# Coverture in Criminal Law: Ancient "Defender" of Married Women

> [You are] "the more guilty of the two in the eye of the law; for the law supposes that your wife acts under your direction." "If the law supposes that," said Mr. Bumble squeezing his hat emphatically in both hands, "the law is a ass — a idiot. If that's the eye of the law, the law's a bachelor; and the worst I wish the law is, that his eye may be opened by experience." (CHARLES DICKENS, *Oliver Twist*, Chapter 51)

## I. INTRODUCTION

The scholar of criminal law Professor Rollin M. Perkins wrote the following words in 1934: "Speaking, not in terms of human traits, but in the language of the criminal law, a woman has the same capacity to commit crime as is possessed by a man. And the criminal capacity of a married woman is the same as that of a *feme sole* . . . "[1]

This seemingly obvious statement of fact, however, is not accepted on its face by a majority of the American jurisdictions which utilize the ancient doctrine of coverture either as part of the common law heritage[2] or as incorporated by statutes.[3] In its most general sense, the doctrine of coverture as applied in the criminal law allows a married woman committing a criminal act in the presence of or in concert with her husband, a defense to the criminal action and creates a presumption that the married woman did the act solely because of her husband's coercion. Thus while affording a unique defense to a married woman, the doctrine of coverture places the wife in a position of legal subservience to her husband, the "coercer."

The ancient law assumed that the bond of marriage created a "oneness" between husband and wife, yet the "one" thus created resembled more the husband than the wife. As a result of this legal assimilation, the wife was generally restricted from contracting and

---

[1]Perkins, *The Doctrine of Coercion*, 19 IOWA L. REV. 507 (1934).
[2]Mosely v. State, 19 Ala. App. 335, 97 So. 247 (1923); Commonwealth v. Helfman, 258 Mass. 410, 155 N.E. 448 (1927); State v. Henderson, 356 Mo. 1072, 204 S.W.2d 774 (1947).
[3]CAL. PEN. CODE § 26 (West 1970); ARIZ. PEN. CODE § 24 (Supp. 1952).

her rights to receive, transfer or devise property were also curtailed. At the same time and due to her subjugation to her husband, she was also "protected" from committing certain torts and most crimes due to her incapacity.[4]

Even before the twentieth century, the legal position of married women was seen to be no different than that of men or of single women. Yet in the criminal law, the tenacious doctrine of coverture still exists to a surprisingly extensive degree. Ostensibly for the protection of married women, the doctrine in practice places such persons in a subordinate legal position, somewhat akin to the disabilities accorded to infants and the insane.

This article shall seek to explore the historical origins and rationale of the doctrine of coverture in the criminal law, the elements of the doctrine, and the applicability and relevance of the doctrine to modern society. The scope of this article shall not extend so far as to discuss coverture in related areas of the law such as tort, contracts, and property.

## II. THE HISTORICAL ASPECTS

To trace the source of the doctrine of coverture would be to take a journey into the miasma of Anglo-Saxon history. Blackstone himself indicated that the "doctrine is at least a thousand years old in this kingdom, being to be found among the laws of King Ina of the West Saxon."[5] The word coverture is itself perhaps as old as the doctrine, being generally defined as " . . . [t]he condition or state of a married woman. Sometimes used eliptically to describe the legal disability arising from a state of coverture."[6] Coverture as a legal term is derived from the Middle English "covert" meaning covered, protected, and sheltered. Thus, a *feme covert* is so called as being under the wing, protection, or cover of her husband.[7]

### A. THE SOCIETAL CONDITIONS UNDERLYING THE DOCTRINE OF COVERTURE

The presumption of coverture, today approximately 1200-years of age, is said to be founded in three conditions of society which existed in early English history.[8] The first underlying reason was the common law belief of the unity between husband and wife, unity insofar as the wife's legal personality was blended into that of her

---

[4]1 W. BLACKSTONE, COMMENTARIES *444.
[5]4 W. BLACKSTONE, COMMENTARIES *28.
[6]BLACK'S LAW DICTIONARY 439 (4th ed. 1968).
[7]*Id.*
[8]Book Note, 3 OKLA. L. REV. 442 (1950).

husband's.[9] Secondly, the husband had the right and responsibility under early common law to chastise and discipline his wife, thus exercising control over her.[10] Finally, the suggestion has been made that the early English concept of "benefit of clergy" may have aided in the development of the presumption.[11] The benefit of clergy allowed ordained clergymen, monks and nuns who might be charged with crimes to be transferred from the common law courts to the ecclesiastical courts. This type of transfer was most decidely to the benefit of the clergy due to the large number of crimes punishable by death in common law courts, and by the fact that ecclesiastical courts were reknown for their leniency to clergy.[12] The benefit of clergy was gradually extended to encompass other privileged groups such as religious clerks and eventually to every man who could read![13] Of course, the possibilities presented by such an extended benefit of clergy, which encompassed women only if they were nuns, could lead to absurd results. One can almost picture the common law judges' discomfiture when faced with a husband and wife charged with the same crime where the husband might receive the benefit of clergy and the subsequent mild punishment or acquittal, and the wife might face a death sentence. The expansion of the ancient doctrine of coverture to fit this criminal law situation and the subsequent presumptions of the husband's coercion are not unreasonable outgrowths in light of this dilemma.

The early cases and writings make clear that the doctrine of coverture in the criminal law is an aspect of the natural law and purely for the benefit of the *feme covert:* " . . . 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."[14] And it has also been noted: "The legal disabilities of married women are recognized and established for their own protection, and not to enable others to profit by them."[15] Indeed, the legal fiction of coverture had its rightful place in the early law where the artificiality of fictions worked as a counterbalance to the weight

---

[9] 1 W. BLACKSTONE, COMMENTARIES *442. "By marriage, the husband and wife are one person in law, that is the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of her husband: under whose wing, protection, and cover, she performs everything."

