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Chapter 8

Daughters of Coke: Women's Legal Discourse in England, 1642–1689

Mihoko Suzuki

When I was writing the introduction to *The History of British Women's Writing, 1610–1690*, volume 3 of Palgrave Macmillan's 10-volume series, one of my tasks was to provide a retrospective history of scholarship of the field. I began with Virginia Woolf's *A Room of One's Own* (1929) and pointed out how her bemoaning of the fate of the fictional "Judith Shakespeare" was proven to be incorrect by scholars writing later in the twentieth century, who have described a vibrant literary culture among early modern women. Indeed, one of those scholars has been Hilda L. Smith, whose 1982 *Reason's Disciples* was a foundational work and an invaluable guide for scholars coming into the field, like myself. Smith's and Susan Cardinale's extensive annotated bibliography of 637 works by women, and nearly 1,000 works for and about women, became an indispensable resource for scholars in identifying texts for further study; it also proved influential in widening the study of women's writing beyond what was traditionally considered "literature." My essay on seventeenth-century women's use of legal discourse is an example of the abiding influence Smith's scholarship has had on the field.

* * *

In 1689, the year of the Glorious Revolution, Aphra Behn's last play, *The Widow Ranter*, was published posthumously. Behn satirizes the English legal system when she has Boozer, one of her Justices of the Peace, state: "though I can't read myself, I have had Dalton's Country Justice read over to me two or three times, and understand the law."¹ Dalton's *Country Justice* was a handbook for JPs that was first published in 1618 and reissued in new editions throughout the century, the latest edition before Behn's play appearing in 1677. Although here and elsewhere in her play Behn satirizes illiterate JPs, she indicates that literacy can lead to legal expertise, most notably in her own case, as she demonstrates her

¹ Aphra Behn, *The Widow Ranter*, in Aphra Behn, *Oroonoko, The Rover, and Other Works*, ed. Janet Todd (London, 1992), p. 287. Further citations in text.

familiarity with legal terms—such as affidavit *viva voce* and *se defendendo*—and addresses legal questions, such as “whether it be lawful to kill, though it be in war” (p. 294). Behn thereby makes an implicit but crucial connection between women’s literacy and legal expertise, and raises the question of how and to what ends seventeenth-century English women deployed this legal expertise.

Lawrence Stone has noted the “widespread public participation in significant intellectual debate on every front” during the years 1590 to 1690, and has explained this phenomenon by what he calls “the educational revolution” between 1560 and 1640 and the resulting high rate of literacy even among the poor.² Stone does not include women in his consideration of the “educational revolution,” however. Sir Edward Coke, one of the most prominent beneficiaries of the “educational revolution,” elucidated his reason for publishing accounts of his cases—“The reporting of particular Cases or Examples is the most perspicuous course of teaching, the right rule and reason of the Law”—and thereby indicated the importance of disseminating legal knowledge among the literate public.³ He states that he intends to make the law accessible to “any of the Nobilitie, or Gentry of this Realme, or of any other estate, or profession whatsoever.”⁴ In fact, James Sharpe states that “the common law ... was generally regarded as one of the subject’s major bulwarks against arbitrary government,” and that “popular participation in the criminal and administrative aspects of the law suggests both a familiarity with the law and a desire to use it.”⁵

Yet Sharpe’s focus is on popular participation in the law by men. And although Coke’s mother Winifred, the daughter of an attorney, owned and read law books, which became part of her son’s law library,⁶ Coke, like Stone, does not include women in his assumptions about the effects of education and literacy in creating a public informed of political and legal issues. Nevertheless, there is strong evidence that literacy among women as well as lower-class men rose significantly during this period, and that this “revolution” had significant effects on women’s legal expertise and political activism.⁷ Patricia Crawford has found

² Lawrence Stone, “The Educational Revolution in England, 1560–1640,” *Past and Present*, 28 (1964): 41–80.

³ Edward Coke, “To the Reader, Part Six of the Reports,” in *Selected Writings of Sir Edward Coke*, ed. Steve Sheppard (3 vols, Indianapolis, 2003), vol. I, pp. 140–41. Further citations from Coke are from this edition.

⁴ Coke, “Preface, Coke upon Littleton,” *Selected Writings*, vol. II, p. 585.

⁵ James Sharpe, “Popular Culture and the Law,” in Barry Reay (ed.), *Popular Culture in Seventeenth-Century England* (New York, 1985), pp. 244, 254.

⁶ Catherine Drinker Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke (1552–1634)* (Boston, MA, 1956), p. 45; Allen D. Boyer, *Sir Edward Coke and the Elizabethan Age* (Stanford, CA, 2003), p. 8.

⁷ A prominent example can be found in the case of Anne Clifford, who compiled her “Great Book” with the aid of the renowned jurist Matthew Hale in order to support

a dramatic rise in the number of women's published writings after 1640, which with some fall-off persisted into the Restoration; during the 1680s and 1690s their number matched and exceeded the level of the 1640s.⁸ In addition to the numerous works authored by women, many books, including books on the law, were targeted at women of various social ranks. For example, the 1632 *The Lawes Resolution of Womens Rights or the Lawes Provisions for Women* was subtitled *The Womans Lawyer*; and the 1700 *Baron and Feme: A Treatise of the Common Law Concerning Husbands and Wives* saw editions well into the eighteenth century, in 1719 and 1738.⁹ Although these works predictably prescribed the exclusion of women from the legal process and stipulated the inclusion of their legal persons in that of their husbands, I suggest that women readers drew on other texts to expand their supposedly very limited standing.

In the section titled "The punishment of Adams sinne," the *Lawes Resolutions* states:

Women have noo voyse in Parliament, They make no Lawes, they consent to none, they abrogate none. All of them are understood either married or to be married and their desires as subject to their husband, I know no remedy though some women can shift it well enough. The common Law here shaketh hand with Divinitie.¹⁰

her extensive litigation to reclaim the titles and lands that her father had willed away from her. See Mihoko Suzuki, "Anne Clifford and the Gendering of History," *Clio: A Journal of Literature, History, and the Philosophy of History*, 30 (2001): 195–229. On Elizabethan women who "refused to be passive victims of a restrictive legal system and became active plaintiffs or vociferous defendants in a clutch of different law courts," see Tim Stretton, *Women Waging Law in Early Modern England* (Cambridge, 1998); the quotation is from p. xii. Stretton points out that one-third of the cases before the judges of Requests involved a female plaintiff or defendant (p. 7). See also W.R. Prest, "Law and Women's Rights in Early Modern England," *The Seventeenth Century*, 6 (1991): 169–87, on "the possibility that early modern English women were increasingly able to use the law for their own ends, rather than remaining crushed by its overwhelming masculinity" (p. 183).

⁸ Patricia Crawford, "Women's Published Writings 1600–1700," in Mary Prior (ed.), *Women in English Society, 1500–1800* (New York, 1985), p. 212, fig. 7.1.

⁹ Prest, "Law and Women's Rights," pp. 178–9, states that the *Lawes Resolutions* expresses "a broad sympathy ... with the lot of women, or at least ... propertied women," and that it represents women as "legally underprivileged, ... discriminated against, and vulnerable to exploitation." He also maintains that, while the text "occasionally address[es] a putative female reader," "its major audience must have come from the exclusively male membership of the inns of court" (pp. 179, 181). As he points out, however, the text is in English rather than law French, which does indeed make it available to non-professionals, including women.

¹⁰ E.[dgar] T.[homas], *The Lawes Resolutions of Womens Rights* (London, 1632), p. 6.

And in the chapter on “The Nature of a Feme Covert,” the anonymous author of the *Baron and Feme* declares:

Coverture is tegere in Latin, and is so called for that the Wife is sub potestate viri. The law of Nature hath put her under the Obedience of her Husband, and hath submitted her Will to his, which the Law follows, cui ipsa in vita sua contradicere non potuit, and therefore will not bind her by her Acts joyning with her Husband, because they are judged his Acts, and not hers; she wants Free Will as Minors want Judgment ... A Feme covert in our Books is often compared to an Infant, both being persons disabled in the Law, but they differ much; an Infant is capable of doing any Act for his own advantage, so is not a Feme Covert. A Lease made by an Infant without Rent is not void, but voidable; but is void in the case of a Feme covert.¹¹

Between the publication of these two texts, during the mid-century English Civil Wars and their aftermath, which culminated in the Glorious Revolution, we find a number of salient examples of women who asserted their legal and, by extension, political standing that belie these accounts of the severely circumscribed status of women as “femes coverts,” even though the *Laws Resolutions* derives the authority of its statements from common law, and *Baron and Feme* from natural law.

