CRIMINAL WIVES IN THE OLD BAILEY: CRIME AND COVERTURE IN EIGHTEENTH-CENTURY LONDON

By

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ABSTRACT

Criminal Wives in the Old Bailey: Crime and Coverture in Eighteenth-Century London

By Marisha Caswell

Abstract: Under coverture husband and wife were one person before the law. Part of coverture was the presumption of coercion, which held that married women who committed crimes did so under the direction of their husbands, and were therefore not liable for their actions. Because of this presumption, criminal historians have discounted the actions of married women accused of crime and thereby supported the eighteenth-century assertion that married women were the favourites of the law. However, studies of property and women's rights often argue that coverture was a patriarchal tool designed to maintain married women's subordination. Using the records of the Old Bailey, London's central criminal court, this study seeks to account for the actions of married women accused of crime in the eighteenth century. The seemingly irreconcilable views of modern feminists and eighteenth-century legal commentators are reconciled and married women are given a place in eighteenth-century criminal history.

August 21, 2006

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TABLE OF CONTENTS

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FIGURES

TABLES

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INTRODUCTION: MARRIAGE, CRIME, COVERTURE AND COERCION

> *When a small brooke or little river incorporateth with Rhodanus, Humber, or the Thames, the poore Rivolet looseth her name, it is carried and recarried with the new associate, it beareth no sway, it possesseth nothing during coverture. A woman as soone as she is married is called covert . . . that is, vailed, as it were, clouded and overshadowed, she hath lost her stream.*
>
> -T.E. *The Lawes Resolutions of Womens Rights*, 1632

In 1700, John and Elizabeth Handley appeared before the Old Bailey. They had lodged at Stephen Rowse's lodging house, and when Rowse awakened the next morning, he found the Handleys gone, his mattress filled with dirt and some contents of the room missing. In the middle of the night, the Handleys had cut open the feather mattress and stolen its contents along with a number of other items. Rowse prosecuted the Handleys for stealing feathers, pewter plates and an iron candlestick. At trial, "The fact was plainly prov'd against them, the jury therupon found the man guilty and acquitted the woman, she doing it in obedience to her husband's commands."[1] The jurors obviously believed that Elizabeth had committed the theft, so why did they acquit her? The answer lies in the complicated common law doctrine of coverture. This doctrine assumed that upon marriage, a husband and wife became one person before the law. The married couple took on the identity of the husband as his was the more powerful personality. Since a married woman did not have an independent legal identity she could not own property, sue or be sued without her husband, make contracts, and in certain cases she was not liable for her debts or criminal actions. Coverture was a complex system of benefits and drawbacks that depended on individual circumstances and interpretations. Elizabeth Handley obviously benefited from coverture, but was her case the norm or was it an

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[1] "John Handley, Elizabeth Handley, Theft: Simple Grand Larceny, 15th January, 1700," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1700s/t17000115-11.html> 2005.

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exception to the practices of eighteenth-century London juries? The defence of coercion illustrates that coverture had some benefits, but in practice these benefits were legal fictions designed to deprive women of certain rights while maintaining their submission to the patriarchal order.

A married woman who committed a crime in the presence of her husband could claim the defence of coercion, and the jury could acquit her of her actions since she did them under her husband's command.[2] Judges and juries often assumed a wife's obedience only when the husband was present. A husband's absence during a crime would often remove the presumption of coercion. Eighteenth-century legal commentators and conduct writers pointed to this aspect of coverture as one of the reasons why women were the favourites of the English law.[3] However, modern scholarship has tended to portray coverture as harmful to women: a legal fiction that maintained women's subordinate position. This thesis will show that these two seemingly irreconcilable views actually reflect the multiple purposes and aspects of coverture. While married women accused of crime, such as Elizabeth Handley, could, in theory, benefit from coverture, practice actually limited its application. An examination of the eighteenth-century Old Bailey cases reveals that only women who conformed to the ideal gender order actually received the benefit of presumed coercion. If a married woman showed independent action or acted outside the proper feminine roles, juries did not feel that she deserved the defence of coercion. In this sense, the defence of coercion

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[2] *Law quibbles. Or, a treatise of the evasions, tricks, turns and quibbles commonly used in the profession of the law* (London, 1724); Sir William Blackstone, *Commentaries on the Laws of England, Book I* (Oxford: Clarendon Press, 1765), 432; Linda K. Kerber, *No Constitutional Right to be Ladies: Women and the Obligations of Citizenship* (New York: Hill and Wang, 1998), 29.

[3] Blackstone, *Commentaries I*, 433; *Baron and Feme: A Treatise of the Common Law Concerning Husbands and Wives* (London, 1700), 4. This point is discussed further in the next chapter.

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was limited favouritism. Rather than benefiting all married women, it actually served to reinforce the gender order by favouring those who conformed and punishing those who did not.

One of the main problems with understanding coverture and how it worked lies in the lack of communication between different areas of historical study. Most historians who study coverture focus on its implications in regards to property.[4] While coverture related primarily to property, it had effects in other branches of the law. By focusing on property, historians have largely ignored coverture's function in the criminal law. Historians of the criminal law face an even larger division as gender and especially female crime is largely ignored. It was not until recently that women have started to gain any more than a cursory reference in works of overall criminality in eighteenth-century England.[5] These works note that women accounted for a small proportion of overall criminality, often lower than 20 percent. Studies of female criminality have sought to explain this difference rather than examine female crime on its own terms.[6] In addition, these studies focus largely on single or widowed women accused of crimes and rarely mention married women. Because of the defence of coercion, historians have tended to argue that married women were not responsible for their actions and therefore leave

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[4] Since coverture is a complicated doctrine, and its understanding is central to this thesis, a more indepth discussion of historiographical debates about the purpose and working of coverture is provided in the next chapter.

[5] Peter Linebaugh, *The London Hanged: Crime and Civil Society in the Eighteenth Century* (London: The Penquin Press, 1991); Douglas Hay, "Property, Authority and the Criminal Law," in *Albion's Fatal Tree*, ed., Douglas Hay, et al. (London, 1975), 17-63; J.M. Beattie, *Crime and the Courts in England, 1660-1800* (Princeton: Princton University Press, 1986); J.A. Sharpe, *Crime in Early Modern England 1550-1750*, Second Edition (Essex: Addison Wesley Longman Limited, 1999). While Beattie and Sharpe mention women in their analyses, women make up a very small proportion of their discussions of criminal behaviour.

[6] J.M. Beattie, "The Criminality of Women in Eighteenth-Century England," *Journal of Social History* 8 (1975); Carol Z. Wiener, "Sex-Roles and Crime in Late Elizabethan Hertfordshire," *Journal of Social History* 8 (1975); Peter Lawson, "Patriarchy, Crime and the Courts: The Criminality of Women in Late Tudor and Early Stuart England," in *Criminal Justice in the Old World and the New: Essays in honour of J.M. Beattie,* ed. Greg Smith, et al. (Toronto, 1988).

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married women who committed or were accused of committing crimes out of the historical analyses.[7] The problem with this lack of communication is that it misses important areas of research. Coverture played a role in the criminal law, and by accepting the application of coercion without question, historians fail to fully understand its workings. Married women did commit crimes and were accused of commiting crimes, albeit fewer crimes than their single or widowed counterparts, and the defence of coercion did exist, but this does not mean that their actions were unimportant or that the courts did not treat them as criminals. It is only by bringing together the different historiographical arguments that one can properly understand the criminal actions of married women in the eighteenth century.

Issues of Order and Control

The eighteenth-century criminal law was especially harsh. As Donald Rumbelow explains, "In the seventy years between 1690 and 1760 the number of capital indictments written down in law rose from under eighty to over three hundred and fifty. There was literally nothing for which a man could not be hanged."[8] The chief example of this was the 1723 Waltham Black Act, which made two hundred to two hundred and fifty offences capital offences, and was "so loosely drafted that it became a spawning ground for ever-extending legal judgements."[9] However, despite the harsh criminal code and the increasing number of offences classified as capital offences, the execution rate remained relatively stable. This did not indicate an inefficient legal system, but rather illustrated

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[7] See the above sources and Peter King, "Female offenders: work and life-cycle changes in late eighteenth-century London," *Continuity and Change* 11:1 (1996), 69; Robert B. Shoemaker, *Gender in English Society 1650-1850: The Emergence of Separate Spheres?* (Essex: Addison Wesley Longman Limited, 1998), 297.

[8] Donald Rumbelow, *The Triple Tree: Newgate, Tyburn and Old Bailey* (London: Harrap Limited, 1982), 88.

[9] E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon Books, 1975), 23.

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the efforts of prosecutors, judges, juries, and authorities to limit the severity of the law.[10] Individual victims rather than the state chose what offences to prosecute. Private prosecution was central to English justice in the eighteenth century. As Allyson May notes, it meant that:

> Offenders who were apprehended might never be tried let alone executed . . . [and] even if a legal prosecution did ensue there were various ways in which the execution of an offender could be avoided: the exercise of *discretion* was available at virtually every stage of criminal proceedings.[11]

Discretion came in many forms and limited the severity of the letter of the law. Even if an individual chose to prosecute, the jury could acquit the defendant, or the jury could undervalue the goods stolen so that the crime did not attract the death penalty, the judge could direct the jury not to convict, the offender could plead benefit of clergy, or the king could exercise his mercy and pardon the offender. The functioning of discretion meant that despite the increasingly harsh criminal code, the number of executions in England remained relatively stable and never matched the severity of the law.

Part of the reason why the execution rate did not have to match the severity of the law was that the purpose of the law was not to punish every offender. Rather, as John Langbein argues, the central purpose of the criminal trial was "to winnow down the number of applications of the capital sanction."[12] Since execution was the primary punishment, it was important to choose offenders carefully to uphold the law and avoid upsetting the careful balance of mercy and terror inherent in the law. The public aspect

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[10] As Cynthia Herrup notes, the court agenda was the "end of an elaborate selection process rather than . . . the bumbling product of a weak and inadequate bureaucratic structure." Cynthia B. Herrup, "Law and Morality in Seventeenth-Century England," *Past and Present* 106 (1985), 103.

[11] Allyson N. May, *The Bar and the Old Bailey, 1750-1850* (Chapel Hill: The University of North Carolina Press, 2003), 13, emphasis added.

[12] John Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003), 231, 6, 336, 338, 343. This stood in stark contrast to the "truth-finding" inquisitorial legal system on the Continent.

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of punishment reinforced the terror of the law and emphasised the key element of punishment, which was deterrence rather than punishing every offender.[13] Authorities sought to make an example of those convicted in order to deter others from committing the same offence.[14] Public execution was also a chance for the state to show its power to the ordinary people. As Peter Linebaugh argues, "hanging was one of the few occasions (coronations were another) that united the several parts of government." This public display reinforced the power of the law and "renewed the power of sovereignty" while repeating "the lesson: 'Respect Private Property'" and the rule of law.[15] While ordinary people controlled aspects of the "Tyburn Procession", where the condemned made his or her way from Newgate to the place of execution at Tyburn, execution was still an example of state power. As V.A.C. Gatrell points out, despite the crowd's actions, the convicted still hanged, which ultimately reinforced the power of eighteenth-century authorities.[16]

In addition to noting the discretionary nature of the law, it is also important to understand why the system was discretionary. In his extremely influential essay, "Property, Authority and the Criminal Law," (1975) Douglas Hay argues that "The criminal law was critically important in maintaining bonds of obedience and deference, in legitimizing the status quo, in constantly recreating the structure of authority which arose

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[13] Simon Devereaux, "In Place of Death: Transportation, Penal Practices, and the English State, 1770-1830," in *Qualities of Mercy*, ed. Carolyn Strange (Vancouver, 1996), 52-54.

[14] As John Rule argues, "The landed rulers of England did not *need* to hang all those indicted for felony; the assumption was of exemplary rather than retributive punishment." John Rule, *Albion's People: English Society 1714-1815* (Essex: Longman Group United Kingdom Limited, 1992), 237.

[15] Linebaugh, *The London Hanged,* xx.

[16] V.A.C. Gattrell, *The Hanging Tree: Execution and the English People, 1770-1868* (Oxford: Oxford University Press, 1994), 91-99. Douglas Hay notes that ultimately the life and death decisions rested with the authorities rather than with the common people, despite the occasional examples of equal treatment before the law. Douglas Hay, "Prosecution and Power: Malicious Prosecution in the English Courts, 1750-1850," in Douglas Hay and Francis Snyder, eds., *Policing and Prosecution in Britain, 1750-1850* (Oxford: Clarendon Press, 1989), 393-394. See also: Susan Dwyer Amussen, "Punishment, Discipline, and Power: The Social Meanings of Violence in Early Modern England," *Journal of British Studies* 34 (1995), 9-10.

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from property and in turn protected its interests."[17] The criminal law was a potent tool of the elite, who used it to maintain the social hierarchy and hegemony of the landed class while protecting private property in the absence of a professional police force and standing army.[18] Instead of a professional police force, the elite relied on "legal instruments" to enforce "the division of property by terror," which ultimately maintained the social hierarchy.[19] John Langbein disagrees with Hay's thesis that the law was an elite tool. Instead, Langbein argues that the "criminal law and its procedures existed to serve and protect the interest of the people who suffered as victims of crime, people who were overwhelmingly non-elite."[20] Both Langbein and Peter King correctly demonstrate that ordinary people used the law to their own advantage, which they argue goes against Hay's theory. However, the strength of the criminal law was not the authority that it gave the elites, but rather the legitimacy it enjoyed amongst all the people of England. Hay does not argue that ordinary people did not use the law. In fact, Hay argues that the law replaced religion and "became a power with its own claims, higher than those of prosecutor, lawyers, and even the great scarlet-robed assize judge himself."[21] The law both maintained the authority of those in power and restrained them. The rule of law was not absolute. As Christopher Brooks explains, "the rule of law prevented social and political chaos and protected the persons and property of the subjects from arbitrary

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[17] Hay, "Property, Authority and the Criminal Law," 25.
[18] Hay, "Prosecution and Power," 392.
[19] Hay, "Property, Authority and the Criminal Law," 21.
[20] John Langbein, "*Albion's* Fatal Flaws," *Past and Present* 98 (1983), 97.
[21] Hay, "Property," 33. See also: Hay, "Prosecution and Power," 344-345, 394-395; Douglas Hay and Francis Snyder, "Using the Criminal Law, 1750-1850: Policing, Private Prosecution, and the State," in *Policing and Prosecution in Britain, 1750-1850*, ed. Douglas Hay and Francis Snyder (Oxford: Clarendon Press, 1989), 4, 16, 47.

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power."[22] The law gained legitimacy from its examples of equal treatment and from ordinary people using the law for their own purposes.[23] Rather than simply being a tool of the elite, the law was a "'multiple-use right' which accommodated complaints from, and depended upon the participation of, members of all social classes with the exception of the poor."[24] The law existed to maintain the status quo. This meant that authorities had to play by certain rules if they expected to remain in power. However, the status quo also meant that the law reinforced the existing social hierarchy. The law was one of the strongest elements of social control because the people accepted its control as natural and as part of their rights as Englishmen and women.

In his critique of "Property, Authority and the Criminal Law," Peter King argues that although Hay's "gentry-centred analysis enables us to answer specific questions, . . . it leaves other important themes unexplored or partially represented."[25] While King and Langbein are correct in pointing out the importance of individual prosecutors, they, along with Hay miss another important aspect of social control inherent in the criminal law. The social order was undoubtedly important, but there was more than one hierarchy to maintain in eighteenth-century England. Eighteenth-century people viewed gender as a hierarchical relationship rather than separate spheres.[26] One of the purposes of the law

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[22] Christopher Brooks, "Professions, Ideology and the Middling Sort in the late Sixteenth and Early Seventeenth Centuries," in Jonathan Barry and Christopher Brooks, eds., *The Middling Sort of People: Culture, Society and Politics in England, 1550-1800* (New York: St Martin's Press, 1994), 125.
[23] The execution of Lawrence Shirley, Lord Ferrers on May 5, 1760 for the murder of his steward clearly demonstrated the "equality" of the law. Gattrell, *Hanging Tree*, 245-246; Hay, "Property, Authority and Criminal Law," 33-35.
[24] Robert B. Shoemaker, *Prosecution and Punishment: Petty crime and the law in London and rural Middlesex, c.1660-1725* (Cambridge: Cambridge University Press, 1991), 4.
[25] Peter King, "Decision-Makers and Decision-Making in the English Criminal Law," *The Historical Journal* 27:1 (1984), 58.
[26] Anna Clark, *The Struggle for the Breeches: Gender and the Making of the British Working Class* (Berkely and Los Angeles: University of California Press, 1995), 2; John Bohstedt, "Gender, Household and Community Politics: Women in English Riots 1790-1810," *Past and Present* 120 (1988), 97. People

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was to maintain this gender hierarchy, which included the subordinate position of women and the authority of men over women. The way to do this was to ensure that women fulfilled their proper gender roles and behaved as ideal women should.[27]

Ideal women were, above all, obedient.[28] George Savile, Marquis of Halifax, explained to his daughter in 1688 that "*Men* who were to be the Lawgivers, had the larger share of *Reason* bestowed upon them; by which means your Sex is the better prepar'd for the *Compliance* that is necessary for the better performance of those *Duties* which seem to be most properly assigned to it."[29] A woman had a duty to obey most men, especially her husband. As William Perkins explained, marriage combined two people into one, "and of these two, the one is always higher and beareth the rule, the other is lower and yieldeth subjection."[30] While it was possible for a woman to be the dominant personality in marriage, conduct writers and most members of society felt strongly that a husband was superior to his wife.[31] In order to maintain this situation, conduct books gave married women advice such as: "the duties of a wife to her husband in every degree and state of life, can be no less than fidelity, and obedience to all his lawful desires and

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saw women as naturally weaker than men, which doomed them to an inferior status. Robert H. Michel, "English Attitudes Towards Women, 1640-1740," *Canadian Journal of History* 13:1 (1978), 39.

[27] Sara Mendelson and Patricia Crawford, *Women in Early Modern England, 1550-1700* (Oxford: Clarendon Press, 1995), 33.

[28] As Vivien Jones explains "'natural femininity . . . offered an illusion of power based on sublimation and passive virtue." Vivien Jones, ed., *Women in the Eighteenth Century: Constructions of Femininity* (London and New York: Routledge, 1990), 15.

[29] George Savile, Marquis of Halifax, "The Lady's New Year's Gift: or Advice to a Daughter, (1688)," in *Women in the Eighteenth Century: Constructions of Femininity,* ed. Vivien Jones (London and New York: Routledge, 1990), 18. Emphasis in original.

[30] William Perkins, "Christian Economy: or, A Short Survey of the Right Manners of Erecting and Ordering a Family According to the Scriptures (1609)," in *Daughters, Wives and Widows: Writings by Men about Women and Marriage in England, 1500-1640*, ed. Joan Larsen Klein (Urbana and Chicago: University of Illinois Press, 1992), 157.

[31] As Anthony Fletcher argues, literature and conduct advice was written by men and "tell us how men wanted women to see the gender order, their place in it and themselves. They tell us what women heard, saw, read or were taught. But they tell us nothing of what they thought." Anthony Fletcher, *Gender, Sex and Subordination in England, 1500-1800* (New Haven: Yale University Press, 1995), xxi.

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prudent counsels."[32] A wife was not supposed to question the authority of her husband who was, in a domestic setting, the "very image of almighty God, the father of all things."[33] In 1722, William Fleetwood explained that it was part of the curse of Eve that a woman obeyed her husband no matter how "unreasonable and extravagant . . . his Desire shall. . . appear."[34] In order to maintain the subordinate position of women, the law and those in power, including husbands, demanded obedience from their inferiors and dependants. As Anthony Fletcher explains, obedience was important since "women were credited with an inner weakness that could all to easily lead them through the assertion of their sexual and emotional power to defy the patriarchal order and break its boundaries."[35] Therefore, authorities enforced obedience through paternalistic doctrines and conventions such as coverture and the defence of coercion. Obedient wives conformed to the prevailing gender ideology and could receive "benefits" inherent to their station. However, such protection was unavailable to disobedient wives. In this sense, the defence of coercion actually reinforced the subordinate status of married women by rewarding obedience and punishing disobedience. The fear of married women destroying the gender order created coverture's system of rewards for obedience and punishments for disobedience.

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[32] Wetenhall Wilkes, "A Letter of Genteel and Moral Advice to a Young Lady, (8th edition 1766)," in *Women in the Eighteenth Century: Constructions of Femininity*, ed. Vivien Jones (London and New York: Routledge, 1990), 35.

[33] Juan Luis Vives, transl. Richard Hyde, "A Very Fruitful and Pleasant Book Called the Instruction of a Christian Woman, (translation 1523," in *Daughters, Wives and Widows: Writings by Men about Women and Marriage in England, 1500-1640*, ed. Joan Larsen Klein (Urbana and Chicago: University of Illinois Press, 1992), 110.

[34] William Fleetwood, *The relative duties of parents and children, husbands and wives, masters and servants*, Third Edition (London, 1722), 138. See also: William Kenrick, *The Whole Duty of a Woman*, Fourth Edition (London, 1764), 75.

[35] Fletcher, *Gender*, 24, 12.

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While obedience was one of the principal duties of women, married or not, other qualities and standards existed. Keith Thomas explains that women were not only expected to behave with sobriety, but also to be modest, delicate, bashful, and silent as well as possessing all the other "feminine virtues."[36] In 1744 John Gregory argued that, "One of the chief beauties in a female character, is that modest reserve, that retiring delicacy, which avoids the public eye, and is disconcerted even at the gaze of admiration."[37] Women were meant to avoid the spotlight and not draw attention to themselves through either their actions or their words.[38] "Humility, sobriety, modesty of deportment, an industrious disposition, [and] an adjustment of [her] manners to [her] circumstances" characterized the ideal woman.[39] In theory and in conduct books, women were passive dependants who were not supposed to take independent initiative, nor were they expected to rule any except their own dependants.[40] The ideal woman was passive, modest, obedient, chaste, sober, and did not question authority of any sort. Despite their limited implementation in practice, these ideals still existed and carried force especially in the decisions of judges and juries, who used the law to uphold this particular gender order.[41]

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[36] Keith Thomas, "The Double Standard," *Journal of the History of Ideas* 20:2 (1959), 214.
[37] John Gregory, "A Father's Legacy to his Daughters, (1744)," in *Women in the Eighteenth Century: Constructions of Femininity*, ed. Vivien Jones (London and New York: Routledge, 1990), 45.
[38] Michèle Cohen, *Fashioning Masculinity: national identity and language in the eighteenth century* (London and New York: Routledge, 1996), 65.
[39] Priscilla Wakefield, "Reflections on the Present Condition of the Female Sex; with suggestions for its Improvement (1798)," in *Women in the Eighteenth Century: Constructions of Femininity*, ed. Vivien Jones (London and New York: Routledge, 1990), 127.
[40] Martin Ingram argues that despite such strictures, strong, active wives were prized, and that the contradictions between patriarchal prescriptions and daily realities often led to charivaris and skimmingtons. Martin Ingram, "Ridings, Rough Music and the 'Reform of Popular Culture' in Early Modern England," *Past and Present* 105 (1984), 97-98, 112-113.
[41] As Mendelson and Crawford explain, the discretion within the law, put "pressure on women to represent themselves as dependent, subordinate and not responsible." Mendelson and Crawford, *Women*, 47. See also: Candace Kruttschnitt, "Women, Crime and Dependency - An Application of the Theory of Law,"

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As Amy Louise Erickson argues, "Despite the fact that women exercised considerably more power over property than has previously been allowed, both the legal system and individual men still kept women firmly subordinate."[42] Even if a woman managed to act independently or work within the system, she was still subject to laws which men wrote and which were enforced in courts staffed by men.[43] It was men, not individual women, who ultimately held the authority of the law and these men sought to maintain the subordinate position of women. Despite the emphasis criminal history places on upholding the social order and the obvious connection between the social and gender hierarchy, studies of women's crime do not generally focus on the gender order. Rather, historians who study women's crime seek to explain why women accounted for less overall criminality than men. Crime in and of itself requires a certain amount of initiative. Because of this initiative and the association of females with passive behaviour, the low numbers of female criminals has led historians and sociologists alike to argue that crime is a typically masculine trait.[44] As Carol Z. Wiener explains, "the greater readiness of men to violate the economic statutes in the first place may have resulted from their more assertive personalities as well as their greater need."[45] Wiener describes female criminals as less daring than male criminals were. They committed the types of crimes that did not require much bravado or initiative, such as receiving stolen

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Criminology 19:4 (1982), 498, 510, for a more modern example of jury behaviour towards dependant women.