[10] *Id.* *444. "The husband also (by the old law) might give his wife moderate correction. For, as he is to answer for his misbehaviour, the law thought it reasonable to entrust him with the power of restraining her, by moderate chastisement . . . " *Also* Bradley v. State, 1 Miss. 158, 1 Walker 156 (1824).

[11] Perkins, *supra* note 1, at 509; 4 BLACKSTONE, *supra* note 5, at *336.

[12] 3 W.S. HOLDSWORTH, HISTORY OF ENGLISH LAW 296, (1925).

[13] 1 J.F. STEPHEN, HISTORY OF CRIMINAL LAW 461 (1883 repr. 1964).

[14] 4 BLACKSTONE, *supra* note 5, at *445.

[15] Seager v. Burns, 4 Minn. 141 (1860).

and severity of punishments. Correct results were obtained in early cases by the employment of coverture as a defense. In *Rex v. Alison*, Patteson, J., said:

> There is an old case which occurred as far back as the reign of James I, which was very similar to the present. In that case a husband and wife, being in extreme poverty and great distress of mind, were conversing together on their unfortunate condition, when the husband said, "I am weary of life and will destroy myself", upon which the wife replied, "If you do, I will too". The man went out, having bought some poison, he mixed it with some drink, and they both partook of it. The draught was fatal to the husband, but the wife, in her agony from the effect of the poison, seized a flask of salad oil and drank it off, which caused a sickness of the stomach, and the consequence was that she voided the poison, and her life was saved. She was afterwards tried for the murder of her husband in this very court, and acquitted, but solely on the ground that, being the wife of the deceased, she was under his control; and inasmuch as the proposal to commit suicide had been first suggested by him, it was considered that she was not a free agent, and therefore the jury, under the direction of the judge who tried the case, pronounced her not guilty.[16]

## B. THE PRESUMPTION OF COVERTURE RECEIVED WIDESPREAD ACCEPTANCE

The doctrine of coverture was generally accepted and achieved widespread application throughout the nineteenth century.[17] The majority view at that time held that there existed a *prima facie* presumption that the wife was coerced by her husband,[18] and was therefore entitled to an acquittal, if she did the prohibited act jointly with her husband[19] or in his presence.[20] Exceptions to the rule were drawn early in cases of crimes which were *mala in se.*[21] Treason, [22] murder,[23] and offenses "as may generally be presumed to be managed by the intrigue of her sex"[24] such as the keeping of a bawdy house[25] were widely held as exceptions to the defense afforded by coverture.

---

[16] Rex v. Allison, L.R. 8 C.P. 423, 425 (1838).
[17] Seiler v. People, 77 N.Y. 411, 413 (1879); Commonwealth v. Daley, 148 Mass. 11, 18 N.E. 579 (1888).
[18] Reg. v. Brooks, 6 Cox Crim. Cas. 149 (1853); Uhl v. Commonwealth (Virginia), 6 Gratt. 706 (1849); People v. Wright, 38 Mich. 744 (1878).
[19] Quinlan v. People, (NY) 6 Park Crim. Rep. 14 (1864).
[20] Seiler v. People, 77 N.Y. 411 (1879).
[21] 4 BLACKSTONE, *supra* note 5, at *29. "This rule admits of an exception in crimes that are *mala in se* and prohibited by the law of nature."
[22] *Id.* "In treason . . . no plea in coverture shall excuse the wife, no presumption of the husband's coercion shall extenuate her guilt."
[23] Bibb v. State, 94 Ala. 31, 10 So. 506 (1891).
[24] State v. Gill, 150 Iowa 210, 129 N.W. 821 (1911).
[25] Commonwealth v. Lewis (Mass), 1 Met. 151 (1840).

Yet even while the use of coverture as a defense in criminal actions was enjoying its "hey-day" in the nineteenth century, some jurisdictions were beginning to modify the rule,[26] and a few others were rejecting it outright.[27] Toward the end of the nineteenth century, a Nebraska court stated that the doctrine of coverture "may have the sanction of age, and may have been justified by the social conditions of primitive times. . . . Certain it is that such presumption runs counter to our broad laws . . . and counter to the reason of men, in view of the domestic relations as they now exist, protected by more enlightened custom and a kindlier law."[28]

The doctrine of coverture, developed and nurtured by early English societal needs, ostensibly for the welfare of married women, and fostered by the Petruchion ethics of the sixteenth through the nineteenth centuries[29] was experiencing the first major rejection of its 1200-year-old tenets.

## III. ELEMENTS OF THE DOCTRINE

The most expedient manner to explicate the elements of the doctrine of coverture is to take the most general statement of the rule and examine each of its parts. Therefore, the rule shall be stated as follows: (A) A married woman (B) is not responsible (C) for a crime committed by her (D) in her husband's presence or in concert with him, (E) and such a situation raises a presumption of coercion by her husband.

### A. A MARRIED WOMAN

There is little dispute with this definitional element of the doctrine of coverture. The entire scope of coverture is applied to the *feme covert* as opposed to the *feme sole.* Before the doctrine can apply there must be a marriage, although the mere fact of marriage is not sufficient by itself to raise the presumption.[30] There must be proof of marriage and mere reputation of cohabitation will be insufficient to raise the presumption unless the jury finds from such reputation and other evidence that a marriage existed.[31]

---

[26] State v. Ma Foo, 110 Mo. 7, 19 S.W. 222 (1891). "There is little in the present organization of society upon which the *prima facie* presumption itself can stand, and certainly nothing calling for an extension of the presumption."

