Re-examining the Presumption: Coverture and ‘Legal Impossibilities’ in Early Modern English Criminal Law

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ABSTRACT
The doctrine of coverture restricted married women’s legal agency during the early modern period and into the nineteenth century. While the impact and ethos of judicial decisions at private law regarding the doctrine has received sustained attention from historians, the impact upon criminal law has received less analysis. This article examines a series of cases, pertaining to offences ranging from recusancy in the sixteenth century to receiving stolen goods in the nineteenth century, to demonstrate the longstanding nature of arguments of ‘legal impossibility’ due to coverture in married women’s criminal trials. While lawmakers sought to uphold patriarchy by ensuring coverture as well as justice was served, the way these two goals were met differed over time and across offences. Yet, the underlying ideology of patriarchy remained steadfast. Overall, a holistic approach is needed to understand the impact coverture had upon the legal agency of femes covert.

KEYWORDS Coverture; marriage law; criminal law; crime; gender; patriarchy; women

I. Introduction
Marriage, the law, and patriarchy have been interconnected throughout history. Marital status was a key indicator of a woman’s legal status in England throughout the early modern period and into the late nineteenth century.1 The common law doctrine of coverture placed a wife under the ‘cover’ of her husband. In theory, a wife’s moveable property passed to her husband upon marriage and her ability to control real property was curtailed. She could not contract, she could not sue in a common law court, and she could not run a business.2 The nature of coverture, an all-encompassing...
principle that theoretically dictated the legal personhood of a *feme covert* in all contexts, affected every echelon of the common law. Whether coverture was used as a practical legal tool or a guiding principle ultimately depended upon the context in which it arose. Nevertheless, at the root of the doctrine was a desire to uphold patriarchal values, both in the household and wider society, over a period that saw many cultural changes that tested this objective in myriad ways.

Katie Barclay defines patriarchy as a system informing the social, cultural, legal, political, and economic dimensions of society, consisting of hierarchical relationships and power structures that regard men as authoritarian and women as subservient. Within marriage, men were expected to control the household as the head, with women managing the house under the husband’s command. Patriarchy, more complex than pure male domination, was constantly tested and renegotiated. Within patriarchy’s ‘broad framework’, the meaning of ‘husbandly authority’ and ‘wifely obedience’ was flexible, and changed over time. Such resistance and repair ensured patriarchy endured, while leaving room for female agency. This is evident in the tension lawmakers faced between upholding the patriarchal values signified by coverture and ensuring the law reflected and supported the proper functioning of patriarchal society.

As Tim Stretton and Krista Kesselring state, strict adherence to coverture ‘would have made ordinary life all but impossible’ for all. The law in theory often bears only a passing resemblance to the law in practice. The magnitude of evidence of married women taking part in market activities, playing key roles in the buying and selling of both chattels and real property, indicates that the gulf between theory and practice for coverture was distinctly large. Married women were heavily involved in all areas of commerce, supporting husbands in the running of inns, alehouses and pawn shops, and as retailers of food and textiles, as well as selling items on the street as hawkers or peddlers. Wives assumed ownership of personal possessions and managed such property accordingly. Many husbands unquestioningly supported such activity. Furthermore, the advent of separate estate trusts

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3 Tim Stretton, ‘Coverture and Unity of Person in Blackstone’s Commentaries’, in Wilfrid Prest, ed., *Blackstone and His Commentaries: Biography, Law, History*, London, 2014, 111.
4 Katie Barclay, *Love, Intimacy, and Power: Marriage and Patriarchy in Scotland, 1650-1850*, Manchester, 2011.
5 Ibid., 31–32.
6 Ibid., 8. See also Deidre Palk, *Gender, Crime and Judicial Discretion 1780–1830*, London, 2006.
7 Stretton and Kesselring, ‘Introduction’.
8 Malcolm M. Feeley and Deborah L. Little, ‘The Vanishing Female: The Decline of Women in the Criminal Process, 1687–1912’, 25(4) *Law & Society Review* (1991), 719; Garthine Walker ‘Women, Theft and the World of Stolen Goods’, in Jenny Kermode and Garthine Walker, eds., *Women, Crime and the Courts in Early Modern England*, London, 1994, 81.
9 Joanne Bailey, ‘Favoured or Oppressed? Married Women, Property and ‘Coverture’ In England, 1660–1800’, 17(3) *Continuity and Change* (2002), 351.
10 Ibid.; Stretton and Kesselring, ‘Introduction’.
allowed married women of various economic backgrounds to control finances and property through a trustee,11 *feme sole* traders were permitted in customary law to run businesses independently,12 wives could sue at equity through a ‘next friend’,13 and the law of necessaries created a presumption that when a married woman contracted, she did so in her husband’s name.14 At criminal law, the principle of marital coercion, which many legal treatises claimed protected all married women who committed crimes with their husbands from conviction, was not often successfully invoked.15 Such circumventions of coverture suggest a desire, or perhaps a need, on the part of lawmakers to renegotiate and alter the concept of wifely subjection under patriarchy and provide married women with legal agency.

While scholars have discussed the circumvention of coverture and female agency at private law,16 studies of married women and crime have placed their focus elsewhere.17 Additionally, there has been little discussion of how the two jurisdictions of criminal and civil law intersected under coverture. Most relevant research has charted married women’s criminality, with a focus on quantifying women’s involvement in crime through counting indictments. Because women appeared less often in the criminal courts, and were treated with greater leniency than men in terms of verdicts and sentencing, Garthine Walker argues that quantitative approaches have ‘resulted in women being duly counted and then discounted’.18 The doctrine dictating the treatment of women at criminal law, plus the extent to which it was followed, has received less attention.19 Discussion of coverture and criminal law has largely been confined to (often brief) references to the presumption of marital coercion, with a few notable exceptions including petty treason.

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11Amy Louise Erickson, ‘Common Law Versus Common Practice: The Use of Marriage Settlements in Early Modern England’, 43(1) *The Economic History Review* (1990), 21.
12Karen Pearlston, ‘What a Feme Sole Trader Could Not Do: Lord Mansfield on the Limits of a Married Woman’s Commercial Freedom’, in Kim Kippen and Lori Woods, eds., *Worth and Repute: Valuing Gender in Late Medieval and Early Modern Europe*, Toronto, 2010, 309.
13Katie Barclay and Emily Ireland, ‘The Household as a Space of the Law in Eighteenth-Century England’, 7(2) *Law & History* (2020), 98.
14Karen Pearlston, ‘Married Women Bankrupts in the Age of Coverture’, 34 *Law & Social Inquiry* (2009), 265.
15Emily Ireland, ‘Rebutting the Presumption: Rethinking the Common Law Principle of Marital Coercion in Eighteenth- and Nineteenth-Century England’, 40(1) *The Journal of Legal History* (2019), 21.
16For example Pearlston, ‘Married Women Bankrupts’; Susan Staves, *Married Women’s Separate Property in England, 1660–1833*, Cambridge, MA, 1990; Amy Louise Erickson, *Women and Property in Early Modern England*, London and New York, 1993; Bailey, ‘Favoured Or Oppressed?’.
17G.S. Rowe, ‘Femes Covert and Criminal Prosecution in Eighteenth-Century Pennsylvania’, 32(2) *American Journal of Legal History* (1988), 138.
18Garthine Walker and Jenny Kermode, ‘Introduction’ in Kermode and Walker, eds., *Women, Crime and the Courts*, at 4.
19For example, J.M. Beattie, ‘The Criminality of Women in Eighteenth-Century England’, 8(4) *Journal of Social History* (1975), 80; Peter King, *Crime and Law in England, 1750–1840: Remaking Justice from the Margins*, Cambridge, 2006; Garthine Walker, *Crime, Gender, and Social Order in Early Modern England*, Cambridge, 2003.
and a short-lived debate over ‘married spinsters’. To understand early-modern female criminality, however, it is important to have a nuanced view of all indicators of women’s interactions with the criminal law.

