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UPDATING THE MARITAL PRIVILEGES: A WITNESS-CENTERED RATIONALE

*Amanda H. Frost**

Levina Enriquez was assaulted by her husband, suffering serious injury.[1] She fled the family home and took shelter in a local crisis center.[2] Ten days later she received a conciliatory phone call from her husband, in which he told her that he was in therapy to control his violent impulses, and he begged her to come back to him.[3] Levina refused, and when the state brought criminal charges against him she willingly testified at her husband's trial, recounting the admissions he had made in the phone call.[4] He protested at trial, and then again on appeal, that her testimony violated the privilege protecting confidential marital communications.[5] The Court of Appeals reversed his conviction on that ground and ordered a new trial at which Levina did not testify.[6] Levina's husband did not spend a single day in jail for the attack.

State v. Enriquez,[7] summarized above, was showcased in an article critiquing the marital privileges from a feminist perspective,[8] but it could just as easily have been cited by a frustrated prosecutor railing

* Staff attorney, Public Citizen Litigation Group. B.A., Harvard College, 1993; J.D., Harvard Law School, 1997. I would like to thank Professor Martha Minow for her insightful critique of an earlier draft of this article. I also thank Joshua Frost and Richard Glenn for their thoughtful comments and editing.

1. *See* State v. Enriquez, 609 A.2d 343, 344 (Md. Ct. Spec. App. 1992).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.* at 347.
7. *See id.*
8. *See* Margaret J. Chriss, *Troubling Degrees of Authority: The Continuing Pursuit of Unequal Marital Roles*, 12 LAW & INEQ. J. 225, 251 (1993).

against needless obstacles to conviction,[9] or by a legal historian critiquing our justice system's habit of mindlessly clinging to vestiges of English common law.[10] The marital privileges suffer no dearth of critics. Hostility toward the adverse testimony privilege[11] — which insulates a witness-spouse from being compelled to give testimony that could incriminate the defendant-spouse — is even more vociferous than toward the confidential communications privilege — which protects confidential communications between spouses.[12]

Courts employing the privileges often justify them with rote assertions of their ability to "preserve marital harmony" and "protect marital privacy," or even more generally, to "promote the socially beneficial institution of marriage," without any explanation of how the privileges actually serve these goals.[13] Furthermore, these rationales ring hollow when contrasted with the disturbing, and certainly atypical, marriages to which they are generally applied. One recent case involved a homeless couple charged with brutally murdering the stranger that gave them shelter, in which the husband unsuccessfully asserted the right to prevent his wife from testifying against him.[14] Another concerned a husband seeking to prevent his teenage wife from testifying about his murder of an elderly woman, which he recounted to her in a fit of boastful indiscretion.[15] In a third, a man accused of kidnapping and attempting to murder his estranged wife asserted the privileges in an effort to stop her from testifying against

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9. *See, e.g.,* Timothy A. Baughman, *Privilege and the Ascertainment of Truth: The Spousal Bar and Other "Grimgribbers,"* 4 COOLEY L. REV. 591 (1987).

10. *See* 8 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2228 (John T. McNaughton rev. ed. 1961) [hereinafter WIGMORE] ("This privilege has no longer adequate reason for retention. In an age which has so far rationalized, depolarized and dechivalrized the marital relation and the spirit of femininity as to be willing to enact complete legal and political equality and independence of man and woman, this marital privilege is the merest anachronism in legal theory and an indefensible obstruction to truth in practice. It is unfortunate that the United States Supreme Court, when handed the opportunity in 1958, failed to eliminate this relic from the impediments to justice in the federal courts."). *See also* Chriss, *supra* note 8, at 227 ("Common law perceptions of a married woman's proper, subordinate role continue to shape and mold the thinking of large segments of the courts and legislatures. This thinking cannot be regarded as a safely sentimental attachment to history and tradition, but must be recognized as a threat to a woman's full and equal status in marriage and in society. Courts, legislatures and society at large must confront the troubling history of unequal marital roles and refuse to tolerate the continuance of these rules.").

11. The adverse testimony privilege goes by several names: it has also been referred to as "spousal immunity" and the "privilege for anti-marital facts." *See Developments in the Law — Privileged Communications,* 98 HARV. L. REV. 1450, 1563 n.1 (1985) [hereinafter *Privileged Communications*]. For the sake of consistency, I shall use the term "adverse testimony privilege."

12. *See* Milton C. Regan, Jr., *Spousal Privilege and the Meaning of Marriage,* 81 VA. L. REV. 2045, 2048 (1995).

13. *See infra* Part II.

14. *See* State v. Robertson, 932 P.2d 1219, 1222, 1229 (Utah 1997).

15. *See* State v. Bush, 942 S.W.2d 489, 494-95 (Tenn. 1997).

him.[16] It is difficult to reconcile lofty ideals of marital harmony and privacy with the dysfunctional and violent relationships depicted in many of the cases in which the privileges are raised.

It is not surprising, then, that the privileges are weakening under a strong current of academic criticism,[17] which in turn has moved courts and legislatures to narrow the circumstances of their application.[18] After reviewing the rationale for the confidential communications privilege, McCormick, author of a noted treatise on evidence, concluded that "while the danger of injustice from suppression of relevant proof is clear and certain, the probable benefits of the rule of privilege in encouraging marital confidences and wedded harmony, is at best doubtful and marginal."[19] Wigmore, another expert in the field, called for the abolition of the adverse testimony privilege, which he considered an "anachronism in legal theory and an indefensible obstruction to truth in practice."[20] The American Law Institute, in its 1942 Model Code of Evidence, rejected the adverse testimony privilege.[21] Likewise, the Uniform Rules of Evidence, created in 1953 by the National Conference of Commissioners on Uniform State Laws, advocated discarding the adverse testimony privilege, calling it a "sentimental relic."[22] The Conference, which revised the Uniform Rules of Evidence in 1974, reaffirmed its original decision by adopting only a limited confidential communication privilege for married persons.[23] Several state legislatures followed suit.[24]

It appears that the marital privileges have survived, despite vociferous criticism stretching back at least a century,[25] because of their long history at common law.[26] Emerging in the latter half of the sixteenth century, the marital privileges are pre-dated only by the attor-

16. *See* Valentine v. State, 688 So. 2d 313, 315-16 (Fla. 1997).

17. *See, e.g.*, KENNETH S. BROWN ET AL., MCCORMICK ON EVIDENCE § 66, at 162-63 (Edward W. Cleary ed., 3d ed. 1984) [hereinafter MCCORMICK-1984]; WIGMORE, *supra* note 10, § 2228, at 213-22; Baughman, *supra* note 9; Chriss, *supra* note 8, at 246-52; 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 339-45 (1827).

18. *See, e.g.*, Trammel v. United States, 445 U.S. 40 (1980) (noting that support for the adverse testimony privilege has been eroding).

19. MCCORMICK-1984, *supra* note 17, § 86, at 202.

20. WIGMORE, *supra* note 10, § 2228, at 221.

21. MODEL CODE OF EVID. 215 (1942).

22. *See* UNIF. R. EVID. 23(2) & comments.

23. *See* UNIF. R. EVID. 504.

24. *See* Trammel v. United States, 445 U.S. 40, 49 (1980) (noting that proposed rule was enacted in Arkansas, North Dakota, and Oklahoma).

25. *See, e.g.*, BENTHAM, *supra* note 17.

26. *See, e.g.*, Bent v. Allot, 21 Eng. Rep. 50 (Ch. 1580) (the first case to explicitly recognize the privilege); *Trammel*, 445 U.S. at 58 ("[T]he long history of the privilege suggests that it ought not to be casually cast aside."); David Medine, *The Adverse Testimony Privilege: Time to Dispose of a "Sentimental Relic,"* 67 OR. L. REV. 519, 553 (1988) (speculating that the privilege likely survives as a result of "the inertia that accompanies a 400-year-old privilege").

ney-client privilege.[27] Although the relationship of a lawyer to his client is basically the same today as it was four centuries ago, the institution of marriage has undergone a fundamental transformation.[28] Opponents of the marital privileges make persuasive arguments that the privileges were designed for a world in which a wife was property, divorce was forbidden, and marriage was as much an economic as an emotional union, and therefore their abolition is long overdue.[29]

This criticism is all the more noticeable when contrasted with the widespread support for privileges protecting professional-lay person relationships that has generated new categories of protected professional relationships and has broadened the scope of those privileges already in existence. For example, the Supreme Court recently concluded that logic and experience required the recognition of a privilege protecting the therapist-patient relationship.[30] In another case decided last term, the Court held that the attorney-client privilege survived a client's death, in part because it believed that a posthumous exception would undermine the privilege's purpose of promoting lawyer-client confidences.[31] At the state level, a number of courts and legislatures have created privileges for social workers, academics, journalists, and accountants.[32]

In this article, I take a hard look at marital privileges in light of the torrent of criticism, and conclude that they still merit a place in the modern American legal system. I do not, however, attempt to defend them with traditional justifications based on outmoded conceptions of marriage. I do not believe that the privileges are capable of

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27. *See* WIGMORE, *supra* note 10, § 2290, at 524. The history of the attorney client privilege goes back to Elizabeth I, where the privilege already appears unquestioned. It is therefore the oldest of the privileges for confidential communication. *See* Berd v. Lovelace, 21 Eng. Rep. 33 (Ch. 1577).

28. *See, e.g., Trammel*, 445 U.S. at 52 ("The ancient foundations for so sweeping a privilege have long since disappeared. Nowhere in the common-law world — indeed in any modern society — is a woman regarded as chattel or demeaned by a denial of a separate legal identity and the dignity associated with recognition as a whole human being.").

29. *See, e.g.*, MCCORMICK-1984, *supra* note 17, § 66, at 162-63 ("The privilege is an archaic survival of . . . a way of thinking about the marital relation that is today outmoded."); Chriss, *supra* note 8, at 247-50.

30. *See* Jaffee v. Redmond, 518 U.S. 1, 9-10 (1996).

31. *See* Swidler & Berlin v. United States, 118 S. Ct. 2081, 2086 (1998).

32. *See, e.g.*, People v. Stamaway, 521 N.W.2d 557 (Mich. 1994) (discussing statutory privilege for communications with social workers); Winegard v. Oxberger, 258 N.W.2d 847 (Iowa 1977) (recognizing reporter privilege); Matter of Photo Mktg. Ass'n Int'l, 327 N.W.2d 515 (Mich. Ct. App. 1982) (recognizing reporter privilege); State v. Knutson, 523 N.W.2d 909 (Minn. Ct. App. 1994) (discussing M.S.A § 595.023, which prohibits compelled disclosure of reporters' sources); *In re* Special Investigation No. 202, 452 A.2d 458 (Md. Ct. Spec. App. 1982) (discussing accountant-client privilege); People v. Paasche, 525 N.W.2d 914 (Mich. Ct. App. 1994) (discussing M.C.L.A. § 339.713, which created accountant-client privilege); Richards of Rockford, Inc. v. Pacific Gas & Elec. Co., 71 F.R.D. 388, 390-91 (N.D. Cal. 1976) (holding scholar may assert privilege).