[27] State v. Clark (Del.), 9 Houst. 536, 44 A. 310 (1891); State v. Hendricks, 32 Kan. 559, 4 P. 1050 (1884).

[28] Smith v. Meyers, 54 Neb. 1, 2, 74 N.W. 277, 278 (1898).

[29] W. SHAKESPEARE, THE TAMING OF THE SHREW, Act 3 Scene 2: "I will be master of what is mine own. She is my goods, my chattels; she is my house, my household stuff, my field, my barn, my horse, my ox, my ass, my anything."

[30] Wampler v. Corporation of Norton, 134 Va. 606, 113 S.E. 733 (1922); State v. Halbrook, 311 Mo. 664, 279 S.W. 395 (1925).

[31] 41 CORPUS JURIS SECUNDUM, Husband and Wife § 222 (1944). Apparently, "common law" marriage will be sufficient where recognized.

### B. IS NOT RESPONSIBLE

To exculpate the married woman from her role in the crime, coverture is used as a defense which negates an element of the crime. There are two philosophies regarding this segment of the definition, both reaching the same end. One line of reasoning examines the defense from the angle of criminal capacity, asserting that if the elements of coverture are present, the married woman is regarded as not having the capacity to commit the crime.[32] Another line of reasoning has been suggested by Professor Perkins who has stated that it is sounder "to view coercion, compulsion, and necessity as matter which may in some cases negative the mind at fault (*mens rea*), but which do not concern criminal capacity itself.[33] Either a finding of no capacity or a finding of no requisite *mens rea* would trigger the defense of coverture.

### C. FOR A CRIME COMMITTED BY HER

The defense afforded by coverture is not all-encompassing: certain crimes are not covered by its scope. The exceptions to the doctrine previously noted, such as treason, murder, and the crimes to which women were traditionally linked, were universally utilized by jurisdictions following the doctrine.[34] Some jurisdictions have expanded the exceptions through case law,[35] while other jurisdictions have achieved similar ends by legislative actions.[36] Some jurisdictions have statutes making married women competent witnesses; in these cases, the presumption of coercion in the commission of perjury in open court is often not applicable just because of the husband's presence in the courtroom.[37]

### D. IN HER HUSBAND'S PRESENCE OR IN CONCERT WITH HIM

The essential element of the doctrine of coverture is that the husband be present or that the husband and wife act in concert.

---

[32]This is the original concept and probably still is the reasoning employed by a majority of the jurisdictions utilizing the doctrine, although it smacks of the "oneness of husband and wife," and places married women, for the purposes of this defense, in a category of persons incapable of committing crime, and including infants and the insane.

[33]Perkins, *supra* note 1 at 507.

[34]Caldwell v. State, 193 Ind. 237, 137 N.E. 179 (1922) (treason and murder); Tomasello v. State, 91 Ind. App. 670, 173 N.E. 235 (1930) (murder); Dawson v. United States, 10 F.2d 106 (9th Cir. 1926) (abducting girls for immoral purposes); Cothron v. State, 138 Md. 101, 113 A. 620 (1921) (murder); Hafner v. State, 176 Wis. 471, 187 N.W. 173 (1922) (operating house of ill fame).

[35]Bibb v. State, 94 Ala. 31, 10 So. 506 (1892) (robbery); State v. Buchanan, 111 W. Va. 142, 160 S.E. 319 (1931) (robbery).

[36]CAL. PEN. CODE § 26 (West 1970).(all felonies excepted).

[37]Commonwealth v. Moore, 162 Mass. 441, 38 N.E. 1120 (1894).

From this element all presumptions spring. The applicable range of "presence" is, of course, a variable factor. It has been held that presence in the same house when a criminal act was perpetrated was sufficient,[38] and it has been held that there was sufficient presence when the husband was upstairs while the wife was downstairs. [39] Sufficiency of presence has been a determination of law made by the court under the general rule "that the husband and wife must be near enough together for the wife to be within the range of the husband's personal and present influence."[40] However, the sufficiency of presence has also been considered a question of fact to be determined by the trier of fact upon appropriate charges from the court.[41] Generally, the wife need not be within sight of the husband, as long as the husband "was near enough for the wife to act under his immediate influence and control, though not in the same room." [42]

When the husband is entirely absent during the planning or perpetration of the criminal act, neither presence nor concert can be shown and the doctrine cannot apply.[43] Similarly, when the criminal act is committed by the married woman's own free will, either individually or jointly with her husband, the doctrine cannot apply. [44] Of course, in both these situations the presumption of coverture would have to be overcome.

It was early recognized that wives do not always act under the control and dominance of their husbands, although this recognition did not shake the foundations of coverture. In *Regina v. Cruse*[45] the case of *Rex v. Archer* was cited wherein it was said: " . . . but if the wife appears to have taken an active and independent part, or to have endeavored to conceal the stolen goods more effectually than her husband could have done, and by her own acts, she would be answerable as for her own uncontrolled offense." Likewise, in a more modern case it was held not error for the trial court to have failed to state the rule of coverture to the jury where it appeared from the evidence that the wife seemed to be in control of the situation and her husband apparently was obeying her orders.[46]

## E. AND SUCH A SITUATION RAISES A PRESUMPTION OF COERCION BY THE HUSBAND

When the aforementioned elements of coverture are present, the

---

[38] State v. Burns, 133 S.C. 238, 130 S.E. 641 (1925).
[39] Vukodonovich v. State, 197 Ind. 169, 150 N.E. 56 (1926).
[40] *Id.* at 170, 150 N.E. at 57.
[41] Commonwealth v. Daley, 148 Mass. 11, 18 N.E. 579 (1888).
[42] Morton v. Tennessee, 4 A.L.R. 264, 274 (1919).
[43] State v. Hollis, 163 La. 952, 113 So. 159 (1927).
[44] Mosely v. State, 19 Ala. App. 335, 97 So. 247 (1923).
[45] Reg. v. Cruse, L.R. 9 C.P. 542, 546 (1838).
[46] State v. Murray, 316 Mo. 31, 292 S.W. 434 (1926).

legal effect is the raising of a presumption of coercion. Thus, the evidentiary elements of coverture, if shown in a particular case, create a presumption of law which must be charged to the trier of fact.