This article examines a selection of cases from the later sixteenth century through to the nineteenth century, in which married women were indicted for marketing offences, offences involving the running of businesses, and offences for which the punishment was purely pecuniary. It analyses the longstanding nature of defendants’ arguments of ‘legal impossibility’ due to coverture. In doing so, it unearths the tension judges faced between upholding the values coverture imbued – of patriarchy and the patriarchal household- and the need to maintain social and economic order through the rigorous implementation of criminal justice. Both were methods of securing female control- through coverture or through criminal law. It is evident that judges consistently found ways to uphold both means of subordination. Thinking laterally and taking a holistic approach to the law in relation to coverture reveals important information about judges’ perceptions of the limits of coverture, and how they negotiated the doctrine, reinforcing patriarchy at different temporal moments. The same ideology underpinned both civil and criminal law, creating parallels in legal decisions regarding married women, made in different English courts and jurisdictions, across time. This information contributes to literature on coverture and civil law by demonstrating the similarities and differences in approach at criminal law. It also bolsters studies on married women and crime by providing some doctrinal underpinning to criminological studies.

The sources used for this study are the English Law Reports, the Old Bailey Sessions Papers and legal treatises. Close reading was undertaken of relevant case reports and treatises for their legal significance. The sources were located through the use of keyword searches online. For example, all reports that referenced ‘coverture’, ‘feme covert’, and various spellings of ‘coercion’ were located in the Old Bailey Sessions Papers for the period 1674–1913. For the English Law Reports, any cases cited as precedent in

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20Ibid.; Palk, Gender, Crime; Kathy Callahan, ‘On the Receiving End: Women and Stolen Goods in London 1783–1815’, 37(2) The London Journal (2012), 106; Carol Wiener, ‘Is a Spinster an Unmarried Woman?’, 20(1) American Journal of Legal History (1976), 27; V.C. Edwards, ‘The Case of the Married Spinster: An Alternative Explanation’, 21(3) American Journal of Legal History (1977), 260; J.H. Baker, ‘Male and Married Spinsters’, 21(3) American Journal of Legal History (1977), 255.

21Joanna Innes and John Styles, ‘The Crime Wave: Recent Writing on Crime and Criminal Justice in Eighteenth-Century England’, 25(4) Journal of British Studies (1986), 380; Adrienne L. Eastwood, ‘A Tribe of Roaring Girls: Crime and Gender in Early Modern England’, 44(2) Explorations in Renaissance Culture (2018), 202.

22Fifty-four cases heard between 1674 and 1913 that referred to either ‘coverture’, ‘feme covert’, or ‘coercion’ appear in the Old Bailey reports. Of the twenty-two cases that involved the indictment of a married woman, sixteen can be said with some certainty to be referring to marital coercion. One case referenced neither marital coercion or any other argument based on coverture, and the remaining five appear ambiguous as to their meaning, discussing a married woman’s ‘coverture’ but not specifically referring to a husband’s ‘control’ or ‘coercion’.
each relevant report were also located. 23 Such ‘working backwards’ through precedent revealed connections between different offences and time periods.

There are, of course, issues with this methodology. Legal treatises only reflect the law in books, not the law on the ground, and the Old Bailey reports are infamous for not including verbatim accounts of trials and for excluding key legal information such as judges’ statements. 24 Similarly, the system of reporting in the common law courts that created the English Law Reports was far from a uniform, monitored, reliable practice for the entirety of the period studied. Generally, only cases of doctrinal significance were reported, and even then, it was not all cases of legal relevance. It is also difficult, sometimes impossible, to identify marital status in the reports of criminal cases. Married women were only recorded as such when their marriage itself, for whatever reason, arose as an issue in court. For all of these reasons, it is very difficult to compile meaningful statistical information on the treatment of married women at the hands of the criminal law, and the ‘legal impossibility’ argument in particular from these sources. 25 While this leaves the systematic lenient treatment of women before the criminal justice system unexplained, demonstrating what did not influence such patterns leaves fewer possible explanations as to what did inspire judicial discretion. 26 Analysis of how the argument was presented and received in court supports other findings that a woman’s gender and broader conceptions of the patriarchal household, not legal formulations of her marital status, impacted her treatment at criminal law. 27

This article connects several offences at different points in time. It demonstrates that ideas regarding the extent of a husband’s responsibility for his wife’s actions and solutions to the perceived impossibility of fining femes covert under recusancy laws in the sixteenth and seventeenth centuries were recycled and renegotiated in cases concerning marketing offences, the regulation of disorderly houses, and receiving stolen goods up to the nineteenth century. It is possible to see three solutions used by lawmakers,

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23 This yielded thirteen reports detailing eight cases.
24 Clive Emsley, Tim Hitchcock and Robert Shoemaker, ‘The Proceedings – The Value Of the Proceedings as a Historical Source’, Old Bailey Proceedings Online. Available online at: www.oldbaileyonline.org, version 7.0, 2 Oct 2021.
25 Court records, such as Assizes indictments, present similar issues. The inclusion of ‘wife of’ and ‘spinster’ in early-modern indictments creates ambiguity as to the status of female defendants. J.S. Cockburn, ‘Early-Modern Assize Records as Historical Evidence’, 5 Journal of the Society of Archivists (1975), 215. Marisha Caswell’s quantitative analysis of marital status and female criminality in the depositions of the northern Assizes and northern circuit gaol delivery books is useful, though approximately one-third of depositions and nearly half of the sample from the northern circuit gaol delivery books did not specify the marital status of the defendant. Marisha Caswell, ‘Coverture and the Criminal Law in England, 1640–1760’ in Stretton and Kesselring, eds., Married Women and the Law, 88; Marisha Caswell ‘Married Women, Crime, and Questions of Liability in England, 1640–1760’, thesis submitted for the degree of Doctor of Philosophy, Queen’s University, Kingston, Ontario, 2012.
26 Palk, Gender, Crime.
27 Caswell, ‘Coverture and Criminal Law’; Ireland, ‘Rebutting the Presumption’; Garthine Walker, ‘Keeping It in the Family: Crime and the Early Modern Household’, in Helen Berry and Elizabeth Foyster, eds., The Family in Early Modern England, Cambridge, 2007, 67.
at different temporal points, when faced with the competing priorities of serving justice and upholding coverture. The first, and earliest, was to place culpability upon the husband. The second solution, appearing in relation to market offences in the seventeenth and eighteenth centuries, was to ensure a *feme covert* could be found guilty through procedural practice, such as providing a different punishment or framing a woman’s marital status in a certain way in the indictment. Thirdly, strict interpretation of the formulation of an offence was used to devalue the element of property ownership or contracting, as evidenced by married women’s treatment in relation to keeping bawdy or gaming houses in the eighteenth century. The three types of judicial argument suggest a shift in judicial focus from implicating the husband in the wife’s actions to legal interpretations that aligned with coverture but allowed for recognition of a wife’s criminal culpability. The shift suggests increasing judicial recognition of female criminal agency, and represents renegotiations of patriarchy in response to specific issues, such as concerns that married women threatened Protestant society or aided debauchery through the running of disorderly houses. Each type of argument will be discussed in turn in the sections that follow to demonstrate the connections between private and criminal law. Although providing small observations of the law in different periods and contexts may at first appear disjointed, this method shows different sorts of connections, and highlights the longstanding grip of patriarchy in early modern legal decisions.