"fostering the harmony and sanctity of the marriage relationship," as the Supreme Court has asserted,[33] nor do I agree that they promote full and frank disclosure between husbands and wives, as courts and commentators have suggested.[34]

Instead, I propose a new rationale for the marital privileges that recognizes that the privileges do not *shape* the conduct of husband or wife, rather, they *respond* to the loyalty — perhaps a misplaced loyalty — that compels the testifying spouse to protect the defendant. Viewed from this perspective, the privileges operate to benefit the witness-spouse, not the defendant, and their purpose is to protect him or her from the sanctions our legal system uses to force reluctant witnesses to testify truthfully in a court of law. The privileges recognize that, for some witness-spouses, it is too much to ask that they assist in their spouse's prosecution. Witness-spouses who choose to remain silent should therefore be spared from the penalties for contempt of court, because their choice is one that many law-abiding citizens would also make out of loyalty to a spouse, and our legal system generally does not hold its citizens to a higher standard than their judges can meet. At the same time, the witness-centered rationale discourages exercise of the privileges, because it recognizes that there is nogreater societal purpose to be served by the witness-spouse's silence. In sum, I argue that the current justifications for the privileges not only have it wrong, they have it backwards. Marital privileges do not create a bond of trust between two persons, as do the professional privileges, they simply make room for the loyalty between spouses that exists independently of laws governing marital conduct.

The witness-centered rationale I propose necessitates some radical changes to the current configuration of the privileges. First, it unifies the rationales behind the marital privileges, and therefore requires combining into one the two separate privileges that now protect the marital relationship. Second, it suggests that the method by which the privileges are currently exercised should be altered. As its name implies, a "privilege" not to testify is a right or an entitlement to remain silent. Witness-spouses are informed of this right, and if they choose to exercise it they need never take the stand. An entitlement not to testify is at odds with the witness-centered rationale that I have proposed, which merely tolerates — without condoning or encouraging — a spouse's silence. I therefore recommend abolishing the privilege altogether, and replacing it with an exemption for the witness-spouse from the penalties that typically accompany being held in contempt of court. The witness-spouse would not be penalized for failure to testify against the defendant, but he or she would be forced to take the stand, state a refusal to speak on the record, and be held in con-

33. Trammel v. United States, 445 U.S. 40, 44 (1980).

34. *See* McCormick-1984, *supra* note 17, § 86, at 201, Wigmore, *supra* note 10, § 2332.

tempt by the presiding judge. Even though the end result would be the same as in the ordinary application of the privileges — the witness-spouse escapes the penalties for refusing to testify — the difference in procedure would send an important message to the witness-spouse, defendant, and society that our legal system excuses, but does not support, a spouse's silence. This witness-centered rationale, and the accompanying reconfiguration of the privileges, should satisfy critics who find the current justifications for the privilege unconvincing.

This article is divided into four parts. Part I traces the development of the marital privileges from their origins in Sixteenth Century England to their current fractured application in American state and federal law. In Part II, I examine the five most common theories supporting the marital privileges, several of which were borrowed or extended from the justifications for the professional privileges.[35] Part II also explains how each of these theories fails to support, fully and adequately, the marital privileges. Frequent references to these inapposite justifications by courts and commentators have steadily eroded the doctrinal foundation of the privileges, creating meaningless exceptions and limitations that bear no relation to their purpose. Part III sets forth the witness-centered rationale for the marital privileges, which I hope will rejuvenate the privileges while discarding the antiquated conceptions of marriage on which they have thus far been premised. In Part IV, I describe how the privileges should be altered to accord with this new theory.

I. BACKGROUND

A. *The Origins of the Marital Privileges.*

For nearly as long as our legal system has been empowered to compel testimony, privileges have insulated special classes of testimony from the command of the court.[36] Evidentiary privileges can be divided into three categories: constitutional privileges protecting the defendant's right to exclude unconstitutionally acquired evidence,[37] and protecting the defendant from compelled self-incrimination;[38]

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35. "The law of privilege, to a great extent, treats family relationships just like other kinds of confidential relationships." *Privileged Communications, supra* note 11, at 1563.

36. "Testimony of witnesses . . . did not come to be a common source of proof in jury trials until the early 1500s and testimonial compulsion does not appear to have been authorized until the early part of Elizabeth's reign." WIGMORE, *supra* note 10, § 2290, at 542-43. Penalty was first imposed against witnesses who refused to testify after service of process after the passage of the Statute of Elizabeth in 1562. *See* WIGMORE, *supra* note 10, § 2190 at 65. The attorney-client privilege was well established by 1577. *See* Berd v. Lovelace, 21 Eng. Rep. 33 (Ch. 1577).

37. *See* U.S. CONST. amend. IV; Minnesota v. Dickerson, 508 U.S. 366 (1993).

38. *See* U.S. CONST. amend. V; Malloy v. Hogan, 378 U.S. 1, 7-8 (1964) (Fifth Amendment prohibits government from compelling defendants to incriminate themselves).

governmental privileges insulating government secrets[39] and informants' identities[40] from public disclosure; and relational privileges protecting participants in covered relationships from being compelled to testify about information shared with one another. Included in this last category are a variety of professional privileges and the marital privileges.

Under federal law and the laws of most states, two separate privileges protect marriage: the confidential communications privilege, which protects private marital communication, and the adverse testimony privilege, which insulates spouses from being compelled to incriminate one another.[41] Although these two privileges frequently overlap in practice, courts and commentators note that they originated at different times and most maintain that they serve different purposes.[42]

It is speculated that the adverse testimony privilege emerged from two now discarded canons of medieval jurisprudence: the rule prohibiting the accused from testifying on his own behalf and the doctrine of "unity" that merged the legal identity of a wife into that of her husband upon marriage.[43] If a man's testimony on his own behalf was inadmissible due to his personal stake in the matter, it followed that his wife's testimony was equally biased, and thus she must be disqualified as well.[44] As Blackstone stated in his *Commentaries*, "If they [the married couple] were admitted to be witnesses for each other, they would contradict the maxim of law, *Nemo in propria causa testis esse debet*

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39. *See, e.g.*, Bowles v. United States, 950 F.2d 154, 155 (4th Cir. 1991) (Trial court did not err in dismissing tort action against United States where "inquiry necessary for plaintiff to establish liability of the United States . . . would necessarily reveal matters covered by the state secrets privilege."); Zuckerbraun v. General Dynamics Corp., 935 F.2d 544, 545 (2d Cir. 1991).

40. *See, e.g.*, Lane v. United States, 321 F.2d 573, 575 (5th Cir. 1963) (government not required to divulge name of informant); Holman v. Cayce, 873 F.2d 944, 946 (6th Cir. 1989) (informant privilege applicable in civil cases). *See also* WIGMORE, *supra* note 10, § 2374 at 761.

41. *See* United States v. Lustig, 555 F.2d 737 (9th Cir. 1977) (Federal courts recognize two distinct privileges arising out of the marital relationship: the first bars one spouse from testifying against the other; the other privilege protects confidential marital communications.).

42. *See Privileged Communications, supra* note 11, at 1577 n.108 (1985); United States v. Ammar, 714 F.2d 238, 258 (3d Cir. 1983); 56 F.R.D. 183, 244-47 (1973) (proposed FED. R. EVID. 505).

43. *See* Trammel v. United States, 445 U.S. 40, 44 (1980).

44. Wigmore disagreed with this version of history. He speculated that the privilege arose out of the fealty a wife, children, and servants owed to the male head of the household: "In a day when the offense of petit treason by a wife or a servant — violence to the head of the household — was still recognized, it would seem unconscionable that the law should abet (as it were) a testimonial betrayal which came close enough to petit treason, and should virtually permit a wife to cause her husband's death." WIGMORE, *supra* note 10, § 2227, at 212. As support for the proposition, Wigmore noted that the early cases all concerned the privilege for a wife's testimony against her husband, and not the husband's against the wife. *See id.*

[No one ought to be a witness in his own cause]."[45] American courts simply adopted the English common law rule of spousal disqualification,[46] and by 1920, the Supreme Court commented that the disqualification of spouses was so well established in the common law as "hardly requiring mention."[47] Spousal disqualification was finally abolished in federal courts in 1933, when the Court ruled that a spouse may testify on the defendant's behalf.[48] The Court reasoned that interested witnesses were no longer prohibited from testifying, and it followed that the rule of spousal incompetency should also be discontinued.[49] The disqualification was thus transformed into a privilege, permitting the defendant-spouse to exclude adverse testimony by the witness-spouse.

During the long period in which spouses were completely prohibited from testifying in each other's cases, there was little need for a confidential communications privilege, for a spouse could only be compelled to reveal marital confidences in cases in which neither spouse was a party.[50] The confidential communications privilege was not explicitly recognized until the 1850s.[51]

In 1958, the Supreme Court revisited the adverse testimony privilege in *Hawkins v. United States*,[52] but refused to accept the government's argument that the witness-spouse, not the defendant, should exercise the privilege.[53] The Court found that the purpose of the rule was to preserve marital harmony, which it believed would be badly damaged if the witness-spouse testified against the defendant.[54]

The Supreme Court submitted its proposed Federal Rules of Evidence to Congress in 1973.[55] Proposed Federal Rule 505 abolished the confidential communications privilege, but retained the adverse testimony privilege empowering criminal defendants to bar their spouses from testifying against them.[56] The Advisory Committee commented that making the defendant-spouse the holder of the privilege

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45. Daniel R. Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599, 610 n.73 (1969-70).

46. *See* Stein v. Bowman, 38 U.S. 184, 194-97 (1839).

47. *See* Jim Fuey Moy v. United States, 254 U.S. 189, 195 (1920).

48. *See* Funk v. United States, 290 U.S. 371, 379 (1933).

49. *See id.* at 380.

50. *See* MCCORMICK-1984, *supra* note 17, § 78, at 189.

51. *See* WIGMORE, *supra* note 10, § 2333, at 644-45; *Privileged Communications*, *supra* note 11, at 1565.

52. *See* 358 U.S. 74 (1958).

53. *See id.* at 77.

54. *See id.* at 78 ("Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage.").

55. *See generally* S. Rep. No. 93-1277 (1974).

56. Proposed Rule 505 reads as follows:

Rule 505. Husband-Wife Privilege

(a) General Rule of Privilege. An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him.

was consistent with the Court's ruling in *Hawkins* as well as with the law in at least thirty jurisdictions.[57] Ultimately, Congress rejected all of the proposed rules concerning the testimonial privileges, enacting instead a single rule stating that the privileges "shall be governed by the principles of common law as they may be interpreted by the courts of the United States in light of reason and experience."[58] As a result, both the adverse testimony privilege and the confidential communications privilege survive in federal court. Many states retained both as part of the common law of privileges, while others enacted statutes codifying one or both into their written laws of evidence.

