

## Women Negotiating the Boundaries of Justice in Britain, 1300–1700: An Introduction

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**Abstract** This introduction places the articles featured in this special issue of the *Journal of British Studies* within the context of recent scholarship on late medieval and early modern women and the law. It is designed to highlight the many boundaries that structured women's legal agency in Britain, including the procedural boundaries that filtered their voices through male advisers and officials, the jurisdictional boundaries that shaped litigation strategies, the constraints surrounding women's appearance as witnesses in court, the gendered differentiation of rights determined by primogeniture and marital property law, and the boundaries between legal and extralegal activity. Emphasizing the importance of a nuanced approach, it rejects the construction of women's litigation simply as a form of resistance to patriarchal norms and also urges caution against overestimating or oversimplifying the choices available to women in legal disputes or their latitude to operate as autonomous individuals. Gender intersected in British courts with locality, resources, jurisdiction, social status, and familial, religious, and political affiliations to inform different women's access to justice, which involved negotiations between unequal actors within various constraints and in complex alignment with multiple and often competing interests.

**T**he selection of articles in this special issue of the *Journal of British Studies* explores women's interactions with courts of law in Britain between the later Middle Ages and the eighteenth century. Focusing on the incidence and legal significance of female litigants and witnesses in a variety of jurisdictions spanning central and urban courts in England and Scotland, the articles together investigate the ways in which women's capacities to negotiate legal institutions intersected with and were shaped by legal custom, regional difference, and broader social and cultural contexts. Sensitive to the conceptual and methodological challenges associated with recovering women's access to and representation before the law, the contributors explore the strategies pursued to promote or dispute women's claims, rights, and interests—for example, as mothers, wives, executrices, or widows—in specifically gendered terms.<sup>1</sup>

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<sup>1</sup> This collection of articles originated in a workshop held at Cardiff University in April 2016, sponsored by the Arts and Humanities Research Council funded project Women Negotiating the Boundaries of Justice: Britain and Ireland, c. 1100–c. 1750 (AH/L013568/1).

The articles consider a series of boundaries that structured women's interactions with the law in late medieval and early modern Britain: the procedural boundaries that filtered women's voices through male advisers and officials; the jurisdictional boundaries that determined women's appearance in different courts; the constraints surrounding women's participation as witnesses in court; the gendered differentiation of rights dictated by marital property law; the boundaries between legal and extralegal activity; and the opportunities some women seized to overcome the barriers that appeared to bar their way.

The overarching goal of the articles is to gain an understanding of the ways that laws and patriarchal values intersected in legal processes and how women from a variety of backgrounds adapted to, gained advantage from, or were prejudiced by their entry into venues staffed by male officials and personnel. The articles therefore challenge the male-dominated paradigms of legal history as an institution-led field of study that has traditionally assumed a male universal subject, by prioritizing the experiences of female court users and highlighting the patriarchal character of the law.<sup>2</sup> The aim is not to essentialize women as subjects but rather to explore the ways in which, over the medieval and early modern periods, the diversity of women's backgrounds, locations, and life choices shaped their experiences of justice. The success or failure of women's legal activities clearly depended on a range of factors apart from gender, from locality, resources, and jurisdiction to social status and familial and political affiliations. Consequently, the authors evaluate the levels of legal agency that women achieved not simply as forms of resistance but in terms of participation in dealings and negotiations between unequal actors, within various constraints, and involving the complex alignment of multiple and often competing interests. In particular, they engage with and question the extent to which women interacted with the law as autonomous individuals, as members of their broader families, or as instruments of others' interests, exploiting opportunities and facing restrictions in each of these capacities. Exploring women's legal activities in these terms raises larger questions for social and legal historians about when and how to separate the shared interests of legal parties working in unison. It also serves to highlight how men's legal activity was subject to similar entanglements and interdependencies, further demonstrating the ways in which women's legal history can inform (rather than merely supplement) the subject as a whole.<sup>3</sup>

With their focus on women's participation in the courts (rather than on the ways in which the law regulated women's lives), these articles build on and extend existing scholarship focused on women's legal rights and on the operation of the law in early modern Britain. Early feminist explorations of women's legal status exposed the central role that laws and legal institutions played in creating and policing patriarchal norms and structures. For many scholars, the two key offenders in England were the custom of primogeniture in inheritance and the rules of coverture in marriage, whereby a woman's legal identity and obligations were subsumed by those of her husband. Both of these manifestations of common law ideology discriminated against women as holders of resources based upon their supposed incapacity, by

<sup>2</sup> Felice Batlan, "Engendering Legal History," *Law and Social Inquiry* 30, no. 4 (Fall 2005): 823–51; Julie Hardwick, "Women 'Working' the Law: Gender, Authority and Legal Process in Early Modern France," *Journal of Women's History* 9, no. 3 (Autumn 1997): 28–49.