II. ‘Legal Impossibility’

Historians to date have confused and merged marital coercion and the argument of ‘legal impossibility’.28 This article grew out of an in-depth study of marital coercion, and a realization that some reports, when referring to coverture, were referencing something different. A number of historians have noted that women received fewer guilty verdicts and lighter punishments than men in eighteenth and nineteenth-century England.29 Some have presented evidence that married women were treated with particular leniency.30 There is, however, scant evidence that marital coercion played a role in gendered patterns of judicial treatment.31 There were a number of elements

28Ibid.; *R v Crofts* (1740) 7 Mod. 397.
29King, *Crime and Law*; Beattie, ‘The Criminality of Women’.
30Garthine Walker, in a study of theft and related offences at the Cheshire Assizes, found that forty-six per cent of married women and sixty-nine per cent of spinsters were convicted, and forty-four per cent of married women and forty-three per cent of spinsters were sentenced to hang. Walker, *Crime, Gender, and Social Order*. Similarly, Robert Shoemaker found that seventy-six per cent of married women found guilty of misdemeanours between 1660 and 1725 received fines at or below 3s. 4d. compared to sixty-four per cent of unmarried women. Robert Brink Shoemaker, *Prosecution and Punishment*, Cambridge, 1991.
31Caswell, ‘Coverture and Criminal Law’; Ireland, ‘Rebutting the Presumption; Walker, ‘Keeping It in the Family’.
necessary to invoke the presumption of marital coercion. A woman had to be married and able to prove her marriage, she had to prove that her husband was present when the crime occurred, and, by the nineteenth century, evidence of actual control or coercion on the part of the husband was required. By the nineteenth century, the presumption was rebuttable. There are always outliers and exceptions that prove the rule, but I found a small number of cases where a married woman was acquitted following discussion of coverture, but the requirements for marital coercion were blatantly not fulfilled. I discovered that, alongside the presumption of marital coercion, there existed what might be termed an informal defence of ‘legal impossibility’. It occasionally arose in criminal proceedings when a married woman was indicted for a crime that either involved the ownership of property or a business, the making of a contract, or had a fine as the punishment. The crimes in question were mainly marketing offences—crimes that involved the selling of illegal items, the illegal selling of items, or selling items in an illegal way, such as forestalling, engrossing or regrating the market, or selling items without a statute-dictated licence. The running of illegal businesses and receiving stolen goods also fell into this category. Because married women were precluded from contracting or vending, they could not theoretically commit these crimes. The argument forwarded was simple: it was impossible to indict a feme covert for these crimes because coverture dictated that they could not own property or contract in the first place. Therefore, they could not have done so illegally, and they had no means to pay a pecuniary penalty.

The ‘legal impossibility’ argument rarely worked. But, the fact that the informal defence was used repeatedly, if infrequently, in the context of a range of offences over several centuries is testament to the enduring nature of the doctrine of coverture and patriarchy in general. As Erika Rackley and Rosemary Auchmuty note, it is important to consider the content of cases beyond the successful arguments that became the substantive law.32 Much of legal history examines ‘the rules and doctrines that survived, not those that were fought for but watered down, or never adopted in the first place’.33 Yet, inspecting the arguments made by or on behalf of married women, even if unsuccessful, can inform us of the wider social and legal constraints femes covert experienced during the early modern period and the values present in judicial reasoning.

The ‘legal impossibility’ argument parallels patterns of behaviour by litigants and judges in the private law courts. It reflects the increasing number of exceptions to coverture, such as separate estate, throughout the

32Rosemary Auchmuty and Erika Rackley, ‘The Case for Feminist Legal History’, 40(4) Oxford Journal of Legal Studies (2020), 878.
33Ibid., 882.
early modern period, and the increasing number of decisions that held a wife responsible for the disposition of her separate property in the eighteenth century. Karen Pearlston notes how private law courts ‘struggled with the procedural consequences of exceptions to coverture, most often when wives were … involved in contractual relationships’. The ‘legal impossibility’ argument closely resembled arguments made by wives seeking to avoid liability for their debts by pleading coverture in abatement or in bar, which involved a married woman admitting the existence of the agreement in question, but claiming that it was void or voidable because coverture dictated she was unable to contract.

Judges’ consistent circumvention of ‘legal impossibilities’ demonstrates a persistent desire to uphold both coverture and its underpinning ideology, as well as justice at criminal law. Judges and politicians were invariably keen to distance decisions from any concept of property or property ownership (both in terms of the offence itself and the resulting punishment). This was not straightforward because these offences and punishments were, by their very nature, built around property ownership and transactions. Judges dealt with this differently over time, demonstrating a shift away from solutions that implicated the husband in the wife’s criminality towards manoeuvres that bestowed married women with agency.

III. The Culpability of the Husband

An early iteration of the ‘legal impossibility’ problem arose in the context of married women and recusancy laws. Following Elizabeth I’s ascension, under the Act of Uniformity 1558, practising Roman Catholics were punished for a range of offences linked to their faith. Several Acts over the course of the late sixteenth and early seventeenth centuries, most notably in 1581 and 1593, regulated and compounded the financial penalties bestowed on those who did not attend church services, also known as recusants. Because the punishment for recusancy was predominantly fines or property confiscation, Elizabethan governments struggled to uphold both the doctrine of

34Married women’s separate estate trusts established property for the wife’s benefit during marriage. They ensured landed estates stayed within families and protected property from husbands. See Staves, Married Women’s Separate Property; Alison Anna Tait, ‘The Beginning of the End of Coverture: A Reappraisal of the Married Woman’s Separate Estate’, 26(2) Yale Journal of Law And Feminism (2014), 165; Erickson, Women and Property.
35Karen Pearlston, ‘Male Violence, Marital Unity, and the History of the Interspousal Tort Immunity’, 36(3) The Journal of Legal History (2015), 260, at 263.
36Ibid.; Edward Lawes, An Elementary Treatise on Pleading in Civil Actions, London, 1806; Stretton, ‘Coverture and Unity of Person’.
371558, (1 Eliz., c.2).
38Act To Retain The Queen’s Majesty’s Subjects In Their True Obedience 1581, (23 Eliz., c.1); Act Against Seditious Sectaries 1593, (35 Eliz., c.1); Act to Restrain the Queen’s Majesty’s Subjects in Their Allegiance 1593, (35 Eliz., c.2).
marital unity and Protestantism in the face of married women’s ability to circumvent the penal laws due to their coverture. A married woman could be indicted and convicted under penal statutes but she could not pay the fine. Lawmakers thus grappled with upholding coverture and Protestantism, two pillars of an envisaged well-ordered patriarchal society. Marie Rowlands notes a tension between the notion that ‘a husband could not be held responsible for his wife’s criminal acts’, and the idea that ‘the duty of ensuring the proper religious behaviour of the family lay with the paterfamilias’. Contemporaries were clearly unsure how to solve the issue, but it appears that the threat recusant wives posed was remedied, predominantly, by holding the husband accountable for his wife’s recusancy.

