a co-party with her. Given that the vast majority of women in the seventeenth and eighteenth centuries were married, the law of coverture was a major obstacle for women's legal action. However, other legal jurisdictions allowed women more flexibility and freedom in pursuing redress before the courts. Over the course of the seventeenth and eighteenth centuries the equity jurisdiction developed a sophisticated body of precedents that allowed married women to own property separately from their husbands. In the ecclesiastical jurisdiction, married women regularly initiated litigation to secure their inheritance.

While colonial women's relationship with the law varied by colony, the overarching trend is that the simplicity of colonial law circumscribed women's legal capabilities. Colonial women lacked the benefits of the multi-jurisdictional and sophisticated legal system that protected women's property in England. This was especially the case in New England, where common law continued to be the dominant legal jurisdiction throughout the seventeenth and eighteenth centuries, and where colonists never

established equity and ecclesiastical jurisdictions. However, southern colonies, especially Maryland, Virginia and South Carolina, adhered more closely to the multi-jurisdictional model. These colonies adopted many facets of the English legal system in the first few decades of settlement, including robust jurisdictions in equity that became an integral part of protecting married women's property.

By the eighteenth century, new legal devices that allowed women more control over their property increased the number of women participating in the commercial economy as traders, borrowers, lenders and rentiers. The English equity jurisdiction increasingly supported married women's separate estates, property which wives could control and profit from independently of their husbands. Colonies that developed equity jurisdictions on the English model bestowed these same benefits on women. The result was an uneven but steady advancement of women's legal and economic activities over the course of the eighteenth century.

### **Women's legal status in England and America: a comparison**

The legal systems of England and the North American colonies were adapted to suit the unique demographic, social, political and religious conditions of each area. But what impact did the development of these distinctive legal systems have on women? The argument advanced in this book – that England's multi-jurisdictional legal system enhanced rather than hindered women's legal capabilities – runs contrary to decades of scholarship on the legal status of women in Britain and America. Many scholars have viewed the legal status of colonial women as much superior to that of their English counterparts, connecting what they see as the greater empowerment of colonial women in the seventeenth century to a corresponding decline in the eighteenth century, as the colonial economy, law and society became more anglicised.<sup>14</sup> Colonies dominated by Protestant Dissenters, so these scholars have argued, streamlined and simplified English legal procedures, making them more accessible to a wide sector of society, including women. This more egalitarian legal climate enhanced social participation and made the law more available to the average person by 'eliminating absurd formalities'.<sup>15</sup> The legal system established by Puritans in New Haven, for example, treated women more equitably than English common law because of its emphasis on lay-pleading and more simplified procedures. Puritan jurisprudence, according to this view, encouraged women's testimonies and countermanded English legal traditions. It was only after 1700, when New England courts began to embrace English legal procedures, that the number of women appearing before the courts

began to decline.<sup>16</sup> Scholars of the colonial Chesapeake Bay region have argued that women's greater empowerment in the tobacco colonies was a product of the unique demography of the region. Because men vastly outnumbered women and mortality rates were high, women often had the opportunity to marry up the economic ladder; if left a widow, a woman might also have control over a substantial amount of property.<sup>17</sup>

Though many scholars have argued that colonial women possessed increasing control over property and a more accessible legal system compared to their English sisters, their arguments do not square with decades of scholarship on the legal capabilities of English women. Far from being bound by outdated rules and arcane legal procedures, these scholars have shown that English women inherited, owned and managed property throughout the seventeenth and eighteenth centuries, and also took legal action to defend it.<sup>18</sup> While acknowledging the real restrictions women faced under the common law, these scholars have noted that other legal jurisdictions gave women the ability to exercise some independent control over property, and the flexibility to pursue litigation if that property was threatened.<sup>19</sup>