The presumption of coercion as applied in coverture must not be confused with actual coercion. The doctrine of coercion necessitates that except for murder and perhaps a few other related crimes, compulsion may constitute an excuse provided it is "present, imminent, and impending, and of such a nature as to induce a well-grounded apprehension of death or great bodily harm if the act is not done." [47] Historically, merely the bare command of the husband was sufficient for the presumption of coercion in coverture to apply,[48] and this historical application of the rule has been generally applied in the cases, negating the need to utilize the much narrower defense of compulsion.[49] It is interesting to note that coverture has afforded a defense for married women in cases where the doctrines of compulsion and duress would not have applied.

Of course, presumptions run the gamut from those which are absolute (inferences which the court draws from the evidence which may not be overturned) to those which are rebuttable (valid until invalidated by evidence or a stronger presumption). There is some evidence that the presumption of coercion was an absolute one during the time of Blackstone[50] and even as late as 1823 when it was referred to in a note of *Rex v. Knight*[51] that a husband and wife had been jointly indicted for robbery and although the husband had been reluctant, the wife had compelled *him* to go with *her* to commit the robbery. The judge directed the jury to acquit the woman on the ground of coercion, saying that it was a presumption of law which he and they were bound by, even if the coercion were in fact reversed![52]

The courts eventually limited the presumption to two classifications: "*prima facie* presumption"[53] and "rebuttable presump-

---

[47] PERKINS, ON CRIMINAL LAW 954 (2d ed. 1969) quoting from Moore v. State, 23 Ala. App. 432, 127 So. 796 (1929)..

[48] 4 BLACKSTONE, *supra* note 5, at *28.

[49] 41 CORPUS JURIS SECUNDUM, *supra* note 31.

[50] 4 BLACKSTONE, *supra* note 5, at *28.

[51] Rex v. Knight, L.R. 1 C.P. 116 (1823).

[52] The note further referred to a statement by Sir Mathew Hale that the presumption of coercion is rebuttable, but the note said that: "though this appears to have been the opinion of Lord Hale, the modern practice is, on finding by the evidence that the offense was joint, for the court to direct the acquittal of the wife, without at all considering or inquiring how far she was or was not the principal actor or initiator of the offense." Other cases with similar acquittals for the wife included Rex v. Price, L.R. 8 C.P. 19 (1836), and Reg. v. Woodward, L.R. 561 (1838).

[53] State v. Fitzgerald, 49 Iowa 260 (1878); State v. Burns, 133 S.C. 238, 130 S.E. 641 (1925).

tion."[54] There appears to be no discernable difference between the two classifications, indeed, *prima facie* presumption is redundant to all intents. Both signify that an inference will be taken of coercion, but that this inference can be rebutted by evidence to the contrary, to be decided by the trier of fact. The quantum of evidence necessary to rebut the presumption will, of course, vary with the individual case, but it has been held that where a wife took a robbery victim by the throat and told him to keep still while her husband rifled his pockets, a finding that she was not acting under her husband's coercion was justified,[55] and in a similar vein, it has been held that the wife's conduct, even in the presence of her husband, may alone be enough to overcome the presumption.[56]

Such rulings led to the development, especially in the late nineteenth century, of a presumption which was only "slight," and which could be overcome by only "slight" evidence.[57] This view, perhaps to mitigate the effects of the doctrine, has been accepted by many of the jurisdictions which utilize the coverture doctrine today.

## IV. APPLICABILITY OF COVERTURE TODAY

### A. THE DOCTRINE OF COVERTURE IS VALID IN A MAJORITY OF UNITED STATES JURISDICTIONS

The criminal law defense of coverture exists to some degree in 24 of the 50 states and probably is the doctrine in four others.[58] Where it is applied, coverture is utilized as a defense with all its highly technical facets intact. The historic presumption has been a rebuttable one and such is the force of the presumption, at least in name, applied by 13 states. Another eight states, perhaps in deference to the great age of this doctrine, have relieved it of much of its burden, and have dubbed the presumption only "slight." Three states, including California, have discarded the presumption but continue to recognize coverture as a defense for married women.

Ohio, one of the states employing a rebuttable presumption has justified its continued utilization of the doctrine in the following manner:

> In Ohio, it has been held broadly that a husband is responsible for the acts of his wife which are only *malum prohibitum* and not *malum in se*, without any limitation to acts committed in his presence and therefore presumed to have been committed under his

---

[54] Commonwealth v. Eagan, 103 Mass. 71 (1869); State v. Cleaves, 59 Me. 298 (1871).
[55] People v. Wright, 38 Mich. 744 (1878).
[56] Commonwealth v. Adams, 186 Mass. 101, 71 N.E. 78 (1904).
[57] State v. Ma Foo, 110 Mo. 7, 19 S.W. 222 (1892); Stewart v. State, 74 Okla. Crim. 412, 127 P.2d 209 (1942).
[58] See chart, page 92.