As Patricia Crawford notes, scripture dictated that woman, ‘designed as man’s companion’, existed under his ‘authority’. Any subversion of this was ‘contrary to God’s order’ and ‘deeply sinful’. A recusant feme covert endangered ‘the whole of society because she might infect others with her disobedience’. Married women were feared because, as household managers, they possessed power to influence the religious practices of the household, which held importance because it was the only place professing Catholics could practise their faith. In Dr Foster’s Case (1614) it was reasoned that ‘Femes-covert were a great part of the realm and very dangerous, because they have the education of their children, and the governing of their servants’. Husbands could make use of coverture in this context too. A household could disguise itself as conforming through the church attendance of the husband, while the wife could not attend and avoid punishment due to her coverture.

*The Countrey Justice*, a popular legal treatise on the powers of local magistrates and Justices of the Peace, written for a lay audience by Michael Dalton, a JP himself, was first published in the early seventeenth century. When
discussing the Act of Uniformity 1558, in relation to fines for recusants, Dalton expressed some uncertainty in his statement that ‘this statute seemeth to extend to women that be married’. According to the report for Dr Foster’s Case, this was not confirmed until 1581. The 1581 Act To Retain The Queen’s Majesty’s Subjects In Their True Obedience was the first to contain a clause that directly addressed recusant wives. Under the 1581 statute, a recusant wife, once widowed, lost two-thirds of her dower and any right in her deceased husband’s property. In practice, however, despite the Privy Council’s unilateral imprisoning of recusant wives throughout the Elizabethan era, the omission of immediate fines for Catholic married women effectively incapacitated the government from prosecuting recusant fames covert. As Karen Peddle notes, the ‘potentially very long delay negated the effects of both the effort to correct recusancy and to direct money to the Crown coffers’. Furthermore, if a married woman refused to appear following an indictment, her lack of property and civil rights meant that the punishment of outlawry could not be applied and she would be ‘waived’.

The 1581 statute theoretically protected the husband as it meant he was not responsible for paying his wife’s fine. The report for Dr Foster’s Case stated that ‘a husband was never responsible for his wife’s fine under indictment’ because he would ‘never be charged for the act or default of his wife’, unless he was ‘made a party to the action’, and judgment was given against both parties. However, this was only the case if a wife was prosecuted under an indictment. While indictment was the only method by which the Queen could prosecute under the 1581 statute, informants were able to levy forfeitures by bringing an information against husband and wife jointly. Plus, Peddle has shown that husbands were held responsible for their wives’ actions through recognizances in the 1570s and 1580s. Thus, in practice many husbands paid penalties for their wives’ recusancy. There was an incongruence in how the law was envisaged in statute and how it was meted out on the ground.

In addition, two 1593 statutes strongly suggest Parliament believed it right to hold the husband responsible for his wife’s recusancy. Legislation enacted
that heads of households would be issued with a £10 fine for every family member who did not attend church. Further statute allowed the Crown to proceed against husband and wife jointly by information for a wife’s recusancy in the same manner informants already could. The statutes delineated a procedural difference between indictment—where it was held absolutely that a feme covert should be prosecuted against alone, without her husband, unless he was involved in the offence himself—and information, where, once a recusant wife inevitably did not pay her forfeiture, informants and then, following the 1593 statute, the Crown, could bring proceedings against husband and wife to recover the sum. None of the provisions directly interfered with or contradicted coverture. The issue of ‘legal impossibility’ was effectively resolved through legislating the legitimacy of bringing an information against both members of a married couple for the wife’s recusancy, meaning the responsibility was at least shared, if not, in reality, bestowed upon the husband, reflecting societal expectations of a husband’s control of his spouse.

The distinction between indictment and information is important because, in offences unrelated to the penal laws, husbands were not held directly responsible for their wives’ fines or criminal behaviour. Dalton stated that ‘if a woman covert without her husband be indicted in trespass, riot, or any other wrong, there the wife shall answer, and be party to the judgement only; and … the fine set upon the wife shall not be levied against the husband’. In the eighteenth century, serjeant-at-law William Hawkins published *Pleas of the Crown*, the ‘first substantial exposition of English criminal law to be printed since that by Sir Edward Coke’. Hawkins specified that ‘a Feme Covert shall answer … as if she were Sole, for any Offence, not capital, against the Common Law, or Statute; and (if … committed by her alone, …) she may be punished for it without the Husband, by way of Indictment’. Yet, it was also clarified that ‘if a Wife incur the Forfeiture of a penal Statute, the Husband may be made a Party to an Action or Information for the same, … and shall be liable to answer what shall be recovered thereon.’ Plausibly, an exception was carved out in the case of the penal laws, where husbands were burdened with greater liability for their wives’ offences. In response to the specific threat married women posed to orderly religious society, coverture, criminal law, and patriarchy, were
upheld through statute that effectively legislated the husband’s responsibility for fines arising from the recusancy of the *feme covert*.\(^{65}\)

### IV. Punishment

Unlike the penal statutes, which implicated the husband in the wife’s criminality, cases concerning marketing offences, such as forestalling or selling gin without a licence, and the running of disorderly houses in the late-seventeenth and eighteenth centuries in which ‘legal impossibility’ was discussed, focused on how to convict and punish the wife herself, thus placing greater emphasis on the wife’s criminal autonomy. Judges applied procedural rules to circumvent the ‘legal impossibility’ argument without directly engaging with coverture or the inconvenient consequences of the doctrine in the criminal law context. One simple solution was to shift the focus away from whether the wife could pay a fine (or whether the husband should pay it for her), to the other punishments available. For example, the issue of a wife’s incapacity to comply with a pecuniary punishment arose in *R v Thomas and His Wife* (1735), in which a husband and wife were indicted jointly for keeping a disorderly house.\(^{66}\) It was argued by affidavit that the wife was 'in so weak a condition, that it was thought a bodily punishment would … kill her downright'.\(^{67}\) The court responded that “The ordinary judgment in this case is the pillory, but for misdemeanor the Court is not tied down to any particular punishment; and, as it is represented that she is unable to suffer a corporal punishment, and that, being a married woman, has nothing to pay a fine withal, the punishment must be imprisonment”.\(^{68}\) The wife was imprisoned for one year. Here, then, for very different reasons, neither a fine or the pillory were suitable punishments. The court did not dispute the fact that coverture rendered a married woman unable to pay a fine, but simply applied a different, arguably more severe, punishment instead.

*R v Crofts* (1740) was heard on an objection following the conviction of a married woman for selling gin without a licence, contrary to statute.\(^{69}\) Sergeant Bootle, for the defendant, argued that ‘the punishment being pecuniary and not corporal, she cannot comply with the penalty designed by the Act’.\(^{70}\) The Solicitor General argued to the contrary, that many *femes covert* had

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\(^{65}\)The Oath of Allegiance, etc. Act 1610 (7 Jac. I, c.6) legislated wives’ imprisonment for non-payment of forfeitures for recusancy. The husband was required to pay £10 a month or one-third of his estate for her release. According to *Dr Foster’s Case*, this provision did not remove the remedy of bringing proceedings by information against husband and wife because the Recusancy Acts were cumulative. After 1620 prosecutions of *feme covert* recusants declined and the problem was left unresolved.

\(^{66}\) *R v Thomas and His Wife* (1735) Cas. t. H 278.