The Court modified the adverse testimony privilege in *Trammel v. United States*.[59] Reversing its decision in *Hawkins*, it ruled that reason and experience required granting control of the privilege to the witness-spouse.[60] The Court opined that if the witness-spouse was willing to testify against her husband the marriage was likely beyond repair.[61] However, the Court was careful to note that the decision did not directly affect the confidential communications privilege still held by the communicator in federal court, whether or not the communicator is the defendant.[62]

B. *Doctrinal Overview of the Marital Privileges*

1. Confidential Communications Privilege

Like the privileges insulating communications between doctors and patients, priests and penitents, and lawyers and clients, the confidential communications privilege only protects communication made in the course of the marital relationship.[63] Conversations before the wedding or after the divorce (or in a few cases, after separation) re-

(b) Who May Claim the Privilege. The privilege may be claimed by the accused or by the spouse on his behalf. The authority of the spouse to do so is presumed in the absence of evidence to the contrary.

(c) Exceptions. There is no privilege under this rule (1) in proceedings in which one spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other, or (2) as to matters occurring prior to the marriage, or (3) in proceedings in which a spouse is charged with importing an alien for prostitution or other immoral purpose or other offense in violation of 18 U.S.C.A. §§ 2421-2424, or with violation of other similar statutes.

56 F.R.D. 183, 244-47 (1973).

57. *See id.* at 245.

58. FED. R. EVID. 501.

59. 445 U.S. 40 (1980).

60. *See id.* at 47.

61. *See id.* at 52.

62. *See id.* at 51.

63. *See, e.g.*, United States v. Pensinger, 549 F.2d 1150 (8th Cir. 1977).

ceive no protection.[64] In some jurisdictions, the privilege can only be asserted by the communicating spouse; the listener is either forced to testify about the conversation or forced to remain silent at the speaker's will.[65] The common law rule, still followed by some states, permits either spouse to claim the privilege.[66] A third category of jurisdictions grants the privilege solely to the defendant, whether or not the defendant was the communicant.[67] The privilege applies in criminal proceedings and in some civil proceedings.[68]

There are exceptions to the confidential communications privilege. Most jurisdictions recognize the partner-in-crime exception, which suspends the privilege for communication relating to crimes jointly committed by the spouses.[69] A second exception, adopted from English common law, exists for crimes or torts committed by one spouse against the other.[70] Most jurisdictions refuse to apply the privilege in cases where one spouse is accused of committing a crime or a tort against the other.[71] In the states where the exception exists,[72] it is defined differently: there are jurisdictions in which the privilege is suspended only for crimes of bodily injury or violence by one spouse against the other,[73] while other jurisdictions require only that the defendant have committed a crime against his spouse.[74] Several jurisdic-

64. *See* JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 81, at 301 (4th ed. 1992) [hereinafter MCCORMICK-1992]; *see, e.g.*, State v. Watkins, 614 P.2d 835 (Ariz. 1980) (privilege does not cover domestic partners); United States v. Boatright, 446 F.2d 913 (5th Cir. 1971) (privilege denied because claimant failed to establish valid common law marriage).

65. *See Privileged Communications*, *supra* note 11, at 1571-72.

66. *See id.* at 1571.

67. *See id.* at 1572.

68. *See* WIGMORE, *supra* note 10, § 2338, at 666; *Privileged Communications*, *supra* note 11, at 1574.

69. *See, e.g.*, United States v. Mendoza, 574 F.2d 1373 (5th Cir. 1978).

70. *See* WIGMORE, *supra* note 10, § 2239, at 672; *see also* Wyatt v. United States, 362 U.S. 525, 526 (1960) ("The common law has long recognized an exception in the case of certain kinds of offenses committed by the party against his spouse."). It was famously applied in *Lord Audley's Case*, heard in 1631, at which Lady Audley was permitted to testify that her husband incited his colleagues to rape her. 123 Eng. Rep. 1140, 1141 (1631).

71. *See, e.g.*, 725 ILL. COMP. STAT. ANN. § 5/115-16 (West 1996); LA. CODE EVID. ANN. art. 504 (West 1995); 1915 Ala. Acts 846 § 1; DeBardeleben v. State, 77 So. 979 (Ala. Ct. App. 1918); State v. Peters, 444 S.E.2d 609, 611-12 (Ga. Ct. App. 1994).

72. Some state legislatures have written the exception into the statutes, *see, e.g.*, 725 ILL. COMP. STAT. ANN. § 5/115-16 (West 1996); LA. CODE EVID. ANN. art. 504 (West 1995), and in other states the courts have read the exception into the statute despite the lack of explicit language, *see e.g.*, DeBardeleben v. State, 77 So. 979 (Ala. Ct. App. 1918); State v. Peters, 444 S.E.2d 609, 611-12 (Ga. Ct. App. 1994).

73. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 9-106 (1995) (suspending privilege when one spouse commits "assault and battery" against the other); CONN. GEN. STAT. ANN. § 54-84a (West 1994) (exception to privilege applies when one spouse "received personal violence from the other").

74. *See* ALASKA R. EVID. 505(a)(2)(d)(i); ARIZ. REV. STAT. ANN. § 13-4062 (West 1989); CAL. EVID. CODE §§ 972, 985 (West 1990); COLO. REV. STAT. § 13-90-107

tions extend this exception to offenses committed against members of the household, or crimes against a third person committed in the same course of conduct.[75]

The confidential communications privilege, straightforward when applied to professional relationships, is more complicated in the marital context. Difficulties occur when defining communications between spouses. Unlike professional relationships, marriages do not consist entirely, or even primarily, of oral and written communication.[76] By virtue of lengthy and intimate companionship, spouses communicate using a great variety of nonverbal signals. Silence, a pointed finger, or a shrug can all send messages as clear as the spoken word. Even the manner in which a spouse walks around the house, or the clothes she chooses to wear, can convey meaning to her partner.

Many courts attempt to limit the privilege to intentional communications; for instance, a nod is privileged, a yawn is not.[77] But if the purpose of the confidential communications privilege is to protect marital privacy — as many contend — this boundary is misplaced. Recognizing the inconsistency, a roughly equal number of courts conclude that communications encompass a wider range of actions.[78] Some hold that all acts performed privately in the spouse's presence constitute privileged communications,[79] while others privilege all in-

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(1989); HAW. R. EVID. 505; ILL. COMP. STAT. ANN. 125/6 (West 1993); IOWA CODE ANN. §§ 622.8, 622.9 (West 1995); KY. R. EVID. 504(c)(2)(A); NEB. REV. STAT. § 27-505 (1989); N.J. STAT. ANN. § 2A:84A-17 (West 1990); N.C. GEN. STAT. § 8-57 (1986); OHIO REV. CODE ANN. § 2945.42 (Anderson 1994), OHIO R. EVID. 601; OR. REV. STAT. § 40.255 (1988); UTAH CONST. Art I § 12; UTAH CODE ANN. § 5.60.060 (1990); VA. CODE ANN. § 19.2-271.2 (Michie 1990); WASH. REV. CODE ANN. § 5.60.060 (West 1990); W. VA. CODE § 57-3-3 (1995); WYO. STAT. ANN. § 1-12-104 (Michie 1988).

75. *See, e.g.*, United States v. Allery, 526 F.2d 1362 (8th Cir. 1975) (privilege did not apply when husband charged with child abuse); People v. Love, 339 N.W.2d 493 (Mich. Ct. App. 1983) (privilege did not apply when husband charged with murdering third person in same episode as his assault on his wife).

76. The Advisory Committee on the Federal Rules of Evidence commented in its note on proposed Rule 505 that the "relationships from which [the] professional privileges arise are essentially and almost exclusively verbal in nature, quite unlike marriage." *See supra* note 56. The Advisory Committee used this observation as a basis for eliminating the confidential communications privilege.

77. *See* MCCORMICK-1992, *supra* note 64, § 79, at 296 ("It seems . . . that logic and policy should cause the courts to halt with communications as the farthest boundary line of the privilege, and a substantial number have held steadfast at this line."). *See, e.g.*, State v. Smith, 384 A.2d 687 (Me. 1978) (husband's display of items to wife was, under circumstances, equivalent to assertion, "I have stolen a gun and camera"); Pereira v. United States, 347 U.S. 1 (1954); United States v. Estes, 793 F.2d 465 (2d Cir. 1986); United States v. Smith, 533 F.2d 1077 (8th Cir. 1976) (testimony of wife that husband placed package of heroin in her underclothing did not violate communications privilege because no message was intended to be conveyed).

78. *See Privileged Communications, supra* note 11, at 1572 n.68.

79. *See, e.g.*, Smith v. State, 344 So.2d 915 (Fla. Dist. Ct. App. 1977) (wide variety of acts and comments incident to an elaborate attempt to dispose body of husband's murder victim held to be communications); Shepherd v. State, 277 N.E.2d 165 (Ind. 1971) (husband's testimony against former wife alleging she had driven car for him

formation acquired by the spouse as a result of the marital relationship.[80] By extending the privilege beyond intended communications, these courts have unintentionally blurred the distinction between the confidential communications privilege and the adverse testimony privilege.

2. Adverse Testimony Privilege

The aptly named adverse testimony privilege prevents witnesses from being compelled to give testimony that could incriminate their spouses.[81] It does not suspend the obligation to testify when the prosecution has granted the defendant-spouse immunity,[82] or when the information is neutral or helpful to the defendant-spouse's case.[83] The privilege can only be invoked in criminal proceedings.[84] It is further limited to testimony alone; handwriting exemplars, fingerprints, and out of court statements to third persons are excepted.[85]

In contrast to the confidential communications privilege, the defendant and witness must be married to one another at the time the adverse testimony privilege is asserted,[86] and the privilege extends backward to encompass testimony concerning events before the marriage.[87] Such a rule brings with it the risk of strategic behavior. It is feared that criminal conspirators will marry shortly before trial so that both may invoke the privilege, thereby insulating themselves from

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during burglary held improperly admitted because participation in crime was a matter in confidence between the two); Menefee v. Commission, 55 S.E.2d 9 (Va. 1949) (wife's testimony concerning her husband's leaving home before the robbery, the time at which he returned, and his placing of a pistol on the mantle-piece held privileged as "communications privately made"). *See also* McCormick-1992, *supra* note 64, §79, at 297.

80. *See* McCormick-1992, *supra* note 64, § 79, at 297; Prudential Ins. Co. v. Pierce's Administratrix, 109 S.W.2d 616, 617 (Ky. 1937) (wife's knowledge of the record of husband's birth in the family Bible was privileged).

81. *See In re* Martenson, 779 F.2d 461, 462 (8th Cir. 1985).

82. *See In re* Grand Jury Proceedings, 443 F. Supp. 1273, 1280 (D.C.S.D. 1978).

83. Some jurisdictions extend the privilege to all testimony by a witness-spouse, whether or not that testimony is incriminating. *See* D.C. Code Ann. §14-306(a) (1996); Mont. Code Ann. § 26-1-802 (1985). Traditionally, the privilege requires that the testimony be adverse to the defendant-spouse, and courts will not apply the privilege to prevent testimony on "objective facts having no per se effect on the party spouse." United States v. Brown, 605 F.2d 389, 396 (8th Cir. 1979). *See also In re* Grand Jury Proceedings, 664 F.2d 423, 430 (5th Cir. 1981).

84. *See* Murl. A. Larkin, Federal Testimonial Privileges § 4.02, at 4-2 (1982).