[42] Amy Louise Erickson, *Women and Property in Early Modern England* (London: Routledge, 1995), 19.

[43] *Ibid*, 18; *The Lawes Resolution of Womens Rights* (London, 1632), 2.

[44] Mary Chesney-Lind, "Women and Crime: The Female Offender," *Signs* 12:1 (1986), 87-88; Ngaire Naffine, *Female Crime:The Construction of Women in Criminology* (Sydney: Allen and Unwin, 1987), 43-44, 60, 62; Darrell Steffensmeier and Emilie Allan, "Gender and Crime: Toward a Gendered Theory of Female Offending," *Annual Review of Sociology* 22 (196), 470, 474, 476; Otto Pollak, *The Criminality of Women* (New York: A.S. Barnes and Company, Incorporated, 1961), xv; Olwen Hufton, "Women in History: Early Modern Europe," *Past and Present* 101 (1983), 139.

[45] Carol Z. Wiener, "Sex-Roles and Crime in Late Elizabethan Hertfordshire," *Journal of Social History* 8 (1975), 43.

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goods or acted as accessories to male crime. In short, women took what was readily available to them and left entrepreneurial theft to men.[46] Arguing along the same line, John Beattie explains that women committed fewer crimes because of their socialization into dependant and passive roles.[47] These roles were part of the gender order; however, neither Beattie nor Wiener accounted for the role of the law in maintaining the gender order. Their focus was rather on characterizing women as passive in their behaviour because of the passive roles they occupied in society. According to Beattie and Wiener, crime and the law was a reflection of, rather than the maintenance of the gender order.

Although women were accused of fewer crimes than men in the eighteenth century, they still committed and were accused of committing crimes. In contrast to the more traditional studies, Garthine Walker and Jenny Kermode point out that measuring female criminality against male criminality marginalizes women's actions and "neglect[s] the dynamics of human interaction [while denying] agency to historical actors."[48] Representing female criminals as abnormal, relatively passive and insignificant leaves out important aspects of the history of crime. In addition, comparing the actions of men and women ensures that men are the norm and female criminals are unusual and not representative of either females or criminals. As Lynn MacKay argues, "female thieves were not simply paler reflections of the male norm."[49] Rather, female criminals should be studied in their own right, not as a subset of male criminality. As Walker explains, the association of criminality with men has meant that "the concepts and methodologies of

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[46] *Ibid*, 42-43.
[47] Beattie, "The Criminality of Women," 89, 96, 98.
[48] Garthine Walker and Jenny Kermode, "Introduction," in Jenny Kermode and Garthine Walker, eds., *Women, Crime and the Courts in Early Modern England* (Chapel Hill: University of North Carolina Press, 1994), 4. See also: Garthine Walker, *Crime, Gender and Social Order in Early Modern England* (Cambridge: Cambridge University Press, 2003), 4.
[49] Lynn MacKay, "Why They Stole: Women in the Old Bailey, 1779-1789," *Journal of Social History* 32:3 (1999), 633.

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historians have been biased accordingly. They have rarely been concerned with gender *per se* and thus offer little illumination of the experience of criminal women."[50] In studying women accused of crime as individuals rather than as an entire group, "women have emerged as far more feisty, individual and complex," people, whose behaviour varies according to individual circumstances.[51] Just as criminal historians study men's criminality according to factors besides gender, so too should historians who study women's criminality.

In addition to the inevitable gender comparison, the belief in the law's chivalrous treatment of women harms the study of female criminality by further discounting their actions. As previously discussed, the law was a complex process that involved a great number of discretionary decisions. People were often unwilling to prosecute women, and some historians argue that juries were less willing to convict women than men.[52] In her study of theft before the Old Bailey, MacKay found that "women were almost twice as likely to be found not guilty or to have their sentences reduced as were men who pleaded distress or who asked for mercy."[53] This finding seems to support the chivalry thesis; however, Walker found that although juries were more likely to acquit women, once convicted, a woman was more likely to hang than a convicted man.[54] In addition, Beattie argues that pressure to extend benefit of clergy to women stemmed not from any need to

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[50] 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* (Chapel Hill: University of North Carolina Press, 1994), 81.
[51] Walker and Kermode, "Introduction," 21.
[52] The chivalry thesis is best explained in Otto Pollak's 1961 sociological study of female criminals. Pollak, *Criminality of Women*, 4-5, 151.
[53] MacKay, "Why They Stole," 627.
[54] Walker, *Crime, Gender and Social Order*, 135-136.

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treat women more fairly, but actually to convince juries to convict more women.[55] Despite such evidence to the contrary, the belief persists that the law treated women more leniently than it treated men. Some historians point to coverture and coercion as examples of leniency towards married women. As Peter King argues, single women were more vulnerable to prosecution because married women benefited from coverture. The concept of "co-defendant immunity" and married women's obvious dependant status meant that fewer married women were prosecuted and convicted than single and widowed women.[56] In contrast, Robert Shoemaker argues that coverture "seems to have resulted in women being discharged without punishment or receiving milder punishments than men, rather than their not being prosecuted or punished at all."[57] Both these arguments, along with the majority of historians who discuss married women's crime, assume that the defence of coercion excused married women from criminal liability.[58] This assumption means that married women are left out of the history of crime. However, previous studies of crime have shown that what the law meant in theory and what actually happened in practice differed. So why should coverture be the exception to this rule? In cases involving property and civil law, judges used discretion when applying coverture, as did judges and juries in the criminal law. Coverture did not mean that married women did not commit crimes or were not accused of crimes, nor did it mean that they were never held liable for their actions. Rather, coverture and the defence

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[55] J.M. Beattie, "Crime and Inequality in Eighteenth-Century London," in *Crime and Inequality,* ed. John Hagan and Ruth D. Peterson (California: Stanford University Press, 1995), 137; J.M. Beattie, *Policing and Punishment in London, 1660-1750: Urban Crime and the Limits of Terror*, (Oxford: Oxford University Press, 2001), 72, 318, 321.

[56] Peter King, "Female offenders, work and life-cycle change in late eighteenth-century London," *Continuity and Change* 11:1 (1996), 69.

[57] Robert B. Shoemaker, *Gender in English Society 1650-1850: The Emergence of Separate Spheres?* (Essex: Addison Wesley Longman Limited, 1998), 297.

[58] King, "Female offenders," 68; Beattie, "Criminality of Women," 87.

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of coercion meant that the criminal courts treated married women differently than single women. It is therefore necessary to examine individual cases in order to see how coverture actually worked within the criminal justice system of eighteenth-century England.

Subordination or Protection?

Eighteenth-century London was a patriarchal and hierarchical society. Women occupied a subordinate position within this hierarchy. The law was just one way that women were kept subordinate. Coverture and the corresponding unity of person enforced the subordinate status of married women within marriage.[59] However, to focus solely on the patriarchal aspects of coverture is to miss other important aspects of its character and purpose. Eighteenth-century commentators such as Sir William Blackstone claimed that coverture made women the favourites of the English law. Blackstone argued that the legal rights, duties and disabilities of husband and wife stemmed from unity of person. However, even the disabilities a wife gained upon marriage were designed for her benefit.[60] Men were "conscious of a natural title [women had] to [their] protection and good offices."[61] Coverture, in other words, was a paternalistic doctrine. If women were willing to submit themselves and accept their subordinate position, the courts would treat them as children, which meant that they could enjoy freedom from certain legal responsibilities. It is this protection from responsibility, inherent in the paternalism of coverture, which Hendrik Hartog argues is what Blackstone meant by married women

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[59] A woman's classification depended on her marital status and different rules governed the behaviour of single, married, and widowed women. These rules all functioned to maintain women's subordinate status. However, as coverture primarily affected married women, it is married women who form the subeject of the bulk of this essay.
[60] Blackstone, *Commentaries I*, 430, 433.
[61] Gregory, "A Father's Legacy," 49.

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being the favourites of the law.[62] In fact, as Sara Mendelson and Patricia Crawford demonstrate, "there was some small margin of equitable feeling that [women] were less responsible than males. The law in its framing and administration contained some elements of chivalry towards women as dependants."[63] However, as this thesis will show, this chivalry was *extremely* limited. It implied protection and limited rights rather than a complete *carte blanche*. It only existed if women played by the rules and submitted to male authority. Once the law started recognizing women as independent persons or women showed independent thought and action, the protections and benefits of coverture disappeared. In this sense, coverture benefited those who were willing to accept a subordinate position, but treated those who did not accept subordination harshly. It was ultimately concerned with order and control rather than protection. Although Blackstone and other commentators argued that the defence of coercion showed favouritism, a study of the Old Bailey records reveals otherwise. Claims of coercion could excuse a married woman's crime because she did it in obedience to her husband. It was not designed to favour women, but rather to enforce married women's subordinate position within marriage by reinforcing the stricture of obedience. Coverture was both paternal and patriarchal; however, its classification depended on individual circumstances and behaviour.

As John P. Zomchick notes, women occupied a contradictory place in society. A "woman, figured both as a subject who threatens domestic social order and as a vulnerable object of value who is endangered by hostile social forces in the public

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[62] Hendrik Hartog, *Man and Wife in America: A History* (Cambridge: Harvard University Press, 2000), 169.
[63] Mendelson and Crawford, *Women in Early Modern England*, 37.

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sphere."[64] Eighteenth-century law sought to maintain the submission of women, especially since many people thought that women could "easily undermine [men's] rightful power, resources, and freedom within the family"; what Anna Clark defines as the "struggle for the breeches."[65] However, there was still some concern over protecting women. As the previous discussion of paternalism illustrates, women who accepted their subordinate status were treated as children before the law. Coverture worked to maintain this situation. The Old Bailey records show that if a married woman followed the rules of society and conformed to the ideal gender roles and behaviour, the law treated her as lacking liability and she could therefore enjoy the "privileges" of coverture. However, if a wife stepped out of line and transgressed proper gender roles, authorities, with their ever present anxiety about maintaining social and gender hierarchies, would step in and seek to reinforce order. Rather than the previous assumptions about the universality of coercion, I argue that it was only those who maintained a submissive role who could expect to benefit from coverture. Any semblance of independent action or conflict within the household forfeited the "benefits" of coverture. This argument connects the seemingly irreconcilable views of eighteenth-century commentators and modern feminists. Coverture could benefit women; however, it remained a potent symbol of patriarchy designed to maintain the subordinate position of women. One can see this double function of coverture by looking at its application in the criminal courts. Since the defence of coercion was a benefit of coverture, it is possible to determine the extent of favouritism that women experienced by examining when judges and juries decided to

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[64] John P. Zomchick, "'A Penetration Which Nothing Can Deceive': Gender and Juridicial Discourse in Some Eighteenth-Century Narratives," *Studies in English Literature, 1500-1900* 29:3 (1989), 536.
[65] Clark, *The Struggle for the Breeches,* 87.

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apply the defence of coercion, and when they decided that a married woman was liable for her criminal actions.

The Old Bailey, London's central criminal court, provides a rich resource of criminal cases. The *Old Bailey Sessions Papers* (hereafter OBSP) were an "early species of periodical journalism, purveying a diet of true-life crime stories for the interest and amusement of a nonlawyer readership."[66] The Old Bailey, the central criminal court for London and Middlesex, sat eight times a year. Its sessions were recorded and a compressed version of the proceedings was published shortly after each session in pamphlet form and sold on London's streets. While the OBSP were pamphlets, there is no reason to doubt their accuracy. Criminal trials were public affairs and the "reputation of the [OBSP] would have quickly suffered if the accounts had been unreliable."[67] So reliable were the OBSP that judges and juries often used the pamphlets to determine what had happened in previous and related cases and in their decisions to apply clemency, including pardoning decisions.[68] Despite their volume and their accuracy, the OBSP are not a perfect source. These were above all pamphlets and the "limitations on space and considerations of reader preferences meant that the most fully reported trials were those which involved sex or violence, or were thought to be entertaining or amusing."[69] The Old Bailey heard a number of cases, and they were not all interesting. Average and "uninteresting" cases often relate the name of the accused, the prosecutor, the crime and the verdict. The publishers excluded testimony, details and sometimes even cases in

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[66] John Langbein, " Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources." *The University of Chicago Law Review* 50:1 (1983), 4.
[67] "The Value of the *Proceedings* as a Historical Source," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/proceedings/value.html> 2005.
[68] Langbein, "Shaping the Eighteenth-Century Criminal Trial," 16-17; Simon Devereaux, "The City and the Sessions Paper: 'Public Justice' in London, 1770-1800," *Journal of British Studies* 35:4 (1996), 471, 501-502.
[69] "Value of the *Proceedings*."

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order to keep the OBSP affordable and accessible to the ordinary people. The OBSP had to sell, and the publishers kept their audience in mind when determining what to omit from the proceedings. These omissions can often be frustrating and do not provide a complete picture of the eighteenth-century criminal trial. Despite the partial transcripts, information is still available in the OBSP that is unavailable elsewhere. As Langbein explains, "To write legal history from the OBSP is, . . . a perilous undertaking, which we would gladly avoid if superior sources availed us. However . . . the OBSP are probably the best accounts we shall ever have of what transpired in ordinary English criminal courts before the late eighteenth century."[70] It is because of their superiority as an available source that they are prevalent in modern scholarship of eighteenth-century criminality and that they are used as the basis of this thesis.

While married women make up a minority of the people accused in the Old Bailey archive, they are still present. This study uses the cases of married women accused of theft-related offences and killing-related offences in the Old Bailey between 1700 and 1799 to determine the practical application of coverture. In doing so, it provides answers to not only how the courts treated married women, but also how they dealt with concepts of individualism and separate identities within marriage, despite what coverture meant in theory. It also seeks to examine how the claims of Blackstone and other legal commentators that coverture was a beneficial doctrine that made women the favourites of the law can be reconciled with modern critiques of coverture as oppressive. Chapter two provides this overview of the differing purposes, functions and interpretations of coverture. This is necessary in order to contextualize the cases since

[70] John Langbein, "The Criminal Trial before the Lawyers," *The University of Chicago Law Review* 45:2 (1978), 271.

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one cannot look at the defence of coercion without first understanding the purpose of coverture. However, the most important aspect of this study is that it brings married women into the criminal historical perspective.

In order to give married female criminals and married women accused of crime their place in the history of eighteenth-century criminality, one must look at the cases themselves. The third chapter therefore examines the accusations of married women for theft-related offences. It is in these cases that one expects to find judges and juries applying the defence of coercion; however, the cases show that judges and juries used their discretion in their decisions about whether or not to apply the defence of coercion. Chapter four discusses married women accused of killing-related offences. The defence of coercion was not applicable in murder cases, as murder was completely uncharacteristic of feminine roles. Therefore, one does not expect to find any mention of the defence of coercion within these cases. The final chapter brings married women into the criminal historical perspective. Long ignored or discounted, married women deserve a place in criminal history. Their actions, although technically excusable, were nevertheless important. Married women's crimes bring together a number of historiographical fields. In doing so, it brings historians to a closer understanding of the complicated legal doctrine of coverture.

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CHAPTER 2: PURPOSES AND INTERPRETATIONS OF COVERTURE

"I know that you could be neither happy nor respectable unless you truly esteemed your husband – unless you looked up to him as a superior." -Mr. Bennett to Elizabeth Bennett
Jane Austen, *Pride and Prejudice*, 1813.

Marriage changed the legal status of women in the eighteenth century. After marriage, a woman was subject to the common law doctrine of coverture and all her rights, privileges and disadvantages stemmed from this doctrine. According to the Bible, marriage bound a man and a woman together and created one flesh. The law reflected this premise by regarding husband and wife as one person: the husband.[71] Coverture refers to the "collective label for the legal disabilities attendant on wifehood."[72] These disabilities could be severe, but coverture was not always harmful to women. There is considerable debate about the purposes of coverture, and modern historians often regard coverture differently than did eighteenth-century commentators. A well-known eighteenth-century proverb held that "England was a paradise for women," and many legal commentators held that this proverb sprang from the privileges attendant on wifehood and the protection that coverture provided for women.[73] However, coverture was not universally praised in the eighteenth century. In 1706, Mary Astell asked the famous question: "If all Men are born free, how is it that all Women are born Slaves?" which demonstrates that coverture did not enjoy universal approval.[74] Nor does the disagreement end there. Modern historians debate the actual purpose of coverture. Early

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[71] "After the commencement of [marriage], there remain no longer separate interests; the two individuals become united, and are therefore to enjoy the same felicity and suffer the same misfortunes." *Moral Essays, chiefly collected from different authors*, Volume I (Liverpool, 1796), 223.
[72] Maeve E. Doggett, *Marriage, Wife-Beating and the Law in Victorian England* (Columbia: University of South Carolina Press, 1993), 34.
[73] *Baron and Feme: A Treatise of the Common Law Concerning Husbands and Wives* (London, 1700), 4.
[74] Mary Astell, *Reflections Upon Marriage. The Third Edition* (London, 1706), xi. This quote is used quite frequently in modern scholarship to explain how the law oppressed women.

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feminist analyses brought forth a criticism of coverture and stressed its contribution to patriarchy and the subjugation of women. Initially, this analysis focused on the role that coverture played in the oppression of women, and it later evolved to examine how women operated within the patriarchal system.[75] However, more recent scholarship, including works of feminist historians, has argued that coverture was not as oppressive as originally argued.[76] In practice, discretion tempered the harshness of theoretical coverture; in much the same way that discretion limited the severity of the criminal law, discretion limited the severity of coverture.[77] While coverture attempted to enforce the ideal gender relations, authorities recognized that these could be too harsh in practice. By using discretion and limiting the severity of husbands in practice, authorities, judges and juries ensured that coverture gained legitimacy in the eyes of many eighteenth-century women as well as men.

In order to understand the workings and competing purposes of coverture, one must look at a number of different areas. The first is the actual definition of coverture.[78] From here, it is possible to gain a sense of the gender ideals of the eighteenth century that coverture was meant to enforce. Joanne Bailey asked if coverture "favoured or oppressed" married women? Since this question is so central to the understanding of

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[75] See for example: Anne Kugler, "Constructing Wifely Identity: Prescription and Practice in the Life of Lady Sarah Cowper," *Journal of British Studies* 40:3 (2001), 291-323; Robert H. Michel, "English Attitudes Towards Women, 1640-1700," *Canadian Journal of History* 13:1 (1978), 35-60; W.R. Prest, "Law and Women's Rights in Early Modern England," *The Seventeenth Century* 6:2 (1991), 169-187.

[76] See in particular Joanne Bailey, *Unquiet Lives: Marriage and Marriage Breakdown in England, 1660-1800* (Cambridge: Cambridge University Press, 2003); Amy Louise Erickson, *Women and Property in Early Modern England* (London: Routledge, 1995).

[77] See Introduction for historical debates surrounding discretion and the criminal law. Tim Stretton, "Married Women and the Law in England since the Eighteenth-Century," *L'Homme, Zeitschrift fur Feministische Gescchichtswissenschaft* 14 (2003), 126; Tim Stretton, "Women, Property and Law," in *A Blackwell Companion to Early Modern Women's Writing*, ed. Anita Pacheco (Oxford: Blackwell Publishers Limited, 2002), 41.

[78] As Tim Stretton argues, "To be fully effective the doctrine of coverture had to be invoked, and before individuals could invoke it they had to understand it." Tim Stretton, *Women Waging Law in Elizabethan England* (Cambridge: Cambridge University Press, 1998), 131.

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coverture, one must also examine debates surrounding these competing outcomes. Did coverture help or hinder women? Rather than one or the other, the answer seems to lie in more of a grey area in between. Coverture had oppressive characteristics, but it could also benefit some women, and its stated goal was to maintain harmony rather than oppress women. In order to understand this argument, one must look at the recent scholarship of historians who look at coverture as neither wholly beneficial nor harmful to women. It is in their work that one can fully see how eighteenth-century men and women reconciled their competing interests and formed a household unit, which consisted of cooperative, not competing individuals.[79]

Under coverture, the law assumed that a husband and wife had one identity, which was that of the husband. As Sir William Blackstone explained, "the very being or legal existence of the woman is suspended during marriage, or at least incorporated and consolidated into that of the husband: under whose wing, protection and *cover,* she performs everything."[80] Upon marriage, a woman lost her legal identity, which meant that she lost a number of other privileges. These privileges included the ability to make contracts, to sue or be sued without her husband, or to assert and defend her rights in court unless she did so in the presence of her husband. One of the primary functions of coverture was in combining property, and a wife forfeited her property rights to her husband for the duration of her marriage. As Mary Poovey explains, "most of a woman's property became her husband's absolutely when she married, whether she brought that property into the marriage or acquired it subsequently. All of a married woman's income

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[79] Bailey, *Unquiet Lives*; Nancy E. Wright, Margaret W. Ferguson and A.R. Buck, eds., *Women, Property and the Letters of the Law in Early Modern England* (Toronto: University of Toronto Press, 2004); Margaret J.M. Ezell, *The Patriarch's Wife: Literary Evidence and the History of the Family* (Chapel Hill and London: University of North Carolina Press, 1987).
[80] Blackstone, *Commentaries I*, 430.