Women and Legal Discourse before 1642

Four years before the 1632 publication of the *Laws Resolutions*, Sir Edward Coke’s commentary on Littleton was published as the first volume of Coke’s four *Institutes of the Laws of England*. Many have noted that Coke’s title announces its affinity to Justinian’s codification of Roman Law.¹² We may see the *Laws Resolutions* as having been compiled in the same spirit, albeit on a much smaller scale, of setting out a codification of the law pertaining to women in England. During the watershed 1628 Parliament and provoked by Charles I’s arrest of the five knights for refusing to contribute to the Forced Loan, Coke and others asserted the liberties of the subject based on the rule of law. To this end, Coke provided an ideology that closely linked liberty to property by claiming that no man was a tenant-at-will for his liberties, and that if a lord could not imprison a villain without cause, then no king could imprison a freeman without

¹¹ *Baron and Feme. A Treatise of the Common Law Concerning Husbands and Wives* (London, 1700), pp. 7–8.

¹² See, for example, Richard Helgerson, *Forms of Nationhood: The Elizabethan Writing of England* (Chicago, IL, 1992), p. 90. Allen Boyer, *ODNB*, s.v.

cause.¹³ Coke collaborated with John Selden in asserting the subject's right to property, goods, and liberty by establishing limits to royal power and in drafting the Petition of Right. They deliberately chose the form of the petition because Charles threatened to veto any bill that would do more than affirm Magna Carta and would curtail his prerogative. Belying the form of its submission, which was presumably more palatable to the monarch, the petition was assertive in declaring subjects' rights; in fact, Coke refused the language suggested by the Lords that described the king as "gracious," and stated that the Magna Carta was a right and not granted by grace of the King.¹⁴ This ideology of the form of the petition is one that the women I will be discussing found useful for their own purposes.¹⁵ After demurring, Charles was forced to accept the Petition because Parliament threatened to impeach his favorite, George Villiers, Duke of Buckingham. The Petition is notable for emphasizing the primacy of "the laws or statutes of this realm," and affirms Magna Carta as "the Great Charter of the Liberties of England." Coke had earlier enraged James I by denying him judicial prerogative because he did not have the requisite legal expertise, or what he called "artificial reason," by asserting the principle that the law and the legal process were independent of monarchical will.¹⁶

¹³ On the 1628 Parliament, and the importance of the Forced Loan in motivating an articulation of the property rights of the subject, see J.P. Sommerville, *Royalists and Patriots: Politics and Ideology in England 1603–1640* (2nd ed., London, 1999), pp. 146–7.

¹⁴ On Coke and the Petition of Right, see Stephen D. White, *Sir Edward Coke and "The Grievances of the Commonwealth" 1621–1628* (Chapel Hill, NC, 1979), pp. 260–74. See also Elizabeth Read Foster, "Petitions and the Petition of Right," *Journal of British Studies*, 14 (1974): 21–45; J.A. Guy, "The Origins of the Petition of Right Reconsidered," *Historical Journal*, 25 (1982): 289–312.

¹⁵ On the history of the concept of the "petition," see Lois Schwoerer, *Declaration of Rights, 1689* (Baltimore, MD, 1981), pp. 14–15; and David Zaret, *The Origins of Democratic Culture: Printing, Petitions, and the Public Sphere in Early Modern England* (Princeton, NJ, 2000). On women's civil war petitioning, see Ellen McArthur, "Women Petitioners and the Long Parliament," *English Historical Review*, 24 (1909): 698–709; Keith Thomas, "Women and the Civil War Sects," *Past and Present*, 13 (1958): 42–62; Patricia Higgins, "The Reactions of Women, with Special Reference to Women Petitioners," in Brian Manning (ed.), *Politics, Religion and the English Civil War* (New York, 1973), pp. 177–222; Anne-Marie McEntee, "The [Un]Civill-Sisterhood of Oranges and Lemons: Female Petitioners and Demonstrators, 1642–53," in James Holstun (ed.), *Pamphlet Wars: Prose in the English Revolution* (London, 1992), pp. 92–111; and Mihoko Suzuki, *Subordinate Subjects: Gender, the Political Nation, and Literary Form in England, 1588–1688* (Aldershot, 2003), pp. 145–51.

¹⁶ Thomas G. Barnes, "Introduction to Coke's 'Commentary on Littleton,'" in Allen D. Boyer (ed.), *Law, Liberty and Parliament: Selected Essays on the Writings of Sir Edward Coke* (Indianapolis, 2004), p. 13. On "artificial reason," see John Underwood Lewis, "Sir Edward Coke (1552–1634): His Theory of 'Artificial Reason' as a Context for Modern Basic Legal Theory," *Law Quarterly Review*, 84 (1968): 330–42; Boyer, *Sir Edward Coke*, ch. 7.

Although Coke became a champion of the rights of subjects against arbitrary and illegal royal power, these subjects, of course, did not include women. In fact, Coke proved to be a tyrannical husband and father, compelling his daughter to marry against her will in order to advance his own political position, thereby permanently alienating his wife, Elizabeth Hatton (who continued to use her first husband's name). Coke had his wife imprisoned with the cooperation of Bacon, who issued the warrant, and had his daughter "tied to the Bedposts and whipped till she consented to the Match."¹⁷ Elizabeth Hatton withstood the pressure Buckingham and the King brought on her to settle some of her property on her son-in-law. In 1634 she successfully filed a complaint against her husband before the Council for various misdeeds, including misappropriating her property, thereby indicating that she clearly did not acquiesce to the assumption that the wife's property belonged to the husband. At Coke's death, she is reported to have remarked, "[w]e shall never see his like again, praises be to God."¹⁸

Charlotte Carmichael Stopes, whose 1894 *British Free Women* was a pioneering study of women's political standing in medieval and early modern England, states that Coke contravened early evidence of women's citizenship to categorically deny women the right to vote.¹⁹ Coke, of course, was not alone in

¹⁷ Laura Norsworthy, *The Lady of Bleeding Heart Yard: Lady Elizabeth Hatton, 1578–1646* (New York, 1936), pp. 61–2. Sir Gerard Herbert, writing to Sir Dudley Carleton, reported: "My Lord Coke gave his daughter to the Kynge ... The Kynge gave her Sir Iohn Villers ... My Lord Coke looked with a merrie Countenance and sate at the dynner and supper, but my Ladie Hatton was not at the weddinge, but is still at Alderman Bennettes prisonere ... The Sondag my Lord Coke was restored to his place of counsellor as befor ..." (pp. 66–7). Despite her differences with Coke, Hatton became a staunch supporter of Parliament during the Civil Wars and wrote to Prince Rupert: "The Parliament is the only firm Foundation of the greatest Establishment the King or his Posterity can wish and attain, and therefore if you should persist in the unhappinesse to support any Advice to break the Parliament upon any Pretence whatsoever, you shall concur to destroy the best Groundwork for His Majesty's Prosperity" (p. 246). In her will she left substantial amounts for the charities for the poor and for the maintenance of maidservants.

¹⁸ British Library, Harleian MS. 7193, fol. 16. Quoted in Barnes, "Introduction," p. 9. Barnes calls Elizabeth Hatton a "harridan" and accuses her of being "given to histrionics and vile temper tantrums ... [s]elfish, demanding, a prodigal spender"; he blames her for the "scandal and indignity visited upon Coke by this unfortunate union," even though he later acknowledges that Coke "assured himself of Buckingham's favor by forcibly abducting his youngest daughter from Lady Hatton's house and marrying the girl to Buckingham's older brother" (p. 16). Bowen, *The Lion and the Throne*, p. 123, also states that, for Coke, the marriage with Lady Hatton, a "gay willful lady, absorbed in dress and society," was "the mistake of his life." Bowen, in her celebratory biography of Coke, generally dismisses Hatton's claims (pp. 397, 399).

¹⁹ Charlotte Carmichael Stopes, *British Freewomen: Their Historical Privilege* (London, 1894), ch. 7.

promoting this asymmetry between male and female subjects. Simonds D'Ewes, who declared in 1640 “the poorest man ought to have a voice, that it was the birthright of the subjects of England”—anticipating Thomas Rainsborough's championing of the political rights of “the poorest hee that is in England” in the Putney Debates²⁰—also declined to extend these rights to women.²¹ Selden was unusual in arguing for women's political rights in *Jani Anglorum facies altera* (*The Other Face of English Law*), translated into English in 1583 as *The English Janus*. Chapter XII is titled: “Women admitted to public debates. A large commendation of the Sex, together with a vindication of their fitness to govern; against the Salick Law, made out by several examples of most Nations.”²² The examples Selden gives include Catherine de' Medici and “our late Sovereign of Ever Blessed Memory, the Darling of Britan, Q. ELIZABETH, ... a great Spirit in discharge the duties of the Kingdom; she levied new Armies, kept the old ones to duty; she governed her Subjects with Clemency, kept her Enemies quiet with threats; in a word, did every thing at that rate, that there was no other difference betwixt her and any King in management, but her Sex.”²³ Since this English translation by Redman Westcot was not published until 1683, the work was not widely available to women readers.