Both equity and ecclesiastical law allowed married women to circumvent some of the harsher restrictions of the common law: equity law allowed women to retain control over real property even after their marriages through the use of trusts, while ecclesiastical law protected women's inheritance and moveable property.<sup>20</sup> Manorial law and local customs gave women an additional avenue for legal redress in English towns and villages. Trusts negotiated by manorial courts allowed women to control and inherit property in spite of common-law restrictions.<sup>21</sup> Moreover, even common law courts could be flexible in their view of coverture when it came to the legal status of married female traders in English cities; English law granted married businesswomen the status of feme sole traders, which allowed them to make contracts, and borrow or lend money in their own names, even while under coverture.<sup>22</sup>

While scholars of American and British women have explored many of the same themes, including the impact of the doctrine of coverture, and the ability of women to inherit and bequeath property, there has been surprisingly little dialogue between them.<sup>23</sup> One of the central aims of this book is to put these works on women and the law into conversation with one another. By setting women's experiences before the law in a comparative perspective, we can see how women in England and North America adapted to changing legal landscapes, and created new strategies to secure the best outcomes in court for themselves and for their families.

Given the variety of laws, legal institutions and procedures, making generalisations about women's legal status across the Anglo-American world is difficult. However, two patterns do emerge that help us interpret women's legal status and their ability to use the law to seek redress. First, the increasing adoption of anglicised legal procedures in the colonies did not alienate women from the colonial courtroom, just as they had never alienated women from the English courtroom. Second, over the course of the seventeenth and eighteenth centuries, equity law gave married women increasing financial independence that ultimately helped to undermine the role of patriarchy as the foundation of familial relationships. As new legal devices, enforceable in courts of equity, expanded the ability of married women to manage their own property, wives relied less and less on their husbands for financial support and legal representation.

### Women's legal power in an age of (eroding?) patriarchy

Women often appeared before the courts when patriarchal relationships, which were supposed to ensure justice and tranquillity between family members, had broken down. In the ideal version of the patriarchal family, ultimate authority was vested in the male head of household, who acted as the benevolent yet supreme leader of the family. He was responsible for caring for and protecting his family members, which included not only a wife and children but servants and other dependents as well. In return for the master's support and protection, the subordinates of the household owed him respect, deference and submission to his commands.<sup>24</sup> This was the ideal version of patriarchy but it was one that very few early modern households lived up to. In reality, men often shirked their responsibilities to provide for their families and sometimes abused the subordinates that they had been charged to protect. Conversely, women, children and servants could be unruly, outspoken and subversive of patriarchal authority.

There are many examples in this study which show that women's words before the court directly confronted household hierarchies. Female servants challenged their masters legally for a range of offences, including breach of contract, debt, rape, murder and theft. Wives petitioned for marital separation and the payment of financial support from husbands who abandoned, abused or neglected them. Widows sued their sons and step-sons for control of their widow's portions. According to religious teaching and social custom, the patriarchal family remained the ideal, yet these relationships were always contested between members of the household. One of the arguments of this book is that individuals negotiating



these relationships increasingly used the law to assert their power and gain more leverage within their households.<sup>25</sup>

As this book will show, some women did possess a great deal of freedom and latitude in pursuing their own legal affairs; but how do we square women's exercise of power in the courtroom with the constraints they faced under the law and in society at large? One of the central issues in this question is how limiting the doctrine of coverture really was for married women. In theory at least, coverture meant that a married woman's legal identity was subsumed within her husband's. Upon her marriage, she surrendered all rights to property as well as her ability to pursue legal action independently. Some scholars have argued that coverture remained remarkably persistent across the medieval, early modern and modern periods, leading two scholars to remark that, as far as their legal status was concerned, 'a typical wife in New England in 1750 had much in common with a typical wife in England in 1250'.<sup>26</sup> These scholars point out that while laws, legal institutions and court procedures could vary drastically in different areas of the Anglo-American world, women's subordination within the patriarchal order remained a basic fact of life for most women, whether married or not. However, on the other hand, some scholars have emphasised that women had a remarkable degree of legal and economic agency, and that both women and men could adapt, or even ignore, the doctrine of coverture when it was convenient to do so.<sup>27</sup>