\(^{67}\)Ibid.

\(^{68}\)Ibid.

\(^{69}\)7 Mod. 397; 9 Geo. II, c.23.

\(^{70}\) *R v Crofts* (1740) 7 Mod. 397.
been convicted upon the Act, and ‘upon non-payment of the penalty’ had ‘undergone the discipline of a house of correction’. The Solicitor General suggested that it was unjust for a husband to suffer a punishment for his wife’s actions, and that the corporal punishment existed not just in addition to a fine, but because of a feme covert’s inability to pay a fine, so that she, and not her husband, would receive punishment. Chief Justice Lee, in agreement, stated that he knew of no case that had found the husband liable following the prosecution of a ‘feme covert’ for a crime upon the breach of an Act, for which there is a pecuniary penalty inflicted, and for default of payment corporal punishment. He then made a direct comparison of the ‘legal impossibility’ argument to marital coercion, stating that in a situation where a married woman was ‘compelled by her husband’, to commit a crime, it was ‘his act’, as much as hers, and therefore the husband was ‘liable to the penalty of the statute’. Coverture alone, however, would not transfer criminal responsibility (and the resulting penalty) from the wife to the husband, or implicate the husband alongside the wife. Chief Justice Lee continued, ‘Though it is said that a feme covert cannot pay damages, and lex non cogit ad impossibilia, and impotentia excusat legem, yet as she is as capable of forbearing the crime forbidden as a man, those maxims do not extend to this case’. The court agreed, but importantly, distinguished the case from ‘the cases that found only in damages’. The question of what would happen to a wife found guilty of a crime only punishable by a fine was left open.

Even in the eighteenth century, then, it was still believed in some quarters that married women could not pay fines due to coverture, but this did not preclude judges’ perception of married women as criminally autonomous. The reliance on alternative forms of punishment, and reluctance to punish the husband, shows how the judges in these cases, though hesitant to interfere with coverture, sought to ensure those who posed a threat to social order, as wives who ran disorderly houses or sold gin without a licence did, were suitably punished. The solution in both instances was to apply a physical punishment, either outright or in the face of non-payment. Neither coverture or criminal law was unsettled by this response, but arguably resulted in the application of harsher punishments to the two defendants in the cases discussed because they were married. If the women

71 Ibid.
72 Ibid.
73 Ibid., 398.
74 The law does not compel one to do that which cannot possibly be performed, and inability excuses the law.
75 R v Crofts (1740) 7 Mod. 398.
76 Ibid., 2 Str. 1121. Strange’s report records the case as occurring in 1739. The word ‘found’ may be a misprint of ‘sound’.
77 It is difficult to discern how unusual these cases were. Reports for twenty-four women and fourteen men indicted for keeping a disorderly house appear in the Old Bailey Reports between 1683 and 1885. Five indictments for women and two for men occurred before the 1751 Act for the Better
were spinsters, they could have received a fine without the complication of coverture.

It is notable that there were several different responses to the parallel issue of a wife paying damages or the costs of a suit at private law. A husband, though not responsible for his wife’s torts, was held responsible for paying damages that arose from a lawsuit.\(^78\) In contrast, from at least the seventeenth century, married women who sued independently at equity were required to do so by a next friend in order that a nominated individual provide security for any costs incurred.\(^79\) In practice, a number of Chancery final decrees from this period involving a married female plaintiff ordered that the costs be taken out of her separate estate.\(^80\) Chancery often dealt with matters pertaining to married women’s separate property specifically. The jump from ‘rubber stamping’ a transaction involving a *feme covert’s* separate property to charging the costs from the same estate was arguably much smaller than ordering a married woman to pay a fine out of separate estate a criminal court could only speculate she might possess.

V. Framing the Indictment

The ‘legal impossibility’ argument continued to appear, sporadically, in the context of marketing offences and offences of keeping disorderly houses throughout the late-seventeenth and eighteenth centuries. In the cases discussed below, the main issue was not whether a husband should be held responsible for a punishment levied against his wife’s actions, or what type of punishment the wife could receive, but whether a wife could be held independently legally responsible for a crime involving the ownership, buying, selling, or managing of property or a business at all. Law reports evidence arguments that a husband’s inclusion in his wife’s indictment was necessary ‘for conformity’. Eighteenth-century discussions of whether a *feme sole* trader could appear at Common Pleas or King’s Bench without her husband show that this argument also arose in the private law context. Karen Pearlston states that the husband had to join ‘for conformity’ in

 Preventing Thefts and Robberies, and for Regulating Places of Public Entertainment, and Punishing Persons Keeping Disorderly Houses (25 Geo. II, c. 36). Three women were found guilty and fined, with one also sentenced to the pillory and imprisonment. One man was fined and one imprisoned. Imprisonment was the most common punishment in the nineteenth-century cases. The majority of offences of this kind were not heard at the Old Bailey as they were punishable as misdemeanours.

\(^78\)Pearlston, ‘Male Violence’.

\(^79\)Ireland, ‘Rebutting the Presumption’.

\(^80\)In nineteen of thirty-four enrolled Chancery decrees listing a married woman as first-named plaintiff between 1714 and 1760 it was ordered that the married female plaintiff pay the defendant’s costs or the costs be taken from the trust estate under dispute, which the married woman claimed a stake in. In one case the plaintiff’s next friend was taxed the costs of the suit. Information on costs was not discernible for two cases. No costs were taxed in two cases.
order ‘to give his wife standing to sue at those courts’. At criminal law, however, *Dr Foster’s Case* was cited as authority for the fact a husband was not required as a party to an action against a wife in order to ensure fulfilment of the punishment. Legal treatises and case law stated that a married woman who committed a crime without her husband’s knowledge would be held responsible for her own actions.

In *R v Crofts*, discussed above, Serjeant Bootle argued that Mary Croft’s husband should have been made a party to the indictment because ‘If a wife do an illegal act in selling anything, it is for her husband’s benefit, and therefore he must be made a party to the indictment’. He objected that as the defendant was a married woman, she was unable to contract. In rebuttal, the Solicitor General, citing Hawkins, argued that ‘where the crime is of such a nature, as can be committed by her alone, she may be indicted without her husband’.

Similarly, in *R v Fenner* (1669) a *feme covert* was indicted upon statute for engrossing the market by buying up fish. Upon arrest of judgment, Symson, for the defendant, argued that Fenner’s ‘husband ought to be join’d, because a fem covert cannot Ingross’. Fenner lacked the power to make contracts, her husband gained the profit, and coverture dictated that her indictment was a ‘legal impossibility’. Symson implied that Fenner was undertaking market activities in her husband’s name and thus the husband should be punished instead of her. This argument connected criminal law to the private law doctrine of necessaries. As Stretton and Kesselring state, wives’ active involvement in the marketplace was enabled, in part, by a ‘tacit presumption that they acted on behalf of their husbands’, ‘in his best interests’, as his ‘agent’.

Defence counsel in *R v Fenner* sought to prove that the defendant was acting for her husband’s benefit when making illegal transactions, presumably on the basis that any profit incurred through her transactions automatically passed to her husband under the doctrine of coverture.

It was further argued that Fenner’s indictment did not properly indicate that she was a *feme covert*. The correct way to frame the indictment was to name her as a spinster, with her maiden name, as well as the wife of Fenner. Perhaps framing the indictment in this way demonstrated that Fenner could not have committed the offence because she was a *feme covert*. 