By contrast, although Coke's 11-volume *Reports* were in law French, he wrote the prefaces in English; and the first book of his *Institutes* made available a translation into English of Littleton's *Tenures*, published originally in law French, along with Coke's commentary in English. The publication of subsequent volumes of his *Institutes* was suppressed by the Crown, but in 1642 the Long Parliament ordered them to be published.²⁴ As Richard Helgerson argued, Coke's writings were “working books, books that every common lawyer needed to own and consult,” but in addition they were “ideal figurations of the legal community and the nation ... that told not only how the law functioned and what the courts had decided but also what England was and what part lawyers had in the making of its identity.”²⁵ Following Helgerson, I suggest that the *Institutes* made legal knowledge concerning the common law and subjects' rights in relation to the Crown available to a wider reading public, rather than

²⁰ A.S.P. Woodhouse (ed.), *Puritanism and Liberty Being the Army Debates (1647–1649) from the Clark Manuscripts* (London, 1992), p. 53.

²¹ Simonds D'Ewes, *The Journal of Sir Simonds D'Ewes*, ed. Wallace Nottestein (New Haven, CT, 1923), p. 43.

²² John Selden, *The English Janus* (London, 1683), p. 24 (misnumbered for p. 18).

²³ *Ibid.*, pp. 19–20.

²⁴ The Crown also seized Coke's papers immediately before his death, but the Long Parliament vindicated him by ordering the papers returned to his son on the same day as the execution of Thomas Wentworth, Earl of Strafford.

²⁵ Helgerson, *Forms of Nationhood*, p. 86.

just lawyers. And this wider reading public included women, even though Coke most certainly did not intend women to be part of his readership.²⁶

Brilliana Harley and the Female Levellers during the Civil Wars

Keeping this state of affairs in mind, I now turn to two examples of women's legal discourse during the English Civil Wars, in which women asserted their rights as subjects protected by the "law of the land." My first example is Brilliana Harley, whose father, Edward Conway, first Viscount Conway and first Viscount Killultagh (c. 1564–1631), enjoyed a prominent political career that coincided with that of Coke. Brilliana became the third wife of her father's protégé, Sir Robert Harley, Puritan MP. Harley is mostly known for her "Ned" letters, which she wrote to her son Edward Harley when he was a student at Oxford. Sidney Lee characterized these letters in his 1908 *DNB* entry on Harley as "chiefly remarkable for their proofs of maternal affection. They abound in domestic gossip, religious reflections and sound homely advice."²⁷ Until as recently as 2004 these letters were regarded as "maternal letters," belonging to the genre of "mother's advice."²⁸ However, Jacqueline Eales, Susan Wiseman, and Joanne Wright have discussed the political import of Harley's letters, including those to her husband, who was attending the Long Parliament during the royalist siege of their seat, Brampton Bryan.²⁹ I extend their discussion to place the legal arguments that underpin Harley's writings in the context of political developments in the 1620s and 1630s.

Even in the letters to "Ned" in which Harley does indeed display maternal concern, sending pies and quinces to him and his tutor, she gives extensive accounts of political developments, thus indicating that one of the main purposes of the letters is the exchange of political news. The more than maternal and

²⁶ Stretton, *Women Waging Law*, p. 33, points out that the common law courts "were often the most helpful organs of justice for women, more helpful at times than equity courts" for those litigating on issues other than marriage and inheritance—for example, "as creditors, debtors, executrixes, administratrixes, lease-holders, tenants, midwives, servants or traders seeking redress for wrongs."

²⁷ S.[idney] L.[ee], *Dictionary of National Biography* (1908) s.v.

²⁸ Raymond Anselment, "Katherine Paston and Brilliana Harley: Maternal Letters and the Genre of Mother's Advice," *Studies in Philology*, 101 (2001): 431–53.

²⁹ Jacqueline Eales, "Patriarchy, Puritanism and Politics: The Letters of Lady Brilliana Harley," in James Daybell (ed.), *Early Modern Women's Letter Writing, 1450–1700* (New York, 2001), pp. 143–58; Susan Wiseman, *Conspiracy and Virtue: Women, Writing and Politics in Seventeenth-Century England* (Oxford, 2007), pp. 60–80; Joanne Wright, "Not Just Dutiful Wives and Besotted Ladies: Epistemic Agency in the War Writing of Brilliana Harley and Margaret Cavendish," *Early Modern Women: An Interdisciplinary Journal*, 4 (2009): 1–25.

filial nature of this correspondence is underlined by the concern she expresses: “When you rwite by the carrier, rwite nothing but what any may see, for many times the letters miscarry.”³⁰ Given the current interest in the political writings of women in various modes and genres, we are now positioned to read these letters in a new light that emphasizes their engagement with the legal, as well as the political, discourses of the day.³¹

In the “Siege Letters” addressed to her husband, Harley indicates her keen interest in the conflict between King and Parliament, and Parliament’s assertion of its prerogatives against Charles. She closely follows the unfolding of events, such as Parliament’s passage of the Bill of Attainder against the Earl of Strafford and Charles’s attempt to arrest the five members of the House of Commons, applauding Parliament’s victories at every turn.³²

It is not surprising, then, that, when Harley addresses Charles I and his agents, who command her to cede Brampton Bryan to the Crown, her response is firmly based on the language used in the Petition of Right. When, on March 4, 1642–43, Fitzwilliam Coningsby, acting on behalf of Charles, summoned Harley and charged her “in his Majesties name to deliver up to his Majesties use the fort and Castle of Brampton Brian, with all Arms, Ammunition, and all other warlike provisions about or in the sayd fort or Castle under the pain to be taken & proceeded against both by Lawe & Martiall force as persons guilty of high treason” (I: 188), Harley responded on the same day:

To the demaund of my House & Armes (which are no more then to defend my Howse) This is my Answer: Our gracious Kinge, having many times promised that he will Maintaine the Lawes & Libertyes of the Kingdome by which I have as good right to what is mine as anyone, maintaines me these, And I know not upon what ground the Refusall of giveinge you what is mine (by the Lawes of the Land) will prove mee or any that is with me Traytours. (I: 189)

In a petition addressed directly “[t]o the King,” Harley emphasizes that her property rights as a subject are inviolable under the “law of the land” even by

³⁰ Brilliana Harley, “Selected Letters to Edward Harley,” in Hilda Smith, Mihoko Suzuki, and Susan Wiseman (eds), *Women’s Political Writings, 1610–1725* (4 vols, London, 2007), vol. I, p. 119. Further citations from Harley’s writings are from this edition.

³¹ Mihoko Suzuki, “What’s Political in Seventeenth-Century Women’s Political Writing?” *Literature Compass*, 6 (2009): 927–41.

³² Harley, “Selected Correspondence with Edward Harley and Others,” in Smith et al. (eds), *Women’s Political Writings*, vol. I, pp. 154, 161. See Susan Wiseman, “Reading Seventeenth-Century Women’s Letters,” in Mihoko Suzuki (ed.), *History of British Women’s Writing*, vol. 3 (1610–90) (Houndmills, 2011), pp. 120–21, for a discussion of the importance of the local “politics of Hertfordshire” in Harley’s letters.

the Crown; and, by extension, her rights as a subject are based on her ownership of property.

Yet so it is, most gracious sovereign, that I have had servants imprisoned and some killed, and now by Sir William Vavasour's forces, all my horses, cattle, corn, and other things taken away: my house attempted with many souldiers, horse and foot, with five or six cannons battering the walls, and almost every day assaulted by small shot, whereas your poor subject did never offend your Majesty, or ever take up arms against your Majesty, or any man of mine, or any of mine appointment was in actual rebellion against your sacred Majesty; and therefore your poor subject hopeth and prayeth the premises being graciously weighed your Majesty will not require that from me which by the law of the land is mine, and which if I shall give up, I have no subsistence for myself and mine; but that your Majesty will be pleased to command Sir William Vavasour to withdraw his forces and restore to me my goods. (I: 201)

In fact, the original meaning of the phrase "lex terrae" signified laws concerning land-holding as underpinning common law.³³ Littleton's *Tenures* focused on land law: for example, on the status of tenants and their rights. As Helgerson points out, in Coke's commentary tenancy goes a long way toward outright ownership and becomes the basis for the liberty of the subject.³⁴ In the second *Institutes*, which was published in 1642, Coke expounded on the phrase "law of the land" in the 29th chapter of Magna Carta, as signifying the "due process of law": "no man [is allowed] to be taken, imprisoned, or put out of his free-hold without process of the Law; that is, by indictment or presentment of good and lawfull men, where such deeds be done in due manner, or by writ originall of the Common law" (II: 858).