<sup>3</sup> Felice Batlan, "Introduction: Making History," *Chicago-Kent Law Review* 87, no. 2 (2012): 335–46.

expressing a clear preference for sons over daughters and husbands over wives.<sup>4</sup> Having established the significance of legal bias, later generations of scholars turned to the operation of legal rules and institutions in practice. In archive after archive, they found evidence of thousands of women actively asserting and defending their rights and property interests in a range of legal contexts.<sup>5</sup> Moreover, the explosion of litigation in the sixteenth and seventeenth centuries had the effect of educating more and more women about available legal opportunities.<sup>6</sup> Meanwhile, the emergence and development of legal instruments such as trusts, jointures, and marriage settlements provided possibilities for avoiding some of the effects of coverture.<sup>7</sup> So great was the autonomy exercised by certain knowledgeable and well-resourced women that recent scholars have begun to minimize the influence of coverture. In practice, coverture could provide a complex mix of both opportunity and constraint to married women and their husbands.<sup>8</sup> The extent to which these complexities

<sup>4</sup> Susan Moller Okin, “Patriarchy and Married Women’s Property in England: Questions on Some Current Views,” *Eighteenth-Century Studies* 17, no. 2 (Winter 1983–84): 121–38; Amy Louise Erickson, *Women and Property in Early Modern England* (London, 1993); Eileen Spring, *Law, Land, and Family: Aristocratic Inheritance in England, 1300 to 1800* (Chapel Hill, 1993); Jane Whittle, “Inheritance, Marriage, Widowhood and Remarriage: A Comparative Perspective on Women and Land,” *Continuity and Change* 13, no. 1 (May 1998): 33–72; Sandy Bardsley, “Peasant Women and Inheritance of Land in Fourteenth-Century England,” *Continuity and Change* 29, no. 3 (December 2014): 297–324.

<sup>5</sup> See, for example, Maria Cioni, *Women and Law in Elizabethan England, with Particular Reference to the Court of Chancery* (New York, 1985); Christine Churches, “Women and Property in Early Modern England: A Case Study,” *Social History* 23 (May 1998): 165–80; Laura Gowing, *Domestic Dangers: Women, Words and Sex in Early Modern London* (Oxford, 1998); Leah Leneman, *Alienated Affections: The Scottish Experience of Divorce and Separation, 1684–1830* (Edinburgh, 1998); Anastasia B. Crosswhite, “Women and Land: Aristocratic Ownership of Property in Early Modern England,” *New York University Law Review* 77, no. 4 (October 2002): 1119–56; Barbara Harris, *English Aristocratic Women, 1450–1550: Marriage and Family, Property and Careers* (Oxford, 2002); Barbara Hanawalt, *The Wealth of Wives: Women, Law, and Economy in Late Medieval London* (Oxford, 2007); Anne Laurence, “Women and the Transmission of Property: Inheritance in the British Isles in the Seventeenth Century,” *Dix-Septième Siècle* 244, no. 3 (2009): 435–50; Lloyd Bonfield, “Finding Women in Early Modern English Courts: Evidence from Peter King’s Manuscript Reports,” *Chicago-Kent Law Review* 87, no. 2 (March 2012): 371–91; Sara Butler, *Divorce in Medieval England: From One to Two Persons at Law* (London, 2013); Lindsay Moore, “Women, Property, and the Law in the Anglo-American World, 1630–1700,” *Early American Studies* 14, no. 3 (Summer 2016): 537–67; Cathryn Spence, *Women, Credit and Debt in Early Modern Scotland* (Manchester, 2016).

<sup>6</sup> Mihoku Suzuki, “Daughters of Coke: Women’s Legal Discourse in England, 1642–1689,” in *Challenging Orthodoxies: The Social and Cultural Worlds of Early Modern Women*, ed. Sigrun Haude and Melinda S. Zook (Farnham, 2014), 165–92; Emma Hawkes, “[S]he Will ... Protect and Defend her Rights Boldly by Law and Reason ...”: Women’s Knowledge of Common Law and Equity Courts in Late Medieval England,” in *Medieval Women and the Law*, ed. Noël James Menuge (Woodbridge, 2000), 145–61.