In my view, there is no fundamental disagreement between these scholars on the status of women under the law: they merely emphasise different sides of the same coin. As this book shows, married women certainly felt the limitations imposed by coverture in common law courts, and some undoubtedly had husbands who asserted to the greatest extent their legal dominance over their wives. However, there are also many examples of women who found brilliant ways to navigate the legal systems, and actively sought to gain what was rightfully theirs under the law. Women's legal power, then, was Janus-faced; there were real limitations and restrictions women faced under the law and in society at large, but also extraordinary opportunities for women to pursue cases in which their persons or the property were at stake. Some women found ways to work around difficult husbands; some husbands were often happy to leave the management of time-consuming litigation to their capable wives; and in further examples some husbands and wives actively partnered in pursuing legal action. As many of the examples in this book suggest, women were active participants in guiding their cases through the courts, and many of them possessed a detailed understanding of the law that they used quite skilfully.

However, to see women's pursuit of legal redress as a straightforward expression of agency or a resistance of patriarchy would be to obscure the complexity of their goals and motivations, and to overlook the critical role many women played in supporting the structures of patriarchy. When initiating litigation or presenting a petition to the courts, women were not always rebelling against patriarchy but finding practical and sometimes ingenious methods of working within it. The idea of 'agency', as a mode of self-directed action, was certainly not how women in the seventeenth and eighteenth centuries would have understood their actions before the courts.<sup>28</sup> The notion of autonomy of the individual that underpinned the women's movement in the nineteenth century was still inconceivable in the seventeenth and eighteenth centuries.

In the early modern period, women's reasons for engaging with the courts were often linked to the nexus of family relationships of which they formed an integral part: their roles as mothers, wives and daughters spurred them to action as they sought to provide for, and to protect, their family's interests. Moreover, most women who initiated litigation or testified before the courts did not explicitly reject patriarchy, although the actions of some women directly contradicted contemporaries' most basic assumptions about women's inferior status. Some women who appeared before the court were even actively involved in supporting the patriarchal structures of the law. Midwives, for example, helped police prosecute sexual immorality in early modern communities, and were actively involved in bringing criminal charges against women and men for sexual offences. In other words, women's legal activity was not always subversive or representative of a desire for autonomy. Rather, women's engagement with the courts was embedded within and defined by social networks in which patriarchy was the norm.<sup>29</sup>

Looking at women's legal activities across a broad time and space, the picture that emerges is one of complexity and variation. While early modern women generally accepted patriarchy as the status quo, they still went to law to secure and protect their own interests. Women had a robust understanding of the law's protection of their persons and their property and were often actively involved in seeking legal redress when they felt these protections had been unlawfully violated. However, other women felt the restrictions imposed on them by law, society and family dynamics. To centre our focus on one group or the other would be misleading, and would distort our understanding of the variety of women's experiences in the early modern world.

In each of the following chapters, there are examples of women who endured the worst abuses and found little recompense in the courts.

Others brilliantly navigated their way through complex legal cases and successfully secured their own advantage. Certainly, all women did not have the same opportunities or resources to seek justice in the courts, and any number of factors might influence their decisions to pursue legal action. One of the goals of this book is to look at the variations in women's circumstances, and to uncover the different strategies and methods that women used to engage with the law.

### **Sources: opportunities and limitations**

Depositions, petitions, bills of complaint and other texts that comprise the historical legal record make this study of women's lives in early modern England and the American colonies possible. The bulk of the evidence for this book is based on nearly six thousand legal cases and over five hundred petitions drawn from courts on both sides of the Atlantic. These legal records form the basis of my quantitative analysis in tracking the number of female litigants and petitioners before the courts and provide the rich material for the qualitative portions of the book that analyse women's experiences of the law and litigation.