Finally, as her house is about to be besieged, Harley states in her letter to Henry Lingen:

Sir William Vavasour's drawing his forces by my house by the King's command, I dare not, I cannot, I must not believe it, since it has pleased our most gracious King to make many solemn promises that he would maintain the laws and liberties of this kingdom. I cannot then think he would give a command to take away anything from his loyal subjects, and much less to take away my house. If Sir William Vavasour will do so I must endeavour to keep what is mine as well as I

³³ Walter Ullmann, *Principles of Government and Politics in the Middle Ages* (New York, 1961), pp. 166–7; Arthur R. Hogue, *Origins of the Common Law* (Bloomington, IN, 1966), p. 112.

³⁴ Helgerson, *Forms of Nationhood*, p. 93.

can, in which I have the law of nature, of reason, and of the land on my side, and you none to take it from me.³⁵

Here, Harley appears to be referring to the *promesso regis*, the Coronation oath, in which the King promises to abide by the laws of the realm. Roy Strong states that “the contents of the Coronation oath touch the heart of the constitutional conflict of the seventeenth century,” for the parliamentarians considered the oath as “first and foremost taken [by the King] to the people.”³⁶ According to the Venetian Secretary, in the aftermath of James’s death, Charles had apparently sought to avoid being crowned and thus taking the oath “so as to remain more absolute, avoiding the obligation to swear to the laws,” but the parliamentarians asserted that “without it they would consider their laws at the discretion of the king and not dependent on the general public authority.”³⁷

Harley’s statements also recall the famous Semayne’s Case (1604) included in Part Five of Coke’s *Reports*, in which the King’s Bench described the privileges of a house-owner, who may defend it “as a Castle” and “his own proper goods” even against entry and search by the King’s sheriffs.³⁸ Moreover, Harley’s reference in this letter to “natural law” in the same breath as the law of reason and law of the land indicates that her conception was in line with that of Coke, who understood common law as based on reason and coinciding with natural law. Coke repeatedly cited the Latin maxim, *Lex est ratio summa* (law is the perfection of reason), and argued that “[r]eason is the life of the Law, nay the Common Law it selfe is nothing else but reason.”³⁹ He also held that the law of nature suffuses all legal systems, including that of England.⁴⁰ More generally, Coke’s exposition of the subject’s protection by the “auntient and excellent Lawes of England” as “the birth-right and the most auntient and best inheritance that the subjects of this realm have ... for by them hee injoyeth ... his inheritance and goods in peace and quitnes”⁴¹ carries resonances for Brilliana Harley’s particular response.

Jacqueline Eales has observed that, in the letters addressed to her husband, Harley accepted patriarchy and his patriarchal power over her, and that her

³⁵ Harley, “Selected Letters to Commanders Besieging Brampton,” in Smith et al. (eds), *Women’s Political Writings*, vol. I, p. 200.

³⁶ Roy Strong, *Coronation: A History of Kingship and the British Monarchy* (London, 2005), p. 240.

³⁷ *Calendar of State Papers Venetian 1625–26*, 51. Quoted in *ibid.*, p. 3.

³⁸ Coke, “Semayne’s Case,” *Selected Writings*, vol. I, pp. 140–41.

³⁹ Coke, “First Institute,” *Selected Writings*, vol. II, p. 701.

⁴⁰ Robert Zaller, *The Discourse of Legitimacy in Early Modern England* (Stanford, CA, 2007), p. 292.

⁴¹ Coke, “Preface,” *Part Five of the Reports, Selected Writings*, vol. I, p. 127.

letters evidence her “conviction that she was engaged in a religious battle.”⁴² And Susan Wiseman calls attention to Harley’s “owed obedience to her husband in whose trust she maintains children and property,” concluding “[h]is commands take precedence.”⁴³ Yet I would emphasize that in publicly responding to the King’s agent and the King himself, Harley, though as *feme covert* technically lacking property rights and legal standing, claimed ownership and proprietary rights of Brampton Bryan without any mention of her husband.⁴⁴ By contrast, Charlotte Stanley, Countess of Derby, who famously defended Latham House in her husband’s absence against a prolonged Parliamentary siege, responded to Fairfax that “till she was assured it was his Lordships pleasure she would neither yield the House nor her self desert it.”⁴⁵ In this context, it is remarkable that Harley asserted her own rights as a subject against the monarch on the basis of her proprietary rights and the protection accorded her by the “law of the land.” Her claim echoes the Petition of Right, especially its section III:

... that no freeman may be taken or imprisoned or be disseised of his freehold or liberties or his free customs or be outlawed or exiled or in any manner destroyed, but by the lawful judgement of his peers or by the law of the land.

Section IV continues:

And in the eight and twentieth year of the reign of King Edward III it was declared and enacted by authority of Parliament that no man, of what estate or condition that he be, should be put out of his land or tenement, nor taken, nor

⁴² Eales, “Patriarchy, Puritanism and Politics,” p. 149; Eales, *Puritans and Roundheads: The Harleys of Brampton Bryan and the Outbreak of the English Civil War* (Cambridge, 1990), p. 170.

⁴³ Wiseman, *Conspiracy and Virtue*, p. 75.

⁴⁴ Wright, “Not Just Dutiful Wives,” p. 10, states, however, that, “where *strategically necessary*, [Harley] draws upon familiar discourses of marital hierarchy and appropriate wifely deference” (emphasis added).

⁴⁵ British Library, Add. MSS 22655, “A Brief Journal of the Siege against Latham House,” f. 12. This account was composed by Edward Rawstorne, one of the captains who defended Latham House under “Her Ladyship” who “commanded in Chief” (f. 23v). See also *A Journal of the Siege of Lathom House, in Lancashire, by Charlotte de la Tremouille, Countess of Derby, against Sir Thomas Fairfax, K^t. and other Parliamentary Officers, 1644* (London, 1823), a transcript of BL, Harleian MSS 2043: “That unless they would treat wth her Lord, they shold never have her, nor any of her friends alive ... that she wold nev’ treat without com’ands from her Lord” (f. 56). No letters composed by Stanley during the siege survive, though she carried on a 40-year correspondence with her sister-in-law, Marie de la Tour d’Auvergne. See Madame Guizot de Witt, *The Lady of Latham; Being the Life and Original Letters of Charlotte de la Trémoille, Countess of Derby* (London, 1869).

imprisoned, nor disherited, nor put to death without being brought to answer by due process of law.⁴⁶

Eales points out that, in his response to Harley's petition, Charles emphasized that he was making the offer of a free pardon, if she surrendered Brampton Castle, in consideration of her "sex and condition" (that is, rank). Thus, although Harley did not represent herself as a woman acting on behalf of her husband, the King called attention to her gender, thereby implying that she would have been more harshly treated if she had been a man.⁴⁷ Yet it was not only from her husband's status as an MP that she derived what Pierre Bourdieu called the "status-linked right to politics" to assert her own prerogative, but perhaps even more importantly, from the status of members of her own family.⁴⁸ Sir William Croft, one of her royalist opponents, addressed her as "my Lord Conway's daughter, my Lord Conway's sister, and Sir Robert Harley's wife, and a woman of great spirit."⁴⁹ Her father was an MP, a member of the Privy Council, and secretary of state, and enjoyed a close relationship with both James I and Charles I through his patron and royal favorite, the Duke of Buckingham.⁵⁰ Harley's brother, Edward Conway, was nominated as an MP by his father's cousin, Fulke Greville, Lord Brooke. A bibliophile, literary critic, and author of political verse, Edward counted among his many correspondents John Selden, as well as his sister Brilliana. Although he was connected with Thomas Wentworth, Earl of Strafford, he later gave evidence against him at his impeachment trial.

The survival of Brilliana's extensive correspondence with her son Edward Harley indicates its importance to the recipient: he became a parliamentary army officer in 1643 and later a JP and MP during the Protectorate and after the Restoration, and continued to support nonconformity, voting for the First Exclusion Bill. His entry in the *Oxford Dictionary of National Biography* states that he "became a leading figure in the country Whig opposition determined to resist the growing encroachment of the executive upon the ancient liberties of the political nation," indicating that his political career remained true to his mother's legacy.⁵¹

When another of Harley's royalist adversaries, Sir John Scudamore, wrote to her about the royalist victories in the north and west in an effort to break her resolve, he included a report of the multitude of "women against the House of Commons" and that "diverse women [had been] killed by the soldiers on this

⁴⁶ "Petition of Right," in David Wootton, (ed.), *Divine Right and Democracy: An Anthology of Political Writing in Stuart England* (Harmondsworth, 1986), p. 169.