85. *See Privileged Communications, supra* note 11, at 1570; United States v. Scott, 784 F.2d 787 (7th Cir. 1986); United States v. Thomann, 609 F.2d 560, 564 (1st Cir. 1979); United States v. McKeon, 558 F. Supp. 1243, 1245-47 (E.D.N.Y. 1983); State v. Henderson, 268 N.W.2d 173, 177-78 (Iowa 1978). *See, e.g.*, United States v. Archer, 733 F.2d 354, 358-59 (5th Cir. 1984); Ballard v. State, 311 S.E.2d 453 (Ga. 1984).

86. *See* United States v. Lilley, 581 F.2d 182, 189 (8th Cir. 1978); United States v. Smith, 533 F.2d 1077, 1078 (8th Cir. 1978) (privilege does not survive dissolution of the marriage prior to trial).

87. *See* United States v. Owens, 424 F. Supp. 421, 422 (E.D. Tenn. 1976).

having to testify against one another.[88] Jeremy Bentham, an early opponent of the adverse testimony privilege, articulated this fear: "A miscreant, then, who could be convicted of an atrocious crime by the testimony of a woman, has nothing to fear, if he has only time to go through the marriage ceremony!"[89] Courts are generally suspicious of unions entered into after commencement of legal proceedings,[90] and will not permit the couple to invoke the privilege if they conclude the marriage is a sham.[91]

Federal circuit courts are divided over whether the privilege should apply if the husband and wife were both involved in the illegal activity. The Seventh and Tenth Circuits adopted a partner-in-crime exception, explaining that these marriages are unworthy of legal protection.[92] The Second and Third Circuits disagreed, reasoning that such marriages may be the only redeeming feature of these couples' lives.[93] The Third Circuit has optimistically speculated that "the marriage may well serve as a restraining influence on couples against future antisocial acts and may tend to help future integration of the spouses back into society."[94]

Courts uniformly recognize an exception to the adverse testimony privilege for crimes committed by one spouse against the other, with the same variety in scope and application as described for the confidential communications privilege.[95]

The adverse testimony privilege has been under continuous attack ever since Wigmore roundly criticized it as a "mere anachronism in legal theory" that has no place in modern jurisprudence.[96] Com-

88. *See generally* JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 238 (M. Dumont ed., 1825).

89. *Id.*

90. *See* United States v. Saniti, 604 F.2d 603, 604 (1979) ("[T]here is a narrow exception to the husband-wife privilege when the marriage is not entered into in good faith."); *see also In re* Grand Jury Proceedings, 777 F.2d 508 (9th Cir. 1985) (although the privilege does not apply to "sham" marriages, mere suspicious timing of a marriage doesn't support a finding of a sham marriage alone); State v. Anderson, 396 P.2d 558 (Or. 1964).

91. *See* United States v. Mathis, 559 F.2d 294, 294 (5th Cir. 1977) (privilege did not apply when, after promises and threats, defendant and prospective witness who had been divorced remarried shortly before trial); United States v. Brown, 605 F.2d 389, 396 (8th Cir. 1979) (privilege denied to couple who had been separated for a significant period of time).

92. *See, e.g.*, United States v. Clark, 712 F.2d 299, 302 (7th Cir. 1983) ("The public interest in discouraging a criminal from enlisting the aid of his or her spouse as an accomplice outweighs the interest in protecting the marriage.").

93. *See In re* Grand Jury Subpoena United States, 755 F.2d 1022, 1025-28 (2d Cir. 1985); *In re* Malfitano, 633 F.2d 276 (3d Cir. 1980) (Court reversed the wife's contempt citation for failing to testify.).

94. *In re* Malfitano, 633 F.2d at 280.

95. *See, e.g.*, WIGMORE, *supra* note 10, § 2338; Trammel v. United States, 445 U.S. 40, 46 n.7 (1980); Herman v. United States, 220 F.2d 226 (4th Cir. 1955). *See also supra* notes 69-74 and accompanying text.

96. *See* WIGMORE, *supra* note 10, § 2228, at 221.

mentators and lawmakers have attempted to abolish the privilege, arguing that the broad swath of information removed from the court's purview by the privilege is antithetical to the truth-seeking goals of our judicial system.[97] Responding to calls to update the privilege, the Supreme Court held that the choice to exercise the privilege should lie with the witness-spouse alone.[98] Most states have since adopted this limitation.[99]

Frequent disruptions in the modern marriage continue to complicate the privileges. Occasionally, couples who have been separated for years, but are still legally married, attempt to assert the adverse testimony privilege.[100] Courts closely examine the relationships of the couples before them, refusing to honor the privilege if the marriage exists in name only.[101] Some courts have gone so far as to bar application of the adverse testimony privilege if they conclude the marriage is not a happy one.[102] One court went in the opposite direction, suspending the privilege because it found that the marriage was so strong that it could withstand the wife's testimony against her husband.[103] Such decisions have been criticized by those who argue that it is inappropriate and presumptuous for judges to pronounce upon the quality of the relationship in order to determine whether the couple is emotionally as well as legally married.[104]

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97. *See, e.g.*, WIGMORE, *supra* note 10, § 2228, at 221; Medine, *supra* note 26; Chriss, *supra* note 8.

98. *See Trammel*, 445 U.S. at 53.

99. *See, e.g.*, Billingsly v. State, 402 So. 2d 1052 (Ala. 1980); Loesche v. State, 620 P.2d 646 (Alaska 1980); Bowler v. United States, 480 A.2d 678 (D.C. App. Ct. 1984). *But see In re* Bozarth, 779 P.2d 1346 (Colo. 1989).

100. *See In re* Witness Before Grand Jury, 791 F.2d 234, 237 (2d Cir. 1986) (court denied privilege because the couple had been separated for twelve years and the husband now lived with another woman with whom he had had a child).

101. For example, in *United States v. Roberson*, 859 F.2d 1376, 1376 (9th Cir. 1988), the court allowed defendant's estranged wife to testify about the defendant's statements to her because the court determined that the couple was separated without possibility of reconciliation at the time of the conversation.

102. *See, e.g.*, United States v. Cameron, 556 F.2d 752 (5th Cir. 1977).

103. *See* Ryan v. Commissioner, 568 F.2d 531, 543-45 (7th Cir. 1977).

104. *See, e.g.*, United States v. Byrd, 750 F.2d 585, 592 (7th Cir. 1984) ("[T]he making of the determination of when a marriage has deteriorated to the point when its communications are no longer confidential would involve courts in difficult factual inquiries in which we are reluctant to require trial courts to become involved."); *In re Malfitano*, 633 F.2d at 279 ("[G]iven the theoretical and empirical difficulties of assessing the social utility of such marriages, either in general or in each case, we do not think that courts should 'condition the privilege . . . on a judicial determination that the marriage is a happy or successful one.'") (quoting United States v. Lilley, 581 F.2d 182, 189 (8th Cir. 1978)). Judge Learned Hand refused to allow a wife to testify after her husband had deserted her and remarried because he did not believe it was the court's role to inquire as to the viability of the marriage. *See* United States v. Walker, 176 F.2d 564, 568 (2d Cir. 1949). *See also* Medine, *supra* note 26, at 532; Steven Gofman, *"Honey, the Judge Says We're History": Abrogating the Marital Privilege: Modern Doctrines of Marital Worthiness*, 77 CORNELL L. REV. 843, 845 (1992).

As this discussion demonstrates, the doctrine of the marital privileges is in some disarray. Courts and legislators debate when the privileges can be exercised, whether the defendant-spouse or the witness-spouse controls the privilege, and the judicial role in making these determinations. Underlying this debate is the ultimate question of what purpose the privileges serve. There will be no consistency in application until a clear conception of the privileges' normative purpose emerges from the fray.

II. Refuting the Commonly Asserted Rationales for the Marital Privileges

Over the course of their long history, a number of different rationales have been marshaled in support of the marital privileges. Many of these rationales aim to justify the existence of all currently recognized testimonial privileges under a single theory.[105] While these generalized theories adequately support the variety of professional privileges — attorney-client, doctor-patient, priest-penitent, and the like — they are ill-suited to justify the marital privileges. Some commentators, recognizing that the marital privileges are unique, have analyzed them apart from the main body of privilege law.[106] They have attempted to ground the privileges in norms of privacy,[107] or in the need to protect or preserve the marriages of the individual couples appearing as witnesses and defendants before the court.[108] These marriage-centered rationales also fail to support the marital privileges because they are based on outdated conceptions of marriage, or idealized so as to be inapplicable to the unstable and sometimes violent marriages to which the privileges are often applied.

A. *Wigmore's Utilitarian Rationale: Promoting Socially Beneficial Relationships*

The utilitarian rationale, first forwarded by Wigmore, is the most frequently cited justification for the testimonial privileges.[109] Wigmore reasoned that the privileges serve to encourage communication

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However, some commentators have encouraged courts to examine the relationship between the witness-spouse and the party-spouse as a means of limiting the privilege to those cases in which it will aid domestic harmony. *See, e.g.*, Paul F. Rothstein, *A Re-Evaluation of the Privilege Against Adverse Spousal Testimony in the Light of its Purpose*, 12 Int'l & Comp. L.Q. 1189, 1194 (1963).

105. *See, e.g.*, Wigmore, *supra* note 10 (applying utilitarian rationale to justify all privileges).

106. *See Privileged Communications, supra* note 11, at 1578, 1583-88.

107. *See, e.g.*, Charles L. Black, Jr., *The Marital and Physician Privileges — A Reprint of a Letter to a Congressman*, 1975 Duke L.J. 45, 49; Lee W. Borden, *In Defense of the Privilege for Confidential Marital Communications*, 39 Ala. L. Rev. 575, 580 (1978).

108. *See Privileged Communications, supra* note 11, at 1580; Richard O. Lempert, *A Right to Every Woman's Evidence*, 66 Iowa L. Rev. 725, 731 n.18 (1981).

109. *See* Wigmore, *supra* note 10, § 2285, at 527; *see also* McCormick-1984, *supra* note 17, § 72, at 171 (utilitarian justification for the privileges has been widely ac-

necessary for the formation and functioning of socially beneficial relationships.[110] From a utilitarian perspective, the privileges are justified if the social benefits of recognizing a privilege outweigh the harm resulting from the loss of information in legal proceedings.[111]

Only the systemic costs and benefits are considered under the utilitarian analysis.[112] Courts do not attempt to measure the value of the particular relationship at issue in the proceedings, or the value of testimony to be excluded in adjudicating the case at hand, but instead perform the costs/benefits balancing in light of the proposed privilege's effect on the entire class of relationships, and all future litigation involving such relationships.[113] Under this approach, courts assume that the testimonial privileges foster the formation of all covered relationships, of which only a small percentage will ever be involved in litigation.[114] As a result, the utilitarian analysis favors the recognition of testimonial privileges, because the number of relationships fostered by a privilege will always outweigh the loss of evidence in the comparatively small number of court proceedings in which the privilege is asserted.[115]

This method of measuring the value of the privileges presumes, of course, that the general public is aware of the legal privileges that protect their communications from compelled courtroom disclosure.[116] Without this presumption, the value of the privileges is lim-

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cepted by the courts and has largely conditioned the development of thinking about the privileges); *Privileged Communication, supra* note 11, at 1472.