While this book draws extensively from the records produced by legal institutions in England and the American colonies, it takes seriously the limitations of using these sources as straightforward evidence of women's words, actions and opinions. The depositions, petitions and other legal records are as much a product of the legal institutions that created them as they are a reflection of the 'voices' of the litigants, witnesses and petitioners before the court. Clerks who took down the depositions of court witnesses routinely edited and streamlined the words actually spoken by the witnesses or petitioners in order to clarify the most important elements in the case. Lawyers who worked in the English church courts, for example, advised scribes recording the depositions of witnesses to eliminate any 'vain talk' or information not relevant to the case.<sup>30</sup> Additionally, what we hear in court records may also be an attempt by legal professionals to persuade a magistrate or judge to a particular point of view more than a straightforward recording of women's words, motivations and opinions. In other words, court records give us a treasure trove of detail about life in the early modern world, but we must remember that these records were produced with certain goals in mind. So, how can we be sure who contributed what?<sup>31</sup>

While court records should be evaluated critically and read against the grain, I think it is rather self-defeating to discredit the possibility of hearing traces of women's voices in the legal record. Interspersed throughout

the following chapters are cases in which the recorded depositions and testimonies of women are written in the first person rather than the third, suggesting that the court clerks working in these cases may have hastily recorded the spoken words of the women without bothering to stop and edit them. Some women personally wrote and signed their own depositions before the court. While it is of course impossible to recreate the specific circumstances of each woman's testimony, it is worth noting when these instances arise in the court records and what these depositions might reveal about how women shaped their narratives, and to what purpose.

Additionally, whenever possible, this book draws from evidence outside of the legal record. Women's letters and correspondence, many written in their own hands to lawyers and legal advisors, augment our perspectives on women's voices in legal matters. While depositions, testimonies and petitions were generally drawn up by court clerks and filtered through formulaic legal language, letters and correspondence give us a more unmediated and distilled understanding of women's legal knowledge and their strategies in pursuing legal action. Joanne Bailey has noted that letters, correspondence and other documents written by lawyers and litigants provide a unique glimpse into the issues at stake in the case. Because these documents were not meant for public consumption, they allow us to move past the legalese of official court documents and hear the voices of individuals.<sup>32</sup>

This book analyses legal records with care and special attention to the social and institutional contexts in which they were written. Court processes and procedures, the intervention of lawyers and legal advisors, and even the *raison d'être* of the legal institutions themselves shaped women's words before the court. Rather than focusing on uncovering the 'truth' of the particular event discussed in a case, this book focuses on the strategies women used to seek redress from the courts and how they shaped their narratives to secure the most beneficial outcome in their cases.<sup>33</sup> Whether the narratives told by women before the court were objectively true or not, what is important is that women crafted accounts of events that they considered believable by their courts and communities.

## Overview

The overall aims of this book are to show how women used the legal systems of Anglo-America to secure their own benefit, and to examine how women's use of the law increasingly undermined the patriarchal family structure. Part I begins with a comparative analysis of women's legal status in England and the American colonies in the seventeenth

century. Examining women as plaintiffs, defendants and petitioners before a variety of courts, it focuses especially on married women's use of the legal system to protect and defend their property. Chapter 1 defines women's legal status in a variety of jurisdictions across the Anglo-American world, and examines how English law was adopted and modified by colonists in the earliest decades of colonisation. Chapter 2 offers a quantitative analysis of female litigants in courts across three jurisdictions during the seventeenth century. Though the percentages of female litigants in common law courts remained low, an increasing number of women sought legal redress in the equity jurisdiction in England and in those colonies that established courts of chancery. Remarkably, women appeared as plaintiffs and defendants in more than half of the cases heard before the English ecclesiastical courts, a percentage that far surpasses women's participation in any court in the colonies.