<sup>7</sup> Susan Staves, *Married Women’s Separate Property in England, 1660–1833* (Cambridge, MA, 1990); Amy Louise Erickson, “Common Law versus Common Practice: The Use of Marriage Settlements in Early Modern England,” *Economic History Review* 43, no. 1 (February 1990): 21–39.

<sup>8</sup> Margot Finn, “Women, Consumption and Coverture in England, c. 1760–1860,” *Historical Journal* 39, no. 3 (September 1996): 703–22; Joanne Bailey, “Favoured or Oppressed? Married Women, Property and ‘Coverture’ in England, 1660–1800,” *Continuity and Change* 17, no. 3 (December 2002): 351–72; Marjorie K. McIntosh, “The Benefits and Drawbacks of *Femme Sole* Status in England, 1300–1630,” *Journal of British Studies* 44, no. 3 (July 2005): 410–38; Amy Louise Erickson, “Possession—and the Other One-Tenth of the Law: Assessing Women’s Ownership and Economic Roles in Early Modern England,” *Women’s History Review* 16, no. 3 (July 2007): 369–85; Cordelia Beattie and Matthew Frank Stevens, eds., *Married Women and the Law in Premodern Northwest Europe* (Woodbridge, 2013);

delivered latitude to married women, however, perhaps should not be too readily overestimated, given coverture's overarching power in the legal imagination and for the population as a whole.<sup>9</sup> What remains the key question when considering women's legal autonomy is how best to reconcile the existence of generally discriminatory rules with specific examples of women defying those rules. There is clearly a need to move beyond simple narratives of resistance or celebrations of agency to investigate the full variety of different women's experiences as well as the law's complicated interrelationship with practice and influence on people's daily lives.

Exploring and understanding the autonomy that women could achieve in legal dealings involves recognizing that they could be defendants as well as plaintiffs and could manipulate and misuse the law as well as fall victim to it. It also requires the employment of sliding scales, acknowledging that some women named in lawsuits played no part in them whatsoever, while others were active litigators who went so far as to correct their legal counselors on points of law and coach them about the best arguments to make.<sup>10</sup> The independence that women proved able to achieve at law varied immensely, given that involvement in litigation was rarely welcomed and individual litigants (male and female) could be reluctant and even involuntary participants. Making overarching generalizations about women's legal agency is unhelpful, as the articles make clear. At the same time, they show that approaching the character of premodern litigation from the vantage point of female litigants and witnesses sheds valuable light on the parameters surrounding access to the law as a resource and on the boundaries surrounding participation in the expanding activities of the courts. Assessment of particular women's legal independence requires clarity on the range of options available to them, the motivations and influences behind the choices they made, and their ability to secure the outcomes they desired. It also requires understanding the complexities of the laws, legal institutions, and property regimes that shaped and color surviving evidence.

The questions that literary scholars and cultural, social, and feminist historians continue to pose are working to liberate understandings of women's experiences of law, lifting legal curtains to reveal the workings of the power structures they conceal. Dangers remain, however, in using legal records without paying sufficient heed to the intricacies of the laws, legal institutions, and property regimes that produced them. In fact, it might be argued that those dangers are increasing, in the sense that the pioneers of the subject of women and the law immersed themselves in the scholarship of traditional legal historians to understand the technicalities of courts, procedures, and legal instruments. Current scholars, by contrast, are more likely to rely on the burgeoning array of works by non-legal specialists, raising the danger of a gradual lessening of expertise over time. The increasing pressure to publish also

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Bronach Kane and Fiona Williamson, eds., *Women, Agency and the Law, 1300–1700* (London, 2103); Alexandra Shepard, "Minding Their Own Business?: Married Women and Credit in Early Eighteenth-Century London," *Transactions of the Royal Historical Society* 25 (December 2015): 53–74.

<sup>9</sup> Tim Stretton, "Coverture and Unity of Person in Blackstone's *Commentaries*," in *Blackstone and His Commentaries: Biography, Law, History*, ed. Wilfrid Prest (Oxford, 2009), 111–27; Tim Stretton and Krista J. Kesselring, eds., *Married Women and the Law: Coverture in England and the Common Law World* (Montreal, 2013).

<sup>10</sup> Christine Churches, "'The Most Unconvincing Testimony': The Genesis and Historical Usefulness of the Country Depositions in Chancery," *Seventeenth Century* 17, no. 2 (September 1996): 209–27.

affords researchers less time to adequately understand legal contexts and how they may have affected women's choices (or absence of them) in legal environments; yet sound conclusions obviously depend on the rigorous and expert interpretation of evidence.