110. *See* WIGMORE, *supra* note 10, § 2285, at 527.

111. Wigmore set out four conditions he believed must be met before a privilege should be granted:

(1) The communications must originate in a confidence that they will not be disclosed;
(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
(3) The relation must be one which in the opinion of the community must be sedulously fostered;
(4) The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.

Id. § 2285, at 527.

Wigmore's four-part test is designed for privileges protecting communications, such as the lawyer-client, doctor-patient, and confidential communications privilege. *See id.*, § 2332, at 642. The basic idea can be applied to the adverse testimony privilege, however, by focusing on whether the privilege helps foster, and keep alive, marriages.

112. *See id.* § 2332, at 642 & § 2380(a), at 829-30.

113. *See Privileged Communications, supra* note 11, at 1473.

114. "For in protecting those relatively few confidential utterances that do bear upon concrete litigation, the law protects all those that may." Thomas G. Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 92 (1973).

115. *See Privileged Communications, supra* note 11, at 1475 n.28.

116. *See id.* at 1579.

ited to promoting the future relationships of those educated through litigation;[117] while the harm, as measured by loss of testimony, remains unchanged.[118]

Not surprisingly, the degree to which the public is aware of the privileges and acts on that knowledge is an essential factor in determining the utility of the marital privileges. Unfortunately, there is no consensus on the issue. Empirical studies are outdated[119] and conflicting.[120] Even without hard empirical data, however, it is logical to assume that the public is more familiar with the professional than the marital privileges.[121] Comparing the traditional professional-lay person relationship with the marital relationship demonstrates why this is so.

Privileging professional relationships educates those who search out professional help, and that information seeps into the pool of knowledge possessed by the general public.[122] Professionals have good reason to advertise the privileges' protection, for it makes their services more attractive to the general public. In contrast, married couples only come to learn of the privilege after one member of the couple is involved in litigation and the other is called to testify.[123] Privileging marital communications, therefore, benefits only the minority of marital relationships in which one spouse has independent knowledge of the privilege.[124] As two commentators have argued,

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117. *See id.* at 1580 n.126.

118. *See id.*

119. For example, one frequently cited article claiming that the privileges are not widely known is over sixty years old, and therefore is based on data collected before the advent of mass media. *See* Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675, 682 (1929).

120. *See Privileged Communications*, *supra* note 11, at 1474, 1579 n.122 (noting that empirical evidence is conflicting). *Compare* Hutchins & Slesinger, *supra* note 119, at 682 ("[V]ery few people ever get into court, and practically no one outside the legal profession knows anything about the rules regarding privileged communications between spouses.") *and* FED. R. EVID. 505(a) advisory committee note, 56 F.R.D. 183, 246 (1973) ("Nor can it be assumed that marital conduct will be affected by a privilege for confidential communications of whose existence the parties in all likelihood are unaware.") *with* Mark Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privileges*, 61 CAL. L. REV. 1353, 1374 (1973) (arguing that expanded media coverage has led to "increased public awareness of legal concepts such as privileges").

121. *See Privileged Communications*, *supra* note 11, at 1476.

122. The Advisory Committee Note to proposed Federal Rule of Evidence 505 noted that the professional privileges "have as one party a professional person who can be expected to inform the other of the existence of the privilege." 56 F.R.D. 183, 246 (1973).

123. *See Privileged Communications*, *supra* note 11, at 1588-89.

124. However, while the public might not be as familiar with marital privileges, it could be argued that the *absence* of a privilege would become public knowledge, which would then discourage marriages, or at least communication within marriages. Under a utilitarian analysis, the harm resulting from termination of the marital privileges would therefore have to be compared with the benefit to the relationship in light of the public's current state of ignorance. *See id.* at 1475.

"[O]ne may seriously doubt that the law of evidence had any formative effect on family life in general. Too few people get into court, and the adjective law is little known outside of it."[125]

In addition, the underlying premise of the utilitarian analysis is at odds with the nature of the marital relationship. The utilitarian rationale assumes that, without the privilege, socially beneficial communication would be chilled, and socially beneficial relationships would be disrupted or never even begun.[126] The assumption is justified in the context of the professional-lay person relationship: absent the privileges, it is likely that patients would hide symptoms from doctors, penitents would abstain from confessing to priests, and clients would not share incriminating information with lawyers. Or worse, individuals in need of professional assistance would never seek it out in the first place, preferring to go without help rather than take the risk that their actions and words will be used against them in court. Relationships protected by the professional privileges are often formed during personal crises that may carry legal consequences. It is entirely reasonable to assume that some persons who could benefit from medical treatment, religious guidance, or legal advice would avoid these sources of support if confidential communications were not assured.

The same reasoning does not apply to relationships between husbands and wives. The decision to marry is based on a myriad of factors; it is hard to believe that the marital privileges could ever play a significant role. Spouses will freely communicate and engage in unguarded behavior because they trust one another, not because a legal privilege protects their communications.[127] Indeed, it could be argued that any marriage in which the marital privileges provide the motivation for the union, or for the sharing of confidences once married, is not a relationship worth protecting.

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125. Hutchins & Slesinger, *supra* note 119, at 677. However, it is again worth noting that Hutchins & Slesinger were writing over 60 years ago; public awareness of the privileges has likely increased since then.

126. *See* WIGMORE, *supra* note 10, § 2285, at 527; *see also Privileged Communications, supra* note 11, at 1472.

127. *See Privileged Communications, supra* note 11, at 1580 n.124 (arguing that family members should not be viewed as rational actors responding to incentives provided by the legal system).

Although Wigmore believed that the confidential communications privilege qualified under his four-factor test, he also expressed doubt that the privilege fulfilled the fourth factor because "the occasional compulsory disclosure in court of even the most intimate marital communication would not in fact affect to any perceptible degree the extent to which spouses share confidences." WIGMORE, *supra* note 10, § 2332, at 642. Nevertheless, he accepted the privilege because the first three conditions "so fully justified" it and because "compulsory disclosure might at least cast a cloud upon an essential aspect of the institution of marriage." *Id.* at 643.

B. *The Power Theory*

The most cynical of the popularly forwarded explanations for the testimonial privileges posits that the privileges were developed by politically powerful subgroups to insulate themselves from the obligation to testify.[128] The power theory provides only an explanation, and not a justification, for the existence of the privileges.[129]

The history of the professional privileges supports the power theory. The attorney-client privilege originated from the judicial reluctance to pressure a "gentleman" to break his oath of secrecy.[130] The professional privileges enhance the status of doctors and lawyers — groups with the political clout to get them enacted into law. Wigmore, after noting that the physician-patient privilege did not exist at common law, attributed its codification to the "weight of the professional medical opinion pressing upon the legislature."[131] Congress vetoed the proposed Federal Rules of Evidence, which attempted to constrict or abolish many of the privileges, at least in part because of lobbying efforts by these protected groups.[132]

The "power theory" is at its weakest when applied to the marital privileges. Lawyers, doctors, and members of the clergy wield political influence; married persons, on the whole, do not. A marriage license does not necessarily raise the economic or social status of the holder, as does a law or medical degree.[133]

Proponents of the power theory counter that, just as the professional privileges arose from legal favoritism of the upper classes, the marital privileges grew out of a legal tradition that promoted husbands' domination over their wives.[134] Spousal privileges emerged in a world in which husbands both controlled and provided for the members of their households.[135] The male head of the household was responsible for disciplining his wife, children, and servants,[136] and concomitantly could be held legally responsible for their crimes.[137] If a household member murdered the male head, the crime was labeled "petit-treason," reflecting the husband's status as "sovereign" of his family and the loyalty that his charges owed him.[138] Power theorists

128. *See Privileged Communications, supra* note 11, at 1493.
129. *See id.* at 1586.
130. *See id.* at 1495.
131. WIGMORE, *supra* note 10, § 2380(a), at 831.
132. *See id.*
133. *See, e.g.*, Reutlinger, *supra* note 120; Krattenmaker, *supra* note 114.
134. *See Privileged Communications, supra* note 11, at 1586.
135. *See* 1 WOMEN IN AMERICAN LAW 430 (Marlene Stein Wortman ed., 1985).
136. *See* Riva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2123 (1996).
137. "[W]here a crime . . . was committed by a married woman conjointly with or in the presence of her husband, prima facie she was not criminally liable, as it was presumed that she acted in obedience to his commands and under his coercion." O'Donnell v. State, 117 P.2d 139, 141 (Okla. Crim. App. 1941).
138. *See* WIGMORE, *supra* note 10, § 2227, at 212.

note that from the very beginning, the privileges operated to protect husband-defendants from the incriminating testimony of their wives,[139] and they continue to do so today.[140] One law professor has estimated that ninety percent of the time the privileges are invoked to prevent wives from testifying against their husbands.[141]

Although the power theory provides a credible explanation for why the privileges came into being, it only weakens the case for their continued survival. If it is true that the privileges are nothing more than legal favoritism for the politically influential, they are antithetical to the equality principle underlying our system of justice. To withstand the battery of criticism, marital privileges must be justified, not merely explained.

C. *The Image Theory*

The image theory conceives of the privileges as serving to protect the reputation of the legal system by excluding unreliable testimony from the courtroom.[142] This theory assumes that, absent such privileges, spouses and professionals would either refuse to testify, or would lie under oath to protect the confidences of their client, patient, spouse, or confessor.[143] Widespread acts of perjury and contempt threaten the accuracy of verdicts and public confidence in the legal system. Advocates of the image theory reason that the privileges exist to protect the reputation of the justice system by insulating these unreliable witnesses from being compelled to testify.[144]

The premise of the image theory is questionable, at least as applied to the professional privileges. It is farfetched to conclude that, absent the privileges' protection, lawyers and psychiatrists would regularly subject themselves to sanctions for perjury or contempt for the benefit of their clients. Members of these professions value the authority of existing political institutions. If the privileges were abolished, it is more likely that lawyers, priests, doctors, and other covered professionals would simply warn their clients of the lack of confidentiality at the start of the relationship, rather than risking their careers by lying under oath or disobeying court orders to testify.

Far more realistic is the assumption that, absent a privilege, spouses might lie or refuse to testify in order to protect their partners.

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139. *See id.* (noting that early cases all exempt wives from the obligation to testify against husbands, and not husbands from testifying against wives).

140. *See Privileged Communications, supra* note 11, at 1587; Lempert, *supra* note 108.

141. *See Privileged Communications, supra* note 11, at 1587 n.170.

142. *See id.* at 1498-99, 1585.

143. *See id.* at 1499, 1585 ("[P]rivilege holders seem to constitute those groups most likely to respond to a court order by lying or refusing to testify. They are bound by strong loyalties or oaths of confidentiality, often supported by professional codes of ethics and the threat of professional sanctions.").

144. *See id.* at 1585.