## COVERTURE AS A DEFENSE — 1973

### THE AMERICAN JURISDICTIONS

| Presumption of Coverture Exists by Case Law Or By Statute | | No Presumption Exists But Coercion By Husband Can Be Affirmatively Proven | Presumption of Coverture Probably Exists | Unknown (No Cases or Statutes on Point) | Presumption of Coverture Probably Does Not Exist | Presumption of Coverture Rejected |
|---|---|---|---|---|---|---|
| Rebuttable | Slight | | | | | |
| Alabama | Arkansas | California | Mississippi | Alaska | Florida | Illinois |
| Arizona | Georgia | Colorado | Montana | Connecticut | Hawaii | Iowa |
| Idaho | Massachusetts | Maryland | Rhode Island | Deleware | Michigan | Kansas |
| Indiana | Maine | | Utah | Minnesota | | Kentucky |
| N. Carolina | Oklahoma | | | N. Dakota | | New York |
| New Jersey | Pennsylvania | | | New Hampshire | | Oregon |
| Missouri | Virginia | | | Vermont | | Texas |
| New Mexico | | | | Wyoming | | Tennessee |
| Ohio | | | | | | Washington |
| S. Carolina | | | | | | Wisconsin |
| S. Dakota | | | | | | |
| W. Virginia | | | | | | |

> coercion. The rule is based not alone upon the authority of the husband as head of the household to direct its affairs, and his duty to use all reasonable means to prevent his wife from using the home for a prohibited business or purpose.[59]

The rebuttable presumption is supported both by the statutes [60] and through case law.[61] The doctrine does not have its greatest impact when the courts have utilized it, however, since the presumption can, of course be rebutted.[62] In this respect the doctrine only creates additional duties of proof for the prosecution. The severest impact of the doctrine has occurred, perhaps ironically, where it has *not* been used. Appellate courts have found reversible error for failure of trial courts to give a correct jury instruction concerning the presumption of coverture.

In the case of *State v. Cauley*, the Supreme Court of North Carolina overturned the conviction of defendant wife for the crime of aiding and abetting her husband in assault with a deadly weapon with intent to kill their three-year-old child. Defendant husband's conviction was sustained. The ground given by the Supreme Court for awarding defendant wife a new trial was that the trial court failed to give the jury an instruction that when a crime is committed by a wife in her husband's presence, she is entitled to a rebuttable presumption that the criminal act was done due to her husband's coercion.[63]

Eight states employ the doctrine but hold through case law that the presumption created is only "slight" or even "weak."[64] In general, the courts have recognized the existence of the doctrine and of the presumption, but the recognition has been a curiously grudging one whereby the courts rather weakened the presumption than discard it entirely.[65]

An Oklahoma case decided by the Court of Criminal Appeals in 1954 is typical of how a court can minimize the effect of coverture by strictly construing the doctrine. In a prosecution for unlawful possession of intoxicating liquors found in defendant wife's home by valid search warrant, defendant wife pleaded the defense of coverture. The court stated:

---

[59] 28 OHIO JURISPRUDENCE 2d 99 (1955).
[60] S.D. COMPILED LAWS 22-5-3 (1971); ARIZ. REV. STAT. 13-134, 13-135 (1972).
[61] Mosely v. State, 19 Ala. App. 335, 97 So. 247 (1923); State v. Carpenter, 67 Idaho 277, 176 P.2d 919 (1947).
[62] Encinas v. State, 32 Ariz. 200, 256 P. 1054 (1927).
[63] State v. Cauley, 244 N.C. 701, 94 S.E.2d 915 (1956) similar results were reached in Johnson v. State, 97 Okla. Crim. 480, 261 P.2d 480 (1953).
[64] United States v. Anthony, 145 F. Supp. 323 (M.D. Pa. 1956) (utilizing Pennsylvania law).
[65] Commonwealth v. Casey, 118 P.L.J. 159, 272 A.2d 234 (1970) where the court affirmed the doctrine, but only with hesitancy; Commonwealth w. Helfman, 258 Mass. 410, 155 N.E. 448 (1927) where the court expressed dissatisfaction with the common law doctrine, but applied it nonetheless.

> It is evident, however, that this court has never gone so far as . . . absolving the wife of unlawful possession of intoxicating liquor where the same was found in her possession and the husband was absent from home, based on the principle that the husband was the head of the family with right to control. Rather, in the jurisdiction the rule of presumptive coercion operated to protect the wife only in cases of her husband's presence at the time of the commission of the offense. . . . [A] reading of the facts in the many cases from this court involving the general rule that when criminal acts are committed by a married woman in the presence of her husband, she is presumed to act under his coercion *meant a personal and physical presence.* [Citations omitted].[66]

The court found that no presumption could exist in the case at bar since the defendant husband was in fact absent at the time of search and arrest of defendant wife.

Arkansas case law has held that the presumption of coercion must be affirmatively proven and will not be assumed merely because of the husband's presence.[67] Thus the application of the doctrine in Arkansas takes the presumption to the point of non-existence notwithstanding the state code which states: "Married women acting under the threats, commands, or coercion of their husbands shall not be found to be guilty of *any crime* or misdemeanor if it appears, from all the facts and circumstances of the case that violence, *threats, commands* or coercion were used; and in such cases the husband shall be prosecuted as principal . . . " [emphasis added].[68]

## B. CALIFORNIA RECOGNIZES THE DEFENSE OF COVERTURE

California finds itself in the embarrassing position of repudiating the doctrine while being forced to apply a statutory replica of coverture. In the case of *People v. Statley*, the California court was faced with both the presumption of coercion as carried over from the common law and a statute which had the same effect.[69] In this case, the wife had been driving a car in which the husband was a passenger, and had been convicted in the lower court of cutting off a pedestrian at a crosswalk, a misdemeanor. The evidence was presented that the husband had told the wife, "You have got plenty of clearance, take it," and that the wife had thereupon driven into the crosswalk causing a pedestrian to jump back. On appeal, the wife contended that the jury was entitled to an instruction relating to the doctrine of coverture.