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belonged to her husband."[81] Married women could not inherit independently, nor could a married woman accept gifts, even from her husband.[82] Property rights ensured a husband could control his wife through economic means. Although wives were not technically the property of their husbands, coverture still ensured that under the law, husbands had a great deal of power over their wives.[83]

Marriage changed the lives and legal status of men and women. When a man married in early modern England, he began to head a household, which conferred a higher status associated with house-holding.[84] In addition to giving him a higher status, marriage increased a man's responsibilities. As William Fleetwood explained in 1722, "there is no Relation in the World, either natural or civil, and agreed upon, but there is a reciprocal Duty obliging each Party."[85] Marriage was not a one-way property transfer. In return for his wife's property, a husband assumed responsibility for his wife's actions, including her debts and even some of her crimes. A husband was also responsible for maintaining and providing for his wife at a level appropriate to his *and* her social status.[86] As David Lemmings argues, "Femes covert . . . exchanged their legal independence for the status, care, and protection supposedly provided by marriage."[87] Conversely, as Margaret Hunt explains, "the responsibility to maintain the wife was the *quid pro quo* for

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[81] Mary Poovey, "Covered but Not Bound: Caroline Norton and the 1857 Matrimonial Causes Act," *Feminist Studies* 14:3 (1988), 474.
[82] Stretton, *Women Waging Law,* 22-23.
[83] The power of coverture was especially extensive because a valid marriage could only be dissolved through an Act of Parliament, which was particularly expensive. Therefore, divorce was not an option for most people in eighteenth-century England.
[84] Alexandra Shepard, *Meanings of Manhood in Early Modern England* (Oxford: Oxford University Press, 2003), 70, 74; Shoemaker, *Gender in English Society,* 91.
[85] Fleetwood, *The relative duties*, 68.
[86] Stretton, "Married Women and the Law," 125; Susan Staves, "Pin Money," *Studies in Eighteenth-Century Culture* 14 (1985), 49; Bailey, *Unquiet Lives*, 62.
[87] David Lemmings, "Women's Property, Popular Cultures, and the Consistory Court of London in the Eighteenth Century," in *Women, Property and the Letters of the Law in Early Modern England*, ed. Nancy E. Wright, Margaret W. Ferguson and A.R. Buck (Toronto, University of Toronto Press, 2004), 69. See also: Michel, "Attitudes Towards Women," 56.

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her obedience and sexual services."[88] Both men and women saw coverture and marriage as a trade-off. It conferred rights and status, while constraining behaviour and assigning differing responsibilities. There is no argument against the belief that marriage was a hierarchical relationship. However, one must not forget that status carried responsibilities towards one's dependants. The reciprocal obligations of husbands and wives to one another are central to an understanding of coverture.

Favoured or Oppressed? Competing Purposes of Coverture

In 1744, John Gregory wrote, "a married state, if entered into from proper motives of esteem and affection, will be the happiest for yourselves, make you most respectable in the eyes of the world, and the most useful members of society."[89] When one begins to research coverture, it is natural to turn to Blackstone and his adage that "even the disabilities which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England."[90] Blackstone was not alone in arguing that women were the favourites of the law.[91] So how could these commentators argue that the legal disabilities inherent in coverture actually benefited women? Coverture was patriarchal, but at the same time, it was also paternal. As Joan R. Gundersen explains, eighteenth-century people "did not equate dependency with abject powerlessness, but rather thought it a relationship in which rights and duties accrued to both parties."[92] A husband had certain responsibilities toward his wife, and it

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[88] Margaret R. Hunt, "Wives and marital 'rights' in the Court of Exchequer in the early eighteenth century," in *Londinopolis: Essays in the Cultural and Social History of Early Modern London*, ed. Paul Griffiths and Mark S.R. Jenner (Manchester: Manchester University Press, 2000), 107.
[89] Gregory "A Father's Legacy," 52.
[90] Blackstone, *Commentaries I*, 433.
[91] *Baron and Feme*, 4.
[92] Joan R. Gundersen, "Independence, Citizenship, and the American Revolution," *Signs* 13:1 (1987), 60.

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was these paternal responsibilities, which coverture guaranteed, that eighteenth-century commentators and people saw as beneficial to women.[93]

Alison Plowden argues that the lot of unmarried women in early modern England was particularly hard. She explains that a spinster "could normally expect little more than a life of dependent drudgery under some charitable relation's roof."[94] Bridget Hill also points out that single women and widows predominate in the parish lists for poor relief.[95] Single women were particularly disadvantaged in the economic system of eighteenth-century England. Since a husband's support of his wife and household was central to coverture, commentators argued that wives benefited from their dependant status. As Robert H. Michel explains, marriage offered women "physical and psychological protection – economic support and companionship – in a harsh society filled with hazards to those who were alone, unemployed, unhealthy, and unattached to a family."[96] In addition to this economic protection, Michel demonstrates that commentators "argued that the divine and human laws which subjugated females actually protected them . . . from the slavery which they, as the weaker sex, must expect in a state

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[93] However it is important to note that it was difficult to enforce these responsibilities if the husband chose to ignore his prescribed role and duties.

[94] Alison Plowden, *Tudor Women: Queens and Commoners* (Gloucestershire: Sutton Publishing Limited, 1998), 164.

[95] Bridget Hill, *Women Alone: Spinsters in England, 1600-1850* (New Haven: Yale University Press, 2001), 96. Despite their often lower economic status, it was still possible for a woman to remain single throughout her lifetime. As Christine Peters points out, "the existence of choice [in] . . . whether or not to marry at all, represents a significant acknowledgement that women's lives were not inevitably defined by marriage." Christine Peters, "Single women in early modern England: attitudes and expectations," *Continuity and Change* 12:3 (1997), 326. See also: Amy M. Froide, *Never Married: Singlewomen in Early Modern England* (Oxford: Oxford University Press, 2005), 1-5, 7, 44-49, 117-119, 152-153, 217-221.

[96] Michel, "Attitudes Towards Women," 56. As Amy Louise Erickson argues, "Even under the restrictions of coverture, marriage was still women's best hope of financial security." Erickson, *Women and Property,* 91.

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of nature."[97] Coverture favoured married women by guaranteeing them protection and support, which single women could not expect.

Although the aspects of coverture relating to property seem especially harsh, commentators felt that these were actually beneficial to married women. Coverture limited the strategic behaviour of a husband "to use his wife's separate identity and separate estate to achieve his own ends."[98] As Margaret Hunt demonstrates in her study of wife beating, separate settlements of property were often a cause of abuse. A husband who wanted control of the money from his wife's separate estate often beat or threatened his wife so that she would sign over her possession and control to him.[99] By not having separate property, coverture actually protected wives from potential abuse. Joseph Addison and Richard Steele contended that "'Separate Purses, between Man and Wife, are . . . as unnatural as Separate Beds.'"[100] The complete dependence of a wife on her husband encouraged a man's love for his wife and made a wife attempt to please her husband at all costs.[101] By not allowing them to have separate property, coverture protected wives from potential abuse, and combined assets actually encouraged harmony within the household, which was the goal of marriage. Other unforeseen benefits also supposedly stemmed from the lack of property. As *A treatise of feme coverts* pointed out in 1732, "a feme covert hath not any goods that can be stolen", therefore she could never be the victim of theft.[102] In addition, the law felt it necessary to protect even the wives of

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[97] Michel, "Attitudes Towards Women," 41.
[98] Hartog, *Man and Wife*, 169.
[99] Margaret Hunt, "Wife Beating, Domesticity and Women's Independence in Eighteenth-Century London," *Gender and History* 4:1 (1992), 17. See also: Susan Moller Okin, "Patriarchy and Married Women's Property in England: Questions on Some Current Views," *Eighteenth-Century Studies* 17:2 (1983), 134.
[100] As quoted in: Hunt, "Wife Beating," 26.
[101] *Ibid.*
[102] *A treatise of feme coverts: or the lady's law* (London, 1732), 87.

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felons. Unlike children, who lost their inheritance if their father committed a felony, wives did not lose their dower or jointure except in cases of treason. However, a husband whose wife was convicted of a felony only received curtesy if they had issue before she committed the felony.[103]

While Blackstone and other legal commentators argued that coverture was beneficial, not all of their eighteenth-century contemporaries agreed with this analysis. Mary Astell argued in 1706 that a wife "was made to be a Slave to [her husband's] Will, and has no higher end than to Serve and Obey him!"[104] Astell also argued that "Marriage is a very Happy State for Men," but there was no corresponding happy state for women.[105] In another response to the argument that England was a paradise for women, Sarah Chapone responded in 1735 by saying that it was also a paradise for men. Chapone argued that "no subjects enjoy such invaluable experiences as [men] do here."[106] She felt that the image of the benevolent husband held as much force as a tyrannical prince arguing that he treated his subjects better "than the Grand Seignior treated his slaves in Turkey."[107] These eighteenth-century feminist commentators agreed that marriage benefited husbands rather than wives. However unique their voices were in the eighteenth century, modern historians have given them more force in today's analyses of the purpose and function of coverture.

"The operation of the English Common Law governing the ownership and inheritance of property seems to offer compelling proof of the utter subjection of

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[103] *Ibid*, 53, 68, 75.
[104] Astell, *Reflections*, 47.
[105] *Ibid*, 91-92.
[106] Sarah Chapone, *The hardships of the English laws in relation to wives* (Dublin, 1735), 45-46.
[107] *Ibid*, 46.

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women."[108] Property was an important part of eighteenth-century life and property ownership helped confer citizenship.[109] Unable to own and control property, married women could never be full citizens. While some may argue that property and its transference through marriage contracts was important only to the elite, Amy Louise Erickson has demonstrated that "the only people to whom property was unimportant in marriage were the vagrant poor."[110] Coverture meant that women lost control of their property when they married. A married woman had no possessions to call her own and her support was dependent on her husband's goodwill and generosity. Depending on the character of the husband for one's support was not necessarily a good thing. In addition, as Hunt points out, men could and did use "their property rights and their economic superiority as weapons."[111] If a woman was in an abusive marriage, she often could not leave the marriage because doing so would mean she had no means of economic support. Since she neither owned nor could own anything, a woman who left her husband effectively declared herself an outlaw.[112] Hunt explains that husbands could treat their wives in virtually any way that they wanted, without threat of the wife leaving since they "knew that when the alternative was starvation, many wives would beg to be taken back."[113]

Women could avoid some of the property restrictions of coverture, provided they took the necessary precautions before marriage. Equity courts recognized that married women could have separate property in the form of trusts and jointures, which, as Susan

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[108] Christine Churches, "Women and property in England: a case study," *Social History* 23:2 (1998), 165.
[109] As the previous chapter showed, property was central to the criminal law. It enjoyed such importance in eighteenth-century England that assault was a misdemeanour whereas theft was a felony.
[110] Erickson, *Women and Property*, 85.
[111] Hunt, "Wife Beating," 19.
[112] Lawrence Stone, *The Road to Divorce: England 1530-1987* (Oxford: Oxford University Press, 1990), 4-5.
[113] Hunt, "Wife Beating," 19.

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Staves argues, "broke the hegemony of the common law rules giving husbands control over wives' property."[114] Trusts and jointures kept property out of the hands of husbands and enabled women to be secure in the knowledge that they would have an income in their widowhood, even if their husband squandered his fortune. Jointures and trusts were also important in separation cases, which gave women a greater degree of freedom in certain instances. However, marriage settlements, jointures and trusts were not always beneficial to women. Under the common law, a widow was entitled to a life interest in one-third of her husband's real property. If she had a jointure, dower was forfeit and a woman would often inherit less under the jointure than she would have under dower. In addition, separate property settlements did not mean that the control of the property went directly to the woman. They were often designed to protect family interests and to keep the money and property out of the hands of a potentially bad son-in-law. Their primary intent was not to give the money or property to the woman under coverture.[115] In addition, most women saw their separate property as something to provide for themselves in their widowhood rather than something to benefit them in marriage. Under the common law doctrine of coverture, married women could not own property and even under the less stringent laws of equity, married women's separate property was not always meant to benefit women in the marriage itself.

According to Linda Colley "'a woman could not by definition be a citizen and could never look to possess political rights.'"[116] As Teresa Brennan and Carole Pateman explain, economic independence was a criterion for citizenship in the eighteenth-century.

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[114] Susan Staves, *Married Women's Separate Property in England, 1660-1833* (Cambridge: Harvard University Press, 1990), 31.
[115] Okin, "Questions," 125.
[116] As quoted in Judy M. Cornett, "Hoodwink'd by Custom: The Exclusion of Women from Juries in Eighteenth-Century Law and Literature," *William and Mary Journal of Women and the Law* 4 (1997), 85.

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Since women were always actual or potential dependants, based on their inability to own property when married, they would forever remain secondary "citizens" dependent on others and not actually part of the political landscape, whereas men could transcend this qualification and become citizens.[117] Coverture, which meant that married women could not own property and therefore could not be citizens, did more than just take away the citizenship of married women. A husband's identity covered his wife's legal identity during marriage. As Norma Basch explains, "the legal invisibility of the wife" was the corollary of the "legal oneness of the husband and wife."[118] She continues to argue "any equation in which one plus one equals one by virtue of the woman's invisibility was a vivid symbol of male dominion in a cultural as well as a legal context."[119] While wives did not cease to exist in marriage, they underwent a civil death, which meant that they lost both power and recognition before the law and in certain other contexts.[120] Modern critics of coverture rightly argue that the loss of legal personhood was definitely not a benefit of coverture. It went further than just taking away the citizenship of married women, preventing the law from recognizing a married woman's existence except when her actions removed the "protections" of coverture.[121]

Some scholars take the argument further than the simple loss of legal personhood in marriage. They speak of wives as slaves to their husbands due to their loss of identity

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[117] Teresa Brennan and Carole Patemen, "'Mere Auxiliaries to the Commonwealth': Women and the Origins of Liberalism," *Political Studies* 27:2 (1979), 196. See also Clark, *The Struggle for the Breeches,* 142. Widows however had an odd position, as they were neither dependant nor always expected to remarry. Despite their ability to hold property, widows could still not be full citizens because of their gender, not their propertyholding status.

[118] Norma Basch, "Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America," *Feminist Studies* 5:2 (1979), 347.

[119] *Ibid*, 354.

[120] Elizabeth Fowler, "Civil Death and the Maiden: Agency and the Conditions of Contract in *Piers Plowman*," *Speculum* 70:4 (1995), 768.

[121] Frances E. Dolan, "Battered Women, Petty Traitors, and the Legacy of Coverture," *Feminist Studies* 29:2 (2003), 256.

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before the law and the corresponding loss of freedom.[122] As Carole Pateman argues, "The status of 'wife' affirmed that a woman lacked the capacities of an 'individual'; she became the property of her husband and stood to him as a slave/servant to a master."[123] Pateman also classifies wives as slaves since their work within the household was unpaid, and was therefore slavery.[124] Scholars such as Pateman argue that this was an unbearable situation and stemmed from the subordinate status of women. Since married women were not independent persons, their personhood belonged to someone else: their husbands. However, married women were never the actual property of their husbands. As Erickson argues, "Many men would have liked to regard women as property in and of themselves; but while married women's legal disabilities put them in the same category with idiots, convicted criminals and infants, they were never legally classed with chattels."[125] Rather, the eighteenth-century definition of slavery differed from the modern interpretation of chattel slavery. Shanley points out that rather than the concept of property in women, Mary Wollstonecroft "found women's inability to earn money, married women's legal incapacity to hold property in their own names and mothers' inability to have custody of their children sure marks of their slavery."[126] In the eighteenth-century freedom was not "absolute but rather [varied] according to status: for slaves, as for servants and wives, 'liberty rightly understood . . . is protection,' not

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[122] Mary Lyndon Shanley, "Mary Wollstonecroft on sensibility, women's rights and patriarchal power," in *Women writers and the early modern British political tradition*, ed. Hilda L. Smith (Cambridge: Cambridge University Press, 1998), 158-159; Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988), 119, 120-124, 130-131; Stone, *The Road to Divorce*, 13. These are just some of the examples that approximate married women with slaves.
[123] Pateman, *Sexual Contract*, 130-131.
[124] *Ibid*, 124. This argument could also be applied today to unpaid household labour, however, this labour is often not characterized as a form of slavery. However, this does not seem to be the case today.
[125] Erickson, *Women and Property*, 232-233. See also Janelle Greenberg, "The Legal Status of the English Woman in Early Eighteenth-Century Common Law and Equity," *Studies in Eighteenth-Century Culture* 4 (1975), 172, 175.
[126] Shanley, "Mary Wollstonecroft," 163.

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equality with the rights of their masters."[127] Unlike the modern dichotomy of free and unfree, eighteenth-century law saw a third option of "personal dominion that did not involve commercial exchange."[128] In this sense, husbands could have property in their wives through personal dominion, but a husband could not own his wife in the sense that he could sell her. Teresa Michaels demonstrates that a husband who sold his wife in a wife sale, made the "mistake of treating an archaic form of real property as if it were a mere moveable thing."[129] Modern analyses of coverture that argue married women were slaves mistakenly equate the eighteenth-century interpretation of slavery with modern interpretations of chattel slavery. Blackstone and other legal commentators did not see the right to claim personhood as freedom, but rather saw freedom as a "person's fundamental right to the absolute ownership of property."[130] Since married women could not own property, they could not enjoy liberty; however, they were not chattels, which modern interpretations of coverture as slavery seem to imply.

Historians who criticize coverture often point to its role in wife beating and its corresponding justifications to show that coverture was harmful to married women. As Maeve Doggett explains, "It was an acceptance of the husband's right to physical control of his wife which lay at the heart of the legal construction of the marital relationship. Far from being a *consequence* of coverture, the husband's right of control was its very *essence*."[131] Since a husband was responsible for his wife's actions, the law allowed him to use physical force to control her behaviour. Those who were in positions of power

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[127] Teresa Michaels, "'That Sole and Despotic Dominion': Slaves, Wives and Game in Blackstone's *Commentaries*," *Eighteenth-Century Studies* 27:2 (1993), 198.
[128] *Ibid*, 195.
[129] *Ibid*, 203.
[130] *Ibid*, 211.
[131] Doggett, *Marriage, Wife Beating and the Law*, 35.

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demonstrated their power by controlling their subordinates and violence was one way for those in authority to maintain this control.[132] Eighteenth-century society saw limited violence as an acceptable and necessary way to maintain order and to punish one's subordinates.[133] Parents used physical force to punish their children, just as masters and mistresses used violent means of punishing their apprentices and servants, as did the state in its punishment of criminals. Violence pervaded hierarchical relationships, and marriage was no exception. However, married women were particularly disadvantaged because there were very few ways to escape an abusive marriage.[134] Divorce was impossible for all but the very wealthy and informal means of separation could often mean leaving one's children and facing starvation because of coverture's property restrictions. Although wife beating was limited in theory, coverture worked to maintain the subordinate position of women by limiting the options available to married women in an abusive relationship. While wife beating is an extreme example, it did exist and it reflected the potential for abuse inherent in the doctrine of coverture.

Did the law favour or oppress women? The answer is neither one nor the other, but rather both. One cannot simplify such a complicated doctrine into an either/or situation. The legal disabilities inherent in coverture, combined with other laws designed specifically against women, detract from the argument that women were the favourites of the English law.[135] While oppressive, one must note that there was no outright rebellion

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[132] Amussen, "Punishment, Discipline, and Power," 4-6, 12-13, 27, 31-32.
[133] Susan Dwyer Amussen, "'Being stirred to much unquietness': Violence and Domestic Violence in Early Modern England," *Journal of Women's History* 6:2 (1994), 74; Hunt, "Wife Beating," 14; Shepard, *Manhood*, 139.
[134] Hunt, "Wife Beating," 20.
[135] These laws include the crime of infanticide, which reversed the traditional burden of proof and petty treason, which defined husband murder as an aggravated offence, punishable by death by burning rather than hanging. Both these laws were specifically designed to police the morality of women and to ensure

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against marriage, and many wives accepted their subordinate status.[136] This does not excuse the oppressive nature of coverture, but coverture and marriage were a trade-off and women made the choice to alter their status. As J.C. Scott argues, "'domination is not simply imposed by force but must assume a form that gains social compliance.'"[137] Coverture needed social compliance in order to work effectively, and if it was as oppressive as some feminist scholars suggest, it would not have gained that social compliance. The problem with these differing interpretations is the sources themselves. As previously stated, historians tend to turn to Blackstone when they begin to research coverture. While it is important to take account of the legal treatises, one cannot base an argument solely on the prescriptions of the law. Discretion limited the entire English legal system and as such, women experienced coverture in different ways both inside and outside formal legal jurisdiction. Not looking at the actual practice of coverture in its many differing applications misconstrues its purposes and misses some important aspects, in particular the trade-offs inherent in coverture. In return for his wife's property, a husband had certain obligations for the duration of the marriage. These obligations ensured that although coverture had its problems, married women could benefit from its existence.[138] It is important to recognize that neither the critical interpretation nor the eighteenth-century commentators' interpretations were entirely

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that they fulfilled their proper gender roles and maintained the gender order. They are discussed further in chapter 4.

[136] Fletcher, *Gender*, 124.

[137] As quoted in Michael J. Braddick and John Walter, "Introduction: Grids of Power: order, hierarchy and subordination in early modern society," in *Negotiating Power in Early Modern Society: Hierarchy and Subordination in Britain and Ireland*, ed. Michael J. Braddick and John Walter (Cambridge: Cambridge University Press, 2001), 5.

[138] It is still important to note that despite the theory of reciprocal obligations, it was often very difficult for a married woman to enforce her husband's duty of support.

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right. Coverture, rather, offered a complex mixture of benefits and drawbacks, a grey area of the law that affected individual women in different ways.

The Grey Area

W.R. Prest argues, "the issue of how English women were treated as objects of or under the law can and should be separated from the question of how far English women as subjects managed to use that same law to their own ends."[139] Women were not always the victims of an oppressive law but often worked within the law, and determined the limits that the law placed on their lives. It is important to recognize the agency of women in practice, which is difficult to do by looking solely at the letter of the law. In addition, eighteenth-century authorities recognized that married women would not automatically accept the harsh strictures inherent in theoretical coverture. It was therefore important to limit the authority of husbands. As Susan Dwyer Amussen explains, "Patriarchy legitimated itself by claiming that its power was benign; it demonstrated this by accepting intervention in cases where domestic power was being abused."[140] As previously discussed, patriarchy was limited and it carried certain responsibilities. In her study of the Second Earl of Castlehaven's trial for rape and sodomy, Cynthia Herrup demonstrates how important this control and limitation of patriarchy could be. It was not Castlehaven's sexual behaviour that was so dangerous, but rather his subversion of patriarchy and the household hierarchy.

> By corrupting the ideal of patriarchy, the Earl revealed too starkly an abusive power that all patriarchs sought to cloak over with talk of responsibility and benevolence. And in doing so, he also threatened the hope that inferiors would believe that the established dispersion

[139] W.R. Prest, "Law and Women's Rights in Early Modern England," *The Seventeenth Century* 6:2 (1991), 183.
[140] Amussen, "Being stirred," 84.