Lawyers and doctors may be virtual strangers to their clients, while spouses are likely to share a personal history and an emotional bond. This difference is precisely what makes the privileges so important in fostering professional-lay person relationships, and so puzzling in the context of relations between spouses. Lawyers, doctors, priests, and social workers must inspire trust and confidence in the people they serve. They rely on legal and professional rules that govern the relationship to synthetically create trust where none would naturally exist.[145] Between spouses, it is their personal relationship, and not legal rules, that generates loyalty.[146] Without privileges insulating them from the obligation to testify, some spouses would likely lie or refuse to testify rather than incriminate their partners.

Nevertheless, the marital privileges cannot be rationalized on the ground that they protect the image of the courts. Our legal system is well-equipped to deal with biased and reluctant witnesses. All witnesses must take an oath to be truthful and subject themselves to cross-examination.[147] The jury will be informed of the witness-spouse's relationship with the defendant, and can discount that witness' testimony accordingly. If the witness lies, she is subject to penalty for perjury.[148] If the witness refuses to testify at all, she can be held in contempt of court.[149] These devices suffice to ensure the truthfulness of most witnesses, or at least the judge's and jury's ability to gauge their credibility. Excusing all unwilling spouses from the obligation to testify goes too far if protecting public faith in verdicts is the only rationale. There is no reason to assume that verdicts will be more accurate because loyal spouses are excluded rather than given the opportunity to appear before the jury and have their stories tested through cross-examination.

D. *The "Preservation of Marriage" Rationale*

The theories summarized thus far bundle the professional and marital privileges together under a single rationale, which is partly why they have failed. The relationship between spouses cannot be equated with those between professionals and their clients. It follows that the legal privileges protecting these two categories of relationships also serve different purposes. Acknowledging that the marital privileges are *sui generis*, some courts have grounded justifications for

145. *Cf.* Trammel v. United States, 445 U.S. 40, 51 (1980) (The professional privileges "are rooted in the imperative need for confidence and trust.").

146. "What encourages [spouses] to fullest frankness is not the assurance of a courtroom privilege, but the trust they place in the loyalty and discretion of the other." McCormick-1984, *supra* note 17, § 86, at 309.

147. *See id.* § 19, at 47 ("For two centuries, common law judges and lawyers have regarded the opportunity to cross-examine as an essential safeguard of the accuracy and completeness of testimony ").

148. *See, e.g.*, 18 U.S.C. § 1623 (1998).

149. *See, e.g.*, 18 U.S.C. § 401.

the marital privileges in the unique institution of marriage itself, concluding that the privileges preserve domestic harmony.[150] They reason that absent the privileges, spouses would be forced to incriminate one another, causing irreparable injury to their relationship.

In its most recent case addressing the marital privileges, the Supreme Court relied heavily on the "preservation of the marriage" rationale.[151] *Trammel v. United States* concerned a husband and wife accused of drug running.[152] The prosecution offered immunity to the wife in exchange for her testimony against her husband.[153] She was willing to testify, but her husband invoked the adverse testimony privilege to prevent her from doing so.[154] The Supreme Court rejected application of the privilege in such circumstances.[155]

According to the Court, the marital relationship — which the Court has referred to as "the best solace of human existence"[156] — is worthy of the privilege's protection.[157] However, the Court reasoned that if one spouse was willing to testify against the other, "whatever the motivation," there was "probably little in the way of marital harmony for the privilege to preserve."[158] At that point, the marriage was beyond repair and did not merit the privilege's protection.

The Court further reasoned that marriages might actually suffer under a system in which the accused retained control of the adverse testimony privilege.[159] Pointing to the facts of *Trammel*, the Court noted that prosecutors would not offer such immunity deals if they knew that the defendant could bar his spouse from testifying against him.[160] As a result, the privilege would "permit one spouse to escape justice at the expense of the other," which itself could cause marital discord.[161]

Ironically, *Trammel* has been criticized as undermining the privilege's ability to preserve domestic harmony.[162] As a result of that opinion, the witness-spouse controls the adverse testimony privilege in federal court, and many states have altered their statutes to accord

150. *See, e.g., Trammel*, 445 U.S. at 44; *In re* Malfitano 633 F.2d 276, 277 (3d Cir. 1980); United States v. Tsinnijinnie, 601 F.2d 1035, 1038 (9th Cir. 1979); Ryan v. Commissioner, 568 F.2d 531, 543-45 (7th Cir. 1977).

151. *See Trammel*, 445 U.S. at 40.

152. *See id.*

153. *See id.* at 42-43.

154. *See id.*

155. *See id.* at 53.

156. *Id.* at 51.

157. *See id.* at 53.

158. *Id.* at 52.

159. *See id.*

160. *See id.*

161. *Id.*

162. *See In re* Malfitano, 633 F.2d 276, 278-79 (3d Cir. 1980) ("Where the spouse does not want to testify, the only way to get her testimony will be to accuse her. This will put pressure on her to testify, perhaps at the expense of her spouse, to protect herself."); Medine, *supra* note 26, at 546 n.143.

with this change in federal law.[163] Some commentators have accused prosecutors of taking advantage of the privilege's new configuration by bringing trumped-up charges against a witness-spouse simply to pressure him into waiving the privilege.[164] Once a spouse is offered immunity or a lenient plea bargain in return for his voluntary testimony, it can be argued that the marriage will be damaged whether or not he accepts the deal.[165] If he testifies, he will incriminate his wife; if he doesn't, he himself is subject to criminal penalty. The witness-spouse's dilemma is therefore similar to what it would have been without the privilege's protection: he must testify, or face legal penalty for failing to do so. Either choice will place tremendous strain on the marriage. Arguably, the relationship would suffer less were the witness-spouse simply compelled to testify in all cases, rather than choosing to testify in order to receive the benefits of immunity or a reduction in charges. The opinion in *Trammel* failed to foresee the way in which prosecutors, husbands, and wives would interact under the new rule.

The Court also neglected to explain why the legal system should protect the relationship between a defendant and his spouse at the cost of losing valuable testimony. In *Trammel*, the Court did not claim that the adverse spousal testimony privilege promoted the institution of marriage.[166] Rather, the Court viewed the privilege in less ambitious terms, describing it as benefiting only the small subset of marriages in which one member of the couple faces criminal charges and the other possesses incriminating information.[167] It is questionable whether these marriages are even worth preserving. Perhaps the privilege only protects relationships between criminal conspirators, safely plotting together with the knowledge that they are shielded from conviction because each can rely on the other's silence. If it goes too far to argue that the marital privileges could encourage criminal activity, it takes no stretch of the imagination to realize that the privileges may operate to protect the least healthy and least socially productive relationships. The loss of a spouse's testimony to the truth-seeking process is too high a price to pay for the benefit of sustaining such relationships.[168]

Moreover, the goal of preserving marriage at the expense of reaching a correct outcome in a criminal proceeding is difficult to justify at a time when marriages in the United States frequently end in

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163. *See* Reagan, *supra* note 12, at 33.

164. *See In re* Malfitano, 633 F.2d at 278-79; Medine, *supra* note 26, at 546 n.143.

165. *See, e.g.*, Lempert, *supra* note 108, at 733-37.

166. *See generally Trammel*, 445 U.S. 40.

167. *See id.* at 52 (commenting that the modern justification for the privilege was to "preserve" marital "harmony").

168. *See* WIGMORE, *supra* note 10, § 2228, at 216-17; Hutchins & Slesinger, *supra* note 119, at 679.

divorce.[169] Legal rules designed to preserve marriage reflect the priorities of an earlier era, when marriage was almost always a life-long union and when relationships outside of marriage were unacceptable. In such a climate, divorce resulted in a degree of social upheaval that is absent today. Does it make sense to allow the defendant to escape criminal or civil penalty simply to preserve a marital union that is more than likely to end in divorce?[170]

E. *The Privacy Rationale*

Recognizing that marital privileges play a negligible role in promoting marriage, some commentators have valued the privileges for their protection of personal privacy.[171] At first glance, privacy appears to be a compelling normative basis for the marital privileges. Insulating home and family from public visibility has traditionally been given great weight in American jurisprudence.[172] Protecting marital privacy is valued in and of itself.[173] Protecting privacy also has an instrumental value: it allows for personal autonomy, permits emotional release, and fosters self-evaluation.[174] Privacy creates the space necessary for the personal development of all citizens.

Whether valued normatively or instrumentally, privacy must always be weighed against other societal interests.[175] The benefit of protecting spousal privacy is countered by the negative effects of the lost information. Balancing these concerns is difficult because they are inversely correlated. The more private the information, the less likely it can be obtained from a source outside the spouse, and therefore the greater the harm to the legal process if it is protected by a privilege. At the moment when privacy concerns are at their strongest, the competing need for testimony is also greatest.

Feminist critics have eschewed the privacy rationale for an entirely different reason. These commentators complain that privacy is frequently used as an excuse to isolate the family from interference by the state, perpetuating traditional gender hierarchies and power im-

169. Sociologists predict that one-half of first marriages in the United States will end in divorce. *See* Note, *Parent-Child Loyalty and Testimonial Privilege*, 100 HARV. L. REV. 901, 919 n.51 (1987) (citing Paul C. Glick, *Marriage, Divorce and Living Arrangements: Prospective Changes*, 5 J. FAM. ISSUES 7, 15 (1984)) [hereinafter *Parent-Child Loyalty*].

170. *See* Medine, *supra* note 26, at 546; Hutchins & Slesinger, *supra* note 119, at 679 ("In this period of readjustment, we can see no reason for sacrificing individual justice (as it has demonstrably been sacrificed in several cases) to a mythical family unity.").

171. *See, e.g.*, MCCORMICK-1984, *supra* note 17, § 86; *Privileged Communications*, *supra* note 11; BLACK, *supra* note 107.

172. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); Mapp v. Ohio, 367 U.S. 643 (1961).

173. *See Privileged Communications*, *supra* note 11, at 1480-82.

174. *See id.* at 1481.

175. *See id.* at 1482.

balances even after the legal rules that established these inequities have been abolished.[176] "The rhetoric of privacy that has insulated the female world from the legal order sends an important ideological message to the rest of society. It devalues women and their functions and says that women are not important enough to merit legal regulation."[177] According to these critics, giving the defendant-husband — for it is almost always the husband[178] — the legal right to silence the witness-wife is yet another example of how the protection of privacy can subjugate women.[179]

In any case, neither of the two privileges is applied in a manner consistent with protecting marital privacy.[180] Many courts limit the confidential communications to interactions through which one spouse *intends* to convey a message to the other.[181] As a result, the privilege does not protect some of the most personal and intimate interactions between spouses. For example, a wife could be forced to testify about what her husband muttered in his sleep, or whether his hands were shaking, or whether he appeared tired, upset, or ill. Yet it is precisely at these private moments when the social mask is removed, and a spouse engages in unguarded, unfiltered behavior before his partner, with no intention of communicating a specific message. These behaviors are worthy of the greatest protection under the privacy rationale.