While Part I offers a quantitative analysis of women's legal activities, Part II takes a qualitative approach. Drawing from petitions, depositions, testimonies, letters and inventories, Part II shows that women on both sides of the Atlantic were remarkably knowledgeable about their legal affairs and that many of them were actively involved in their legal cases. Women's legal competence was not necessarily linked to social status: both elite women and women lower on the social scale possessed a detailed knowledge of what they were entitled to under the law. Chapter 3 examines how the legal status of female servants and slaves evolved over the course of the seventeenth century. While female servants had a relatively wide spectrum of legal rights and routinely petitioned the courts for breach of contract, slaves had no legal standing before the courts. The legal relationship between a master and a female servant depended on a contract that stipulated the amount of time to be served and the payment the woman would receive for her labour. Masters owned the labour of the servant while she was under contract, but not the servant herself. The legal relationship between a master and a slave, however, was not subject to the terms of a contract. Masters owned not only the labour of their slaves but also their persons; this made it legally impossible for slaves to bring any grievances against their masters to court.

Chapter 4 assesses the legal power of wives, midwives and mothers in the legal regimes of Anglo-America. Though under coverture, wives clearly had a right to petition the courts to compel neglectful husbands to give them financial maintenance. Husbands had a patriarchal responsibility to provide for their wives and children, and magistrates had an interest in holding men to their obligations to care for their families. Laws regarding divorce and marital separation differed by location. In England and the

southern colonies, authorities granted full divorces in very few instances. Instead, these areas preferred separation of bed and board. Under this agreement the couple was still legally married and a wife could claim financial support from her husband even if she lived separately from him. The New England colonies, however, permitted couples who could not live harmoniously together to divorce; this agreement dissolved the marriage and negated any obligation of the husband to provide for his wife. Remarkably, in all areas of the Anglo-American world, a man who fathered children out of wedlock still had a patriarchal responsibility to provide financial support to his family. Mothers of these children, supported by midwives, could legally claim financial support from the men they named as the fathers even if the fathers denied the women's accusations.

While the women examined in chapter 4 are mostly of middling and lower status, those studied in chapter 5 are drawn from the English and colonial elite. This chapter draws from women's letters and correspondence to lawyers and family members to examine the depth of women's legal knowledge and how they participated in litigation even while they were under coverture. Different demographic patterns and inheritance laws across England and the colonies affected how elite women managed and protected their property, and defined the legal conflicts between women and their male relatives. In England the relative shortage of land and the likelihood of parents to live into old age often resulted in family feuds: widows who sought to gain their widow's portions came into conflict with heirs eager to receive their full inheritance. In the colonies, on the other hand, land was more abundant, a factor that released some of the pressure between generations. However, the longer life-spans of people in New England compared with those of people in the Chesapeake had a significant impact on elite women's control of property. In colonies such as Maryland the frequency of death and remarriage gave men an incentive to grant their widows wide authority over family property. Because widows usually remarried, this property was often placed in trust for the benefit of widows and children to prevent it from being squandered by a greedy step-father.

Part III takes us into the economic expansion and the increasing development of the equity jurisdiction in the eighteenth century. The legal regimes of England and the southern colonies gave women a wide latitude to pursue investment and trade and allowed married women greater financial independence than ever before. In urban areas of England and America the expansion of the use of feme sole trading status allowed married women to make contracts in their own names for transactions pertaining to their trade. The increasing appearance of women in cases

concerning mortgages, foreclosure, debts and contracts, all matters heard before the courts of equity, reveal women's wide participation in the economy as investors, renters, borrowers and lenders. Equity law also expanded married women's ability to retain control of their own property during marriage through the creation of new legal devices such as the simple agreement, equity to a settlement and restraint upon anticipation. Because of these economic and legal changes in the eighteenth century, family relationships came to be more defined by legal notions of contract rather than the mutual obligations that underpinned the patriarchal family.