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of power was actually to their advantage.[141]

Patriarchy had to be limited in order for it to be effective.[142] If it transgressed the undefined boundaries, the community or individuals stepped in to limit its abuses. As Jennine Hurl-Eamon demonstrates, even abused wives could determine the limits of patriarchal power. Although wives were expected to accept a certain amount of physical correction, they used recognizances to force their husbands to keep the peace within the household. This allowed wives, the victims of domestic violence, rather than husbands to determine what was an acceptable level of violence. This level of violence was not always as extreme as the cases found in petitions for separation.[143] In daily life, married women defined the boundaries of patriarchy and limited its impact on their lives. It was in these definitions that eighteenth-century married women showed that they were not the passive victims of an overarching patriarchal system suggested by some historians.

Scholars who focus on married women's loss of independence, identity and property ownership judge the eighteenth century according to modern values of individuality and equality. While these are undoubtedly important values, one must remember that they did not carry the same force in the eighteenth century that they do today. As Margreta de Grazia explains, "Coverture did not incorporate two Lockean individuals, each of whom could be 'seen essentially as the proprietor of his own person

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[141] Cynthia Herrup, "The Patriarch at Home: The Trial of the Second Earl of Castlehaven for Rape and Sodomy," *History Workshop Journal* 41 (1996), 8, 11, 13.
[142] As Elizabeth Foyster explains, "There was a point at which the use of physical control could threaten rather than enforce patriarchy." Elizabeth Foyster, "Male Honour, Social Control and Wife Beating in Late Stuart England," *Transactions of the Royal Historical Society*, 6th series 6 (1996), 217.
[143] Often this violence was simply the threat of violence, although it did include physical abuse. Jennine Hurl-Eamon, *Gender and Petty Violence in London, 1680-1720* (Columbus: The Ohio State University Press, 2005), 56-57.

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or capacities, owing nothing to society for them.' For neither is self-owned."[144] She also points out that "private property, held individually to the exclusion of others, may be more the anomaly than the rule."[145] Rather, as Bailey argues, property benefited the entire household despite existing in the husband's name.[146] Eighteenth-century men and women did not see marriage as the loss of identity and rights, but rather saw it as the combining of two persons into one household unit, which was neither the husband nor the wife, but rather simply the household. It is therefore anachronistic to assume that a woman "lost" her identity and legal rights upon marriage. As Margaret J.M. Ezell notes, "The twentieth-century interpretation of domestic life in seventeenth-century England restricts the activities of the patriarch's wife more than the actual practice did."[147] Ezell's argument applies to interpretations of the eighteenth-century as well. Married women did have restricted rights, especially in theory, but these restrictions were limited in practice. A successful marriage demanded cooperation and a focus on the loss of rights, although important, misses this key component.

Marriage not only changed the legal status of women, it also affected the lives of men. As Alexandra Shepard argues, "While men were often better placed to benefit from them, patriarchal imperatives nonetheless constituted attempts to discipline and order men as well as women."[148] In addition to the responsibilities imposed by coverture, husbands had to conform to expected behaviour and roles. Men were also subject to

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[144] Margreta de Grazia, "Afterword," in *Women, Property and the Letters of the Law in Early Modern England*, ed. Nancy E. Wright, Margaret W. Ferguson and A.R. Buck (Toronto: University of Toronto Press, 2004), 301.
[145] *Ibid*, 302.
[146] Bailey, *Unquiet Lives*, 106; Joanne Bailey, "Favoured or Oppressed? Married women, property and 'coverture' in England, 1660-1800," *Continuity and Change* 17:3 (2002), 366.
[147] Ezell, *The Patriarch's Wife*, 162.
[148] Shepard, *Manhood*, 1.

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other hierarchies, despite their superior status in the gender order.[149] Shepard notes that "prescriptions of male self-sufficiency, economic independence and responsibility towards others informed the ethics of evaluation by which subtle status distinctions as well as broader hierarchies were established."[150] Economic independence was impossible for many and husbands therefore relied on the economic contributions of wives for personal and familial survival. Husbands also had to rely on their wives' credit reputation for their economic autonomy as much as they had to rely on their own.[151] In much the same way as the criminal law restrained and benefited eighteenth-century elites, marriage and coverture both benefited and restrained a husband's behaviour.

The goal of marriage was harmony, and separation cases often complain of the disquiet and lack of harmony in the marital relationship. Coverture was supposed to enable husband and wife to live together in harmony by nature of their shared interest: the household. Joanne Bailey notes that all married couples had the common ambitions "to manage their household economies efficiently and protect their individual and household credit and creditworthiness."[152] Bailey also argues that marriage was a co-dependent relationship. Her emphasis on both husbands and wives demonstrates that it was often difficult, if not impossible, for either spouse to live without the other. Although many interpretations of eighteenth-century family life emphasise the importance of a husband's provision, a wife's role as household manager was equally important. Bailey argues that "the sheer extent and intensity of women's household

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[149] Susan Dwyer Amussen, *An Ordered Society: Gender and Class in Early Modern England* (New York: Columbia University Press, 1988), 3.
[150] Alexandra Shepard, "Manhood, Credit and Patriarchy in Early Modern England," *Past and Present* 167 (2000), 89.
[151] Bailey, *Unquiet Lives*, 75.
[152] *Ibid*, 62.

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government meant that its denial could only occur when husbands had a substitute for their wives."[153] In addition to household management, wives also made important economic contributions to the household. Their marriage portion often enabled the couple to set up an independent household and both spouses contributed their wages and labour to what they saw as the familial pool.[154] This emphasis on the familial and household benefit, rather than individual earnings, gave married women a stake and authority within the household. Rather than being simply dependants of either autocratic or benevolent husbands, wives were partners in the domestic relationship. Bailey emphasises co-dependency, which undercut male authority, and characterises marriage as a partnership, not necessarily between equals, rather than a struggle between individuals.[155]

Shepard argues that "Patriarchal ideology itself was muddled and contradictory, and selectively invoked rather than a monolithic system which simply received adherence or rejection."[156] Most eighteenth-century commentators believed that the common law doctrine of coverture benefited married women. This was a paternalistic argument in which married women were protected from the dangers of living without male authority. However, using the same sources, some scholars argue that coverture actually oppressed wives. Married women's loss of legal personhood and property rights ensured their subordinate status in the household and throughout life. The problem with these two analyses is the sources. While they both raise important points, one must go further than

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[153] *Ibid*, 83.
[154] *Ibid*, 109, 193; Shepard, *Manhood*, 95-96. Interestingly, men who sued their wife's lover for criminal conversation sometimes turned their settlement over to the defendant. This enabled the ex-wife and her lover to set up a new household, which allowed for marriage. Susan Staves, "Money for Honor: Damages for Criminal Conversation," *Studies in Eighteenth-Century Culture* 11 (1982), 291-292.
[155] Bailey, *Unquiet Lives*, 195-196.
[156] Shepard, *Manhood*, 1.

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legal treatises and the letter of the law to see how a legal doctrine such as coverture actually worked. If coverture was beneficial to married women, why was it later opposed and if coverture was so oppressive why did it last for so long? As Ezell explains, "So many gaps existed between the rigid theory and the actual enforcement that its degrading and restrictive nature was not immediately felt. Conditions were not intolerable to the point of open rebellion for the majority of [married] women in their everyday lives."[157] Coverture existed in a grey area, which ensured that most husbands and wives could live in harmony rather than in a constant struggle for the breeches. The discretionary nature of coverture limited its severity and gave it legitimacy in the eyes of eighteenth-century English men and women. It is therefore necessary to examine the actual function of coverture rather than focusing on the prescriptive commentary. One such way is to examine an area of coverture that was theoretically beneficial to women: the defence of coercion.

[157] Ezell, *Patriarch's Wife*, 163.

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CHAPTER 3: THIEVING WIVES IN THE OLD BAILEY

> *The imperious woman raiseth a storm for her own shipwreck, and she that affects dominion should be made the slave of her husband.*
>
> -William Kenrick, *The Whole Duty of Woman*, 1764

According to the eighteenth-century English common law, a married woman was not an independent legal person; her identity was subsumed or "covered" under that of her husband's for the duration of the marriage. However, as Frances Dolan argues, it was possible for the wife to pop back up into view since her identity and agency were understood to be "suspended, covered, or delegated rather than . . . erased."[158] It was when this "cover" disappeared that the law could consider a wife an independent legal entity. Dolan studies petty treason, an aggravated form of murder where a wife murders her husband. This crime obviously removed a wife's "cover" and thus placed her in the legal record; however, there were other ways a wife could be treated as a person in her own right rather than through her husband. Sir William Blackstone explained that "in some felonies and other inferior crimes, committed by her, through constraint of her husband, the law excuses her: but this extends not to treason or murder."[159] Although he acknowledged the defence of marital coercion, Blackstone allowed for the possibility of indicting and punishing wives separately from their husbands.[160] It is important to remember that Blackstone's *Commentaries,* although influential, is a legal treatise that was not always followed in practice.[161] So when was a wife liable for her criminal

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[158] Dolan, "Battered Women," 256.
[159] Blackstone, *Commentaries I*, 432.
[160] *Ibid*, 431.
[161] Some scholars such as Dolan and Hendrik Hartog have started to question Blackstone's historical analyses. Dolan, "Battered Women," 256; Hartog, *Man and Wife*, 106, 108. However, Blackstone's argument that coercion excused wives is generally accepted as the standard rule without further study. Peter King, "Female offenders," 69; Beattie, "Criminality of Women," 87; Shoemaker, *Gender in English Society*, 297.

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actions and when did criminal juries decide that she had acted under the direction of her husband and was therefore not liable for her actions? The law itself is unclear, and the cases are marked with inconsistencies. Judges and juries used discretion when interpreting and assigning responsibility to wives accused of crime in the eighteenth century.

According to the principle of marital coercion, eighteenth-century judges and juries assumed that a wife committed a crime under her husband's coercion if he was present when the act took place; therefore, she was not liable for her actions although a jury could find her husband guilty.[162] In principle, if a married woman could prove that her husband was present when she committed the crime, the jury had to acquit her.[163] However, as the cases in the Old Bailey show, the defence of coercion was open to interpretation. Husbands often had to be both present and privy to the crime for the defence of coercion to apply. There are cases where the jury acquitted the husband while convicting his wife, or in some instances, judges and juries applying the defence of coercion even if the husband was not present. Cases were also resolved because of other legal rules including lack of evidence, the absence of the prosecutor, or even a fault in the indictment. Just because marital coercion existed in principle did not mean that it applied universally in practice.

How did marital coercion work in practice and how did coverture affect the criminal liability of married women? If coverture was the rule, as historians such as Peter

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[162] Doggett, *Marriage, Wife-Beating and the Law*, 53.

[163] Notable for its legal dialogue, one can see this in the case of Susannah Clarke. It should be noted however, that Clarke's case is unique in its dialogue and debate about the presence of her husband. A search in the *Old Bailey Sessions Papers* also failed to find evidence of her husband being charged for the same crime. "Susannah, the wife of Edward Clarke, breaking the peace: riot, June 28th, 1780," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1780s/t17800628-76.html> 2005.

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King suggest, then married women accused of crimes could simply say that their husbands were present and the law would force the jury to acquit them.[164] However, the records do not show married women directly appealing to the defence of coercion, but rather show the judges and juries applying the defence of coercion. More often than not, married women accused of theft-related offences in association with their husbands claimed that they committed crimes out of want and starvation, very rarely did they argue the defence of coercion.[165] This suggests that ordinary people were unaware of the intricacies of coverture or did not trust its authority as a legal principle, and that it did not enjoy the widespread application that legal treatises attributed to it. And what about married women who committed crimes without their husbands? Would committing any sort of crime forfeit the benefits of coverture, or did the courts treat married women differently than single women even if they were not directly acting with their husbands? One can illustrate married women's criminal behaviour and the court's treatment of such women, including the defence of coercion, by examining the cases involving theft-related offences in the Old Bailey. Since coercion could excuse married women in theft-related offences, one would expect to find numerous acquittals of married women accused of such crimes. However, the Old Bailey records bear different results. While the court applied the defence of coercion in some cases, it was neither universal nor did it excuse all married women from criminal liability. Hendrik Hartog argues that coverture was "a set of imaginary 'facts' created to achieve a legal result. It was a tool, not an explanation:

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[164] King, "Female offenders," 69.

[165] See for example: "Jane Johson, theft: receiving stolen goods, theft: receiving stolen goods, 19th May, 1743," *The Proceedings of the Old Bailey* <http:www.oldbaileyonline.org/html_units/1749s/t17430519-18.html> 2005; "William Bransgrove, Mary the wife of James Terry, theft: burglary, 26th April 1775," *The Proceedings of the Old Bailey* <http:www.oldbaileyonline.org/html_units/1770s/t17750426-14.html> 2005.

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existing only for particular purposes, to be discarded when no longer useful."[166] In the case of marital coercion, coverture could only go so far and judges and juries often considered married women independent legal identities, as liable for their criminal actions as anyone else in eighteenth-century London.

How often did married women commit theft-related offences, what sorts of offences did they commit and how did the courts treat those accused of such crimes? There are 1,080 surviving cases involving married women accused of theft-related offences in the Old Bailey during the eighteenth century. Of the 1,080 cases with married women, 880 (81.5 percent) involved wives accused of crimes without their husbands. For this reason alone, one would not expect to find numerous examples of juries assuming coercion. However, 199 cases involved women accused of committing theft-related offences with their husbands. Since the defence of coercion often depended on the presence of a woman's husband, cases involving women accused with their husbands will be examined separately from cases involving women accused without their husbands. One would not expect to find the application of coercion in cases without husbands; however, juries often used their discretion in applying the defence of coercion and the presence, or absence, of a woman's husband did not always guarantee the interpretation of coercion according to the legal treatises.

Before examining the actual cases, it is important to understand a number of the terms used in, and to describe matters raised by, the court records. The term "theft-

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[166] Hartog, *Man and Wife*, 107. This contrasts with J.H. Baker's argument that "no one was harmed by [legal] fictions, and they were only allowed where their operation was fair and the effect desirable in the eyes of the court." J.H. Baker, *An Introduction to English Legal History*, Fourth Edition (London: Butterworths Lexis Nexis 2002), 202. The discussion of coverture in the Old Bailey demonstrates that coverture and the legal fiction of unity of person was definitely not "fair," although their effects were desirable in the eyes of authorities.

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related offences" refers to a number of different crimes, all of which were felonies. The most common form of theft was simple grand larceny, which was theft of any item worth more than one shilling.[167] Simple grand larceny was a clergyable offence, which meant that any man or woman convicted of it could plead benefit of clergy and escape execution. After 1718, those who successfully pled clergy were sentenced to seven years transportation, which led to most judges simply sentencing offenders to transportation rather than execution. The second most common offence amongst married women was theft from a specified place, which was primarily concerned with the actions of domestic servants. This theft was defined as: "theft from a dwelling house of goods valued at more than forty shillings," and became a nonclergyable offence in 1713.[168] Receiving stolen goods, the third most common offence amongst married women, involved a person, often a pawnbroker, taking in goods he or she knew to be stolen and then selling them for a profit. Other theft-related offences included housebreaking, burglary, highway robbery, animal theft, robbery, pick pocketing, shoplifting, and the all encompassing "theft." Some of these crimes still exist and their definition has changed little since the eighteenth century.[169]

As previously discussed, the English legal system was harsh and the only punishment for felonies was hanging. In an attempt to lessen the severity of the law, juries often delivered partial verdicts. These verdicts lessened the value of the goods stolen, or lessened the offence in order for the offender to receive a lighter sentence. For

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[167] J.M. Beattie, *Crime and the Courts in England, 1660-1800* (Princeton: Princeton University Press, 1986), 181-182.
[168] *Ibid*, 173; Paula Humfrey, "Female Servants and Women's Criminality in Early Eighteenth-Century London," in *Criminal Justice in the Old World and the New: Essays in Honour of J.M. Beattie*, ed. Greg T. Smith, Allyson N. May, Simon Devereaux (Toronto, 1998), 73.
[169] For a more in depth explanation of crimes prosecuted in the Old Bailey see: "Crimes Tried at the Old Bailey," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/history/crime/crimes.html> 2005.

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example, a jury could find a person accused of pickpocketing guilty of stealing, but not from the person. This meant that the offender would still be punished, but he or she would not be hanged. Also common, especially with simple grand larceny and theft from a specified place, was the deliberate undervaluing of goods to fit within the statutes. After 1718, the main secondary punishment was transportation to the colonies for seven years, but offenders who received partial verdicts were also whipped or branded. Partial verdicts ensured that offenders would be punished and other people deterred from crime, while making sure that the law did not lose its authority by appearing too harsh. The other two verdicts available to juries were "guilty" and "not guilty."

Wives with Husbands

The Old Bailey has 199 surviving cases involving married couples accused of theft-related offences together. Because of the rules of coverture, one would expect to find the defence of coercion applied in these cases, but this was not always the case in the records. Many people were unaware of the intricacies of coverture, and women's defences often resembled defences of men or single women, including poverty and a reliance on character witnesses.[170] As Table 3.1 shows, the defence of coercion was not applied consistently or universally. Only 58 (29.1 percent) cases involve the textbook application of the defence of coercion, where a husband was convicted while his wife was acquitted, while a rare group of cases actually involve the reverse. Juries found 13 women (6.5 percent) guilty of theft-related offences while acquitting their husbands. That is hardly the picture of coverture Blackstone portrays in his *Commentaries*, nor does it reflect the common historiographical argument that married women routinely escaped

[170] Douglas Hay, "War, Dearth and Theft in the Eighteenth Century: The Record of the English Courts," *Past and Present* 95 (1982), 128; J.M. Beattie, "The Pattern of Crime in England, 1660-1800," *Past and Present* 62 (1974), 85.

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conviction because of the defence of coercion. It is true that juries acquitted the majority of married women accused of theft-related offences with their husbands; however, of these cases, 103 involved acquittals for both spouses, which is over half the cases. Historians of crime do not argue that married men who were accused with their wives were treated more leniently than single men and married men accused without their wives; however, the Old Bailey demonstrates otherwise.

Table 3.1: Verdicts for Wives Accused of Theft-Related Offences with their Husbands in the Old Bailey, 1700-1799

	Wife Guilty	Wife Not Guilty	Wife Partial Verdict	**Total**
Husband Guilty	5	58	0	63
Husband Not Guilty	13	103	5	121
Husband Partial Verdict	0	15	0	15
Total	18	176	5	199

Source: Old Bailey Sessions Papers N=199[171]

In the cases involving men, either unmarried or married without their wives, accused of theft-related offences, just over one-third resulted in acquittals. This contrasts with the almost two-thirds acquittal rate for married men accused with their wives.[172] Perhaps this difference occurred because the jurors, many of whom would be on the Parish committees, were concerned with the effect that transportation or execution of a spouse and/or parent would have on the familial dependants, especially since the burden to provide for these families would fall on the local authorities.[173] The presence of the spouse would emphasise the potential fallout on these dependants. However, the predominant view amongst historians has been that married women were less likely to be convicted when it was obvious that they had a family to support, which would then be

[171] Partial verdict refers to a jury undervaluing the stolen goods or convicting the offender on a lesser offence.
[172] Of the 35,959 cases involving males accused of theft-related offences, 12, 973 (36.1%) resulted in acquittals compared to the 121 acquittals out of 199 cases (60.8%) involving men accused with their wives. *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org> 2005.
[173] Beattie, *Policing*, 438.

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placed on parish relief.[174] While this was obviously a concern of parish authorities, this argument is not complete. Transporting or executing a husband would place the wife on parish relief, as well as her family. This would have been especially troublesome since widows were amongst the deserving poor and therefore entitled to relief.[175] This argument, combined with the finding that juries were more likely to acquit both spouses accused of theft-related offences together, leads to the conclusion that coverture was not necessarily a mitigating factor. A man accused with his wife received a more lenient treatment than a man who was accused without his wife.[176] This leads to the conclusion, that marriage, *not* coverture led to juries treating offenders more leniently, but only when the spouses were accused together.

The defence of coercion still excused a number of married women from criminal liability. One such case was that of Richard and Ann Lindsey in 1721. James Gibbs accused the Lindseys of assaulting him and stealing some of his clothing. Gibbs met Ann in Grays-Inn Lane, where she invited him to her house for some ale. Upon arriving Gibbs claimed that Ann called

> Dick; telling him he need not fear any thing, for Dick was but a Boy of 6 Years of Age; but instead of such a Youth, her Husband, the Prisoner, came up, knockt him down, and held him, while she took his Shirt off his Back and rifled him, and that Ann Lindsey advised her Husband to cut his (the Prosecutor's) Throat.

Upon searching the Lindsey's house, the prosecutor found the missing shirt. The jury acquitted Ann because she committed her actions in the presence of her husband.

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[174] King, "Female offenders," 70; Beattie, *Policing*, 444.
[175] Barbara J. Todd, "Demographic determinism and female agency: the remarrying widow reconsidered ... again," *Continuity and Change* 9:3 (1994), 421-422, 427; Amy M. Froide, "Marital Status as a Category of Difference: Singlewomen and Widows in Early Modern England," in *Singlewomen in the European Past, 1250-1800*, ed. Judith M. Bennett and Amy M. Froide (Philadelphia: University of Pennsylvania Press, 1999), 252-254.
[176] Although the term "wife" referred to a woman's status, one cannot search men's marital status in the Old Bailey.

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However, they did not believe that Richard was innocent and convicted him of a lesser offence, which carried the punishment of transportation rather than death by hanging.[177] Although Ann was involved in the crime, her subordinate and obedient position within the household ensured that she could receive one of the benefits of coverture.

Almost one third of the cases involving married couples resulted in verdicts similar to that of Richard and Ann Lindsey, but judges and juries did not apply coverture consistently. As the 1720 case of Thomas and Ann Tompion shows, juries also recognized that a wife could be guilty of an offence while her husband was innocent, even when he was present at the event. Elizabeth Cole accused Thomas and Ann of stealing her purse while they were on a boat together. Elizabeth got on the boat and sat between Thomas and Ann, her purse being on Ann's side. After Elizabeth got off the boat, she noticed that her purse was missing and began to make inquiries. In her search to find the pickpockets, Elizabeth was told that it must be the Tompions, but more specifically Ann since she "was reputed to be the most ingenious Pick-Pocket in London." Although there was no doubt that Thomas was present at the time of the crime, it appeared that Ann actually took the purse. Since the initiative and action was all upon

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[177] "Richard Lindsey, Ann Lindsey, Theft with Violence: Robbery, 1st March, 1721," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1720s/t17210301-34.html> 2005. See also: "John Barret and Ann his wife, John Barret, theft: Simple Grand Larceny, 11th October, 1732," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1730s/t17321011-21.html> 2005; "Robert Cook alias Hedgly, Margate his wife, Robert Cook alias Hedgly, Thomas Davis, Deborah Stent, theft: Burglary, 30th June, 1714," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1710s/t17140630-41.html> 2005; "Robert Colson, Mary Colson, theft with violence: highway robbery, theft with violence: highway robbery, theft: receiving stolen goods, 11th September, 1734," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1730s/t17340911-33.html> 2005.