Moreover, the confidential communications privilege falls well short of protecting the privacy of the family or the home, for it does not insulate communications between parent and child, between siblings, or between parents themselves if a child old enough to understand the conversation is within earshot.[182]

Privacy is not the focus of the adverse testimony privilege. The privilege is both over- and under-inclusive if privacy is taken as its motivating rational. It is over-inclusive because it applies to testimony concerning matters that are not confidential, and under-inclusive because it covers only adverse testimony. A spouse may refuse to testify against the defendant, even if that testimony does not impinge on marital privacy. For example, the privilege covers events occurring

176. *See* Melinda Seymore, *Isn't it a Crime: Feminist Perspective on Spousal Immunity and Spousal Violence,* 90 NW. U. L. REV. 1032, 1052 & nn. 147-48 (1996); NADINE TAUB & ELIZABETH M. SCHNEIDER, *Women's Subordination and the Role of Law, in* THE POLITICS OF LAW 151, 151-52 (David Kairys ed., rev. 1990).

177. Elizabeth M. Schneider, *The Violence of Privacy,* 23 CONN. L. REV. 973, 978 (1991).

178. *See supra* notes 121-23 and accompanying text.

179. *See* Seymore, *supra* note 176, at 1071; *see also* Chriss, *supra* note 8, at 250.

180. *See* MCCORMICK-1984, *supra* note 17, § 86, at 202.

181. *See supra* notes 79-81 and accompanying text.

182. *See* MCCORMICK-1992, *supra* note 64, § 80, at 303. However, courts have held that the privilege still applies if the children are too young to understand what is said, and therefore the communication remains confidential. *See* Hicks v. Hicks, 155 S.E.2d 799, 801-02 (N.C. 1967).

prior to marriage,[183] information learned through a source other than the defendant-spouse, and matters that are public knowledge. Yet a spouse may be forced to testify about private marital matters as long as the information is not adverse to the defendant.[184] The Supreme Court's decision in *Trammel* to alter the privilege so that it can be waived by the witness-spouse over the objections of the defendant-spouse also demonstrates that the Court did not take marital privacy to be the privilege's core concern.[185]

More to the point, privacy is an inadequate justification for the privileges because legal privileges are simply not needed to foster confidential communication between spouses. Spouses share the intimate details of their lives with each other for reasons largely unaffected by the legal protection of the privileges — a protection of which many spouses are unaware.[186] Expressing his doubt as to the efficacy of the marital privileges, McCormick wrote, "What encourages [spouses] to fullest frankness is not the assurance of courtroom privilege but the trust they place in the loyalty and discretion of the other. If the secrets are not told outside the courtroom there will be little danger of their being elicited in court."[187] McCormick's view is supported by numerous cases involving the privileges, making it clear that spouses confided in one another without conscious thought about whether their conversations were legally protected. One example, discussed in the introduction of this article, is the teenage husband who boasted about committing a murder to his new bride;[188] Levina Enriquez's husband's conciliatory phone callis another.[189] These individuals were unaware of the privileges' protection at the time they acted. They revealed themselves not because they counted on the formal legal protection of the privileges, but rather because, whatever the requirements of the law, they trusted their spouse not to reveal the secrets they shared.

III. A WITNESS-CENTERED RATIONALE FOR THE MARITAL PRIVILEGES

The five rationales for the privileges discussed in the preceding section — the utilitarian rationale, the political influence of the protected classes, the image of the courts, the preservation of domestic harmony, and privacy — have each failed to justify the continued

183. *See, e.g., In re* Grand Jury Proceedings, 640 F. Supp. 988 (E.D. Mich. 1986) (marital privilege applies to testimony about events that occurred prior to the marriage).

184. *See, e.g., In re* Martens, 779 F.2d 461 (8th Cir. 1985) (holding that adverse testimony privilege did not apply because wife failed to establish that her testimony was adverse to her husband); *see also* WIGMORE, *supra* note 10, § 2234, at 231.

185. *See generally* Trammel v. United States, 445 U.S. 40 (1980).

186. *See supra* Part II.A.

187. MCCORMICK-1984, *supra* note 17, § 86, at 201.

188. *See* State v. Bush, 942 S.W.2d 489, 494-95 (Tenn. 1997).

189. *See* State v. Enriquez, 609 A.2d 343, 344 (Md. Ct. Spec. App. 1992).

existence of the marital privileges. As a result, the privileges are subject to frequent criticism by commentators, hostility from lawmakers, and have received an increasingly unfriendly reception in the courts.[190] Attacks on the privileges come from every ideological angle.

If the marital privileges are to survive, they must be shown to serve some useful purpose. A new rationale is needed to rejuvenate the privileges, to prove that they are more than a "sentimental relic"[191] of an antiquated legal system. To be satisfying, this rationale should be based upon the unique nature of the relationship between husbands and wives, yet should not take an idealistic view of marriage that is at odds with the frequently unstable and conflict-ridden unions in which the privileges are raised. Any modern rationale for the marital privileges must be compatible with a legal system in which wives are on equal footing with their husbands. It is vital that the rationale for the privileges unites the adverse testimony privilege and the confidential communications privilege so that they are understood to serve a common purpose.

I propose that courts and legislatures look at the marital privileges from the perspective of the witness-spouse and focus on their value as a means of accommodating the witness' desire not to testify. Without a legal privilege, the witness-spouse is faced with a "cruel trilemma": she must incriminate her spouse, perjure herself, or refuse to testify at all and face the penalty for contempt of court.[192] Some spouses voluntarily testify against the other without compunction; others refuse, presumably out of loyalty to their spouses. For the latter group, the marital privileges accommodate the witness-spouse's refusal to testify, protecting her from penalty for placing personal loyalties over her duties to the court. Refocusing the marital privileges on the witness-spouse, and away from the defendant and the quality of the marriage, brings into relief the true value of the marital privileges: saving the witness-spouse from having to choose between incriminating her husband or perjuring herself.

Sometimes personal relationships should take precedence over legal duties. Philosophers have long recognized that we are all "plural selves," torn between personal allegiances and our obligations as citizens of the state.[193] As E. M. Forster flippantly stated: "[I]f I had to

190. *See supra* Part I.

191. *See* UNIF. R. EVID. 23(2) cmt.; *see also* Hawkins v. United States, 358 U.S. 74, 81 (1958) (Stewart, J., concurring); Medine, *supra* note 26, at 519.

192. I have borrowed this term from *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964), where it was used by the Court in its discussion of how the privilege against self-incrimination protects defendants against the "cruel trilemma" of being forced to choose between incriminating themselves or committing perjury or contempt.

193. *See* Sanford Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631, 635; MICHAEL WALZER, OBLIGATIONS 205 (Harvard Univ. Press ed., 1970).

choose between betraying my country and betraying my friend, I hope I should have the guts to betray my country."[194] By releasing the witness-spouse from the duty to assist in convicting the defendant, the marital privileges recognize that loyalty to a spouse may supersede obligations to the state.

However, I am careful to speak of the privileges as serving to accommodate and excuse spousal loyalty, not to encourage or promote it. Here, I differ from commentators who have argued that the marital privileges are justified because they protect a witness' right to remain faithful to a spouse, even at the expense of fulfilling his or her obligations as a citizen of the state.[195] Although the word "loyalty" has positive connotations, loyalty can easily be misplaced. One spouse's unyielding devotion to the other can be an unhealthy, destructive phenomenon. Often the defendant is unworthy of the witness' desire to protect him, and society suffers for her choice if he goes unpunished. In some cases, the witness' silence may be the product of an abused spouse's "learned helplessness,"[196] which bears no relation to true loyalty. A survey of recent cases in which the privilege was asserted reveals marriages that were unstable and violent.[197] It is hard to imagine that the witness-spouses in those cases opted for silence out of a loyalty that society would recognize as desirable.

The distinction between encouraging a spouse to remain silent and merely accommodating a spouse's decision to do so mirrors the difference between justification and excuse in criminal law.[198] As Professor George Fletcher has explained, actions are justified if they represent morally correct choices, and excused if they are morally flawed but understandable under the circumstances.[199] Criminal law employs the doctrine of excuse to avoid punishing understandably wrong choices because our justice system generally refuses to hold people to a higher standard than judges themselves can meet.[200] The Model Penal Code (MPC) recognizes the defense of duress, which excuses persons who commit illegal acts while under intense external pressure to do so.[201] Although the external pressure does not justify their crimes, they are excused because the average law-abiding citizen

194. EDWARD MORGAN FORSTER, TWO CHEERS FOR DEMOCRACY 66 (O. Stallybrass ed., 1972).

195. *See* George E. Cornelius, *Spousal Testimony in Pennsylvania*, 86 DICK. L. REV. 491, 515-16 (1982).

196. LENORE WALKER, THE BATTERED WOMAN 55 (1979).

197. *See supra* notes 14-15 and accompanying text.

198. *See generally* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 758-875 (1978).

199. *See id.*

200. *See id.*

201. *See* MODEL PENAL CODE, §2.09 (1980) (This section recognizes the defense of duress, but limits its application to actions committed under the use or threat of unlawful force against the actor or another person.)

would have done the same.[202] As the MPC explains, such individuals should escape punishment if a "person of reasonable firmness" would have committed the same act under the same circumstances.[203] The duress defense has typically been limited to illegal acts committed under use or threat of force,[204] and therefore it provides no formal protection for a witness-spouse who refuses to testify against the defendant-spouse. Nevertheless, excuse provides the normative framework from which to reconcile a sense of compassion for the witness-spouse with the knowledge that society would be better off if the witness-spouse testified against the defendant.[205]

I believe that requiring an unwilling spouse to testify against the other asks much more than the typical law-abiding citizen can give. The lives of most husbands and wives are emotionally and financially intertwined; requiring one to testify against the other places the witness-spouse under tremendous pressure. If the privileges did not exist, the witness-spouse would have to choose between incriminating her spouse, remaining silent, and likely being jailed for contempt, or perjuring herself.[206] Since the first two options carry penalties for the defendant-spouse or the witness-spouse, respectfully, perjury becomes the "understandable wrong choice" that the average law-abiding citizen would resort to if placed in similar circumstances.[207] Yet perjury cannot be excused lightly. Public confidence in the legal system would diminish were even a small class of witnesses given *carte blanche* to lie on the witness stand. Equally important, a rule granting blanket immunity from perjury prosecutions would undermine the testimony of all witness-spouses, including those giving truthful testimony exonerating their spouses. Instead, the marital privileges relieve the pressure on the witness-spouse to perjure herself by immunizing silence. If the spouse chooses not to testify under the marital privilege, she will not be punished.

Although no court or commentator has grounded the marital privileges in a theory of excuse, a similar explanation has been given for the Fifth Amendment privilege against self-incrimination.[208] In

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202. *See* GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 130 (1998).

203. *See* MODEL PENAL CODE, § 2.09(1) (1980).

204. *See id.*; *see also* William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1243 (1988).

205. *See* Fletcher, *supra* note 198, at 833-35; STANFORD H. KADISH, ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 797-99 (4th ed. 1983). Professor William Stuntz also discussed broadening the theory of excuse in rationalizing the privilege against self-incrimination. *See infra* notes 208-13 and accompanying text.

206. *See* Stuntz, *supra* note 204, at 1296 n.2 (discussing the "cruel trilemma" of self-incrimination, perjury or contempt that would face criminal defendants if there were no privileges against self-incrimination).