---

[66] Trapp v. State, 98 Okla. Crim. 480, 484, 268 P.2d 913, 917 (1954).
[67] Freel v. State, 21 Ark. 212 (1860).
[68] ARK. ANN. CODE 41-114 (1947).
[69] People v. Statley, 91 Cal. App. 2d Supp. 943, 206 P.2d 76, 206 Cal. Rptr. 76 (1949); CAL. PEN. CODE 26: "All persons are capable of committing crimes except . . . (7) Married women (except for felonies) acting under the threats, command, or coercion of their husbands."

The appellate court agreed holding that the instruction should have been given and that failure to do so was reversible error. On the code provision the court stated, "The possibility that the code provision has become anachronistic does not justify the courts in disregarding it. A legislative enactment is not repealed by time or changed conditions, but only by further legislation."[70] At the same time, however, the court strongly rejected the presumption of coercion doctrine as developed in the common law: "Where the reason for the rule of the common law which is the spirit and soul of that law, fails, the rule itself fails. We conclude, then, that the reign of the thousand-year-old presumption has come to an end."[71]

In *People v. McCann* the defense of coverture was raised by defendant wife to the charge that she and her husband had issued six bad checks. Both defendants were charged with three counts of passing bad checks — each charge a felony. The California appellate court hearing this case met defendant wife's argument as follows:

> The defendant also contends that the evidence establishes, as a matter of law, that she acted in the premises upon the command, under the coercion and in fear of her husband, and that, for this reason, her conduct was not criminal. ... In this regard the defendant further contends that there is a presumption that she was acting under the command or coercion of her husband within the meaning of Section 26, subdivision Seven of the Penal Code. However, this section relates only to misdemeanors. The offenses of which the defendant was convicted were felonies.[72]

Thus while not rejecting the statutory language, the court interprets it strictly so as not to apply to the case. The California statute is still on the books. The effect of the statute is to create a defense for married women acting under the threats, command or coercion of their husbands. Thus, a married woman in California may be legally excused from the commission of a misdemeanor if she can show that she was acting under the *bare command* of her husband. The married woman need not defend her criminal act under the narrow doctrine of coercion by showing that she committed the act under imminent fear of death or great bodily harm; she need only prove that she acted under the bare command of her husband. Certainly a unique statutory defense for married women!

## C. LAWS OF OTHER JURISDICTIONS HAVE BEEN INFLUENCED BY COVERTURE

Two other states — Colorado and Maryland — have rejected the presumption raised by coverture, but allow affirmative showings of

---

[70] People v. Statley, 91 Cal. App. 2d Supp. 943, 951, 206 P.2d 76, 81.
[71] *Id.* at 951, P.2d at 81.
[72] People v. McCann, 233 Cal. App. 2d 561, 565; 43 Cal. Rptr. 789, 793 (1956).

"coercion" by the husband to be a valid defense for the wife. Maryland retains the notion by statute.[73] The Maryland statute, for example, states: " . . . but on a charge against the wife, for any offense other than treason or murder, it shall be a good defense for her to prove that the offense was committed in the presence of and under the coercion of, the husband."[74] Colorado has achieved similar results by case law.[75] Although the burden of proof is affirmative and no presumptions exist, the law in these jurisdictions has recognized that a wife may be under the husband's dominion and thus may be exculpated from her criminal acts. These jurisdictions have not, however, articulated any doctrine concerning the possibility that the husband may be acting under the wife's coercion or control.

In four states the presumption of coverture is probably still a valid doctrine although not recently tested by the cases. In Mississippi the doctrine has not been tested by case law, but as recently as 1942, a court held that one of the underlying doctrines of coverture was still good law — the court upheld the doctrine that man and wife were one in the law.[76] In Montana, the statutes continue to affirm the validity of the doctrine, although it has not yet been tested in the case law at an appellate level.[77] Utah also has perpetuated the presumption by statutory law, although it has not been tested in the courts. The Utah statute goes so far as to state that married women are incapable of committing *any* crime (except those punishable by death) if they were "coerced" by their husbands.[78] Rhode Island has upheld the doctrine of coverture and has affirmed that the doctrine exists in regard to minor offenses, but their holding has not been tested for 90 years.[79]

### D. COVERTURE IS EXPRESSLY REJECTED IN ONLY TEN STATES

Ten states have squarely rejected any presumptions or notions of coverture: Illinois, Iowa, Kansas, Kentucky, New York, Oregon, Texas, Tennessee, Washington, and Wisconsin. The states of Illinois, New York, Oregon, Washington and Wisconsin have rejected the doctrine through statutory enactments;[80] the remaining states have

---

[73] ANN. CODE MARYLAND 35-7 (1957).
[74] *Id.*
[75] Dalton v. People, 68 Colo. 44, 189 P. 37 (1920); 40 C.R.S. 1-8 (1963).
[76] United States v. Shaddix, 43 F. Supp. 330 (S.D. Miss. 1942).
[77] REV. CODE MONT. ANN. 94-201 (1947).
[78] UTAH ANN. CODE 76-1-41(8) (1953).
[79] State v. Boyle, 13 R.I. 1537 (1882).
[80] 39 N.Y. PEN. LAW 1092 (McKinney Supp. 1966); WIS. STAT. ANN. 939.46 (West 1958); 38 ILL. ANN. STAT. § 7-11 (West 1961) repealing old § 38-596 which recognized the presumption; ORE. REV. STAT. 161-270(3) (1971); R.C.W.A. 9.01.113 (1961).

reached the same result through the courts.[81] The reasoning of Iowa is typical of the courts which have rejected the common law doctrine in the modern context:

> A wife who commits a crime in the presence of her husband will not be presumed to have acted under his coercion in a state in which practically all the disabilities of coverture are removed and a woman stands in the eyes of the law with practically all the rights, duties and privileges of a *feme sole*.[82]

The doctrine of coverture has probably been rejected in the federal courts, but a case as current as 1971 has indicated that the doctrine and presumption may still be viable.[83] Other common law jurisdictions are split on the applicability of the doctrine. Thus, Canada, South Africa and Scotland all apply the doctrine to varying degree, while England and India reject it.