⁴⁷ Eales, "Patriarchy, Puritanism and Politics," p. 155.

⁴⁸ Pierre Bourdieu, *Distinction: A Social Critique of the Judgment of Taste* (Cambridge, MA., 1984), p. 409.

⁴⁹ Eales, *Puritans and Roundheads*, p. 3.

⁵⁰ *Ibid.*, pp. 2, 21.

⁵¹ Gordon Godwin, rev. David Whitehead, *ODNB*, s.v.

tumult,⁵² thereby implicitly threatening Harley with the fate of the disorderly female petitioners to Parliament. However, despite the apparent difference in status between Harley and the female petitioners, she held much in common with the wives of Levellers who were petitioning for their imprisoned husbands in the mid- to late 1640s.⁵³

The 1646 petition of Elizabeth Lilburne, the wife of John Lilburne, cites Coke's commentary to Magna Carta in the second *Institutes* as the foundation of her petition:

Seeing that by the 29. of Magna Charta your Petitioners husband, or any other Commoner whatsoever, in criminall cases are not to be tried otherwise then by their Peers, which Sir Edward Cook, in his Exposition of Magna Charta (which book is printed by your own speciall authority) saith is meant [Equals] folio 28. In which (saith he) folio 29. are comprised Knights, Esquires, Gentlemen, Citizens, Yeomen, and Burgesses of severall degrees, but no Lords. And in pag: 46 he saith: No man shall be disseised, that is put out of seison, or dispossessed of his freehold (that is saith he) Lands. or livelihood, or of his liberties, or free customes,] that is, of such franchises, and freedoms, and free customes, as belong to him, by his free birth-right, unlesse it be by the lawfull judgment] that is, Verdict of his Equals, (that is, to speake it once for all) by the due course and prosses of Law.⁵⁴

By repeatedly invoking the voice of Coke—"he saith"—Lilburne has Coke speak through her; yet her declaration "to speake it once for all" enables her own confident voice to be heard. Not only does she challenge Parliament for not following Coke's writings even though it authorized the printing of Coke's *Institutes*, she also reminds Parliament of its authorship of the Petition of Right: "Which Statutes are Nominally and expressly confirmed by the Petition of right, by the act made this present Parliament for the abolishing of the Star-Chamber." Here, Lilburne seems to suggest that Parliament's extra-legal acts are tantamount to those of the Star Chamber that it abolished. Lilburne's text thus closely follows Coke's legal thinking and his language, implicitly claiming that she is a true heir of Coke, who reproves Parliament for betraying the legal principles expounded by its most prominent member. In addition, as is evident from a juxtaposition of Lilburne's broadside and one of the folios she cites from Coke's *Institutes*, Lilburne's use of extensive marginal citations—some referring to Coke—reproduces the *form* of Coke's work (see Figures 8.1 and 8.2).

⁵² Quoted in Wiseman, *Conspiracy and Virtue*, p. 76.

⁵³ Wright, "Not Just Dutiful Wives," p. 9, makes the connection between Harley and "women pamphleteers and petitioners" because they "test[ed] a language of citizenship, ownership, property, and even rights that contradicted the gendered ideological norms of this period."

⁵⁴ Elizabeth Lilburne, *The Humble Petition of Elizabeth Lilburne* (London, 1646).

Magna Charta.

Cap. 29.

Against this charter, as set out here, many different branches of the law of England have grown.

See W. L. 1. 1. 1. 1.

1. That no man shall be taken or imprisoned, but by the lawful judgment of his equals.

2. That no man shall be outlawed, excommunicated, or put out of the realm, but by the lawful judgment of his equals.

3. That no man shall be imprisoned, but by the lawful judgment of his equals.

4. That no man shall be imprisoned, but by the lawful judgment of his equals.

5. That no man shall be imprisoned, but by the lawful judgment of his equals.

6. That no man shall be imprisoned, but by the lawful judgment of his equals.

7. That no man shall be imprisoned, but by the lawful judgment of his equals.

8. That no man shall be imprisoned, but by the lawful judgment of his equals.

9. That no man shall be imprisoned, but by the lawful judgment of his equals.

10. That no man shall be imprisoned, but by the lawful judgment of his equals.

Magna Charta.

Cap. 29.

Against the law of the land, to enter into common franchises in that case without advice of peers.

See W. L. 1. 1. 1. 1.

1. That no man shall be imprisoned, but by the lawful judgment of his equals.

2. That no man shall be outlawed, excommunicated, or put out of the realm, but by the lawful judgment of his equals.

3. That no man shall be imprisoned, but by the lawful judgment of his equals.

4. That no man shall be imprisoned, but by the lawful judgment of his equals.

5. That no man shall be imprisoned, but by the lawful judgment of his equals.

6. That no man shall be imprisoned, but by the lawful judgment of his equals.

7. That no man shall be imprisoned, but by the lawful judgment of his equals.

8. That no man shall be imprisoned, but by the lawful judgment of his equals.

9. That no man shall be imprisoned, but by the lawful judgment of his equals.

10. That no man shall be imprisoned, but by the lawful judgment of his equals.

Figure 8.1 Edward Coke, The Second Part of the Institutes of the Lawes of England (1642). Reproduced by permission of The Huntington Library, San Marino, California.



Figure 8.2 The Humble Petition of Elizabeth Lilburne (1646). © The British Library Board. General Reference Collection E.359 (17, 18).

The 1646 petition by Mary Overton, the wife of Leveller Richard Overton, does not use marginal glosses as Lilburne did, but includes citations within the text at the end of paragraphs. Many of these citations refer to Coke's texts, such as his commentaries on Slade's Case (on breach of contract) and Semayne's Case (on the inviolability of "any mans house" in the Reports. Overton's appeal to the "Law of the Land usually called the Common-Law, being grounded upon right reason and equity" indicates her close familiarity with Coke's championing

of common law and his emphasis on its foundation on reason.⁵⁵ She also follows Coke in affirming legal reforms: for example, by “caus[ing] the Lawes of the Land to be translated out of Pedlars French and Latin, into the English Tongue” (p. 10). It is not only Coke who underpins Overton’s text; Overton refers prominently to “*Lawyer Fortescue*,” John Fortescue (c. 1394–1476), the author of *De Laudibus legum Angliae* (*In Praise of the Laws of England*), quoting him in Latin: “*Impius & crudelis est, qui libertati non favet: Anglia Jura in omni casu libertati dant favorem*” (“He is to be judged impious and cruel who does not favor liberty. In every case the English laws are favorable to liberty”) (p. 2). Coke based his influential assertion of the continuity of English law on Fortescue’s. In disparagingly calling the House of Lords “these Norman-Prerogative Taskmasters” and the “Norman brood of insolent domineering Tyrants and Usurpers,” Overton refers to the concept of the Norman Yoke, the belief that common law pre-existed the Norman Conquest, a position advanced by Coke and by Levellers such as Lilburne (p. 13).⁵⁶ Not only does Overton display her familiarity with these legal principles; she also provides her own commentary to Magna Carta chapter 29 by citing statutes from the reigns of Edward III, Henry VIII, and Elizabeth, thereby demonstrating her own legal expertise and mastery of both the content and method of Coke’s commentaries.

The female Levellers’ petition of May 5, 1649, *To the Supreme Authority of England the Commons assembled in Parliament. The humble Petition of diverse Women of London and Westminster*, “claim[s] equal interest with the men of this Nation, in those liberties and securities, contained in the Petition of Right,” as well as access to “the process of Law and conviction of twelve sworn men of the Neighbourhood”—that is, trial by jury.⁵⁷ While Lilburne and Overton clearly proved their legal expertise despite their lack of legal status as *femes covert*s, this petition explicitly makes rights claims for women as a logical extension of universal rights hitherto asserted only by men. It thereby anticipates Mary Wollstonecraft’s *Vindication of the Rights of Woman* (1792), which argued for women’s rights as a logical consequence of the rights of non-aristocratic males. The petition not only cites Coke’s *Institutes* and Parliament’s judgment

⁵⁵ Mary Overton, *The Humble Appeale and Petition of Mary Overton, Prisoner in Bridewell* (London, 1646), p. 1. Further citations in text.