## Notes

- 1 John Webster, *The Devil's Law-Case: or When Women goe to Law, the Devill is full of Businesse* (London, John Grismand: 1623), G 3.
- 2 Webster, *The Devil's Law-Case*, G 5–6.
- 3 For a discussion of women's portrayal in Jacobean and Restoration satires and dramas, see Tim Stretton, *Women Waging Law in Elizabethan England* (Cambridge: Cambridge University Press, 1998), pp. 55–69.
- 4 Christopher Brooks, *Lawyers, Litigation, and English Society Since 1450* (London: Hambledon, 1998), p. 68.
- 5 Amy Erickson, 'Common law versus common practice: the use of marriage settlements in early modern England', *Economic History Review*, 43:1 (1990), p. 28; Amy Erickson, *Women and Property in Early Modern England* (London: Routledge, 1993), p. 115. Wilfrid Prest estimates that women accounted for 40 per cent of all complainants before the Chancery court in 1625. See Wilfrid R. Prest, 'Law and women's rights in early modern England', *Seventeenth Century*, 6:2 (1991), p. 182.
- 6 Stretton, *Women Waging Law*, p. 39.
- 7 J. A. Sharpe, *Defamation and Sexual Slander in Early Modern England: The Church Courts at York* (York: Borthwick Institute of Historical Research, 1980), pp. 27–8.
- 8 Based on a sampling of a total of 241 cases from English ecclesiastical courts. Essex Record Office, Chelmsford, UK, Archdeacons of Essex Depositions, D/AE/D8; London Metropolitan Archives, London Commissary Court and London Consistory Court, D/CL. These sources are discussed in more detail in chapter 2. See also Laura Gowing, *Domestic Dangers: Women, Words, and Sex in Early Modern London* (Oxford: Oxford University Press, 1996), pp. 35–7.
- 9 Major works on Britain's establishment of and increasing control over the American colonies include James Horn, *Adapting to a New World: English Society in the Seventeenth-century Chesapeake* (Chapel Hill: University of North Carolina Press, 1994); Alan Taylor, *American Colonies: The Settling of North America* (London: Penguin, 2002); Nicholas Canny (ed.), *The Origins of Empire: British Overseas Enterprise to the Close of the Seventeenth Century* [vol. 1 of William Roger Louis (ed.), *The Oxford History of the British Empire*] (Oxford: Oxford University Press, 1998). On Britain's increasing economic control over the colonies, see John Brewer, *The Sinews of Power: War, Money, and the English State, 1688–1783* (London: Unwin Hyman, 1989); David Hancock,