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Ann, the jury acquitted Thomas and convicted Ann, the judge later sentencing her to death.[178]

Juries often interpreted the defence of coercion and determined how strictly to apply it in determining liability. In the case of James and Frances Emerton in 1732, it was unclear whether James was present at the time of the theft, which would determine whether the jury could presume coercion. Robert Dawcett, the victim of the robbery, claimed that Frances and another woman took him "to the White Horse in Chick Lane, and there, as soon as I laid my self upon the Bed, they [stripped] me by main Force, and took away my Money and my Watch." James did not appear during this robbery, but stopped Robert at the door as he tried to escape. The day after the robbery, James "offer'd to make it up with [Robert], and said, [he] should have [his] Watch and every thing again, if [he] would be but easy." This suggests that James was aware of the crime, even if he did not approve of his wife's actions. However, it neither suggests his presence at the crime nor his knowledge of it before or during its occurrence. This case is marked throughout with Frances' colourful language. She claimed that Robert "call'd the Watch because I would not lie with him as well as t'other woman." Juries in the eighteenth century took robbery cases very seriously as there was a great concern with violent theft-related offences. However, they considered this a masculine crime and the

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[178] "Thomas Tompion, Ann Tompion, Theft: Pick Pocketing, 12th October, 1720," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1720s/t17201012-5.html> 2005. See also: "Christopher M'Donald, Francis Farrel, John Roney, Alice Roney, Jonathan Parker, theft: simple grand larceny, theft: receiving stolen goods, theft: receiving stolen goods, theft: receiving stolen goods, 16th January, 1765," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1760s/t17650116-35.html> 2005; "Martin Thompson, Patty Thompson, theft: specified place, theft: simple grand larceny, 15th May, 1771," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1770s/t17710515-24.html> 2005; "Sarah wife of Thomas Painton, Thomas Painton, theft: simple grand larceny, theft: receiving stolen goods, 28th February, 1759," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1750s/t17590228-25.html> 2005.

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conviction rate for male offenders was much higher than that of female offenders. Whether for this reason or another, Frances feared that the jury would convict her husband, even though she "knew" he was innocent. She pleaded with the jury to "take it into Consideration; and do what you will with me let all Punishment be due to me, but clear my Husband; don't hang him whatever you do." Since it appeared that James was not present, and that Frances acted independently, the jury acquitted James. However, the plea for mercy also affected the outcome of the case as the jury delivered a partial verdict and sentenced Frances to transportation, rather than death, which was the punishment for robbery.[179]

The case of William and Sarah Northey in 1784 also shows how a judge or jury's interpretation of the principle of coercion determined whether a woman deserved the benefit of coverture. In this case, the concern was about the husband's knowledge. Thomas Flint accused the Northeys of shoplifting some lace edging from his store. The Northeys went into Flint's shop and were looking at lace, when Sarah "took a card out of the box, and she said she would let it lay till she came to a card that she liked better." The store clerk soon missed the card and testified that he "saw the woman take it in her hand, and she seemed to put it under her stays, by her manner of shrinking herself up; it was the woman [the store clerk] saw, and not the man." After leaving the shop, Flint and his clerk found the missing lace in William's pocket. William testified that this was a

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[179] "James Emerton and Frances his wife: James Emerton, theft with violence: robbery, 5th July 1732," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1730s/t17320705-10.html> 2005. See also: "William Brisbane, Jane Brisbane, theft: simple grand larceny, 29th October, 1783," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1780s/t17831029-36.html> 2005; "John Rowley, Elizabeth Rowley, theft: simple grand larceny, theft: receiving stolen goods, 15th January, 1778," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1770s/t17780115-53.html> 2005; "William Holland and Margaret his wife, William Holland, theft: simple grand larceny, 10th July, 1776," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1770s/t17760710-37.html> 2005.

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simple misunderstanding: he had put the lace in his pocket after his wife said that she wanted it because he thought he had paid for it with his other purchases. As soon as he discovered that the lace had not been paid for, William offered to pay for it; however, Flint "was determined to make an example of them, as [he suffered] daily" from shoplifting. At the end of the case, the judge explained to the jury that,

> where a felony is committed by a married woman in the presence of her husband, she ought to be acquitted, . . . But if you are of opinion that the wife stole it altogether without knowledge or privity of her husband, and he knew nothing at all of it, then his being present will neither affect him, nor excuse her; and upon that supposition, if you can be satisfied he knew nothing of the fact at all, you should find the woman guilty and acquit the man: If you are doubtful whether either of them stole this, you should acquit them both.

The jury believed that Sarah acted without the knowledge of her husband as they convicted her of a lesser offence and acquitted William. This, and the previous examples of James and Frances Emerton and Thomas and Ann Tompion demonstrate that the principle of coercion was open to interpretation.[180]

Other considerations besides the principle of coercion often played a role in the assigning of guilt or innocence. As the 1757 case of John and Sarah Page shows, reputation played a large role in jury deliberations. James Case charged John and Sarah with stealing a number of items from their lodging room. Case testified that he "took up the woman, who confessed she had pawn'd [the items] at several pawn brokers, where I went and found them pawn'd in her name. I have heard a very good character of the

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[180] "William Northey, Sarah Northey, theft: shoplifting, 26th May, 1784," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1780s/t17840526-78.html> 2005. See also: "William Shepard, Elizabeth Shepard, theft, 15th October, 1729," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1720s/t17291015-11.html> 2005; "Elizabeth Fisher, George Holden and Rebecca his wife, George Holden, theft: specified place, theft: receiving stolen goods, 3rd September, 1740," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1740s/t17400903-19.html> 2005; "Miles Barne, and Anne his wife, otherwise Anne Warren, Miles Barne, theft: simple grand larceny, 15th January, 1767," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1760s/t17670115-32.html> 2005.

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man, but a very bad one of the woman." The pawnbrokers testified that Sarah pawned the goods herself and that her husband was not present during these transactions. However, Sarah testified that her "husband went along with [her], and [stayed] at the doors while [she] pawned these things," which suggests that he was both present and privy. The principle of coercion was relevant, yet Case seemed to believe that Sarah, not John, committed the offence. Case answered the question "Did she say she pawn'd the goods by the order of her husband?" with "No, she did not mention him." Sarah did not have a very good character. John's nephew testified that he "would trust him with a million of money if I had it, but to the woman she is very bad." This testimony was very important since it appears to have helped the jury determine whose story to believe. In this case, the jury believed Sarah acted independently and convicted her of theft from a specified place while acquitting John.[181]

The eighteenth-century criminal law was characterized by discretion, and crimes involving married couples were no exception. As previously illustrated, England had an incredibly harsh criminal law for which the chief punishment was death by hanging until 1718. To lessen the severity of the law, English judges and juries exercised discretion, judging each case according to its merits and applying the law accordingly.[182] The benefit of clergy, juries undervaluing stolen goods, and the system of pardons all worked together to lessen the severity of the law and enabled authorities to use their discretion according to the merits of each individual case. Discretion was not limited to the

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[181] "John Page and Sarah his wife, theft: specified place, 7th December, 1757," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1750s/t17571207-7.html> 2005. See also: "Elisha Wormlayton, and Ann his wife, Elisha Wormlayton, theft: simple grand larceny, 1st April, 1761," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1760s/t17610401-16.html> 2005.

[182] Langbein, *Adversary Criminal Trial*, 6, 231, 336, 338, 343.

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criminal law, and its main strength was that it enabled the law and its discriminatory practices to "operate, adapt, and persist for so long without being seriously challenged."[183] As the previous cases show, jurors were discriminating in their decisions about whether to apply the principle of coercion. Jurors were willing to acquit wives if it was apparent that that they had acted within the parameters of patriarchy, coverture and the prescribed feminine social roles. However, women who showed independence, especially in cases where it was clear that the wife had instigated the offence, were more likely to be convicted.[184] An assumption of the principle of marital coercion was that a husband was responsible for his wife's actions and should keep her under control. Despite the concerns with upholding patriarchal authority, judges and juries saw independent wives rather than husbands as the problem. In cases of clear female independence, judges and juries preferred to punish the wife for her crime rather than punish the husband for his failings as a patriarch. As long as married women were willing to live within their socially constructed, subordinate roles, they could expect to benefit from coverture; however, judges and juries, in common with society in general, were concerned with insubordinate women and did not grant such women the "benefits" of their sex.

Wives without Husbands

The defence of coercion has led some historians to argue that the courts treated married women leniently and allowed them to escape conviction because of the

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[183] Stretton, "Women, Property and Law," 41; Stretton, "Married Women," 126; Hay, "Property, Authority and the Criminal Law,"; Cynthia Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth-Century England* (Cambridge: Cambridge University Press, 1987).
[184] Beattie, *Crime and the Courts*, 414.

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presumption of coercion.[185] However, there has been a lack of research into the actual application of coverture in the criminal courts, with the exception of research into the seemingly incompatible term of married spinsters.[186] Within this debate, Valerie C. Edwards argues that:

> women were probably as aware of the possibilities of the defence of marital coercion as men were of their much wider right of benefit of clergy. They perhaps pleaded it habitually and automatically as a last straw, whether entitled or not, just as illiterates pleaded benefit of clergy in the hope of being able to recite the 'neck verse' with sufficient accuracy to convince the court.[187]

This suggests that married women were aware of the intricacies of coverture and used it to their advantage. As the Old Bailey cases involving married couples accused together demonstrate, married women did not appeal to coverture as a defence. Instead, judges and juries chose to apply the defence of coercion, and this decision depended on individual circumstances. Married women could not rely on the defence of coercion to excuse their criminal actions. In addition, the defence of coercion was only supposed to apply if the husband was present and privy to the criminal action. Coercion was a limited defence, and it was not supposed to be used in cases involving married women accused of crimes without their husbands. It is important for all historians to remember that married women often acted on their own and to discover how the courts treated those married women to whom the defence of coercion could not apply in principle.

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[185] One of the main proponents of this argument is Peter King, who discounts married women as unimportant when compared to the larger number of single female offenders, See: King, "Female Offenders," 69.
[186] Carol Z. Wiener, "Is a Spinster an Unmarried Woman?" *American Journal of Legal History* 20 (1976), 27-31; J.H. Baker, "Male and Married Spinsters," *American Journal of Legal History* 21:3 (1977), 255-259; Valerie C. Edwards, "The Case of the Married Spinster: An Alternative Explanation," *American Journal of Legal History* 21:3 (1977), 260-265.
[187] Edwards, "Married Spinster," 264.

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Married women were more likely to be accused of crimes without their husbands than they were to be accused with their husbands. Of the 1,080 cases involving married women, 881 (81.6 percent) involved married women accused without their husbands. It is in these cases that one would not expect to find the presumption of coercion. Table 3.2 shows the verdicts of married women accused of crimes without their husbands, and the numbers are noticeably different from the numbers for married couples found in table 3.1. These numbers detract from the argument that coverture benefited women and that the law treated married women more leniently than single women and men.

Table 3.2: Verdicts for Wives Accused without their Husbands in the Old Bailey, 1700-1799

Verdict	Number	Percentage
Guilty	278	31.60%
Not Guilty	433	49.10%
Partial Verdict	170	19.30%
Total	881	100.00%

Source: Old Bailey Sessions Papers
N=881

Juries acquitted under half of the married women accused without their husbands (49.1 percent), which contrasts with the 88.4 percent acquittal rate for wives accused with their husbands found in table 3.1. The acquittal rate for single and widowed women was 44.0 percent, which is quite similar to the acquittal rate for married women without their husbands (49.1 percent).[188] This contrasts with the argument that the courts treated married women differently than single or widowed women. Even husbands involved with their wives received a higher acquittal rate (60.8 percent) than wives without husbands. These numbers indicate that one cannot assume that the defence of coercion excused all married women from criminal liability. Since eighteenth-century Londoners

[188] Of the 17,702 theft-related offences involving single and widowed women, 7,818 received acquittals, 5,404 were convicted and 4,540 received partial verdicts. *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org> 2005.

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were willing to prosecute married women, and jurors were willing to convict these women, it seems clear that eighteenth-century law and society did not expect a husband to be fully responsible for his wife's actions. Little evidence exists of a general unwillingness to assign criminal responsibility to married women accused of theft-related offences. The courts did not recognize coercion as an overarching defence; married women could and did expect to be convicted when they were accused of theft-related offences. The courts treated married women accused without their husbands similarly to single or widowed women. This further argues against the belief that judges and juries treated married women more leniently because of coverture. In addition, the cases involving married women accused without their husbands seems to suggest that marriage was only a mitigating factor when couples were accused together in cases where the presumption of coercion was supposed to apply.

Despite the theoretical requirement of a husband's presence, judges and juries sometimes applied the defence of coercion in cases involving married women accused without their husbands. In 1749, Henry Barnet accused Elizabeth More of stealing sheets, saucepans, a flat iron and a number of other goods. The case contains little detail but it explains that the jury acquitted More because "she did it by the directions of her husband."[189] Another similar case was that of Elizabeth Henley in 1785. John Collins accused Henley of stealing sheets, a flat iron and a copper teakettle from the lodging he had let to Henley and her husband. Henley testified that she pawned the goods because she was experiencing great poverty due to her husband's illness. Both Collins and the pawnbroker testified to the same effect. However, the judge did not rely on the defence

[189] "Elizabeth More, theft: simple grand larceny, 22nd February, 1749," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1740s/t17490222-40.html> 2005.

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of poverty and instead instructed the jury "to judge whether she did this under the authority of her husband, if you think so you will acquit her." Whether for reasons of sympathy or for belief that Henley was only obeying her husband, the jury acquitted Henley.[190] Both More and Henley's experiences show that even in cases not involving a husband's direct involvement, judges and juries were willing to use their discretion and apply the defence of coercion. However, it is rare for the cases to even mention coercion if the husband is not also named in the indictment. More often than not, married women accused of theft-related offences relied on defences other than coercion.

The most common defence women relied on was poverty.[191] In 1768, Cornelius Wardman accused Margaret Martin of stealing a coat, a waistcoat and a pair of stays. Martin lived in the same house as the Wardmans and upon returning to her house after an absence of three days, Mrs. Wardman noticed the items missing from a drawer. Mrs. Wardman took Martin up on suspicion and Martin confessed to the crime. She took Mrs. Wardman to the pawnbrokers where she had pawned the goods and the pawnbroker later testified that the goods came from Martin. In her defence, Martin claimed that she "was in necessity, [her] husband being in confinement, and [she] could not starve." The jury considered this plea and delivered the partial verdict of theft under one shilling. As a result, Martin was whipped instead of hanged.[192] The defence of poverty or an

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[190] "Elizabeth Henley, theft: specified place, 14th September, 1785," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1780s/t17850914-68.html> 2005. See also: "Elizabeth Prior, theft, 4th December, 1734," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1730s/t17341204-6.html> 2005.

[191] As Dana Rabin explains, "the mention of the poor with madmen and idiots seems to acknowledge that the desperation of poverty may result in actions for which one should not be held accountable." Dana Y. Rabin, *Identity, Crime, and Legal Responsibility in Eighteenth-Century England* (New York: Palgrave Macmillan, 2004), 87.

[192] "Margaret wife of Robert Martin, theft: simple grand larceny, 7th September, 1768," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1760s/t17680907-35.html> 2005. See also: "Hannah (wife of Richard) Hooper, theft: specified place, 25th October, 1786," *The Proceedings of the Old*

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emergency could also result in an acquittal, as the case of Elizabeth Chatfield in 1766 illustrates. Chatfield lived alone, since her husband had abandoned her two years before the theft occurred. John Vaughan accused Chatfield of stealing "three flat irons, one iron poker, one pair of iron tongs, one iron fire-shovel, one copper quart pot, one pewter bason, and one iron trevet" from the room which she had leased from him. Vaughan also testified that nothing had gone missing while Chatfield and her husband lived together. In her defence, Chatfield claimed that she "did not take them in order to steal them, it was upon an emergency." Her character witnesses testified that they did not believe the accusations and her employer Mr. Godfrey even claimed that if she was acquitted, he hoped she would come back to work for him. Accepting the defence of temporary need, the jury acquitted Chatfield.[193] Poverty could often mitigate or even excuse theft and married women, much like men, single women and widows, relied on this as a defence. Since more married women used the defence of poverty than the defence of coercion, it suggests that poverty was a much more reliable and effective defence than marital coercion.

Similar to married women accused of theft-related offences with their husbands, married women without their husbands faced the same assumptions about acceptable behaviour in the courts. Judges and juries often reflected their intolerance of independent

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Bailey <http://www.oldbaileyonline.org/html_units/1780s/t17861025-6.html> 2005; "Sarah wife of Charles Griffice, theft: specified place, 16th January, 1754," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1750s/t17540116-13.html> 2005.

[193] "Elizabeth Chatfield, theft: specified place, 3rd September, 1766," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1760s/t17660903-60.html> 2005. See also: "Mary, wife of Timothy Curtin, theft: specified place, 22nd October, 1760," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1760s/t17601022-26.html> 2005; "Elisabeth wife of William Freeman, theft: simple grand larceny, 9th April, 1755," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1770s/t17750409-11.html> 2005; "Ann wife of John Cartwright, theft, 24th April, 1754," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1750s/t17540424-41.html> 2005.

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or unfeminine actions in their verdicts. Anne Burry acted outside the proper feminine roles in 1751 and suffered because of her behaviour. Martha Elgar accused Burry of assaulting her in a park near the king's highway and stealing twelve shillings from her person. While Elgar was walking in St. James's Park, "under the very shadow of the trees, a woman came up to [her], and took [her] by the hand, and demanded [her] money, in a very rough way." The woman threatened Elgar that if she did not deliver her money, the thief would "stave [her] brains out." After this threat, the woman put her hand in Elgar's pocket and upon finding nothing reached into her "bosom and took out twelve shillings." When Elgar cried out "a young man came up, and said, what, Staffordshire Nan! I thought you had been in Newgate." After the robbery, Elgar and her husband inquired around the market for Staffordshire Nan and discovered that she was in Bridewell. The Elgars went to Bridewell and asked for Staffordshire Nan. When Burry came to the gate, Elgar accused her of theft and Burry threw her pipe at Elgar through the grates. The jury found Burry guilty of highway robbery and sentenced her to death by hanging.[194] Burry's behaviour was hardly characteristic of proper feminine behaviour and the jury chose not to extend her leniency, as she showed no remorse and did not fit the patriarchal ideal.

A married woman could act in a more feminine manner, but by taking initiative in theft, she often forfeited the "benefits of her sex." Mary Tremain and Martha Lomack

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[194] "Anne, wife of John Burry, theft with violence: highway robbery, 11th September, 1751," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1750s/t17510911-22.html> 2005. See also: "Mary Young, alias Jenny Diver, Elizabeth Davis, alias Catherine the wife of Henry Huggins, theft with violence: highway robbery, 16th January, 1741," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1740s/t17410116-15.html> 2005; "Mary Royan, Locklen Kelley, theft: housebreaking, 7th December, 1748," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1740s/t17481207-41.html> 2005; "Richard Garrett, John Eddin, Frances Hall, otherwise Frances the wife of Joshua Hall, theft with violence: robbery, 13th April, 1774," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1770s/t17740413-12-11.html> 2005.

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both showed initiative in their criminal activities and the jury convicted them of lesser offences. John Par accused Tremain of stealing a silver watch from his pawnshop in 1733. Tremain came to Par's shop to retrieve a shirt, which she had pawned earlier. Par's servant went upstairs to get the shirt and after Tremain left the store, he noticed the watch that had been on the counter was missing. Upon searching in other pawnshops, Par found the watch pledged in the name of Tremain and her husband. The presence of the husband's name on the pledge suggests that it was likely that he was at least aware of the theft, but Mary stole the watch, not her husband.[195] The jury did not believe Tremain's husband was responsible for her actions in this case and convicted her of theft under forty shillings and sentenced her to transportation.[196] Like Tremain, Lomack herself committed the theft. John Lomas accused her of stealing a two-quart pewter pot from his tavern in 1754. Elizabeth Cooley saw Lomack come into Lomas's public house and take the pot from a bench where Lomas had left it. Cooley informed Lomas and he caught Lomack and found the pot in her petticoats. Lomack's defence was that "she borrowed it to carry her husband some drink." While Lomack was supposedly performing her proper domestic duties, she, not her husband, had taken the initiative to steal the pot. The jury therefore convicted her of theft under one shilling and sentenced

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[195] Married women could not make contracts, which included pledging items, but cases exist where married women, not their husbands, pledged the items. Juries often determined that a wife had acted independently because stolen goods were pledged in her name. See for example: "Lewis Sanders and Jane his wife, alias Jane Norris, Lewis Sanders, theft: specified place, 12th December, 1787," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1780s/t17871212-64.html> 2005; "William Sheppard, Elizabeth Sheppard, theft, 15th October, 1729," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1720s/t17291015-11.html> 2005.

[196] "Mary the wife of Peter Tremain, theft: specified place, 12th September, 1733," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1730s/t17330912-11.html> 2005. See also: "Ruth, wife of Quilt Arnold, theft: shoplifting, 16th October, 1723," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1720s/t17231016-2.html> 2005; "Mary Deppenn, Mary the wife of William Anderson, theft: specified place, 9th July, 1740," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1740s/t17400709-8.html> 2005.

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her to transportation.[197] By taking initiative, Lomack and Tremain acted outside of their proper gender role and showed the jury that they did not deserve the defence of coercion.

Assuming that married women escaped conviction because of coverture ignores the experience of married women accused without their husbands. It also assumes that coverture was the rule and that married women were the one group in England whom the law did not treat with discretion. Even in theory the defence of coercion could only excuse actions if a wife's husband had been present and privy to the action. This meant that a wife accused without her husband was not supposed to receive the benefit of coverture. This often included cases where the wife claimed she was obeying her husband's commands even though he was not present at the offence. As the cases of Elizabeth More and Elizabeth Henley show, the defence of coercion was open to interpretation even if the husband was not present. Juries often used discretion in determining whether a husband commanding his wife to steal was enough to merit the presumption of coercion. However, these cases were exceptions, and more often than not married women accused without their husbands had to rely on other defences to excuse their theft-related offences. The most common defence was poverty, which showed some form of dependency. Both Elizabeth Chatfield's and Margaret Martin's husbands were absent, and these women had no one else to rely on to support themselves. They turned to theft in desperation and the jury considered this when deciding on a suitable verdict and sentence for their offences. Like married women accused with their husbands,

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[197] "Martha wife of Ralph Lomack, theft: simple grand larceny, 11th September, 1754," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1750s/t17540911-6.html> 2005. See also: "Mary the wife of William Mitchell, theft: simple grand larceny, 14th May, 1777," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1770s/t17770514-33.html> 2005; "Ann wife of Joshua Richmond, theft: simple grand larceny, 23rd February, 1763," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1760s/t17630223-13.html> 2005.