Bringing a British dimension to the fields of legal history and gender history, the articles in this special issue also address broader questions of state formation and legitimacy as well as the operation of patriarchy in conjunction with other dimensions of social inequality.<sup>11</sup> The boundaries and opportunities that shaped women's participation in the courts were a product of the "patriarchal state" ostensibly devoted to the preservation of established order and legitimized in such terms.<sup>12</sup> Notwithstanding procedural variations associated with the maze of multiple jurisdictions of the three kingdoms (with their roots in pre-common law, common law, and Roman law), the structures and processes of the courts rested on a pervasive vision of the social order founded on intersecting hierarchies of wealth, status, and gender.<sup>13</sup> The divinely ordained authority of rulers over subjects, masters over servants, parents over children, and rich over poor intersected with and overlaid that promoted for husbands over wives. The normative expectations these hierarchies of power helped create were intrinsic to the growing volume of criminal and civil litigation processed by courts through which the early modern state took shape. No matter how many legal loopholes, jurisdictional anomalies, or even gendered stereotypes women were able to exploit when pursuing or defending their interests, they were structurally disadvantaged by a system that was exclusively populated by male officials on whom they necessarily relied for legal advice, formal representation, judgments, and enforcement. This system therefore normalized and depended on principles of female subordination and male power (not least its violent expression), however much it could accommodate women's claims in particular instances.<sup>14</sup> The choices available to women litigants, therefore, were always bounded by their gendered position within interlocking hierarchies of age, wealth, and status in ways that contributed to the legitimization of the state more than to the expansion of women's opportunities for participation. Furthermore, the legal independence that women did manage to achieve often emerged from and served family and dynastic strategies rather than efforts to expand individual rights. As Christine Churches observes, families and state officials expected wives and daughters "to play second fiddle, until the first fiddle had ceased to play."<sup>15</sup>

<sup>11</sup> Keith Wrightson, "The Politics of the Parish in Early Modern England," in *The Experience of Authority in Early Modern England*, ed. Paul Griffiths, Adam Fox, and Steve Hindle (Basingstoke, 1996), 10–46; Michael J. Braddick, *State Formation in Early Modern England, c. 1550–1700* (Cambridge, 2000); Steve Hindle, *The State and Social Change in Early Modern England, 1550–1640* (Basingstoke, 2000).

<sup>12</sup> Braddick, *State Formation*, 101–2.

<sup>13</sup> Michael J. Braddick and John Walter, "Introduction: Grids of Power: Order, Hierarchy and Subordination in Early Modern Society," in *Negotiating Power in Early Modern Society: Order, Hierarchy and Subordination in Britain and Ireland*, ed. Michael J. Braddick and John Walter (Cambridge, 2001), 1–42. See also Susan Dwyer Amussen, *An Ordered Society: Gender and Class in Early Modern England* (Oxford, 1988).

<sup>14</sup> Susan Dwyer Amussen, "Punishment, Discipline, and Power: The Social Meanings of Violence in Early Modern England," *Journal of British Studies* 34, no. 1 (January 1995): 1–34; Garthine Walker, *Crime, Gender and the Social Order in Early Modern England* (Cambridge, 2003); Alexandra Shepard, *Meanings of Manhood in Early Modern England* (Oxford, 2003).

<sup>15</sup> Churches, "Women and Property," 179.

This themed issue is organized into three sections. The first reflects on the collaborative processes whereby women's voices were represented in court and on the power relations inherent in shaping legal scripts. The extent to which historians might discern an authentic female voice in court records remains open to debate, recently reinvigorated by the publication of Frances Dolan's *True Relations*.<sup>16</sup> The articles in this section explore the impact of various procedural conventions that filtered women's claims before the law. Reflecting on the nature of surviving evidence of women's legal activities, and the difficulties that scholars face in interpreting it, Tim Stretton explores the smoke and mirrors at work in representing women's interests in court. Rather than pick sides in ongoing debates about the reliability of legal records, he advocates adopting methods suited to particular documents or archives, such as identifying the "repertoires" of values, norms, and assumptions that participants drew upon in legal conversations. Amanda Capern explores the operation of one such repertoire in the Court of Chancery in the seventeenth century, showing how women and their lawyers and opponents deployed the traits associated with good and bad mothering in conflicts over children and marital resources. Alexandra Shepard widens the focus beyond female litigants by investigating the conditions that presided over women's representation as witnesses in the church courts and the basis for, and barriers against, their assertions of authority.