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81 Pearlston, ‘Male Violence’, 263.
82 (1614) 11 Co. Rep. 56a.
83 Wiener, ‘Is a Spinster an Unmarried Woman?’; Caswell, ‘Coverture and the Criminal Law’; Dalton, *The Countrey Justice; Dr Hussey’s Case* (1611) 9 Co. Rep. 71b.
84 (1740) 7 Mod. 397.
85 (1739) 2 Str. 1121.
86 *R v Fenner* (1669) 2 Keb. 468.
87 Ibid., 480.
88 Stretton and Kesselring, ‘Introduction’, 9; See also Margot Finn, ‘Women, Consumption and Coverture in England, c. 1760-1860’, 39(3) *The Historical Journal* (1996), 703; *Capel v Powell* (1864) 17 CB (NS) 743.
89 *R v Fenner* (1669) 1 Sid. 410.
covert and was thus contracting on behalf of her husband. The ‘unmarried spinster’ format might have been the correct way of framing the indictment for a married woman who, for whatever reason, wished to draw attention to the fact she was a feme covert. It may also have helped judges to avoid a situation in which a defendant’s coverture impeded justice. The court’s statement that ‘after verdict [Fenner] may be intended a single woman’ supports Carol Wiener’s theory that indictments were framed this way to ensure the correct person faced justice and the indictment was not voided for technical reasons.\(^90\) Calling married women ‘spinsters’ was a ‘legal fiction’ that allowed judges to ‘live happily’ and ‘shuttle’ between ‘a practical world in which wrongdoers must be punished according to their wrongs and an ideological world in which married women were uniformly subservient to their husbands and in which the law, as written in law books, actually worked’.\(^91\) Wiener notes that resorting to legal fiction, instead of confronting ‘the problem head on’ is indicative of the extent to which justices made ‘no serious effort to change the criminal law as it related to femes covertes … except in the case of recusants’.\(^92\) Judges used the ‘married spinster’ format to circumvent coverture in order to convict married women of crimes they theoretically could not commit, and thus uphold both coverture and criminal law. Considering coverture holistically, and comparing the agency bestowed on femes covertes in civil and criminal law settings, the judges reasoned that ‘the wife may as well ingross and sell as convert or eject’.\(^93\)

Judgment for the King is recounted in two reports of \(R\ v\ Fenner\), neither of which suggests a direct decision regarding the ‘legal impossibility’ issue.\(^94\) One report notes that the court issued Fenner with a fine but did not give any opinion as to whether a feme covert could be indicted for engrossing or fore-stalling without her husband.\(^95\) The other report suggests that despite the fact the indictment was framed correctly, there was doubt as to whether Fenner was, in fact, a married woman. The court stated that ‘the verdict hath found her guilty, which they could not do were she a fem covert, and this may be assign’d for error in fact that she was covert’.\(^96\) Regardless of Fenner’s actual marital status, the judges circumvented a conclusion on how coverture impacted the administering of justice under the statute in this case.

\(R\ v\ Fenner\) only considered whether a husband needed to be prosecuted alongside his wife by indictment. A husband and wife could still be joined in an information for the wife’s wrongdoing. A King’s Bench case, \(R\ v\)

\(^{90}\)Ibid., 2 Keb. 480; Wiener, ‘Is a Spinster an Unmarried Woman?’.
\(^{91}\)Wiener, ‘Is a Spinster an Unmarried Woman?’ 31.
\(^{92}\)Ibid.
\(^{93}\)\(R\ v\ Fenner\) (1669) 2 Keb. 480.
\(^{94}\)Ibid., 1 Sid. 410; 2 Keb. 503.
\(^{95}\)Ibid., 1 Sid. 410.
\(^{96}\)Ibid., 2 Keb. 503.
Jordan, concerned an information brought against a *feme covert* for selling fish. Justice Twisden stated that the information ‘lay not against the wife, ‘but against the husband alone… being his contract’. The court agreed. It appears this case was more straightforward than *R v Fenner* because it was settled law that a husband could join with his wife on an information but, as was established in *R v Fenner* and the statutes against recusancy, the husband was not required to join on an indictment. Despite this, instead of a final verdict, ‘judgment was staid’. The reason cited for this was that the case had originated from ‘a difference between fishmongers and the poor women’, but that this argument was ‘since settled’. The court was perhaps unwilling, or thought it unnecessary, to interfere in a concluded private disagreement. No further action was needed because the disruption to the market had already been resolved outside the courtroom. Indeed, *R v Crofts* noted that *R v Jordan* was apparently decided ‘upon a compromise’. The report places married women in the context of the market, and perhaps points towards a lack of judicial interest in interfering in cases which no longer posed a threat to economic order.

As Walker states, despite coverture, most married women ‘had a high profile in the legitimate acquisition, exchange and sale’ of ‘food, drink, clothing and other household items’. It follows that married women probably also played a significant role in the illegitimate acquisition, exchange and sale of things. The marketplace accommodated commercial and social negotiation. The crowded nature of the market ‘allowed a measure of private subversion of space’ that challenged ‘authority, order and hierarchy’. Much like how Catholics were thought to disrupt Elizabethan society, itinerant and independent market traders such as hawkers and peddlers were often the subject of suspicion during periods of dearth in the seventeenth and eighteenth centuries. Various ‘paternalist’ pieces of legislation against forestallers, engrossers and regraters were enacted during the eighteenth century. Indeed Lord Kenyon, in 1800, called forestalling ‘an evil of the greatest magnitude; and … a most heinous offence against religion and

97(1670) 2 Keb. 634.
98Wiener, ‘Is a Spinster an Unmarried Woman?’; Dalton, *The Country Justice; R v Fenner* (1669) 2 Keb. 480.
99*R v Jordan* (1670) 2 Keb. 634.
100Ibid.
101*R v Crofts* (1740) 7 Mod. 397, 398.
102Walker, ‘Keeping it in the Family’.
103Dave Postles, ‘The Market Place as Space in Early Modern England’, 29(1) Social History (2004), 41.
104Ibid., 42.
105E.P. Thompson, ‘The Moral Economy of the English Crowd in the Eighteenth Century’, 50 Past & Present (1971), 76; Anon., *An Essay to Prove That Regrators, Engrossers, Forestallers, Hawkers and Jobbers of Corn, Cattle, and other Marketable Goods … are Destructive of Trade, Oppressors to the Poor, and a Common Nuisance to the Kingdom in General*, London, 1718.
106Ibid.; John Walter and Keith Wrightson, ‘Dearth and the Social Order in Early Modern England’, 71 Past & Present (1976), 22; Wendell Herbruck, ‘Forestalling, Regrating and Engrossing’, 27(4) Michigan Law Review (1929), 365.
morality, and against the established law of the country.107 According to Robert Gamble, itinerant traders, ‘viewed as marginal and rootless’, had the potential to sharpen ‘anxieties about the stability of class, race, and gender hierarchies’.108 Regulating the market and ensuring market laws applied to married women was important to maintaining social order, particularly because, as Sandra Clark states, the transgressions of fames covert, ‘if violating the norms for ... domestic roles, were particularly threatening’.109 The need, on the part of judges, to maintain both coverture and criminal law reflected the need to maintain both women’s subordination to men and a well-ordered marketplace.110 Trials and convictions for marketing offences played an important role in maintaining patriarchal society, as litigation and criminal indictment were woven into the fabric of culture as a means of ordering people and regulating social relations.111 Married women needed agency to operate in the marketplace, which was, in turn, necessary to the continuation of socio-economic society. Judges made decisions that gave women agency separately from their husbands, upholding both coverture and criminal justice, by ensuring married women’s indictment and conviction for marketing offences.