## V. CONCLUSION

### A. COVERTURE IN THE MODERN CONTEXT

Total equality of all persons before the law is perhaps a visceral ideal, but is certainly far from being a legal reality. The law does in fact recognize and condone a certain inequality, if the classifications are reasonably made and effect a legitimate state interest.[84] For example, the law recognizes that minors cannot be treated on the same basis as adults in their capacity to engage in legal transactions and in their capacity to be answerable for their transgressions; in fact, the classification "minors" is often broken down into subclassifications dependent upon age. Along the same lines, doctors as a class are held to a higher standard of knowledge than their lay

---

[81] State v. Renslow, 211 Iowa 642, 230 N.W. 316, 71 A.L.R. 1111 (1930); State v. Hendricks, 32 Kan. 559, 4 P. 1050 (1884); Wireman v. Commonwealth, 224 Ky. 116, 5 S.W.2d 884 (1928); King v. State, 169 Tex. Crim. Rep. 34, 335 S.W.2d 378 (1960); Evans v. State, 188 Tenn. 637, 221 S.W.2d 952 (1949).

[82] State v. Renslow, 211 Iowa 642, 644, 230 N.W. 316, 318, 71 A.L.R. 1111, 1112 (1930).

[83] United States v. Swierzbensk, 18 F.2d 685 (W.D. N.Y. 1927) *but see* United States v. Harris, 328 F. Supp. 973 (W.D. Okla. 1971) which indicates the presumption exists.

[84] Without delving too deeply into the constitutional law questions of equal protection doctrine, suffice it to say that there are in fact two equal protection "tests." (1) The traditional test would look at the reasonableness of the classification in relation to the legitimate state purpose it is to serve. (2) A more modern test employs a strict scrutiny of the classification when triggered by "suspect" classifications (e.g., race, religion) or by fundamental freedoms (e.g., voting, traveling). It is noteworthy that the United States Supreme Court to date has not employed the "suspect" classification test to classifications due to sex, which would impose a much higher burden of proof on the proponents of the classification. Reed v. Reed, 404 U.S. 71 (1971). However, some forward-looking state courts have in fact utilized this test, much to the advantage of women's rights. Sail'er Inn v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

brothers and sisters, and the law may recognize that women are entitled pregnancy leave while men are not.

The rationale behind the classifications condoned by law are as numerous as the classifications themselves. The standard of knowledge attributed to doctors, for example, is based upon practical realities. The denial of certain civil rights to convicted criminals is based on a certain retributive justice condoned by society. The doctrines of coverture are founded in the tandem theories that married women do not possess the same capacity as men and *feme soles* to do certain acts, and a desire to protect married women from the dominance of their husbands.

The reasons for the rule, as will subsequently be shown, have long since passed into history and any continued classification as created by coverture is unreasonable and unegalitarian. The presumption of coverture may be one of the last legal remnants of an age when the sexes were unequal before the law. Yet it is a persistent and tenacious doctrine that has survived remarkably well to the present day and is being applied in recent cases, albeit grudgingly.[85]

An assault and battery case which came before a Pennsylvania appellate court in 1970 presented the question of how the defense of coverture applies in a modern context. The facts were substantially presented by numerous witnesses and were only rebutted by testimony from defendant husband and wife: a man by the name of Ryan (who was also the presecuting witness) had dinner with his wife in a restaurant-bar, and had gone to the bar for a drink. While at the bar, defendant wife approached and glared at Ryan and after a period of such glaring stated that Ryan should know her since he had "rolled" her husband a short time ago. The bartender and hostess then intervened to quiet her down, and defendant husband finally led her away from the bar and back to the table at which defendants had been sitting. Some few minutes later as Ryan and his wife were departing, they passed defendant's table and defendant husband took off his glasses and rushed toward Ryan. Other patrons of the restaurant separated the two men without any blows being struck. The restaurant manager then intervened and convinced Ryan and his wife to remain in the restaurant while defendants left. After a few minutes of waiting, the Ryan's also left and as Ryan held open the door for his wife, he was seized from behind in a bear hug, thrown to the ground and kicked by the defendants.

Defendant wife pleaded not guilty on grounds of the common law defense of coverture, which is that as to criminal acts committed in

---

[85]People v. McCann, 233 Cal. App. 2d 561, 43 Cal. Rptr. 789 (1965); Commonwealth v. Casey, 118 P.L.J. 159, 272 A.2d 234 (1970) (application for allocatur denied).

the presence of her husband, a married woman is presumed to have acted under his coercion and is therefore to be acquitted. In applying "the crusty old doctrine," the Pennsylvania court notes that, "The Pennsylvania cases that we could find that have considered the doctrine in the twentieth century state that the presumption is rebuttable, that is to say, the commonwealth may rebut the presumption that a woman who commits an offense in the presence of her husband did so at his direction or under his coercion."[86]

The court goes on to say that:

> . . . we will presume for this opinion that the doctrine survives. The evidence in the instant case demonstrates quite clearly that there was no coercion on the part of the husband. In fact, the evidence indicated that there was an effort at restraint of the wife on the part of the husband, for at the first confrontation executed by the wife defendant, it was the husband who intervened and drew her back to the table. The evidence throughout indicated a continuing independent hostility on the part of the wife, so that the presumption was clearly rebutted by the evidence in the case.[87]

## B. REASONS FOR THE SURVIVAL OF COVERTURE IN THE TWENTIETH CENTURY

The reasons for coverture's survival into the twentieth century are probably three:

(1) The general ennui of courts and legislatures to commit the doctrine to its final rest, possibly in the feeling that since it is a defense, married women can only be aided by its application.