⁵⁶ On the Norman Yoke, see Christopher Hill, *Intellectual Origins of the English Revolution Revisited* (Oxford, 1997); and J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (1957; rev. ed. Cambridge, 1987).

⁵⁷ *To the Supreme Authority of England ... The Humble Petition of Diverse Women of London and Westminster* (1649). This unsigned petition has been attributed by some scholars to Katherine Chidley. See Ian Gentles, *ODNB* s.v.; Katherine Chidley, *Katherine Chidley*, ed. Katharine Gillespie (Aldershot, 2009), pp. 11, 88; Wiseman, *Conspiracy and Virtue*, p. 132.

against the Earl of Strafford to condemn the extra-legal use of martial law in imprisoning the four Leveller leaders, but also gives legal evidence through its concrete and vivid descriptions of the use of the government's "force and arbitrary power": the men are "fetcht out of their beds, and forced from their Houses by Souldiers, to the affrighting and undoing of themselves, their wives, children and families." One prisoner is "snatcht and carried away, beaten, and buffeted at the pleasure of some Officers of the Army"; another is "kept close Prisoner, and after most barbarous usage be forced to run the Gantlop, and be most slave-like and cruelly whipt."⁵⁸ These indictments were disseminated widely, for this petition, like Lilburne's and Overton's, was printed and circulated as independent text, and included in collections of Leveller tracts.⁵⁹ The petition performatively challenged a central and basic tenet of patriarchy in seventeenth-century England by prominently marking the disjunction between patriarchal prescriptions asserting women's legal disability and the actual and pervasive practice, during this period, of women exercising "artificial reason."

Thus, although Coke explicitly declined to extend to women the rights he was supporting for male subjects, these petitioners extended it themselves by using the terms of his argument—that is, his emphasis on competence and "artificial reason." As he stated in a famous passage,

[r]eason is the life of the Law, nay the Common Law it selfe is nothing else but reason, which is to be understood of an artificiall perfection of reason gotten by long studie, obseruation and experience and not every mans naturall reason, for *Nemo nascitur artifex*. This legall reason *est summa ratio*.⁶⁰

And in the Preface to Part Two of the *Reports*:

There is no Jewell in the world comparable to learning; No learning so excellent both for Prince and Subject as knowledge of Lawes; and no knowledge of any Lawes, (I speake of humane) so necessary for all estates, and for all causes, concerning goods, lands, or life, as the Common Lawes of England. (I: 39)

Thus, even though Coke himself would not have extended the right to practice law to women, they could interpret his insistence on the importance of learning in law as prerequisite to the right to exercise it to mean that, if they

⁵⁸ [Chidley], *Humble Petition*.

⁵⁹ Ann Hughes considers the inclusion of female Levellers' petitions within Levellers' publications as evidence of their subordination as wives. See her "Gender and Politics in Leveller Literature," in S.D. Amussen and Mark A. Kislansky (eds), *Cultural Politics in Early Modern England* (Manchester, 1995), pp. 170–72.

⁶⁰ Coke, *The First Parts of the Institutes, Selected Writings*, vol. II, p. 701.

could demonstrate legal expertise, it would follow that they should be able to participate in legal discourse.

The Restoration, the Popish Plot, and the Exclusion Crisis

Women's intense interest and involvement in legal matters did not abate at the Restoration of Charles II. Margaret Fell, in *A Declaration and an Information From us the People of God called Quakers, To the present Governors, the King and Both Houses of Parliament* (1660), gives a detailed and graphic account of the torture suffered by Quaker prisoners—"their bodies bruised till death, stigmatized, bored thorow the tongue"—and asserts "our civil Rights and Liberties of Subjects, as freeborn English men."⁶¹ This is a serious accusation that goes to the heart of English national identity, since the English claimed not to torture. Sir Thomas Smith, in *De Republica Anglorum*, proudly asserted the superiority of English laws for their refusal of torture: "Torment or question, which is used by the order of the civile law and custome of other countries, to put a malefactor to excessive paine to make him confesse ... is not used in England. It is taken for servile."⁶² Coke, in the third *Institutes*, comments on Magna Carta chapter 29 by denying "the maintenance of tortures or torments"; and in the fourth *Institute* he goes even further by deriving the prohibition of torture from the same passage.⁶³ Fell's account—as well as Elizabeth Cellier's, as we shall see—belies this celebratory account based on a Whig view of continuous progress. Fell's use of the term "civil Rights" is notable, for it antedates by several decades the earliest use of 1721 recorded in the *OED*. In *To the Magistrates and People of England* (1664), Fell extended, perhaps for the first time, Leveller John Lilburne's term "freeborn Englishmen" to include women, attacking the authorities for "making of Lawes against ... freeborn Englishmen and women."⁶⁴ The Jacobite Lady Anne Halkett also demonstrates her legal expertise in the memoirs, which she

⁶¹ Margaret Fell, *A Declaration and Information* (London, 1660), pp. 2, 4.

⁶² John Fortescue condemned torture but does not deny that it was practiced. See John Fortescue, *De Laudibus legum Anglia: On the Laws and Governance of England*, ed. S. Lockwood (Cambridge, 1997), chs. 22, 32. David Jardine shows how, despite the theoretical rejection of torture, incidents of torture were pervasive in England during the Tudor and Stuart period. He identifies torture with the royal prerogative of "controlling and subverting the law" and states that, after the death of Charles I, the uses of torture were "wholly swept away during the ten years which succeeded that event, and were never afterwards revived." See David Jardine, *A Reading on the Use of Torture in the Criminal Law of England Previously to the Commonwealth* (London, 1837), pp. 68–9.

⁶³ Quoted in Jardine, *Reading on the Use of Torture*, pp. 7–9.

⁶⁴ Margaret Fell, *To the Magistrates and People in England*, appended to *A Letter Sent to the King* (London, 1666).

composed during 1677–78, by condemning “fraudulent conveyance of all the mony in good hands” and demanding a warrant of the parliamentarian soldiers who violently broke into her house. She thereby claimed her right to “liberty in my own lodging” and excoriated the “uncivil actions” of the soldiers.⁶⁵ “Uncivil” in her usage does not merely mean “uncivilized” or “rude,” but pertaining to the rights of private individuals and legal proceedings concerning these rights. This passage at once recalls Harley’s assertion of her rights as a property owner to Charles I and his agents, when she employs the language of Petition of Right, and Fell’s affirmation of “civil rights” for the Quakers.⁶⁶

I now turn to the examples of Elizabeth Cellier and Anne Docwra, whose writings came during and in the wake of the Popish Plot and the Exclusion Crisis. The political upheavals during the early 1680s generated by the Popish Plot (which revolved around the accusation that Catholics were conspiring to assassinate Charles II, caused by Parliament’s attempt to exclude James from the succession) brought concern about the outbreak of another civil war. The Catholic midwife Elizabeth Cellier (fl. 1680) was indicted in 1680 for treason. According to the accusation, she “trayterously did compass, imagine, and intend the killing, death, and final destruction of our said Lord and King, and to change, alter, and utterly to subvert the ancient Government of this Realm ... and to extirpate the true Religion within this Realm established.”⁶⁷ In the account of the trial, Cellier calls attention to her own knowledge of, and competence in, the law. She conducts her own defense—because defendants in treason trials were not permitted counsel—and proves to be instrumental in securing her own acquittal. Most notably, she successfully challenges Thomas Dangerfield, the state’s witness against her, by means of her own witnesses, who impeach Dangerfield by testifying to the crimes he had committed; she also produces copies of records to show that he was a felon, “whipt, and transported, pilloried, perjured, &c” (p. 13). The Lord Chief Justice, appalled at the illegitimacy of Dangerfield as witness, gave unambiguous instructions to the jury concerning

⁶⁵ Lady Anne Halkett, *Memoirs*, ed. John Loftis (Oxford, 1979), pp. 65, 63.

⁶⁶ Halkett’s “Meditations” from the 1690s includes an important entry, in which she testifies to, and condemns, the practice of torture. Halkett, like Fell, provides a vivid and graphic account of the torture of a Catholic “English gentleman” by the Scots: the victim was placed on “the racke to make him confesse what hee knew of the King’s [James] affaires wch after so Long a time could nott be vsefull for them to know.” He is further tortured by means of thumbkin, which compressed the thumb; his leg was placed in a boot whereby nine wedges were driven in, and the wedges were given four strokes. She reports that the council did not have “the heart to stay & see the poore Gentleman so vsed.” Lady Anne Halkett, *Selected Self-Writings*, ed. Suzanne Trill (Aldershot, 2007), p. 161.