- Citizens of the World: London Merchants and the Integration of the British Atlantic Community, 1735–1785* (Cambridge: Cambridge University Press, 1995).
- 10 Cynthia Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth-century England* (Cambridge: Cambridge University Press, 1987); J. H. Baker, *An Introduction to English Legal History*, 3rd edn (London: Butterworths, 1990), pp. 113–14, 147–52; Stretton, *Women Waging Law*, pp. 26–7.
- 11 David Thomas Konig, *Law and Authority in Puritan Massachusetts: Essex County, 1629–1692* (Chapel Hill: University of North Carolina Press, 1979), pp. 109–13, 156–7.
- 12 Horn, *Adapting to a New World*.
- 13 Christopher Tomlins and Bruce Mann (eds), *The Many Legalities of Early America* (Chapel Hill: Omohundro Institute of Early American History and Culture, 2001), Introduction.
- 14 See the arguments made by John Murrin, including ‘The legal transformation: the bench and bar of eighteenth-century Massachusetts’, in Stanley Katz and John Murrin (eds), *Colonial America: Essays in Politics and Social Development* (Boston: Little, Brown, 1971).
- 15 William M. Offutt, Jr., *Of ‘Good Laws’ and ‘Good Men’: Law and Society in the Delaware Valley, 1680–1710* (Urbana: University of Illinois Press, 1995), pp. 16–17, 30.
- 16 Cornelia Hughes Dayton, *Women Before the Bar: Gender, Law, and Society in Connecticut, 1639–1789* (Chapel Hill: University of North Carolina Press, 1995), pp. 10–11; Cornelia Hughes Dayton, ‘Was there a Calvinist type of patriarchy? New Haven colony reconsidered in the early modern context’, in Tomlins and Mann (eds), *The Many Legalities of Early America*, p. 346. The origin of this thesis seems to come from Richard Morris, *Studies in the History of American Law: With Special Reference to the Seventeenth and Eighteenth Centuries* (New York: Octagon Books, 1930), pp. 126–8, 200. It has a strong presence in work on colonial women undertaken in the 1970s and 1980s. See Joan R. Gundersen and Gwen Victor Gampel, ‘Married women’s legal status in eighteenth-century New York and Virginia’, *William and Mary Quarterly*, 3rd series, 39:1 (1982), pp. 114–34; Nancy Cott, ‘Divorce and the changing status of women in eighteenth-century Massachusetts’, *William and Mary Quarterly*, 3rd series, 33:4 (1976), pp. 586–614; Sheldon Cohen, ‘What man hath put asunder: divorce in New Hampshire, 1681–1784’, *Historical New Hampshire*, 41:3 (1986), pp. 118–41. For more recent works, in addition to the works by Offutt and Dayton, see Elizabeth Reis, *Damned Women: Sinners and Witches in Puritan New England* (Ithaca: Cornell University Press, 1997), pp. xi–xii; Irmira Wawrzyczek, ‘The women of Accomack versus Henry Smith: gender, legal recourse, and the social order in seventeenth-century Virginia’, *Virginia Magazine of History and Biography*, 105:1 (1997), p. 6.
- 17 Lois Green Carr and Lorena S. Walsh, ‘The planter’s wife: the experience of white women in seventeenth-century Maryland’, *William and Mary Quarterly*, 3rd series, 34:4 (1977), p. 543; Linda Sturtz, *Within Her Power: Propertied Women in Colonial Virginia* (New York: Routledge, 2002), pp. 6–7, 11.
- 18 The following list is not exhaustive but will give the reader a sense of the trend of this historiography. In addition to the works discussed in the text, see Maria Cioni, *Women and the Law in Elizabethan England, with Particular Reference to the Court of Chancery*