The second section is more squarely focused on the intersection of women's access to justice with the demands and opportunities associated with particular courts. The volume of litigation in the late medieval and early modern periods has largely precluded approaches that trace disputes across multiple courts, making it difficult to relate the activities of litigants in a single jurisdiction to their broader legal strategies. Cordelia Beattie uses references to previous and subsequent litigation in Chancery bills to reconstruct women's pursuit of their claims across several jurisdictions and to establish a clearer outline of the complexity of women's legal strategies that spanned multiple suits and involved tactical variation in the representation of their claims. Contextualizing Chancery bills in relation to proceedings conducted elsewhere complicates our understanding of the "choices" exercised by women in Chancery and also defies generalization on the basis of gender—beyond the pervasive structural disadvantage faced by women who could not exercise official power either within or beyond the courts. Deborah Youngs similarly focuses on the "choices" available in Star Chamber to female litigants from Cheshire and Wales (whose palatinate courts precluded the option of entering a suit in the central courts of King's Bench and Common Pleas). Her article reveals the difficulties inherent in attempts to assess motives and measure agency within legal disputes while nonetheless demonstrating the attraction of Star Chamber to women, not least in attempts to correct local abuses of power.

The final section explores women's experiences in urban courts. In contrast to the sizable and growing scholarship on central courts, surprisingly little is known about women's contact with local jurisdictions in rural and urban communities, especially

<sup>16</sup> Frances E. Dolan, *True Relations: Reading, Literature, and Evidence in Seventeenth-Century England* (Philadelphia, 2013). See also Joanne Bailey, "Voices in Court: Lawyers' or Litigants'?", *Historical Research* 74, no. 186 (November 2001): 392–408.

in the early modern period.<sup>17</sup> Smaller urban courts had fewer resources and less oversight than national jurisdictions and often exhibited more flexibility in their procedures and adherence to rules. Their records can therefore be revealing of local priorities and the influence of ideologies or principles on the day-to-day operations of courts, seen, for example, in officials' toleration for exceptions to general rules. In particular they reveal the limited usefulness of approaching women in court exclusively as autonomous individuals, given how often their participation was contingent on their marital status and their obligations to and shared interests with others—particularly husbands (deceased and current) and children, but also siblings and wider kin. These entanglements regularly demanded more than the deft manipulation of gender stereotypes associated with, for example, the defenseless widow.<sup>18</sup> The articles in this section therefore examine the ways in which women pursued claims as daughters, betrothed singlewomen, mothers, wives, and widows, justifying their legal and extralegal pursuits in terms of protecting the interests of others besides themselves. Teresa Phipps's study of the representation of married women in cases of debt and trespass in Nottingham's borough court in the late Middle Ages and Rebecca Mason's survey of married women's litigation in the early modern Glasgow courts add new perspectives to recent examinations of the impact of coverture on women's legal representation by questioning the extent to which marital status was a straightforward category in these urban courts. In Nottingham, the descriptors applied to female litigants were inconsistent and not always dictated by their marital status, suggesting a flexible attitude to coverture depending on the issues in dispute. In Glasgow, Rebecca Mason has identified a "marital spectrum" that differentiates between wives litigating on the basis of a range of positions (for example, as remarried widows, as heirs to deceased parents, or as temporarily or permanently abandoned wives) that defy generalization about the legal impact of marital status.

All the articles ultimately complicate assessments of women's legal agency by embedding their litigating activities within procedural requirements and in relation to broader sets of claims that might not always have served their individual interests and over which they exercised varying levels of control. The resulting complexities did not benefit or disadvantage women either straightforwardly or uniformly. Their litigious activities were heavily shaped by legal requirements that demand careful assessment of the options women might have been able to pursue, and they were often not undertaken in isolation from all sorts of other strategies—legal and extralegal—that are rarely visible in the surviving record. Nonetheless, women's negotiation of the boundaries of justice was rarely, if ever, gender neutral. Women's representation in court was mediated by men at every turn and heavily steeped in gender norms and, as a result, shaped by gender differentiation—even if the possible positioning and outcomes were multifaceted and far from predictable.

<sup>17</sup> Medieval scholars of women, by contrast, have paid local courts considerable attention; see, for example, Miriam Muller, "Peasant Women, Agency and Status in Mid-Thirteenth- to Late Fourteenth-Century England: Some Reconsiderations," in Beattie and Stevens, *Married Women and the Law*, 91–113; Bardsley, "Peasant Women and Inheritance of Land."

<sup>18</sup> Tim Stretton, *Women Waging Law in Elizabethan England* (Cambridge, 1998), 180–87.