VI. Interpreting the Substantive Offence

Enabling married women’s involvement in markets extended to their involvement in businesses. As such, the ‘legal impossibility’ issue arose in the context of indictments for the running of illegal premises, such as gaming houses or brothels. Much like the judicial response to marketing offences, the aim of circumventing coverture was to punish the wife, not the husband. Eighteenth-century lawmakers secured convictions upon wives for keeping disorderly houses through interpreting the substantive offence in such a way as to circumvent coverture. Treatise-writers enunciated these interpretations. William Hawkins specified that husband and wife could be jointly indicted for keeping a bawdy house because the offence referred to the ‘governance’ of the house, as opposed to its ownership or management.112 According to Hawkins, though the wife could not physically own the business or business property, she was presumed to have a ’principal

107 R v Waddington (1800) 1 East. 141, 155.
108 Robert J. Gamble, "For Lucre of Gain and in Contempt of the Laws": Itinerant Traders and the Politics of Mobility in the Eighteenth-Century Mid-Atlantic’, 13(4) Early American Studies (2015), 836, at 837.
109 Sandra Clark, Women and Crime in the Street Literature of Early Modern England, London, 2003, 53.
110 Rowe, ‘Femes Covert and Criminal Prosecution’.
111 Innes and Styles, ‘The Crime Wave’; Douglas Hay, ed., Albion’s Fatal Tree: Crime and Society in 18th Century England, London, 1975, rev. ed., London, 2011; Thompson, ‘The Moral Economy’; Craig Muldrew, The Economy of Obligation: The Culture of Credit and Social Relations in Early Modern England, Basingstoke, 1998.
112 William Hawkins, A Treatise, 3.
The offence of keeping a disorderly house was thus separated from proprietorship, enabling courts to avoid the difficulties coverture posed, and successfully convict wives and uphold social order by ensuring no individual escaped conviction due to ‘legal impossibility’.

In R v Williams (1711) ‘It was moved in arrest of judgment, that husband and wife could not be jointly indicted for keeping a bawdy-house’, because ‘the keeping a house could not be the keeping of the wife, any more than it is the keeping of the servant’. But, the court held that ‘the indictment was not only for keeping a bawdy-house, but for procuring lewdness, &c.’ and ‘that these crimes are in their nature several’. One report, referring specifically to a wife’s inability to own property, specified that the ‘keeping’ was ‘not to be understood’ as ‘having or renting in point of property; for in that sense the wife cannot keep it, but the keeping here is the governing and managing a house in such a disorderly manner as to be a nuisance’. ‘Keeping the house’ did not ‘necessarily import property’, but perhaps signified ‘that share of government which the wife has in a family as well as the husband’. Such arguments rested upon societal notions of the wife’s role within the household. While a wife had no control over family property, she had control over how the household was governed (as already discussed, this issue sparked fear for the sixteenth-century lawmakers who dealt with recusancy,) and was thus also capable of governing a bawdy house.

The same argument arose in R v Dixon and His Wife (1716), in which a husband and wife were jointly indicted for keeping a gaming house. In demurring, the defendants argued that the indictment should have been brought against the husband only. The court was of the opinion that the ‘objection would have weight in it if the property or the ownership of the house was the matter in question;’ but because the indictment referred not to the property, ‘but the criminal management of the house’ the case was not distinguishable from R v Williams. It was stated that though the wife could not own or run the business, she might ‘have as great, nay a greater share than the husband’ in the criminal management of a gaming house, as she could play an active role ‘in promoting gaming, and furnishing the guests with all conveniencies for that purpose’. Again, by referencing

113Ibid.; See also William Blackstone, Commentaries on The Laws of England: Book IV: Of Public Wrongs, Oxford, 1769, Ruth Paley, ed., Oxford, 2016.
11410 Mod. 62.
115R v Williams (1711) 1 Salk. 384.
116Ibid., 10 Mod. 62.
117Ibid., 1 Salk. 384.
118Ibid., 10 Mod. 62.
119Walker, ‘Keeping It in the Family’; Barclay and Ireland, ‘The Household’.
12010 Mod. 335.
121Ibid.
122Ibid.
women’s traditional role as homemaker and household manager, the court circumvented the question of property ownership or business management in light of coverture and, by instead focusing on the fact the indictment was framed as a nuisance, acknowledged the agency of married women and ensured they were held liable for their criminality.

Securing conviction for keeping a brothel or gaming house was made easier by the Disorderly Houses Act 1751 which made specific reference to both men and women when describing who could be held criminally liable for keeping a disorderly house.\textsuperscript{123} The Act stated that:

\begin{quote}
any person who shall ... appear, act, or behave him or herself as master or mistress, or as the person having the care, government, or management of any bawdy-house ... or other disorderly house, shall be deemed ... to be the keeper thereof, and shall be liable to be prosecuted and punished as such, notwithstanding he or she shall not in fact be the real owner or keeper thereof.\textsuperscript{124}
\end{quote}

An individual could be considered ‘master or mistress’ of a bawdy house regardless of their ownership of the property, a stipulation that, perhaps intentionally, ensured married women under coverture were included in the scope of the Act.\textsuperscript{125}

It helps to view these decisions and legislation in light of a ‘moral panic’ and ensuing crackdown on the perceived disorder of eighteenth-century society due to gaming houses and brothels.\textsuperscript{126} By the 1720s Westminster justices were leading a campaign for the suppression of gaming houses.\textsuperscript{127} The decisions discussed, like those in the context of \textit{feme covert} and marketing offences, reflected a need to maintain order through indictment and conviction of married women despite their coverture. In the eyes of lawmakers, married women’s offences were made ‘on behalf of their households’.\textsuperscript{128}

While disorderly houses were not identical to households, the notion that wives’ guilt rested upon their ability to manage a disorderly house in the

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\textsuperscript{123}Heather Shore, “‘The Reckoning’: Disorderly Women, Informing Constables and the Westminster Justices, 1727–33’, 34(4) Social History (2009), 409.
\textsuperscript{124}25 Geo. II, c. 36.
\textsuperscript{125}Evidence suggests the clause was also designed to catch all individuals involved in running bawdy houses. For example, between 1849 and 1856, five women were tried on separate indictments for their involvement in running a brothel leased by Ann Robinson. \textit{Old Bailey Proceedings Online}. Available online at: \texttt{www.oldbaileyonline.org}, version 8.0, 19 April 2022, Aug 1849, trial of Mary Hinds (t18490820-1494); April 1855, trial of Ann Robinson (t18550409-395); July 1855, trial of Caroline Howard Mary Jones (t18550702-707); March 1856, trial of Mary Curtis (t18560303-294). Men were caught by the framing of the Act too. Adolphus Harrison was indicted for keeping a bawdy house in 1854. Mr Ballantine, for the defence, when asked whether he could ‘resist a verdict’ upon the evidence, responded that ‘as the Act ... made any person taking any part or share in a house of this description equally responsible with the proprietor, he could not, consistently with his duty, struggle against a verdict’. April 1854, trial of Adolphus Harrison (t18540403-531).
\textsuperscript{126}Shore, ‘The Reckoning’.
\textsuperscript{127}Shoemaker, \textit{Prosecution and Punishment}; Julian Hoppit, ‘The Myths of the South Sea Bubble’, 12 Transactions of the Royal Historical Society (2002), 141.
\textsuperscript{128}Walker, ‘Keeping It in the Family’, 93.
\end{flushright}
same way they managed a household links the two. A disorderly house was a disrupted version of the household, which eighteenth and nineteenth-century thinkers depicted as ‘a little commonwealth’. As Walker states, ‘the emphasis on the household as the primary conduit of law and order ... raised the status and practical authority of wives’ to an authoritative position. Wives’ involvement in disorderly houses, much like recusancy, threatened patriarchy, as they denoted married women’s disturbance of the smallest denominator of the wider state, posing a significant risk to order. It was therefore critical to circumvent coverture and ensure married women were convicted and punished for their involvement in the running of such disorderly businesses. The method by which this was achieved was to interpret the offence as a nuisance, therefore silencing any questions about the actual ownership of the illegal businesses in question.