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married women alone were subject to presumptions about proper feminine behaviour. Those who showed initiative in their actions or acted outside of the proper gender roles did not receive any benefit of coverture, or any presumption of innocence. Married women accused of committing crimes, like women who appeared before other courts, had to emphasise their dependency and conformity to the proper gender roles in order to receive an acquittal.[198]

Thieving Wives

Married women were much less likely than unmarried women to be accused of crime in the eighteenth century, although this does not mean that they were absent from the criminal record.[199] Nor does it necessarily indicate that married women were less likely to commit crime than were single women. The eighteenth-century marriage rate was relatively low. Many married late, and as E.A. Wrigley argues, "where marriage is late, many never marry."[200] In early modern England, only around one third of women were actually married at any given time.[201] Married women may appear in the criminal record less frequently than single and widowed women simply because there were less married women than single women. However, there are other possible explanations for why married women make up such small percentages in the criminal record. The dark

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[198] Dolan argues that in order for a woman to qualify for "battered woman syndrome" in today's courts, she must emphasize her weakness and dependency. Dolan, "Battered Women," 252-254. Candace Kruttschnitt found that women with more economic freedom (and therefore less social control) receive harsher sentences than women who are economically dependant and socially controlled. Candace Kruttschnitt, "Women, Crime and Dependency – An Application of the Theory of Law," *Criminology* 19:4 (1982), 498.

[199] Peter King found that only 1/3 of offenders were married in the Old Bailey indictments while 3/5 of offenders were single. Peter King, "Female offenders," 69.

[200] E.A. Wrigley, "Marriage, Fertility and Population Growth in Eighteenth-Century England," in *Marriage and Society: Studies in the Social History of Marriage*, ed. R.B. Outhwaite (New York: St. Martin's Press, 1982), 149.

[201] Anne Laurence, *Women in England, 1550-1760: A Social History* (London: Weidenfeld and Nicholson, 1995), 41. This proportion of married women is similar to King's finding about the proportion of married women in the Old Bailey, which suggests that married women accounted for 1/3 of accused offenders because they only accounted for 1/3 of the population.

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figure of unreported crime constantly challenges criminal historians. It was the decision of the individual victims whether to prosecute an offence. As John Beattie argues, crime "was made visible by the decisions of victims and magistrates who together selected the offences that would come to public attention from a much larger pool of offending behaviour."[202] Individuals were often reluctant to bring forth cases, especially when the only available punishment was death. Both transportation as a secondary punishment and the extension of the benefit of clergy to women were designed to combat these problems by increasing the willingness of victims to prosecute, and of juries to convict, offenders. It is therefore wrong to assume humanitarian motives for these measures.[203] Decisions to prosecute often depended on the perceived level of crime at the time, the character of the offender, the availability of other informal methods of punishment, and how well the prosecutor knew the offender. It is also possible that victims were reluctant to prosecute married women because of the possible consequences for their families.

As the following figures show, the readiness to prosecute changed over the course of the eighteenth century. One striking feature of the Old Bailey records is the pattern of married women's crime in the eighteenth century. Figure 3.1 shows the pattern of accusations for theft-related offences against married women in the eighteenth century. Although crime increased during this period, there is a marked peak from the 1750s until the 1780s. The pattern in figure 3.1 is even more striking when it is compared with the pattern in figure 3.2, which shows the overall pattern of accusations for theft-related offences in the eighteenth-century Old Bailey. Figure 3.2 differs from 3.1 in that it does not have a marked peak, and the increase occurred from 1760 to 1780. The peak of

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[202] Beattie, *Policing*, 40.
[203] *Ibid*, 318, 321, 435.

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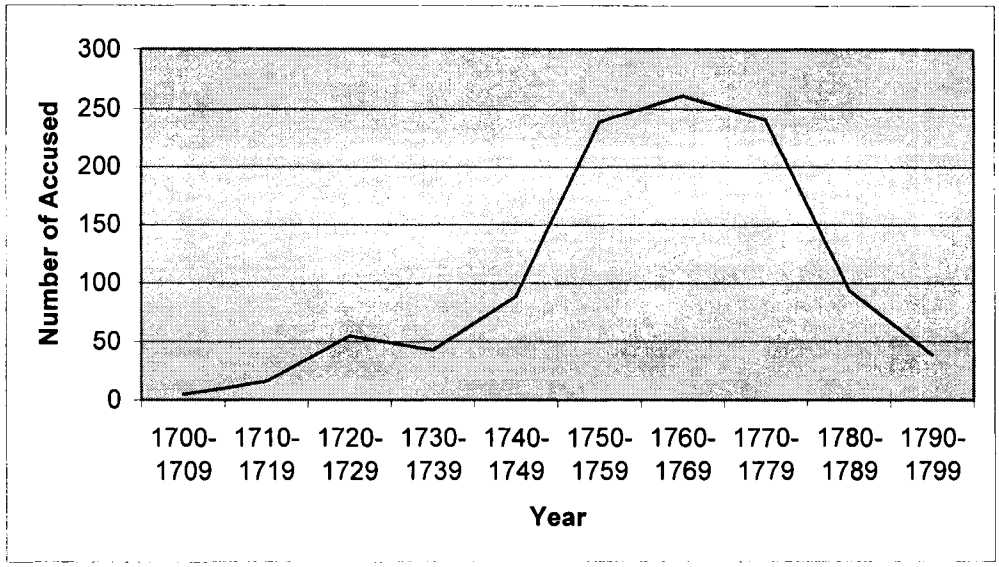
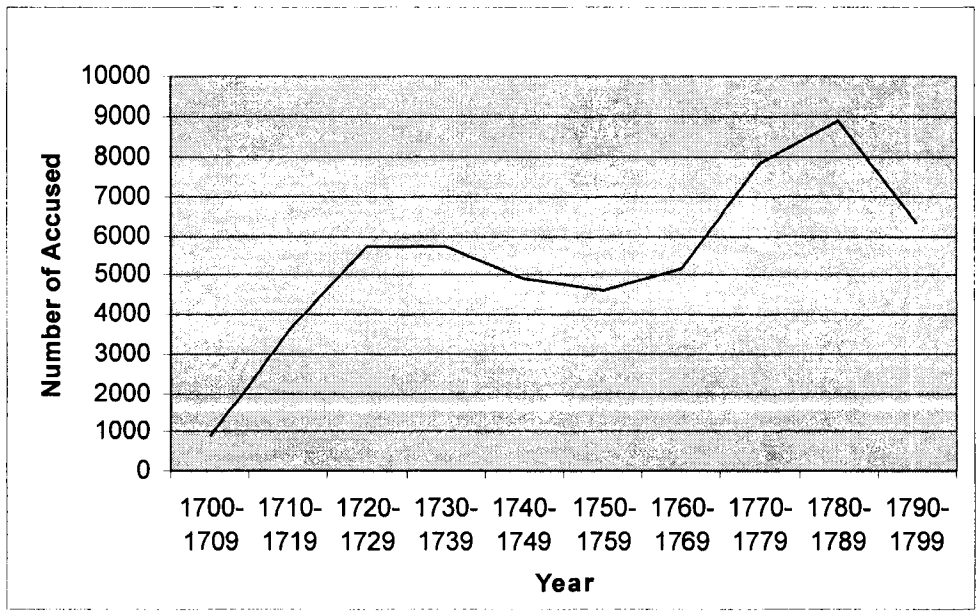
figure 3.2 occurs when the accusations against married women fell in the 1780s. Since the pattern of accusations for married women (figure 3.1) differs from the overall pattern (figure 3.2), the cause of the increase clearly relates to the attitudes toward, and behaviours of, married women rather than with the character of crime more generally.

Figure 3.1: Accusations against Married Women for Theft-Related Offences in the Old Bailey, 1700-1799



Source: Old Bailey Sessions Papers N=1,080

Figure 3.2: Accusations of Theft-Related Offences in the Old Bailey, 1700-1799



Source: Old Bailey Sessions Papers N=53,757

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Eighteenth-century England was a time of great change and instability, and nowhere was this instability greater than in London. London was the largest city in eighteenth-century Europe, containing ten percent of the population of England and Wales.[204] This high population was unique in that it did not increase through natural means; the death rate actually exceeded the birth rate. Population increased through migration and the typical migrants were young and unattached.[205] Londoners experienced a greater degree of freedom than their rural counterparts did. Authorities were concerned because the paternalism that characterized and enforced the social hierarchy in rural areas was absent in London and other forms of control were not as effective. Authorities were particularly worried about the increased freedom of women in the capital, especially unmarried women.[206] London provided a place for these women to live independently from husbands and fathers, which increased patriarchal concerns about the danger and irresistible sexual power of women.[207] In response to the perceived problem of lack of social control, lawmakers increased the severity of the law and came to rely on the legal system as the principal form of control.[208] This severity matches the finding about authorities punishing wives outside of control instead of the failed patriarchal authority in accusations against married couples for theft-related offences. Changes in the prosecution and conviction levels were predicated on perceived changes in the conception of women and individual liability and personhood.

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[204] George Rudé, *Hanoverian London, 1714-1808* (Berkely: University of California Press, 1971), 5.
[205] *Ibid*, 7.
[206] Beattie, "Crime and Inequality," 128, 129; Beattie, *Policing*, 64; Humfrey, "Female Servants," 61.
[207] Beattie, *Policing*, 64. Beattie also argues that "the prosecutions of large numbers of women ... helped to encourage a sense that society was changing in some important ways, that the natural feelings of deference and obedience that underlay social order were shifting, that the old controls that underpinned the cohesion of society were being undermined." Beattie, "Crime and Inequality," 128.
[208] Kruttschnitt, "Women, Crime and Dependency," 498. This punishment of females who challenged patriarchal authority rather than punishment of failed patriarchs is similar to the treatment of independent married women accused of theft-related offences with their husbands.

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As Beattie argues, the concern with single women centred on the lack of control and the increasing crime levels amongst single women during the late seventeenth and early eighteenth centuries.[209] Contemporaries still saw marriage as a form of control. Since a wife was subordinate primarily to her husband, it was his responsibility to control her actions. Authorities sought to control the actions of the husband and he in turn controlled the actions of his wife, at least theoretically. As Maeve Doggett argues, coverture enabled a husband to control his wife, through force if necessary, and it was this control, rather than the principle of unity, which was the essence of coverture.[210] However, attitudes toward coverture and the unity of persons changed in the mid-eighteenth century. As Susan Staves shows, from 1675 to 1778 equity courts were willing to recognize separate maintenance contracts, which meant that husband and wife were two separate persons. This practice changed after 1778 as the courts began to reassert the principle that husband and wife were one person before the law.[211] It is probable that this change in conceptions of married women's individuality and separate legal status also affected the criminal law, especially since Staves' pattern reflects the pattern found in figure 3.1. From the mid-eighteenth century until the 1780s, there was a perception of wives as separate from their husbands. If wives had their own identity, coverture was not relevant or enforced and therefore a husband could not control his wife. This lack of control scared authorities and potential victims of crime who then

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[209] Beattie, *Policing and Punishment*, 40, 318.
[210] Doggett, *Marriage, Wife-Beating and the Law*, 35.
[211] Staves, *Married Women's Separate Property,* 169, 175, 229-230. Interestingly, Dror Wahrman has also found this pattern in eighteenth-century culture. Dror Wahrman, "*Percy's* Prologue: From Gender-Play to Gender-Panic in Eighteenth Century England," *Past and Present* 159 (1998), 117, 121-123, 154-156; Dror Wahrman, "On Queen Bees and Being Queens: A Late –Eighteenth-Century 'Cultural Revolution'?" in *The Age of Cultural Revolutions: Britain and France, 1750-1820*, ed. Colin Jones and Dror Wahrman (Berkely and Los Angeles: University of California Press, 2002), 267-270, 274-275, 280; Dror Wahrman, "Gender in Translation: How the English Wrote Their Juvenal, 1644-1815," *Representations* 65 (1999), 21, 29-31.

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came to rely on the criminal law and the gallows as the most effective form of controlling married women. As coverture was reasserted in the 1780s, there was less of a need for control and prosecutions therefore fell. The benefits of coverture only applied when a husband was able to control his wife. For this reason, one cannot argue that coverture made wives the favourites of the English law. Rather, it reinforced the gender hierarchy and the subordination of wives to husbands.

Marriage did not excuse wives from criminal responsibility in eighteenth-century London. The criminal justice system believed that although married women were entitled to the defence of coercion, it was up to the judge and jury to decide which cases merited this privilege. There were a number of exceptions to the principle of coercion, all of which depended on the circumstances of the individual cases. Juries used discretion in all of their decisions, including the decision of whether or not to apply the principles of coverture when faced with married women accused of theft-related offences. The law qualified its legal fictions with loopholes, and coverture was not an exception to this rule. Coverture was not applied consistently throughout the eighteenth century and there were exceptions in both the criminal and the civil law. Juries appear to have convicted married women who acted outside of their prescribed gender roles and those who took independent initiative. It is the exceptions to the defence of coercion that detract from the argument that coverture made married women the favourites of the English law. Coverture could explain why a married woman could not own property, or why she was not a person before the law, but it could not excuse her from all criminal responsibility. While historians must recognize that coverture existed in the criminal law,

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it must not be overstated and used to argue the leniency of the law.[212] Rather, coverture was yet another form of control, which ultimately reinforced the gender hierarchy and patriarchal system of eighteenth-century London.

[212] Walker, *Crime, Gender and Social Order*, 75-76.

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CHAPTER 4: MURDERING WIVES IN THE OLD BAILEY

> *If they are so undiscerning as not to be able to perceive the essential Difference between obeying their Husbands in the Lord, and in the direct opposition to and Defiance of him; then let their blind Obedience to their Husbands excuse them in the Case of Treason as well as it does in other cases.*
> -Sarah Chapone, *The hardships of the English laws in relation to wives*, 1735

As the previous chapter illustrated, judges and juries were willing to treat married women as separate legal persons in theft-related offences, especially if they committed the crime without their husbands or showed independent initiative in their actions. However, even in theory the defence of coercion was only supposed to excuse certain offences. As Michael Dalton explained in 1618, "If a feme covert doth steale goodes by the compulsion of her husband, this is no felonie in her. But if by the compulsion of her husband, shee committeth murder, this is felonie in them both."[213] Even in theory, the law was only willing to let the excuse of coverture go so far and the previous chapter demonstrated that the defence of coercion was limited in practice. Judges and juries felt that married women who transgressed prescribed gender roles did not deserve the defence of coercion. Only married women who conformed to the gender hierarchy could expect to receive the paternal benefits of coverture. But why were certain offences excluded? Garthine Walker explains that in the early modern period, "To wield violence was to assert authority and superiority."[214] Murder and killing were by definition violent offences, and women who committed such offences acted outside of their proper gender roles. They asserted authority through their violent actions and denied their "natural" status as nurturers. Perhaps authorities believed that violent wives were outside the

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[213] Michael Dalton, *The countrey justice conteyning the practise of the justices of the peace out of their sessions* (London, 1618), 236.
[214] Walker, *Crime, Gender and Social Order*, 40.

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control of their husbands and therefore could not claim the defence of coercion by the nature of their behaviour. On the other hand, perhaps authorities did not feel that wives could obey their husbands against the laws of God. One other possible reason is that murder was such a serious offence that authorities did not believe it necessary to offer any possible defence that could excuse such heinous behaviour. Janelle Greenberg explains that authorities saw actions such as keeping a brothel, treason, and *mala in se* offences including murder "as so reprehensible that [a married woman] had to assume sole responsibility for her behaviour, even [if] it took place within the presence of her husband."[215] Even in theory the defence of coercion could not completely excuse married women from criminal responsibility. Murder was one of the most serious offences, and as such, it avoided the defence of coercion. It demonstrated a transgression of social *and* gender roles, and married women accused of murder received especially harsh treatment because of this extreme transgression. The treatment of married women accused of killing-related offences further weakens arguments about the law's lenient treatment of married women.

As Malcolm Gaskill explains, "Murder usurped God's right to take life; symbolizing rebellion against providence, nature, authority and Christian society."[216] However, there were different categories of killing and murder in eighteenth-century England. The most common of these was wilful murder. Sir Edward Coke defined murder as: "when a man of sound memory and of the age of discretion, unlawfully killeth . . . any reasonable creature . . . with malice fore-thought, either expressed by the party or

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[215] Greenberg, "The Legal Status of the English Woman," 174. *Mala in se* means "evil in itself."
[216] Malcolm Gaskill, *Crime and Mentalities in Early Modern England* (Cambridge: Cambridge University Press, 2000), 210.

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implied by law."[217] Murder differed from manslaughter in the presence of malice aforethought. Sir Matthew Hale explained that "an intention of evil, though not against a particular person makes malice."[218] He further drew the distinction between murder, which was killing without provocation, and manslaughter, which was "killing another person upon a sudden falling out or provocation, or unjustifiable act."[219] Manslaughter was a clergyable offence, and an offender convicted of manslaughter was branded, whereas those convicted of murder were hanged. The purpose of the 1752 Murder Act was to increase the terror of execution and thereby deter more offenders. This Act held that those convicted of murder would be hanged within two days, and their bodies would be delivered to a surgeon to be dissected and anatomized.[220] The two crimes of petty treason and infanticide directly targeted women's behaviour. Petty treason was a "Manner of Treason, . . . when a Servant slayeth his Master, or a Wife her Husband, or when a Man Secular or Religious slayeth his Prelate, to whom he oweth Faith and Obedience."[221] Although both men and women could commit petty treason, the majority of those prosecuted for the offence were wives who murdered their husbands. Petty treason's status as an aggravated form of murder meant that it carried a harsher sentence than wilful murder. Men convicted of petty treason were drawn on a hurdle to the place of execution and hanged, while women convicted of petty treason were burned at the stake, which was the same punishment applied to female high traitors. The law of petty treason was an attempt to control the behaviour of married women by giving husbands

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[217] Sir Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and other Pleas of the Crown, and Criminal Causes* (London, 1671), 48.
[218] Sir Matthew Hale, *Pleas of the Crown* (London, 1678), 36.
[219] *Ibid*, 37, 46.
[220] *Statutes of the Realm*, Volume 6, 604-605; Beattie, *Crime and the Courts in England*, 78-79.
[221] *The Statutes at Large*, Volume I, 255.

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the same status as the king within the household.[222] By contrast, the law of infanticide was designed to control the behaviour and morality of unmarried women. In 1624, in an attempt to prevent fornication, Parliament passed a law against the murder of bastard children. "This Act provided that a woman who concealed the death of her bastard child was presumed to have murdered it unless she could prove by at least one witness that the child had been born dead."[223] Infanticide was unique in that it reversed the traditional burden of proof. Rather than the accused being innocent until proven guilty, she was guilty unless she could prove otherwise. Even concealing the pregnancy meant that a woman was presumed to have committed infanticide if someone found her child's body. Both petty treason and infanticide were directed almost exclusively at women, and they both carried harsh penalties. As such, one cannot argue that the law as a whole was guided by fundamentally chivalrous intentions. However, one must also examine the practice of the courts in determining the treatment of other categories of offenders.

Women committed or were prosecuted for fewer crimes than men and murder was no exception. Including infanticide, there are 1,164 killing cases in the Old Bailey records. Of these, men were accused of committing 891 offences, just over three quarters of the cases. Married women were accused of the least offences at 78, with unmarried women accused of committing 195 offences. However, when one takes infanticide out of the calculations, the numbers change, especially for unmarried women.[224] Married

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[222] Ruth Campbell, "Sentence of Death by Burning for Women," *Journal of Legal History* 5 (1984), 55.
[223] Allyson N. May, "'She at first denied it,': Infanticide Trials at the Old Bailey," in *Women and History: Voices of Early Modern England,* ed. Valerie Frith (Toronto: Coach House Press, 1995), 19.
[224] Infanticide is generally taken out of murder statistics since it skews the results. Single women predominate in infanticide cases as the law was designed to combat their behaviour. However, the acquittal rates for infanticide were quite high in the eighteenth-century. Unmarried women were acquitted in 76.9% of infanticide cases and married women were acquitted in all but one of the fourteen infanticide cases before the Old Bailey. In addition, unlike almost every other offence, there was no possibility of a partial

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women were still accused of committing the least offences, 64, but unmarried women were only accused of committing 78 offences. The numbers for men remain the same. Removing infanticide from the statistics also affects the acquittal rates as Tables 4.1 and 4.2 illustrate. What is striking about these two tables, however, is the differences in acquittal and conviction rates between genders and women of different marital status.

Table 4.1: Verdicts in Killing Offences, including Infanticide, in the Old Bailey, 1700-1800

Verdict	Married Women	Single Women	Men	Overall
Guilty	20.50%	21.00%	22.10%	21.80%
Not Guilty	56.40%	71.80%	44.10%	49.60%
Partial Verdict	21.80%	6.20%	33.10%	27.80%
Special Verdict	1.30%	1.00%	0.80%	0.80%

Source: Old Bailey Sessions Papers

As Table 4.1 shows, even with infanticide included, married women received convictions in 20.5 percent of the cases. All the other conviction rates are similar, with the highest being that of males, at 22.1 percent. While juries acquitted just over a half the married women in cases including infanticide, unmarried women received more acquittals (71.8 percent). Juries acquitted men in just under half of the cases, (44.1 percent) which is quite similar to the acquittal rate for married women (56.4 percent). However, men received more partial verdicts than married and single women combined.[225] Men received partial verdicts in 33.1 percent of their cases while married women's rate was 21.8 percent and single women only received partial verdicts in 6.2 percent of their accusations. Since partial verdicts generally carried the sentence of branding instead of death by hanging for a full conviction, these numbers are particularly striking. They

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verdict for infanticide. Therefore, historians look at both killing with infanticide and killing without infanticide.

[225] The partial verdict for murder was manslaughter, and as Walker points out, manslaughter was a masculine form of homicide. According to legal and societal understandings, both slayer and victim had to be grown men for a killing to be considered manslaughter. Walker, *Crime, Gender and Social Order*, 124.

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suggest that judges and juries treated murderers similarly despite their gender, except when delivering partial verdicts.