⁶⁷ Elizabeth Cellier, *The Triall of Elizabeth Cellier, at the Kings-Bench-Barr, on Friday June the 11th 1680* (London, 1680). Further citations in text.

the inadequacy of the prosecution's case, and they "returned her not guilty" (p. 17).

Cellier cites "the Statute of the Fourth of King James," which states that "persons accus'd shall have Witsnesse produc'd upon Oath, for his better Clearing and Justification," as well as "Lord Cook," as saying "he never read in any Act of Parliament, Author, Book, Case, nor ancient Record, that in criminal Cases, the Party accus'd should not have sworne Witnesses."⁶⁸ She concludes:

And the Lord Cook dyed but lately; and if there was no Law against it then, I desire to know by what Law it is now denyed me; for the common Law cannot be altered. And I pray your Lordships, being of Counsel for me, that you will not suffer any thing to be urged against me contrary to Law, but that my Witnesses may be sworn, or Counsel assigne'd to me; to that point of Law. (p. 37)

Cellier here demonstrates her understanding of the subject's right as an inviolable one based on common law; her citations of statutes and the writings of Coke provide evidence of her "artificial reason" that gives her the right to legal discourse.

In *Malice Defeated*, her self-defense which she published in 1680, Cellier lays claim to both reason and loyalty to the state to rhetorically enable her to expose the torture and starvation of prisoners and the foul conditions of imprisonment she witnessed. She gives her own circumstantial and vivid testimony concerning torture:

I came down into the Lodge with five Women, of which, three were Protestants, and we all heard Terrible Groans and Squeeks which came out of the Dungeon, called the Condemn'd hole. I asked Harris the Turnkey, what doleful Cry it was, he said, it was a Woman in Labour ... [We] soon found that it was the voice of a strong man in Torture, and heard, as we thought, between his Groans, the winding up of some Engine.⁶⁹

This passage is followed by the account of an "officer," who came running out and responded to the women's query and assertion—"What are they doing in the prison?" and "It's a Man upon the Rack"—with "Pray Madam do not ask me, for I dare not tell ye, but it is that I am not able to hear any longer" (p. 3). Cellier takes pains to specify that three of the five women who witnessed this event were Protestants, implicitly asserting that her accusation cannot be dismissed as coming from a Catholic disloyal to the English state. In addition

⁶⁸ Elizabeth Cellier, "An Abstract of the Tryal of Elizabeth Cellier," appended to *Malice Defeated* (London, 1680), p. 37. Further citations in text.

⁶⁹ Cellier, *Malice Defeated*, p. 3. Further citations in text.

to this persuasive account, Cellier provides others' testimonies of "Tyrannical Barbarisme inflicted on the Kings Prisoners in His Majesties Goal of Newgate," including a charge that "the Jaylor ordered his Subbs to Punish or privately Torture with Thumb-scrues, the person of Dorothy Ramsey." Furthermore, Mary White, whose torturers were fully aware of her pregnancy, was "put in the Bilboes, and [they] bolted her hands down to the Ground with Staples of a great bigness," so that "her Child died soon after it was born" (p. 6). Elizabeth Evans was tortured by having "a Cap of Maintenance ... fixed to her head with a thing like the Rowel of a Spur, being put into her Mouth, [which] cleaves to the Roof with such extream Torture, that is not to be exprest" (p. 7). These accusations of female prisoners being tortured are especially striking, for David Jardine states that "it was not a regular practice in England to torture females."⁷⁰ The form of Cellier's text (that is, the marginal listing of names of those who may be called to "give Testimony according to the Truth" concerning each of her charges (Figure 8.3) recalls that of Coke and Elizabeth Lilburne with their marginal citations.

The specificity of Cellier's account evokes those of the Leveller women petitioners and Margaret Fell. Cellier, like her predecessors, seeks to give evidence against the extra-legal actions of the state. In fact, Cellier's account in *Malice Defeated* is confirmed in the account of her subsequent trial for libel (for stating falsely in *Malice Defeated* that the state practiced torture). According to the transcript of the trial, Cellier is effective in cross-examining the wife of a torture victim:

Cellier. Did you not hear your Husband tell me, how heavily he was Fettered and used? That he was Chained to the Floor with a Chain not above a yard long? And was forced to drink his own water?

Mrs. Corral. Madam, he is not sensible many times what he does say.

Cellier. But, Did not you hear him tell me so?

Mrs. Corral. I can't remember.⁷¹

The seriousness of Cellier's charges is expounded upon by the judge: "the Laws of the Land do not admit a Torture, and since Queen Elizabeths time, there hath been nothing of that kind ever done" (p. 31). He goes on to state: "God in

⁷⁰ Jardine, *Reading on the Use of Torture*, p. 66. Although Jardine acknowledges Burnett's report of the torture of Anne Askew, he expresses skepticism, stating "there is no authentic record of the fact."

⁷¹ Cellier, *Triall*, p. 27. Further citations in text.

[5]

A Brief Account of the Tyrannical Barbarisme inflicted on the Kings Prisoners in His Majesties Goal of Newgate.

THe detaining of Prisoners for Fees without limitation, and may till Death yield more favour than a stupified Jaylor, and all this after they have taken the benefit of his Majesties Most Gracious Free Pardon.

Mary Middleton.
Susan Wallace.
T. Willoughby.

The taking 3 s. 6 d. per week for Lodging when the Statute allows but 2 d. per night or thereabouts, which if not paid, the persons indebted must immediately to the Common-side, and there be detained (as many have been) till they are starved, notwithstanding their being acquitted by Proclamation in open Court.

Mary White.
Mary Middleton.
John Whiteband.
Robert Ball.
James Douglas.
T. Willoughby.

The shackling and lading of all persons committed with Irons, whose weight is without pity (from the Jaylor) to the intent they should give Sums of Money to purchase particular ease, which all persons cannot do, and those (of all) are most miserable.

John Whiteband.
Mary White.
John Player.
Tho. Willoughby.

The mercenary Intrigues of the Jaylor, which are beyond the thoughts of Christians, are thus, when any Prosecutor comes to view a prisoner in custody, and knows him to be the person for whom he fought, the prisoner is by the Jaylor forthwith feint for, who questions his ability, and if he finds sufficient to satisfy his Avarice, he promises to secure him with Life against Justice, by virtue of his Interest in the Recorder, but if poor, joyns with the Prosecutor to the same intent, either to the hazard of the Prisoners life, or at least a tedious Confinement.

William Leigh.
Anne Sutton.
Tho. Willoughby.

The illegal detaining of another sort of persons which have pleaded His Majesties Pardon of Transportation, and according to the form thereof have given in Bail to Transport themselves in 8 months, which is the time limited in the said Pardon, which persons, notwithstanding their being bail'd, are still detained, and often till the time be expired, which makes the Jaylors Market with the Merchant, and inflaves the persons, or at least creates Vice instead of Reformation, and converts the Money to his own Use.

Judeth Collingson.
Elizabeth Evans.
Mary Porter.
Tho. Willoughby.
Mary White,
and others.

The debarring Prisoners liberty of Conscience, and compelling them to go 3 or 4 pair of Stairs to Chappel, (as the Jaylor calls it), but as it will otherwise appear to be seen by Strangers, (through Grates like the Lions at the Tower) who give money to the Jaylor for the same, which persons are so severely tortured, that it is not to be thought, and that with such Irons as (in Jaylor's language) are called Shears, which are in weight 40 or 50 lb. and a yard in length, with one Legg fixed at one end, and the other at the other end, which barbarous Engine produces such Torture, that the persons on smooth ground can move but 3 or 4 inches at a time, this is his pretence to secure his Prisoners.

Jane Middleton.
Mary White.
Charles Parker.
T. W.

The putting of persons which are Debtors to the Crown, in the place he used to secure Condemned Prisoners, and that for not writing this following Supercription on a Letter (To the Worshippful William Richardson Esquire)

Jane Middleton.
Magdalen Clench
Jof. Mallory.
T. W.

Figure 8.3 Elizabeth Cellier, *Malice Defeated* (1680). Reproduced by permission of The Huntington Library, San Marino, California.

Heaven knows, there hath been no such thing offered in this Kings Reign ... we have lived under as lawful and merciful a Government as any People whatsoever” (p. 32).