VII. Conclusion

The ‘legal impossibility’ argument did not apply once the Married Women’s Property Acts effectively removed coverture. Yet, before the late nineteenth century, ‘legal impossibilities’ caught judges between two facets of law aimed at maintaining social order and existing patriarchal norms. On the one hand, coverture was to maintain patriarchal values and the patriarchal household, but on the other hand criminal indictments, particularly involving markets, businesses or transactions, were important to maintaining economic order and social stability. Married women needed to exercise autonomy when acting in commercial spaces, so coverture required circumvention to allow femmes covert agency. If such agency led to criminality, coverture needed to be evaded to allow for conviction and punishment. Judges upheld both aspects of the law in cases where coverture was claimed to conflict with criminal law. This renegotiated, but did not assuage, patriarchy.

Judicial desires to hold femmes covert accountable for offences in which they claimed ‘legal impossibility’ might directly conflict with the ethos of the presumption of marital coercion. Yet marital coercion was not often successfully invoked which, in itself, suggests judicial recognition of married women as independent criminal agents. The presence of two interrelated principles derived from coverture at criminal law, however, poses questions for the

129Katie Barclay, ‘Happiness: Family and Nation in Nineteenth-Century Ireland’, 43(2) Nineteenth-Century Contexts (2021), 171; Emily Ireland, ‘Conventional and Unconventional Emotions in the Eighteenth-Century English Court of Chancery: The Story of “Unhappy” Mary Bangs’, in Katie Barclay and Amy Milka, eds., Cultural Histories of Law, Media and Emotion: Public Justice, New York and London, 2022; Walker, Crime, Gender, and Social Order.
130Walker, ‘Keeping It in the Family’, 93.
131Married Women’s Property Act 1870, (33 & 34 Vict., c.93); Married Women’s Property Act 1882, (45 & 46 Vict., c.75).
132Ireland, ‘Rebutting the Presumption’. 
interpretation of some sources. When ‘coverture’ or a ‘feme covert’ is referred to in law reports it is important to pay attention to the exact details of the defendant wife’s actions and the way her coverture is discussed. For example, in the 1714 *Old Bailey* report for Margate and Robert Cook, Thomas Davis and Deborah Stent, all indicted for theft and burglary, Margate is acquitted ‘by reason of her Coverture’. One may presume the report is referring to marital coercion, but it is not clear in the report that Robert and Margate were together at any point during the offence. Thomas and Robert committed the burglary, and Thomas and Margate went to Deborah’s house to sell the goods. Thomas and Robert admitted to the burglary, and ‘Davis and Cook’s Wife went to Stent’s House, and sold the 8 Dishes for 5 Shillings: But this last being only hearsay, Stent was acquitted, as was Cook’s Wife by reason of her Coverture’. As the requirements for marital coercion were perhaps not met in this instance, it is entirely possible that Margate was acquitted because she lacked the legal capacity to sell the goods on account of her coverture.

Another example concerns Mary Daley who was indicted for receiving stolen sugar in 1860. One reading is that the presumption of marital coercion was successfully invoked despite the absence of Mary’s husband when the offence was committed. However, the report notes that Mr Sleigh ‘contended that there was no felonious receipt on the part of Daley, she acting on behalf of her husband’. This could be a reference to marital coercion, but it could also be a reference to the law of necessaries or the presumption that a married woman contracted in her husband’s name. Mr Sharpe’s submission in response, that ‘it would not be her duty to buy sugar in her husband’s absence’, and the court’s opinion that Mary ‘could not be held responsible for any act done in her husband’s absence, unless it was clearly a separate act’ makes more sense in this context. The presumption that a wife contracted on her husband’s behalf meant that, unless Mary clearly contracted separately, she could not be held criminally accountable for the transaction. Such interpretation supports findings regarding the necessity of a husband in invoking the presumption of marital coercion, and demonstrates the existence of coverture and ‘legal impossibility’ as a separate, informal, defence to crimes involving financial transactions.

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133 *Old Bailey Proceedings Online*. Available online at: www.oldbaileyonline.org, version 8.0, 16 Jan 2021, June 1714, trial of Robert Cook alias Hedgly, Margate his Wife, Thomas Davis, Deborah Stent (t17140630-41).
134 Ibid.
135 *Old Bailey Proceedings Online*. Available online at: www.oldbaileyonline.org, version 8.0, 17 Jan 2021, July 1860, trial of Thomas Crouch (14) Mary Daley (44) (t18600709-610).
136 Ireland, ‘Rebutting the Presumption’.
137 Stretton and Kesselring, ‘Introduction’.
138 *Old Bailey Proceedings Online*. Available online at: www.oldbaileyonline.org, version 8.0, 17 Jan 2021, July 1860, trial of Thomas Crouch (14) Mary Daley (44) (t18600709-610).
Often, perhaps inevitably, the study of women and the common law leads to a ‘derogation from neat narratives’ of legal history.139 Gwen Seaborne believes such ‘complexity and nuance’ should be embraced.140 So, while the cases discussed here support a trend visible in the development of many laws relating to married women through the early modern and modern period (namely, an increasing inclination to give married women legal responsibility), they do not track them exactly. The cases do, however, demonstrate the importance of taking a holistic approach to examining the ways coverture affected married women’s interactions with the law, plus the significance of the legal arguments that never became the substantive law, but were important for the social issues they represented.141 It is important to acknowledge that the various effects of coverture, and the methods of circumvention and limits set by judges in different realms of the law, were connected, spoke to each other, and impacted each other, creating a complex web of allowances and circumscriptions that made up married women’s legal agency. Many *femæ covert* were indicted for the offences discussed. In most cases coverture was not raised as an issue. The importance of the small number of reported cases in which coverture was brought up lies in the social and cultural significance, for defendant and lawmaker, and of the two competing methods of upholding patriarchy. I once wrote that to ‘truly understand the effect gender has had on this system across time, we may need to look at the law a little more closely, for often all is not quite as it seems’.142 This article has demonstrated that I, as much as anyone else, must follow this advice.

**Disclosure Statement**

No potential conflict of interest was reported by the author(s).

**Note on Contributor**

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139 Gwen Seabourne, *Women in the Medieval Common Law c.1200-1500*, Abingdon, 2021, 158–159.
140 Ibid.
141 Auchmuty and Rackley, ‘The Case for Feminist Legal History’.
142 Ireland, ‘Rebutting the Presumption’, 43.