- (New York: Garland, 1985); Maria Cioni, 'The Elizabethan Chancery and women's rights', in D. J. Guth and J. W. McKenna (eds), *Tudor Rule and Revolution* (Cambridge: Cambridge University Press, 1982), p. 160; Prest, 'Law and women's rights in early modern England', pp. 169–87; Christine Churches, 'Putting women in their place: female litigants at Whitehaven, 1660–1760', in Nancy Wright, Margaret Ferguson and A. R. Buck (eds), *Women, Property, and the Letters of the Law in Early Modern England* (Toronto: University of Toronto Press, 2004), pp. 50–65; David Lemmings, 'Women's property, popular cultures, and the Consistory Court', in Wright, Ferguson and Buck (eds), *Women, Property, and the Letters of the Law in Early Modern England*, pp. 66–94; Joanne Bailey, 'Favoured or oppressed? Married women, property, and "coverture" in England, 1660–1800', *Continuity and Change*, 17:3 (2002), pp. 351–72; Margaret Hunt, 'Wives and marital "rights" in the Court of Exchequer in the early eighteenth century', in Paul Griffiths and Mark Jenner (eds), *Londinopolis: Essays in the Cultural and Social History of Early Modern London* (Manchester: Manchester University Press, 2000), pp. 111–12; Margot Finn, 'Women, consumption, and coverture in England, c. 1760–1860', *Historical Journal*, 39:3 (1996), p. 703; Bronach Kane and Fiona Williamson (eds), *Women, Agency, and the Law, 1300–1700* (London: Pickering and Chatto, 2013); Tim Stretton and Krista Kesselring (eds), *Married Women and the Law: Coverture in England and the Common Law World* (Montreal: McGill-Queen's University Press, 2013).
- 19 Pearl Hogrefe, 'Legal rights of Tudor women and the circumvention by men and women', *Sixteenth Century Journal*, 3:1 (1972), pp. 97–105; Ruth Kittel, 'Women under the law in medieval England, 1066–1485', in Barbara Kanner (ed.), *The Women of England: Interpretive Bibliographical Essays* (Hamden: Archon, 1979), pp. 131–2; Patricia Crawford, 'From the woman's view: pre-industrial England, 1500–1750', in Patricia Crawford (ed.), *Exploring Women's Past: Essays in Social History* (London: George Allen & Unwin, 1984), pp. 61–3.
  - 20 Stretton, *Women Waging Law*; Erickson, *Women and Property*, pp. 27, 32–5, 156–71; Erickson, 'Common law versus common practice', pp. 21–39; Susan Staves, *Married Women's Separate Property in England, 1660–1833* (Cambridge, MA: Harvard University Press, 1990).
  - 21 Christine Churches, 'Women and property in early modern England: a case-study', *Social History*, 23:2 (1998), pp. 165–80.
  - 22 Craig Muldrew, '"A mutual assent of her mind"? Women, debt, litigation, and contract in early modern England', *History Workshop Journal*, 55:1 (2003), pp. 47–71. See also Marjorie K. McIntosh, 'The benefits and drawbacks of *femme sole* status in England, 1300–1630', *Journal of British Studies*, 44 (2005), pp. 410–38.
  - 23 Two notable exceptions are worth mentioning here. First, see the cluster of articles on gender, sexuality and family in the early modern Atlantic world, which begins to explore some of the benefits of a transnational approach to women's history, especially the article by Karin Wulf, 'Women and families in early (North) America and the wider (Atlantic) world', in 'Rethinking gender, family and sexuality in the early modern Atlantic world', *History Compass*, 8:3 (2010), pp. 238–47. Also, although her analysis is focused on a comparison of elite women in Britain and America in the eighteenth

- century, see Rosemary O'Day, *Women's Agency in Early Modern Britain and the American Colonies* (London: Pearson, 2007).
- 24 Carole Shammas, 'Anglo-American household government in comparative perspective', *William and Mary Quarterly*, 3rd series, 52:1 (1995), pp. 104–44.
- 25 On the contested nature of patriarchy, see Terri Snyder, *Brabbling Women: Disorderly Speech and the Law in Early Virginia* (Ithaca: Cornell University Press, 2003); Anthony Fletcher, *Gender, Sex, and Subordination in England, 1500–1800* (New Haven: Yale University Press, 1995).
- 26 Stretton and Kesselring, *Married Women and the Law*, p. 5.
- 27 Cordelia Beattie and Matthew Stevens (eds), *Married Women and the Law in Premodern Northwest Europe* (Woodbridge: Boydell Press, 2013).
- 28 Walter Johnson, 'On agency', *Journal of Social History*, 37:1 (2003), pp. 115–16.
- 29 Cornelia Hughes Dayton, 'Rethinking patriarchy, recovering voices', *American Historical Review*, 109:3 (2004), pp. 842–43; Dana Wessell Lightfoot, *Women, Dowries and Agency: Marriage in Fifteenth-Century Valencia* (Manchester: Manchester University Press, 2013), pp. 2–8.
- 30 R. H. Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* [vol. 1 of *The Oxford History of the Laws of England*] (Oxford: Oxford University Press, 2004), pp. 339–40.
- 31 Frances Dolan, *True Relations: Reading, Literature, and Evidence in Seventeenth-Century England* (Philadelphia: University of Pennsylvania Press, 2013), p. 122.
- 32 Joanne Bailey, 'Voices in court: lawyers' or litigants?', *Historical Research*, 74:186 (2001), pp. 393–4.
- 33 One of the pioneers of this approach of 'unlocking' legal records by focusing on the presentation of women's arguments in court was Stretton, *Women Waging Law*, pp. 10–19.