(2) The tendency of courts to view married women as still being under some control by their husbands in the most practical sense — that is, economic control or a dominance of will.

(3) The heavy reliance by courts on the theory of *stare decisis.*[88]

### *1. IN DEFENSE OF MARRIED WOMEN*

The California statute which affords the defense of coverture to married women is an example of the first point.[89] This statutory scheme was propounded in 1872 and allowed married women a defense for crimes except those punishable by death, if acting under the threats, command or coercion of their husbands. It was later amended so that it applied only to misdemeanors and exists in that form today. Whether married women are benefited by such a defense is doubtful, and it is indeed a dubious honor for married women to

---

[86] Commonwealth v. Casey, 118 P.L.J. 159, 163 (1970).
[87] *Id.*
[88] 20 AM. JUR. 2d Courts § 183.
[89] CAL. PEN. CODE § 26 (West 1970).

join a list of individuals incapable of committing crimes, including infants, idiots, lunatics and insane persons.[90]

### 2. EQUAL PROTECTION AND COVERTURE

The Equal Rights Amendment (ERA) proposed for the United States Constitution would ensure that all men and women would stand equally before the law.[91] Although such an assumption may seem self-evident, it has been slow in development — the doctrine of coverture, for one, attests to that. Coverture is just one area where the law tends to treat men and women by separate standards. It is often true that conflicts of legal doctrine are in reality based upon factual conflicts or public policy considerations. To perpetuate coverture as a criminal defense for married women or to discard it, is likewise based in large measure upon a factual dispute: that is, are married women who commit crimes in the presence of their husbands, in fact, committing those crimes due to the "coercive dominance" of their spouses' presence? As a general proposition, it can hardly be said that married women in America today would commit crimes on the bare command of their husbands, nor that the mere presence of a husband when the wife commits that crime should justify a presumption of coverture. The larger question of husband-wife dominance in marriage is beyond the scope of the factual dispute in coverture, for even if some "Gallup Poll" showed that husbands are generally the dominant partner in marriage, this "fact" has no bearing on the question of whether husbands could make wives commit criminal acts by bare commands or threats.

There are strong public policy arguments against classifications based upon sex. Notwithstanding the public policy arguments and the fact that the reasons for the doctrine of coverture have passed into history, articles on the subject of coverture have been only mildly in favor of its abolition.[92] The courts often take a stronger view as expressed by *People v. Statley:* "In our society, when no bride promises to obey her husband, and where it is not accepted as the usual that a wife does what her husband wishes by way of yielding obedience to a dominant will, the basis for the presumption [of coverture] has disappeared."[93]

---

[90] *Id.*

[91] S.J. RES. 61, 91st Cong. 1st Sess. Section 1 (1969). "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." See also Article, *The Discredited American Woman: Sex Discrimination in Consumer Credit*, 6 U.C.D. L. REV. 61 (1973).

[92] A typical article stated: "Today, with the increased assertion of feminine equality, the disallowance of the rule in all jurisdictions seems the better path." Paul, *The Doctrine of Marital Coercion*, 29 TEMPLE L. Q. 190, 195 (1956).

[93] People v. Statley, 91 Cal. App. 2d Supp. 943, 951, 206 P.2d 79, 81.

A recent decision rendered by the California Supreme Court held invalid a California statute prohibiting women from tending bar except when licensees, wives of licensees, or with their husbands as sole shareholders of a corporation holding a license. In this case, the court applied a test of strict scrutiny, finding that classifications based upon sex were highly suspect. Said the court:

> Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship associated with them. [Citations omitted]. Women, like Negroes, aliens, and the poor have disabilities. Like black citizens, they were, for many years, denied the right to vote and, until recently, the right to serve on juries in many states. They are excluded from or discriminated against in employment and educational opportunities. Married women in particular have been treated as inferior persons in numerous laws relating to property and independent business ownership and the right to make contracts. Laws which disable women from full participation in the political, business and economic arenas are often characterized as 'protective' and beneficial. Those same laws applied to social or ethnic minorities would readily be recognized as invidious and impermissible. *The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage* . . . [emphasis added].[94]

### *3. STARE DECISIS*

Precedent may lend both stability and uniformity to the judicial process, but it should not serve to lock into the law such doctrines and dogma which the growing knowledge of man repudiates. As an ancient English jurist said, "We will give judgment according to reason; and if there be no reason in the books I will not regard them."[95] *Cessante ratione, cessat ipsa lex.* When the reason for a law has changed, the law itself must be changed. The doctrine of coverture is one of the remnants of a prior age when women were second-class citizens in the eyes of the law, and has no relevancy to a modern society. The ancient reasons upon which the doctrine was founded have long since passed into history with other doctrines of inequality. The 1200-year-old doctrine of coverture must finally be permitted to join its companions such as "the oneness of husband and wife" and "disabilities of the *feme covert* to contract or convey" in the museum of legal relics.

*David Rosenberg*

---

[94] Sail'er Inn v. Kirby, 5 Cal. 3d 1, 12, 485 P.2d 529, 540, 95 Cal. Rptr. 329, 340 (1971).

[95] Anderson, C.J., Case of the Resceit, Gouldes 69 (ca. 1600).