Table 4.2: Verdicts in Killing Offences, not including Infanticide in the Old Bailey, 1700-1800

Verdict	Married Women	Single Women	Men	Overall
Guilty	23.40%	19.20%	22.10%	22.00%
Not Guilty	48.40%	64.10%	44.10%	45.90%
Partial Verdict	26.60%	15.40%	33.10%	31.40%
Special Verdict	1.60%	1.30%	0.80%	0.80%

Source: Old Bailey Sessions Papers

Just as removing infanticide from the killing statistics drastically changes the number of unmarried women accused, so too does it affect the acquittal and conviction rates and their corresponding statistics. Table 4.2 illustrates the conviction and acquittal patterns according to gender and female marital status. Without infanticide, married women received the highest percentage of convictions (23.4 percent), which even went above the overall conviction rate of 22 percent. However, the conviction rates are similar between the different categories. Unmarried women had the highest acquittal rate (64.1 percent) while men (44.1 percent) and married women (48.4 percent) were very similar, with only a 4.3 percent difference. Just as before, men received more partial verdicts (33.1 percent) than married and unmarried women did. Only 15.4 percent of unmarried women's verdicts were partial verdicts, while married women received partial verdicts in 26.6 percent of the cases. These statistics reinforce the conclusions drawn from the cases including infanticide found in table 4.1. Unmarried women received the most lenient treatment in killing offences, even when infanticide is not included, and juries treated married women and men relatively the same, despite men being accused of committing more offences. These findings do not support the assertion that juries treated women

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more leniently than they treated men. They also argue against Robert Shoemaker's argument that juries convicted fewer women because they felt that there was less need for deterrence.[226] In fact, the higher conviction rate for married women illustrates that people perceived murdering wives as so far outside of the gender order and patriarchal control that there was a definite need for deterrence through the gallows. An act so heinous as murder did not deserve the benefits of coverture since it completely removed all forms of paternal control. Coercion did not provide a defence in a charge against killing and marriage did not seem to provide a more lenient treatment for murdering wives.

The only exception to the lack of leniency on the part of married women was the crime of infanticide. As Allyson May argues, married women "suspected of killing a child at or soon after its birth would have been charged with the common-law offence of murder," since the 1624 statute specifically targeted single mothers.[227] Part of the crime was concealing pregnancy, which a married woman would likely not have done. Since infanticide targeted bastards, not legitimate children, marital status could excuse a woman from conviction. In 1704, Mary Tudor was accused of murdering her female infant bastard "by throwing the same into a House or Office, whereby it was choaked and strangled." In her defence, Tudor "called a Witness to prove that she was Married, and that the Child was no Bastard." Tudor's marital defence appears to have resonated with the jury as they acquitted her of the charges.[228] Another similar case was that of Martha Shackleton in 1743. Shackleton "was indicted for the Murder of her Female Bastard

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[226] Shoemaker, *Gender in English Society*, 297.
[227] May "'She at first denied it'", 19.
[228] "Mary Tudor, killing : infanticide, 8th March, 1704," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1700s/t17040308-30.html> 2005.

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Child, by casting and throwing it into a Privy belonging to the Dwelling-House of William Porter, wherein by Reason of the Filth and Excrement the said Child was choaked and suffocated, and thereof instantly died." Both William Porter and his wife, Shackleton's employers, suspected that she was pregnant. After receiving a letter from his wife and observing Shackleton's strange behaviour, William had the vault of the necessary house opened. Upon opening, he discovered the remains of an infant. The surgeon, Joseph Warner, deposed that since the child had lain in the soil for some time, he was unable to judge whether the child was either full term or if there had been any violence done to the infant. The court then asked Shackleton if she was married, to which she replied, "Yes - My Husband is at Sea, his Name is Hill." The jury acquitted Shackleton when they heard that she was married.[229]

Perhaps because of cases like Tudor and Shackleton's, unmarried women thought to argue they were married in order to escape conviction. If they did not give birth to a bastard they could not be convicted of concealing their pregnancy and murdering their child. In 1746, perhaps out of shame and perhaps out of an attempt to escape conviction, Mary Hope lied about her marital status. Hope was accused of wrapping her infant child in an apron and putting him in a box where he suffocated. Hope had felt ill and went upstairs in the house where she was working and residing. She did not want anyone with her, although others testified that they heard a great deal of noise from her room. William Aget, Hope's master, testified that he sent his wife and another servant up to the

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[229] "Martha Shackleton, otherwise Hill, killing: infanticide, 7th December 1743," *The Proceedings of the Old Bailey*< http://www.oldbaileyonline.org/html_units/1740s/t17431207-36.html> 2005. See also: "Diana Parker, killing: infanticide, 17th September 1794," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1790s/t17940917-46> 2005; "Hannah Bradford, killing: infanticide, 19th April 1732," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1730s/t17320419-15.html> 2005.

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room where "they saw what they thought was sufficient to convince them that there had been a Labour or something like it." Mrs. Aget and her servant searched for the body and upon finding a locked box, Hope made such a fuss that they opened the box and found the body of a male infant. Richard Wheatland, the constable, asked Hope, "good Woman are you married?" to which Hope replied "yes." Wheatland then asked her if she had made any provisions for the child and upon answering no, Wheatland became more suspicious. He testified that:

> it was surprising to me that a married Woman should suffer herself to bring a Child into the World and have nothing to put it in; tell me the Truth I says, are you married or not? she crying still, said at last she was not; I then ask'd her again, have you nothing at all made for this Child, no Linnen whatsoever? none at all she said: I ask'd her who was the Father of the Child; she said a Sailor. I ask'd her what was become of him, she said he was gone to Sea:

Despite these circumstances, Hope was acquitted because there were no marks of violence on the body and the midwife could not testify whether the child had been born alive or was a stillborn.[230] More often than not, women relied on other means of defending themselves when accused of infanticide, such as producing clothing they had made for the baby. However, infanticide was the one crime in which married women received a more lenient treatment, as the law was not designed to monitor their behaviour.

Table 4.3 illustrates the different verdicts according to crime for married women in the Old Bailey. Married women were mainly prosecuted for murder, as defined by the statute, infanticide and petty treason. Only one married woman accused of infanticide received a guilty verdict. For murder, the conviction and acquittal rates reflect the

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[230] Mary Hope, killing: infanticide, 15th October 1746," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1740s/t17461015-23.html> 2005.

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percentages found in the previous tables. However, petty treason received more guilty verdicts than not guilty verdicts, which was unique among all murders prosecuted in the eighteenth-century Old Bailey.[231] Unlike the law of infanticide, which was directed at the behaviour of single women, petty treason attempted to control the behaviour of married women and other subordinates. As Frances Dolan explains, "the murderous wife calls into question the legal conception of wife as subsumed by her husband and largely incapable of legal or moral agency."[232] In addition, Walker argues that the most dangerous sort of woman was one who "subverted household, social and moral order."[233] Feminine violence of any sort towards men, even in self-defence, upset the gender order, and petty treason was the extreme example of such violence, since it went against a husband's direct authority and higher status within marriage.[234] When a subordinate such as a wife murdered her superior husband, she took power for herself and completely reversed the gender order. As Dolan and Ruth Campbell explain, the punishment of death by burning, which was the same for women convicted of high treason, both equated the husband with the monarch and provided an intimitadory symbol designed to maintain the subjection of subordinate women.[235] Therefore, it is not surprising that the conviction rate is high for such offences. Petty traitors demonstrated that coverture and the principals of the gender order could not control their behaviour. Therefore the courts, through the law of petty treason, stepped in to enforce the gender order and maintain the household hierarchy.

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[231] In most murder cases, juries delivered more "not gulty" verdicts than "guilty" verdicts (see tables 1 and 2). However, petty treason was the exception to the rule as table 3 illustrates.
[232] Frances E. Dolan, "Home-Rebels and House-Traitors: Murderous Wives in Early Modern England," *Yale Journal of Law and the Humanities* 4 (1992), 3.
[233] Walker, *Crime, Gender and Social Order*, 83.
[234] *Ibid*, 49.
[235] Dolan, "Home-Rebels and House-Traitors," 4; Campbell, "Sentence of Death by Burning for Women," 55.

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Table 4.3: Verdict According to Crime in Cases of Married Women Accused of Killing Offences in the Old Bailey, 1700-1800

	Guilty	Not Guilty	Partial Verdict	Special Verdict	**Total**
Infanticide	1	13	0	0	14
Murder	10	24	14	0	48
Petty Treason	5	4	3	0	12
Manslaughter	0	1	0	1	2
Killing	0	2	0	0	2
Total	16	44	17	1	78

Source: Old Bailey Sessions Papers N=78

In 1737, Ann Mudd stood before the Old Bailey accused of stabbing her husband, Thomas Mudd, in the back. John Owen testified that he was in the cellar with Ann and her mother when Thomas started to come down the stairs. Ann then struck Thomas and he bid her to be quiet. "She had a knife by her side, which she pull'd out and clapp'd it down on a cupboard, . . . then, as he stood upon the 3d step she struck him again in the face, and he bid her be quiet." Upon Ann's third slap, Thomas attempted to restrain her. Ann then "went to the cupboard where she had laid the knife, and hurl'd something at him." Owen could not identify the object, but when Ann went to Thomas, "he immediately cry'd out, O Lord! I am stabb'd." Elizabeth Aggleton testified to the same events. When the constable and Justice of the Peace asked Ann why she stabbed her husband, she said that she "stabb'd him in the back with a knife, for funn." Ann had nothing to say in her defence and the jury found her guilty.[236] Ann's actions did not typify those of a subordinate wife. She both instigated the offence and attacked without provocation. In a similar case from 1773, Elizabeth Herring also stabbed her husband,

[236] "Ann Mudd, killing: petty treason, 20th April 1737," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1730s/t17370420-6.html> 2005.

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Robert, without apparent provocation. John Boyle testified that he was in a pub with the Herrings, when Elizabeth started arguing with Robert about bread. Elizabeth

> had a knife in her hand picking a bone; in the space of two or three minutes, she went up to her husband; [Boyle] though she was going to give him a lick with her hand; instead of which she struck the knife into his throat; the blood immediately spouted out as if a butcher had killed a pig.

Boyle also testified that the only word of a quarrel he heard between Elizabeth and Robert, was the argument about the bread. Hannah Darling also saw Elizabeth stab Robert after exchanging a few words and testified that she heard Elizabeth say "she would spill his blood, and be hanged for him." Elizabeth testified to relentless abuse at Robert's hands. At Darling's, Elizabeth said Robert threw a pipe in her face, and when she went to another box he threw a pint of beer in her face. She "had a pennyworth of beer in one hand and the knife in the other; [she] threw the knife at him, which proved fatal." Although Elizabeth claimed provocation, other witnesses did not see the events she described. The jury found Elizabeth guilty of petty treason and sentenced her to death by burning.[237]

Both Elizabeth Herring and Ann Mudd acted outside of prescribed gender roles by attacking their husbands. Despite allegations of abuse, Elizabeth and Ann were not justified in attacking their husbands. As Walker explains, "Male violence was sanctioned to uphold order, female violence subverted it."[238] By their violent actions against a superior, Elizabeth and Ann subverted the gender order. As such, the law sought to restrain and punish their actions. The case of Elizabeth Fisher in 1714 further illustrates

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[237] "Elizabeth Herring, killing: petty treason, 8th September 1773," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1770s/t17730908-6.html> 2005. See also: "Joyce Hodgkis, killing: petty treason, 8th September 1714," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1710s/t17140908-35.html> 2005; "Susannah Broom, killing: petty treason, 5th December 1739," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1730s/t17391205-2.html> 2005.

[238] Walker, *Crime, Gender and Social Order*, 140.

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that unlike murder cases, provocation was not an acceptable defence for petty treason. Elizabeth "was indicted for the murther of her husband Will. Fisher, by giving him a mortal wound with a knife on the right side of his body, . . . on the 21st of July. . . of which he languish'd till the 8th of August, and then dy'd." While under care before he died, Will claimed that he had offered Elizabeth provocation by misusing and beating her. He said that he was beating Elizabeth when she grabbed a knife and attempted to cut his boots and "in the scuffle the knife struck him in the breast." Elizabeth's actions appeared to be accidental. However, the jury did not acquit Elizabeth because of the provocation or apparent accidental nature of the stabbing. Rather it was because of the surgeons' testimony as to the cause of Will's death. Two surgeons deposed that "he did not die of the wound, for that it had not penetrated the trunk of the body, and that he had been an infirm man for a great while before."[239] Provocation could not excuse a wife's violence against her husband. Judges and juries treated married women accused of petty treason harshly because they demonstrated that they were completely outside of men's control. Their actions totally upset the gender order, and as such received high conviction rates and harsh punishments.

Even though perceived as less serious than petty treason, wilful murder was still a serious offence. Over half of the accusations for killing-related offences against married women were for murder. Juries treated married women accused of murder as independent legal persons. These women faced the full force of the law when juries

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[239] "Elizabeth Fisher, killing: petty treason, 8th September 1714," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1710s/t17140908-41.html> 2005. It is possible that the surgeons testified that Will did not die because of Elizabeth's actions since they saw the stabbing as justifiable homicide. However, it is impossible to tell the surgeons' motives from the records. See also: "Lydia Adler, killing: petty treason, 28th July 1744," <http://www.oldbaileyonline.org/html_units/1740s/t17440728-23.html> 2005; "Anne Williams, killing: petty treason, 9th September 1747," *The Proceedings of the Old Bailey*< http://www.oldbaileyonline.org/html_units/1740s/t17470909-21.html> 2005.

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delivered their verdicts and judges delivered punishments. Like theft, the majority of murder cases involved wives alone. The presence or absence of a husband was not even important in theory since the presumption of coercion was unavailable for killing-related offences. However, a very small minority were accused of murder with their husbands.[240] One such case was that of Esther and Archibald Levingston in 1763. Esther was the principal in this case, whereas Archibald was indicted for "aiding, assisting, abetting, comforting, and maintaining her to commit the said murder." John Dent testified that upon coming home one day, the neighbourhood was in a great confusion and its inhabitants "said they could not sleep in their beds, for [Esther] had said, she would kill some of the women and set fire to the neighbourhood afterwards." She had also assaulted Mrs. Ashby who "lay bleeding on the ground" when Dent arrived home. The neighbours agreed that Esther needed to be secured and Dent went for the constable. Upon his return, Dent found that Esther and Archibald had locked themselves in their room. Matthew Lemond, the constable, testified that he tried talking to the Levingstons through the door and the more he "endeavoured to perswade her to govern her passion, the more outragious she grew, and both her husband and she declared the first that entered the room they would kill them." Lemond, Dent, and a group of men attempted to break down the door to secure Esther. When the door opened a little bit, one of the men attempted to reach in and Lemond said he "saw a woman's arm and hand come out," at which Peter Dove immediately cried out "I am stabbed." John Chesney, who was also attempting to secure Esther, testified that when the door opened, "the first [he] saw was the man with his right hand on the door, he had a pair of tongs, or a poker, in his hand which he held up, it was iron: the woman immediately rushed her arm and head out and

[240] Only four cases involved married couples accused together.

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stabbed the deceased." Dove died from his wounds two days later. While both Esther and Archibald were involved, Esther was the one who stabbed Dove. As a result, the jury convicted her and she was sentenced "to be executed on the Monday following, and her body dissected and anatomized." Archibald could not deny his involvement but the jury found him guilty of manslaughter, for which he was branded.[241]

Another case involving a married couple became justifiable homicide, as the jury accepted that provocation given to the husband justified his and his wife's actions. In 1792, Samuel Taylor stood before the Old Bailey charged with murdering Thomas Partridge and his wife Jane Taylor with aiding and abetting the murder. Sarah Horton, Thomas Partridge and Erasmus Gregory were walking in Catharine-wheel alley when they came across the prisoners. Horton testified that "Samuel Taylor and his wife made use of several scandalous expressions . . . and damned and blasted several times, and many bad expressions." Gregory took exception to these words, and when his friends turned around, he was having words with Samuel. Sarah Horton testified that:

> Partridge directly ran back, and I followed him; and by the time I got up with Samuel Partridge, he was down on the ground, and Taylor flat upon Partridge. I did not see any blows pass; Partridge was striving to get up; Jane Taylor was close by; and I heard Jane Taylor say, Damn him, stab him; and she repeated it seven or eight times over as they both of them lay on the ground.

All three left the area, but Partridge did not feel well. He was ill for some time, and, according to the surgeon, "he never in my judgment recovered from the injury he received; and I am obliged to say, that I have no doubt but he died of the wound he first

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[241] "Esther Levingston, Archibald her husband, killing: murder, 14th September, 1763," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1760s/t176230914-59.html.> 2005. See also: "James Brownrigg, Elizabeth his wife, John their son, killing: murder, killing: murder, 9th September 1767," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1760s/t17670909-1.html> 2005.

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received." Samuel justified his actions by explaining that Partridge and Gregory both offered provocation. As the Taylors were walking "arm in arm," Partridge "said, Cobler, are you going to light your wife home? Says I, mind your own wife. With that Gregory came, and struck me." The jury weighed the evidence, and found them both guilty of manslaughter. They were sentenced to twelve months in prison and each fined one shilling.[242]

By definition violent behaviour transgressed proper gender roles; however, women could act further outside their gender roles by the types of murder they committed. This included petty treason for married women and infanticide for unmarried women, but also included other unnatural acts such as violence against children, which went against proper maternal behaviour. In 1751, Rachel Beacham was charged with the murder of Henrietta Dawes, who was six years old. Mary Hyde, Henrietta's mother, left her with Beacham while she went to get coal. Hyde was only gone half an hour when Isabella Pollard ran to get her. Pollard had heard that Henrietta had been murdered, and immediately thought of Hyde. Upon returning to Beacham's lodgings, Pollard and Hyde saw Beacham "rubbing her hands all over bloody." They went up to her room and saw Henrietta's body "lying in all its gore upon the floor." Pollard testified that the body was "cut from ear to ear." Beacham's defence was that "she was tempted to do it," but she did not specify how tempted. This was an apparent act of murder, and transgressed proper feminine maternal roles by murdering a child for no apparent reason. It is probable that the jury would have convicted Beacham regardless

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[242] "Samuel Taylor, Jane Taylor, otherwise Morgan, killing: murder, 13th January, 1792," *The Proceedings of the Old Bailey*, <http://www.oldbaileyonline.org/html_units/1790s/t17920113-53.html> 2005. Because of coverture it was impossible to fine a wife since she had no property of her own. However, the fine in this case suggests that the judge and jury saw Jane completely separate from Samuel because of her participation in the murder.

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of Henrietta's age. This crime seems abhorrent enough despite being committed against a child. Whatever the reasons, the jury found Beacham guilty and sentenced her to death.[243]

A contrasting case was that of Mary Hinds in 1761. Hinds was accused of throwing Edward Mulby, a five-month-old infant, into a pond and thereby drowning him. Sarah Mulby, Edward's mother, testified that Hinds "was going to see her brother-in-law . . . [and] she took my child (being seemingly fond of it), and said she would be gone half and hour." When Hinds did not return, Sarah became frightened and "inquired about the streets, workhouses, and hospitals." She found Edward's body three days later "at Saint George's Hospital; [and] it looked as if it had been drowned." Sarah did not see Hinds for another four months. In her defence, Hinds testified that she "stopped upon the bridge in the park [at Kensington], and suddenly the child gave a spring into the river." She tried to get him from the river but was unable to because she was pregnant. She did not return to Sarah because she was scared, although she later regretted that decision. The jury weighed the evidence and determined that since this was an accidental death, Mary Hinds was innocent.[244] Both Mary Hinds and Sarah Beacham's cases involved children, but only Beacham's appeared to have transgressed acceptable behaviour. As such, she suffered the penalty of the law.

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[243] "Rachel wife of Joseph Beacham, killing: murder, 4th December, 1751," *The Proceedings of the Old Bailey*, <http://www.oldbaileyonline.org/html_units/1750s/t17511204-21.html> 2005.

[244] "Mary the wife of John Hinds, killing: murder, 9th December, 1761," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1760s/t17611209-26.html> 2005. Interestingly, Mary Hinds was later indicted for almost exactly the same crime seven years later. This time, however, the jury found her guilty and sentenced her to death and dissection. "Mary the wife of John Hindes, otherwise Mary Jones, killing: murder, 18th May, 1768," *The Proceedings of the Old Bailey* <http://www.oldbaileyonline.org/html_units/1760s/t17680518-39.html> 2005.

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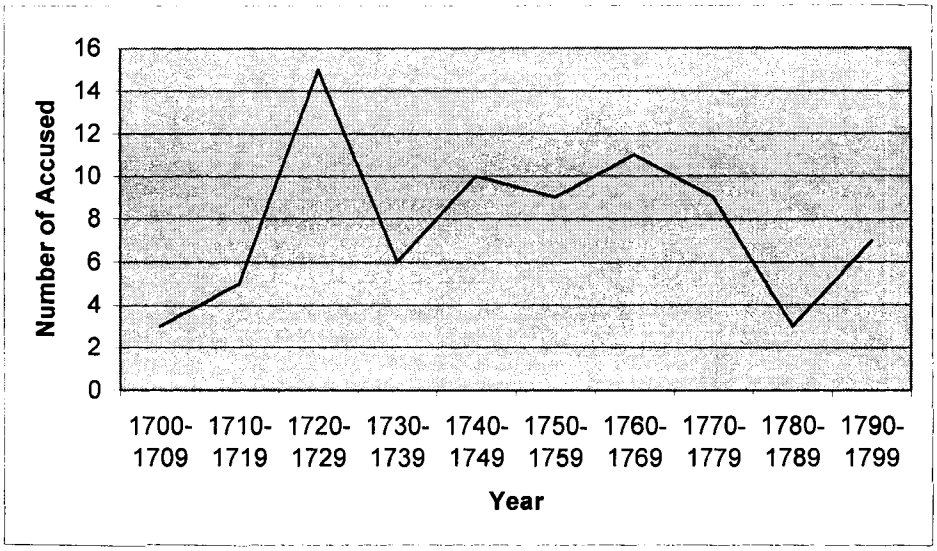
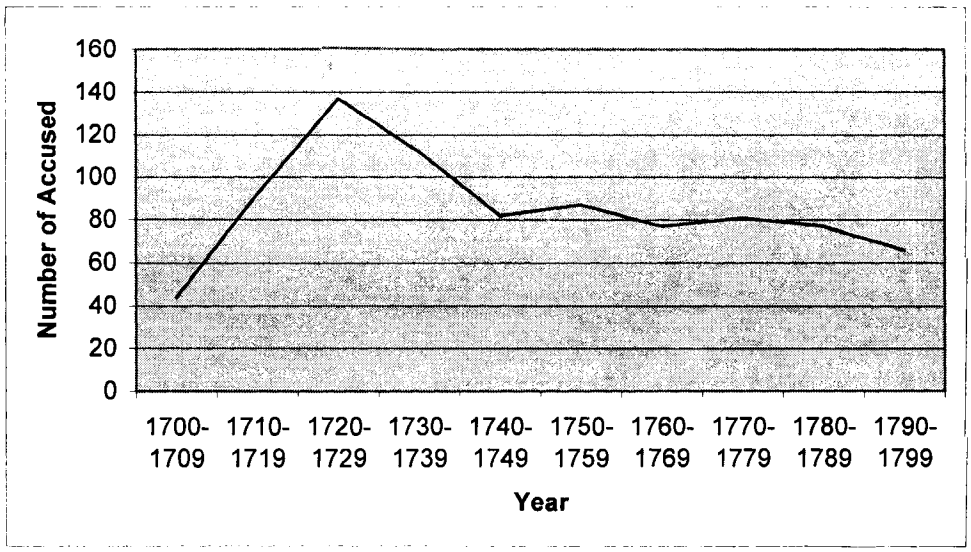
Figure 4.1: Accusations against Married Women for Killing-Related Offences in the Old Bailey, 1700-1799



Source: Old Bailey Sessions Papers N= 78

Figure 4.2: Accusations of Killing-Related Offences in the Old Bailey, 1700-1799



Source: Old Bailey Sessions Papers N=1, 164

Similar to married women accused of theft, married women accused of murder faced conviction if they transgressed proper gender roles of submission and obedience, which murder did by its violent nature. Unlike theft however, married women accused of murder could not expect to have their actions excused because of coverture and the

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defence of coercion. In addition, the pattern of murder accusations differs from the pattern of theft accusations seen in the previous chapter. Figure 4.1 shows the pattern of murder accusations for married women in eighteenth-century England. There is a noticeable drop in the 1780s, which is similar to the pattern in figure 3.1 for married women's theft-related offences. However, this trend is reversed in the 1790s. This confirms that the treatment of married women accused of killing-related offences differed from the treatment of married women accused of theft-related offences. Since people always considered murder a heinous offence, treatment of married female murderers should not follow the pattern outlined in table 3.1. In addition, the pattern of married female murderers differs from the pattern outlined in figure 4.2. Unlike the variations in figure 4.1, figure 4.2 seems to follow a more definite pattern. Both unmarried women's murder accusation rates and men's murder accusation rates conform to the pattern found in figure 4.2. This shows that juries treated married women differently than both men and single women, as this chapter has shown.