In *Malice Defeated*, Cellier repeatedly indicates her familiarity with legal concepts and procedures: for example, she uses habeas corpus—affirmed in the Petition of Right—to have Thomas Dangerfield transferred from Newgate to the Kings Bench (p. 122). When she is refused bail and informed that she is being accused of high treason, she complains with justice that she “had as yet no Accuser; And by the Law, no person ought to be committed for Treason, till accused by two honest, sufficient, lawful, and credible Witnesses, witnessing one and the same Individual Fact,” as the provisions of the Petition of Right specify (p. 133). Recalling Elizabeth Lilburne’s assertion, based on Coke’s commentary on Magna Carta chapter 29, that it was illegal for commoners to be tried by the House of Lords, Cellier states:

My Lord, I am not obliged to answer that Question; your Lordships are none of my Judges. I appeal to my equal Judges, Twelve Commons of England in a Court of Judicature, let them that desire my life, assault it there, and though I cannot defend it like a man, yet I will not part with it in complement to your Lordships, and I desire to be tried as soon as may be. (p. 146)

These exchanges manifest Cellier’s desire to represent herself as having legal expertise superior to the male professionals, though her legal status as a woman precludes her from defending herself “like a man.” She thus underscores the contradiction between her own legal status as a woman, which disables her in the eyes of the law, and her legal knowledge and competence, supposedly unavailable to women.

Like Harley, the female Levellers, and Fell, Cellier makes use of the form of the petition. She petitions the King and the Privy Council for either her release or an opportunity to advise her husband and children on a pending “Process of Law,” since she has the “management of her Husband’s Estate” (p. 147). Here, she represents herself, not her husband, as having the indispensable legal expertise that will allow her to “advise them how to proceed in their Suit, and thereby prevent their ruine.”⁷² She had earlier asserted the legal protection afforded her as “a Foreign Merchant’s Wife”: “my Husband, both by the General Law of Nations, and those of the Kingdom, ought to remain unmolested both in his Liberty and Property, till a breach happen between the two Crowns, and the King hath declared as much in his Royal Proclamation” (p. 132).

Although it is not clear how Cellier achieved her impressive expertise, her contemporary, the Quaker Anne Docwra (1624–1710), recounts that when

⁷² Ibid.

she was “about 15,” her father, a justice under Charles I, encouraged her to read “the great Statute Book that lay upon the Parlor Window, by saying [i]t was as proper for a Woman as a Man to understand the Laws, because they must live under them as well as Men.” As a result of reading “several Law Books, besides the Statute-Book,” she claims that she attained “some understanding in the Laws and Statutes of the Land” and that she could be justifiably called “She-Lawyer” (rather than “She-Prelate,” an aspersion cast by her anti-Quaker opponent Francis Bugg.)⁷³ Docwra published *A Looking-glass for the Recorder and Justices of the Peace, and Grand Juries for the Town and County of Cambridge* (1682), which constitutes, according to Hilda L. Smith, “a political and legal commentary that exposes the lack of conformity to the standards of justice and legal procedure established in the Magna Charta.”⁷⁴ Docwra explicitly appeals to the protection of the law accorded to all English citizens: “the Oyer of the Law may be observed and allowed in all points, which is no more than the undoubted Right of every Free-born Subject of this Nation”⁷⁵—a term used by John Lilburne as well as by Margaret Fell. Docwra appears to assume the inclusion of women in her formulation, “every Free-born Subject of this Nation” and the right of due process for each:

First, look into the Statute made the first year of Q. Elizabeth, chap. 1. An Act to restore the Crown to the Antient Jurisdiction, over the State Ecclesiastical and Spiritual, and to abolish all Forreign Power repugnant to the same.

By this Statute all Commissioners are limited, that have Authority to hear and determine the Offences of Error, Heresies, Schism, Abuses and Enormities, so that they shall not only in any wise have Authority or Power to order, or determine, or judge any matter or cause to be Heresies, Schism, Abuses, and Enormities ... and none shall be indicted or arraigned for any of the Offences made, ordained, or revived or adjudged by this Act, unless there be two sufficient Witnesses, or more, to testifie and declare the said Offences, whereby he shall be indicted or arraigned. This Statute says further, That the Witnesses shall be brought face to face, before the Party so arraigned, if he require it.⁷⁶

Extending the “Law of the Land” and “the great Charter of England” to women, Docwra at the same time challenges the assumption that the laws against Catholic recusants enacted during the reigns of Edward VI and Elizabeth I were applicable to Quakers: “Do not they that put this Statute in execution against

⁷³ A.[nne] D.[ocwra], *Apostate Conscience Exposed ...* (London, 1699), pp. 24–5.

⁷⁴ Hilda L. Smith, headnote to Anne Docwra, in Smith et al. (eds), *Women's Political Writings*, vol. III. p. 65.

⁷⁵ Anne Docwra, *A Looking Glass for the Recorder and Justices of the Peace*, in Smith et al. (eds), *Women's Political Writings*, vol. III, p. 67.

⁷⁶ *Ibid.*

Protestant Dissenters (that are clear of such doings) go a great way from the real intentment of the Law?" (III: 70). Accusing magistrates who have been "absolute Princes in their Offices, so Arbitrary have they been in the administering of Justice" of "legal Tyranny," Docwra affirms that the "Oyer of the Law ... is that both King and Subjects hold their Rights and Properties by; the violating thereof may make all things run on heaps again, as it hath done formerly, so that all Parties may be Sufferers for a time" (III: 72). Here, her reference to former disorders alludes to the Civil War, and her accusation of the judges' tyranny and arbitrary rule that does not respect the subjects' rights and properties recalls the language of Coke's challenge to the Crown.

Conclusion: The Glorious Revolution and Aphra Behn

As my final example I will return briefly to Behn's *The Widow Ranter*, with which I began. In incorporating her legal understandings in a play presented on the public stage, Behn writes in the tradition not only of Shakespeare and Elizabethan and Jacobean playwrights, such as Thomas Kyd and Ben Jonson, but also of Restoration playwrights, such as Thomas Otway and Nathaniel Lee, all beneficiaries of Stone's "educational revolution." In *The Widow Ranter*, set in Virginia, Behn calls attention to the contrast between the Old World and the New, where transported criminals become members of the governing council and servants rise to become Justices of the Peace. Yet the legal structure remains the same, with characters describing their polity as "a civil government by law established" (p. 264). Here, as in England, her female characters are mostly regarded as property or vehicles to acquiring property by the younger sons, who have come to seek fortunes in the New World. It is only the eponymous Widow Ranter, who, because she possesses £50,000 and does not allow herself to be the victim of widow-hunters, can safeguard her self-possession and independence. Her cross-dressing as a man and her successful performance of masculinity—she smokes, drinks, and displays her expertise in swordplay—marks her as an exception to the other women, who are invariably pursued as property. Behn further demonstrates the crucial relationship between "liberties and properties" for the colonists as well as for the Indians, whose king complains: "we were monarchs once of all this spacious world, till you an unknown people landing here, distressed and ruined us by destructive storms, abusing all our charitable hospitality, usurped our right, and made your friends your slaves" (pp. 295, 269). The King here makes an explicit connection between property and liberty, usurpation and enslavement. Thus Behn indicates that while the legal and political system in the New World reproduces that in the Old World (including the inequity of according "liberties and properties"

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to men but not to women), it does not extend this system of “law and equity” to the native peoples.

The women I have discussed—Brilliana Harley, the female Leveller petitioners, Margaret Fell, Anne Halkett, Elizabeth Cellier, Anne Docwra, and Aphra Behn—all demonstrated the ways in which they were heirs of Coke in thinking with and through the law, while extending the rights accorded to subjects by the common law to themselves (and to native peoples in the New World in Behn's case), though it was assumed that common law only applied to “freeborn Englishmen” and did not include women in their provisions. In doing so, these writers were placing common law in the tradition of natural rights, or, in Judith Butler's terms, they sought to universalize the particular to create a “different kind of universality” that included women as well as men and even colonized peoples in that universality.⁷⁷ They interpreted what Hilda L. Smith considered to be “falsely universal”—which implied the inclusion of women but on the contrary excluded them—to be in fact universal, thus including women.⁷⁸ While Coke celebrated the common law as “lex aeterna” and immutable, he also quoted in the Preface of the First *Reports* the proverb, “for assuredly out of the old fields must spring and grow the new corne,” thus indicating his understanding of the flexibility of the common law (I: 6). He also affirmed reason as the basis of the law in that it is through reason that law can adjudicate new cases,⁷⁹ though he may not have agreed with the kind of universality argued for by these women writers.

⁷⁷ Judith Butler, “Competing Universalities,” in Judith Butler, Ernesto Laclau, and Slavoj Žižek (eds), *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left* (London, 2000), p. 166.

⁷⁸ Hilda L. Smith, *All Men and Both Sexes: Gender, Politics, and the False Universal in England, 1640–1832* (University Park, PA, 2002).

⁷⁹ James R. Stoner, Jr., *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* (Lawrence, KA, 1992), p. 26.