Murder transgressed the bounds of proper feminine behaviour. Although all murders were unacceptable, masculine violence was more acceptable than feminine violence. Feminine violence, especially when directed at men, upset the gender order and transgressed proper gender roles. Violence suggested a form of autonomy and assertion which was not typical of prescribed feminine behaviour. Killing was the extreme expression of violence, and women who killed, especially married women, suggested by their actions that they were outside of male control. Just as with the theft-related offences, wives who were outside of their husbands' control deserved to bear the full force of the law. Although the defence of coercion did not excuse any form of killing,

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the treatment of married women accused of killing-related offences was similar to those involved in theft-related offences, where coercion was an available defence. Neither married women who killed, nor married women who took the initiative in theft-related offences, received any leniency before the law regardless of their marital status. In addition, judges and juries treated married women who committed crimes that explicitly transgressed the gender hierarchy more harshly than those who did not. One only has to compare the conviction rates for petty treason and infanticide to see that transgressing gender boundaries and upsetting the patriarchal order was an inherent concern to all authorities. However, authorities were more concerned with hierarchy than with proper gender roles when it came to married women accused of killing-related offences. The ideal woman was maternal, and infanticide goes completely against all maternal instincts and proper maternal behaviour. The law of infanticide was classified with the murder of bastard, not legitimate, children. As such, the acquittal rate for married women accused of infanticide was almost 100 percent. The only example of leniency towards married women accused of killing-related offences was infanticide. In contrast, the law of petty treason was designed to maintain the gender hierarchy within the household and particularly targetted the behaviour of married women. Married women accused of petty treason had the highest conviction rate of everyone accused of killing-related offences in the eighteenth century. This suggests that authorities were more concerned with maintaining patriarchal authority and the gender hierarchy than with maintaining proper gender roles. Married women could transgress certain gender boundaries, but courts, judges and juries made those married women who transgressed the gender hierarchy into extreme examples of the severity of the law. The law was meant to uphold the social and

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gender hierarchy, and it had to do so without explicitly portraying it as such. Therefore, judges and juries treated those who upset the gender hierarchy particularly harshly.

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CHAPTER 5: CRIMINAL WIVES IN THE OLD BAILEY

The Disorders of Marriage proceeding from the two foregoing Causes, viz. The too great Liberty allowed our Women, and the want of true Love in the young Couple before the indissolvable Knot is tied.
-Philogamus, *The Present State of Matrimony,* 1739

Malcolm Gaskill studied serious crimes to see "how ordinary people . . .perceived themselves, their social environment and their universe, and conversely, how these perceptions both reflected and shaped popular beliefs and behaviour over time."[245] Crime is a useful area of study because it reveals quite sharply what people thought, the boundaries they set, and how they treated and dealt with those who transgressed these boundaries. In addition, one can also study particular groups of accused criminals to reveal attitudes towards larger groups in the social fabric. Married women were a unique group since theoretically coverture made them into children before the law and enabled them to occasionally escape criminal liability. Not only did marriage demand obedience, but the theoretical unity of person meant that married women did not technically exist before the law. Coverture therefore led to the defence of coercion. As Blackstone explained: "in some felonies, and other inferior crimes, committed by [a wife], through constraint of her husband, the law excuses her: but this extends not to treason or murder."[246] Although even Blackstone's wording is limited, a great deal of modern scholarship has come to accept that married women were not liable for their crimes.[247] Accepting the defence of coercion at face value ignores the multiple purposes and experiences of coverture while discounting the actions of a portion, albeit a small portion, of eighteenth-century accused criminals. The study of married women accused of crime

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[245] Gaskill, *Mentalities*, 3.
[246] Blackston, *Commentaries I*, 432.
[247] King, "Female offenders," 69; Beattie, "Criminality of Women," 87; Shoemaker, *Gender in English Society*, 297; Froide, "Marital Status as a Category," 260.

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not only reveals the treatment of married women before the courts, but also how coverture functioned outside of property law and larger attitudes towards married women and individuality throughout the eighteenth century.

Figure 3.1, which charted the accusations against married women for theft-related offences, showed a distinctive pattern that rose drastically in the 1740s and continued to rise until a sudden drop in the 1780s. Since this pattern differs greatly from the pattern for overall accusations for theft-related offences in the eighteenth-century charted in figure 3.2, it suggests a change in attitude towards married women during the eighteenth century. Although figure 4.1 indicates a drop in prosecutions of married women for killing in the 1780s, the pattern of accusations does not match the overall pattern found in figure 3.1. This is because the defence of coercion did not apply to married women accused of killing. It would be rather shocking to find a similar pattern between theft-related offences and killing-related offences. However, since judges, juries and the law itself already saw murdering wives as individual people, there is no perceivable change in the pattern of accusations as there was in the theft-related offences where married women were not considered legal individuals. As previously stated, the pattern in figure 3.1 reflects the pattern Susan Staves found in her examination of equity cases. Staves argues that separate maintenance contracts recognized two persons within marriage because a contract must be between two people, and these contracts recognized separate interests within the marriage.[248] She found that from 1675 until 1778, "equity courts were increasingly hospitable to the idea of separate maintenance and contract logic."[249] In recognizing separate maintenance contracts, equity courts allowed for the possibility of

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[248] Staves, *Married Women's Separate Property*, 169, 181.
[249] *Ibid*, 175.

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two persons within marriage, which went against the basic premise of coverture: unity of person. However, this trend changed in the late eighteenth century. From 1778 to 1780,

> A series of cases at both law and equity attempted to reassert the 'general principle' that a husband and wife being in law one person cannot contract with each other against what were now said to be mistaken exceptions. Much of the criticism centred on what were claimed to be the hopeless confusions and illogicalities of allowing an anomalous middle state between feme covert and feme sole.[250]

In much the same way as contracts required two legal entities to be valid, the courts needed to deal with legal individuals when apportioning blame for criminal acts. As Dana Rabin explains, "The legal system depended on a true and coherent self that could be held responsible for its behaviour and misbehaviour."[251] By recognizing married women as separate from their husbands, the courts' actions allowed ordinary people to see married women as liable for their actions, which was not the case in the theory of coverture. While the courts had been willing to recognize married women as independent legal entities during most of the eighteenth century, the 1780s saw a reassertion of traditional values, roles, and married women's legal status. Both Staves' examination of equity courts and my examination of the Old Bailey records indicate that the 1780s saw a reassertion of traditional values in regards to coverture.

One can see these patterns in other areas of eighteenth-century life. During the Renaissance, there was a need for the "idea of two genders, one subordinate to the other, to provide a key element in [the] hierarchical view of the social order and to butress [the] gendered division of labour."[252] These two categories of gender were very important during the gender struggles of the sixteenth and seventeenth centuries. As Jean Howard

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[250] *Ibid*, 178.
[251] Rabin, *Identity, Crime and Legal Responsibility,* 10.
[252] Jean E. Howard, "Crossdressing, The Theatre, and Gender Struggle in Early Modern England," *Shakespeare Quarterly* 39:4 (1988), 423.

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explains, "the vast social changes of the period led to intensified pressures on women and a strengthening of patriarchal authority in the family and the state."[253] However, as the courts' treatment of married women shows, characterizations of gender changed in the eighteenth century. During the early and mid-eighteenth century, Dror Wohrman argues that English society "was characterized on the part of many (albeit not all) by a resigned – if not humouring – willingness to accept that gender boundaries could ultimately prove porous and inadequate; and therefore that individuals were not necessarily always defined or fixed by those boundaries."[254] Gender was something external, as in masculinity defined by the wearing of the breeches.[255] To a large extent, people could choose their gender roles by their actions, and this was not a fixed decision. Women could act as men, and men could act as women. Moreover, the choice to take on the characteristics of a particular gender was reversible.[256] Wahrman further explains that:

> although the expectations from 'masculinity' and 'femininity' were generally well defined, contemporaries did not perceive them as necessarily determining each and every individual, and could often be found to react to apparent subversions of these expectations with resignation, or tolerance, or – not infrequently – even appreciation.[257]

During the first three quarters of the eighteenth century, people began to question gender boundaries and to experiment with different ideas of conformity to gender roles. Wahrman sees this in representations of Amazons and other women prized for their "masculinity," female dress with decidedly masculine cuts, and even in translations of the

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[253] *Ibid*, 427. See also: D.E. Underdown, "The Taming of the Scold: the Enforcement of Patriarchal Authority in Early Modern England," in *Order and Disorder in Early Modern England*, ed. Anthony Fletcher and John Stevenson (Cambridge: Cambridge University Press, 1985), 116; Susan Dwyer Amussen, "Gender, Family and the Social Order, 1560-1725," in *Order and Disorder in Early Modern England*, ed. Anthony Fletcher and John Stevenson (Cambridge: Cambridge University Press, 1985), 210, 217.
[254] Wahrman, "*Percy's* Prologue," 117.
[255] Clark, *Struggle for the Breeches*, 68.
[256] Wahrman, "*Percy's* Prologue," 121.
[257] Wahrman, "Queen Bees," 274.

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Roman satirist Juvenal.[258] However, the "gender play" and willingness to experiment ended abruptly in the 1780s. Wahrman terms this a "gender panic" that replaced the playfulness of the previous decades "with a widespread anxiety about such instabilities of gender boundaries and gender categories."[259] Thus, guardians of order and reform sought to fix and "refashion the expectations and values of men and women alike."[260] These new expectations and values were actually a return to traditional roles, which included the reassertion of unity of person. Despite the experiences of married women in the first three-quarters of the century, married women after the 1780s could expect judges and juries to treat them as children before the law. It was during the playfulness of the earlier period where prosecutors, judges and juries treated many married women as independent legal entities. This was obviously a reflection of the prevailing ideology of the time. The findings of this thesis reinforce Wahrman and Staves' argument that the 1780s witnessed a large reversal in the treatment of women and the reassertion of fixed gender categories.

Despite a willingness within society to "play with" gender roles, coverture still functioned in the eighteenth century. As the cases where the defence of coercion applied illustrate, coverture existed in the Old Bailey despite an increased willingness to see married women as independent legal entities. However, coverture was not the rule and an increase in prosecutions, brought about by a change in perception of gender, meant that more married women faced the prospect of conviction throughout the eighteenth century. Elizabeth Handley, who along with her husband stole feathers, pewter plates and an iron candlestick from Stephen Rowse, certainly benefited from coverture. In

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[258] *Ibid*, 251-253, 259, 261, 271; Wahrman, "Gender in Translation," 21.
[259] Wahrman, "Gender in Translation," 31.
[260] Kathleen Wilson, *The Island Race: Englishness, Empire and Gender in the Eighteenth Century* (London and New York: Routledge, 2003), 93.

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1700, a jury acquitted her of theft and convicted her husband, despite believing that Elizabeth was guilty of the theft.[261] However, Ann Tompion, the pickpocket who stole from Elizabeth Cole in 1720 did not receive the benefit of coercion despite the presence of her husband during the theft.[262] The jury convicted Ann and sentenced her to death while acquitting her husband. Neither Ann nor Elizabeth represents the majority of married women accused of theft-related offences. Ann was as much an exception to the rule of the defence of coercion as was Elizabeth. Rather, coverture and the defence of coercion, much like everything else in the eighteenth-century English law was discretionary in nature.[263] The decision to apply the defence of coercion rested with judges and juries, and their decisions rested on a number of factors.

As P.G. Lawson explains, "it was the need to make the message of the gallows as effective as possible which not only gave early modern criminal justice its particular character but also shaped the behaviour of its principal decision makers, including the jurors."[264] The decision to send an offender to the gallows depended on the nature of the offence, the character of the offender, the status of the offender, and often the perceived state of crime at the time of the trial. However, for married women, the judge and jurors' chief consideration was the conformity of the offender to prescribed gender roles. The defence of coercion excused a married woman of criminal liability because she committed the act under the authority of her husband *not* because of unity of person. It was cases such as Elizabeth Handley's or Ann Lindsey's, where the wife acted under her

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[261] "John Handley, Elizabeth Handley, 15th January, 1700."
[262] "Thomas Tompion, Ann Tompion, 12th October, 1720."
[263] Hay, "Property, Authority and the Criminal Law;" Langbein, *Adversary Criminal Trial*, 6, 231, 336, 338, 343; Stretton, "Women, Property and Law," 41; Herrup, *The Common Peace.*
[264] P.G. Lawson, "Lawless Juries? The Composition and Behaviour of Hertfordshire Juries, 1573-1624," in *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800*, ed. J.S. Cockburn and Thomas A. Green (Princeton: Princeton University Press, 1988), 120.

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husband's direct orders, that resulted in acquittals because of coercion.[265] Cases such as Frances Emerton's, who was accused of robbery in 1732, and Sarah Northey's shoplifting case from 1784, where the wife took the initiative resulted in convictions because the wife did not conform to her proper submissive role.[266] Married women transgressed boundaries by independent thought or action, and the defence of coercion did not apply in these cases. The defence of coercion could not excuse murder or other killing-related offences, even in theory. By killing someone, married women stepped so far out of their prescribed gender roles that the courts had to step in and reassert male authority and the authority of the state. The gender "playfulness" of the first three quarters of the eighteenth century was still limited. Gender boundaries could be pushed, but they still had limits, and criminal behaviour reveals the extreme limit of such tolerance. When criminal wives pushed the boundaries too far, judges and juries ensured that the law would remove any potential benefits from the paternalistic doctrine of coverture. If women acted as men through violent or independent initiative in criminal acts, the law did not feel that the defence of coercion was applicable, and therefore held them liable for their actions.

This illustrates Hay's argument about the law's central element of control.[267] However, the need to control order implied more than the social order. Gender control was central to the social order and the law sought to maintain the proper gender order by stepping in when women transgressed certain boundaries. In 1739, "Philogamus" wrote that: "the great Concern of every Commonwealth, is to keep [women] within due

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[265] "John Handley, Elizabeth Handley, 15th January, 1700;" "Richard Lindsey, Ann Lindsey, 1st March, 1721." With certain exceptions, husbands generally had to be present for juries to assume coercion.
[266] "James Emerton and Frances his wife, 5th July, 1732;" "William Northey, Sarah Northey, 26th May, 1784."
[267] Hay, "Property, Authority and the Criminal Law."

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Bounds."[268] As Wahrman demonstrates, these boundaries were questioned in the eighteenth century, but there were still limits. The influence and importance of the patriarchal head of household remained throughout the eighteenth century, and women were still subordinate.[269] There was a recognition of the ability to take on masculine roles, but it did not extend to equality between the sexes in the modern sense. Despite an increased willingness in the eighteenth century for prosecutors to regard a wife as separate from her husband, judges and juries still utilized the defence of coercion. Coverture existed in part to control female behaviour by ensuring that a husband's authority could be more powerful than the laws of England. By giving husbands such power, and enforcing that power through the occasional defence of coercion, judges and juries reinforced the gender hierarchy.

There was no professional police force or standing army in eighteenth-century England. The only way that those in authority could maintain the law was through private prosecution. However, prosecutors did not largely come from the elite part of society, but rather the middle and the lower, excluding the vagrant poor.[270] Hay and Linebaugh both demonstrate that the elite made and administered the law to serve their best interests, but everybody used the law for their own purposes.[271] The overwhelming social acceptance of the law was its most powerful asset, and served to keep the elite in

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[268] Philogamus, "The Present State of Matrimony: or, the Real Causes of Conjugal Infidelity and Unhappy Marriages, (1739)," in *Women in the Eighteenth Century: Constructions of Femininity*, ed. Vivien Jones (London and New York: Routledge, 1990), 77.
[269] John Tosh, "The old Adam and the new man: emerging themes in the history of English masculinities, 1750-1850," in *English Masculinities, 1660-1800*, ed. Tim Hitchcock and Michèle Cohen (New York: Longman, 1999), 225.
[270] Langbein, "Fatal Flaws," 105-108, 120.
[271] Hay, "Property, Authority and the Criminal Law,"; Linebaugh, *London Hanged*, 74, 79, 83; Hay, "Prosecution and Power," 392-394.

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power without significant protest from below. Michael Braddick and John Walter explain that:

> the apparent hegemony of values which serve the interests of the dominant groups is a product of the need to normalise relations, either to compensate for the absence of, or to avoid the political costs of, rule by coercion. In making authority appear natural, these modes of self-presentation by elite groups serve to 'euphemise' power.[272]

The law enjoyed acceptance because it appeared natural, beneficial and equal. Even execution had to be carefully considered since the execution of certain individuals could "weaken the legitimacy of the sanction."[273] Although it benefited them, the landed classes had to work within the law, which further strengthened the legitimacy of the law. Scott explains that in order for a power system to be effective it "must, in effect 'make implicit promises of benefits for subordinate groups that will serve as the stake which they too have in the prevailing order,' and some, at least, of these promises must be delivered upon 'if it is to have the slightest hope of gaining compliance.'"[274] In the case of the criminal law, these promises included the protection of property and the equal treatment of all before the law. Everyone had property and it was important to him or her. The chance to prosecute those who stole from an individual was essential to the law. Examples of elites who broke the law, such as Lord Ferrers, reinforced the notion of equality before the law. By limiting the law and living within its boundaries, the elites managed to control social order and maintain their authority without the presence of a professional police force or standing army.

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[272] Braddick and Walter, "Introduction," 5-6.
[273] Lawson, "Lawless Juries," 149.
[274] As quoted in: Braddick and Walter, "Introduction," 6.

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The criminal law also controlled the gender order. The law of petty treason and its corresponding punishments reinforced the authority of the husband within marriage and as head of the household. The law of infanticide reinforced strictures against premarital sex and sought to control the actions of unmarried women. However, one of the main forms of control was coverture. In theory, coverture meant that husband and wife were one person before the law. Upon marriage, a woman underwent a civil death, and no longer existed as an independent legal person.[275] She lost all her property, unless a contract was made before the marriage, any property she obtained during marriage became her husband's, she could not sue or be sued without her husband, and she could not make contracts for the upkeep of her family or herself without her husband's permission. These property rules made married women into dependants, whose lives and well-being depended on the benevolence of their husbands. While coverture was supposed to create harmony by combining resources and providing a common purpose for the household, daily life often complicated the unity of persons within marriage.[276] Both husbands and wives were often unaware of the implications of coverture, and many lived their lives as if unity of person was nothing at all. However, married women accused of theft-related offences in the eighteenth century sometimes had a chance to be thankful for coverture and the corresponding defence of coercion.

This lack of criminal liability was one of the reasons why eighteenth-century commentators claimed that women were the favourites of the law. However, this assertion contrasts with modern scholarship that claims coverture was a patriarchal tool designed to maintain married women's subordinate position. As this thesis demonstrated,

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[275] Fowler, "Civil Death," 768.
[276] Bailey, *Unquiet Lives*, 71, 83-84, 105-108, 193-194; De Grazia, "Afterword," 300-301; Ingram "Rough Music," 97.

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these two seemingly irreconcilable ideas are actually quite similar. Coercion was an example of limited favouritism that actually reinforced the subordinate status of women. An ideal woman was obedient, married, submissive and dependant. She did not take independent initiative, nor did she disobey her husband's commands. The ideal woman knew, however, that certain commands such as murdering someone, could not be obeyed, and she therefore sought to persuade her husband to give up his folly and avoid ill behaviour. Theoretical coverture and the defence of coercion were about ideals rather than reality. In practice, judges and juries used discretion in their decisions to apply the defence of coercion, and their decisions depended on the behaviour of the accused and how well it conformed to ideal behaviour. Women who acted outside proper gender roles by showing initiative in theft cases, or who displayed violent behaviour in murder cases, did not receive the defence of coercion. Women who obeyed their husbands or who appeared passive throughout the criminal act and the proceeding case did receive the defence of coercion. By providing examples of women who could escape criminal liability by passive behaviour, judges and juries reinforced the proper position of women. Subordination went hand in hand with the defence of coercion, despite its appearance of favouritism. In this sense, both eighteenth-century commentators and modern feminists and historians can be found to agree about the nature of coverture.

Marriage did not mean that women stopped committing crimes. As the previous chapters illustrate, although only a small percentage of overall accused criminals, married women were still accused criminals. These married women were prosecuted, stood before the Old Bailey and faced the same punishments as single women, widows, and men. The defence of marital coercion was extremely limited, even in theory. To use it as

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justification for an argument that married women were not important as criminals misconstrues coverture's purpose and discounts an important group of people in criminal history. The defence of coercion did not excuse every offence, and judges and juries used it sparingly. Rather, the defence of coercion reveals a limited favouritism that ultimately reinforced the gender hierarchy. By ensuring that only married women who showed dependency and did not transgress the gender boundaries received the defence of coercion, judges and juries provided a strong case for obedience. In addition, the decision to punish married women who transgressed gender boundaries, demonstrates that the paternal nature of coverture was extremely limited.

In light of these findings about criminal wives, a reassessment of both coverture and criminality is necessary. Historians need to allow for female criminals in studies of criminality as criminals in their own right instead of pale reflections of the male norm. Garthine Walker and Jenny Kermode accurately point this out, and it remains to be seen where the future study of female criminality will lead. Also important is the inclusion of criminal wives in this study. Coverture affected more than just married women, and a study of criminals' marital status can lead to a better understanding of how marriage *not just* coverture affected the treatment of male and female offenders in the courts. Stemming from this work is an inquiry into what happened to the families and dependants of the executed or transported. Since juries weighed the potential fallout on the dependants, it is important to study more than just jury behaviour. By recognizing married women as independent persons and not relying on coercion to explain their fewer numbers in the criminal record, historians can better understand the treatment of married women and the corresponding complicated common law doctrine of coverture.

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