207. *See id.* at 1243-44.

208. *See id.* at 1239; MCCORMICK-1984, *supra* note 17, § 118; Bernard D. Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 692-93 (1951).

Murphy v. Waterfront Commission, the Supreme Court stated that the privilege against self-incrimination "reflects . . . our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt."[209] As Professor William Stuntz has recognized, implicit within this passage is the notion that it asks too much to require a defendant to incriminate himself, and the acknowledgement that many law-abiding citizens would themselves commit perjury if compelled to testify.[210] He further asserts that "[w]itnesses asked to choose between self-conviction and perjury perhaps should choose the former, but the proper choice may require more courage and integrity than most of us possess."[211] In accordance with the principle that the law should not hold people to a higher standard than their judges can meet, perjury by a defendant forced to testify against his own cause should be excused. However, as discussed above, routinely excusing perjury would come at great expense to the truth-seeking goal of our criminal justice system, and would prevent the truthful criminal defendant from bonding his testimony with the threat of criminal sanction for perjury.[212] Instead, Stuntz argues that the privilege against self-incrimination immunizes silence, thereby relieving the pressure on the defendant to lie under oath.[213]

The doctrine of excuse fits the marital privileges far more comfortably than it does the privilege against self-incrimination. Commentators who object to using the excuse theory to explain the privilege against self-incrimination point out that criminal law does not excuse defendants if their own culpable conduct created the conditions of their excuse.[214] The pressure on criminal defendants to lie on the witness stand is of their own making, in that it arises from their criminal acts. In contrast, witness-spouses are not to blame for their predicament. They are asked to testify about the information they have gathered as a participant in the marital relationship, not as a participant in illegal activity.[215] An act of perjury by the witness-spouse to protect the defendant resembles any other victimless crime committed under duress, and therefore should be excused from legal penalty.

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209. 378 U.S. 52, 55 (1964).

210. *See* Stuntz, *supra* note 204, at 1296 n.2.

211. *Id.* at 1228-29.

212. *See id.* at 1255-56.

213. *See id.* at 1255.

214. *See* David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1098-1100 (1986) (arguing that a defendant who lies to avoid conviction for a crime cannot be excused because he created the conditions of his own excuse by committing the crime; if he was not guilty of the crime, he would not fear conviction for telling the truth).

215. The one exception would be witness-spouses whose knowledge of the defendant's crime arose from their own participation in the illegal activity. *See infra* Part IV for a discussion of the "partners in crime" exception.

Excusing the witness-spouse from the obligation to testify aids him or her without doing significant harm to the truth-seeking process. For the most part, allowing the witness-spouse to opt out of testifying does not deprive the judge or jury of valuable information, because, without a privilege, reluctant spouses are likely to lie rather than incriminate the defendant.[216] The image rationale for the privileges argues that the privileges prevent the inevitable perjury that would occur if the witness-spouse were forced to testify, thereby preserving the accuracy of legal verdicts and the reputation of the courts.[217] Although I reject the image rationale as overprotective and lacking the normative force to justify the marital privileges, I accept its premise that in a world without the privileges, spouses are likely to lie for one another.[218] The value of this perjured testimony is close to nothing. It does not add to the pool of relevant information to be considered by judge or jury in reaching a verdict. At best, it informs the jury that the witness-spouse knows something worth hiding. Therefore, abolishing the privileges and forcing a spouse to testify will serve little practical purpose, yet it may subject the witness-spouse to prosecution for perjury.

Rationalizing the marital privileges under the conceptual framework of excuse refocuses the privileges on the more sympathetic of the two partners: the witness-spouse. Wigmore, a critic of the adverse testimony privilege, posed the following hypothetical: If Smith's spouse witnesses Smith injure Jones, why should the judicial system protect Smith's marriage over Jones' interest — not to mention society's interest — in seeing Smith brought to justice?[219] Looking at the situation from the witness' perspective provides the answer: the marital privileges protect Smith's spouse from criminal charges that would likely follow if she were forced to choose between harming her spouse and subjecting herself to penalty for contempt or perjury. Smith's interest in preserving his marriage is irrelevant.

Excuse theory releases the marital privileges from burdens they cannot support, such as their purported role in promoting marriage or protecting privacy. It acknowledges that for some, spousal loyalty trumps legal obligations, yet it does so without encouraging or even condoning these witnesses' priorities. Excuse theory is a pragmatic solution to the problem of spousal perjury; it assumes that without the privilege, witness-spouses would lie under oath, adding nothing to the pursuit of justice.

A witness-centered rationale for the marital privileges also defuses the attacks from both sides of the political spectrum. Feminist critics argue that the privileges are weapons, wielded in the name of mar-

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216. *Cf.* Stuntz, *supra* note 204, at 1293 (noting that if there was no privilege against self-incrimination, testimony of defendant would be unreliable).

217. *See supra* Part II.C.

218. *See id.*

219. *See* WIGMORE, *supra* note 10, § 2228, at 216-17.

riage, that disempower women in order to protect men from legal penalties.[220] These critics note that in the vast majority of cases, marital privileges silence the witness-wife in order to protect her defendant-husband.[221] Presumably, if convinced that the privileges operate to protect the wife from sanction for perjury or contempt, while freely permitting her to testify against her spouse when she chooses, feminist critics would support, or at least not object to, the marital privileges.

The witness-centered rationale should also make the privileges more palatable to those advocating a reduction in procedural protections for criminal defendants. These critics view the marital privileges as another example of overzealous concern for the rights of defendants at the expense of the efficient administration of justice.[222] Public cynicism about the American legal system is at its peak, and these critics blame, in part, the special protections and exceptions that hinder juries from reaching accurate results.[223] Convincing these commentators that the marital privileges actually serve to protect the witness-spouse, rather than the defendant, should alleviate some of their concerns. Demonstrating that the privileges do not prevent information from reaching juries — in fact, they may even aid the truth-seeking process by allowing willing spouses to testify regardless of the defendants' wishes — could turn these critics into supporters of the marital privileges.

Finally, a witness-centered approach to the marital privileges modernizes the privileges. Marital privileges first appeared in England 400 years ago, before all but the attorney-client privilege.[224] The attorney-client relationship has remained fairly static over the past half-century compared to the fundamental changes in the relationship between husbands and wives.[225] To survive in our legal system, modern-day marital privileges must prove their relevance in a society in which the legal status of women, particularly the legal status of wives, now stands fundamentally transformed. Focusing on the witness-spouse, and giving her control over the privileges, accomplishes that goal.

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220. *See id.* § 2232, at 226.

221. *See supra* notes 138-40 and accompanying text.

222. *See, e.g.*, Baughman, *supra* note 9; Medine, *supra* note 26.

223. *See* Baughman, *supra* note 9.

224. Marital privileges first appeared in England 400 years ago, before all but the attorney-client privilege. *See* Bent v. Allot, 21 Eng. Rep. 50 (Ch. 1580) (first case to explicitly recognize the marital privilege).

225. *See, e.g.*, Trammel v. United States, 445 U.S. 40, 52 ("The ancient foundations for so sweeping a privilege have long since disappeared. Nowhere in the common-law world — indeed in any modern society — is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being.").

IV. Reformulating the Marital Privileges to Accord with the Witness-Centered Rationale

The traditional rationales for the marital privileges, discussed in Part II, have created a number of awkward exceptions to, and modifications of, the privileges. For example, in order for the adverse testimony privilege to conform with the preservation of the marriage rationale, courts create exceptions for sham marriages and for marriages considered beyond repair, even if still legally in existence.[226] Likewise, the confidential communications privilege has been extended by some courts to cover nonverbal communications, or communications made in the presence of the couple's children, in order to fulfill the privilege's perceived purpose of protecting family privacy.[227] Some courts, relying on Wigmore's utilitarian rationale, refuse to apply the privilege if the married couple were accomplices. Other courts disagree, arguing that such marriages are worth saving.[228] The debate can never be resolved because courts are ill-equipped to judge the value of a particular marriage.[229]

Altering the privileges to comport with the excuse rationale will hopefully simplify this area of law by strengthening, as well as narrowing, the current privileges into one uniformly applied privilege. Changes suggested by the excuse doctrine should also make the privileges palatable to their opponents.

A. *Transforming the Privileges from a Legal Entitlement to Remain Silent into an Exemption from Penalty for Refusing to Testify*

Critics of the marital privileges object to the fact that they encourage witness-spouses to remain silent.[230] The spouse of the defendant, unlike all other witnesses, is not faced with an obligation to testify, but instead is informed of her right to silence, as illustrated by the following colloquy between an Ohio state trial judge and the witness-spouse in a capital murder case:

> THE COURT: The other exception that permits a spouse not to testify against her husband . . . is if they elect to do so. You have a *right*, therefore, not to elect to testify against your husband in this case . . . .
>
> Now the purpose of my asking these questions . . . is to make sure you understand your *right* under that rule . . . you have [the] *right not to testify or to testify.* Do you understand that rule?
>
> THE WITNESS: Yes, I understand.
>
> THE COURT: Okay. Now, the state . . . intends to call you as their next witness if you elect to testify in this matter.

226. *See supra* notes 90-92 and accompanying text.
227. *See supra* notes 67-70 and accompanying text.
228. *See supra* notes 92-99 and accompanying text.
229. *See supra* note 104.
230. *See* Chriss, *supra* note 8, at 251; Seymore, *supra* note 176, at 1081.

THE WITNESS: Yes, I do.[231]

The witness went on to assure the court that she knew what voluntary meant and was testifying voluntarily.[232] This extensive *voir dire* is mandatory in Ohio, where the court must make "an affirmative determination on the record that the spouse has elected to testify."[233] A witness who chooses not to testify, however, need only remain silent.

Procedures like those followed in Ohio make it easy for a reluctant or fearful witness to choose not to testify and appear to give judicial approbation to that choice. As a result, feminists criticize the marital privileges because they enable abusers to silence their victims.[234] Although the privileges are suspended when one spouse is charged with committing a crime against the other, these critics note that courts often construe this exception narrowly.[235] Thus, the confidential communications privilege has been used to bar witness-spouses from testifying even in cases in which they were the victims of the defendant-spouse's criminal behavior.[236] The adverse testimony privilege, which gives witness-spouses the choice to testify or remain silent, leaves the witness vulnerable to coercion from the defendant-spouse and his lawyer. It is easy to imagine witness-spouses choosing the course of least resistance by quietly asserting the privilege outside the presence of the jury, avoiding the danger of speaking out against her abuser and the unpleasant experience of being questioned, and then cross-examined, in front of a courtroom full of strangers.

Another argument against entitling witness-spouses not to testify is that it symbolically transfers spousal abuse from the public to the private domain, making it more akin to a tort than a crime.[237] Until recently, domestic violence has been treated as a private matter to be dealt with by the family, not the state.[238] Police manuals instructed officers responding to domestic disputes to avoid making arrests whenever possible. Even when arrests were made, prosecutors dismissed such cases lightly and judges handed down lenient sentences

231. State v. Henness, 679 N.E.2d 686, 692 (Ohio 1997) (emphasis added).

232. *See id.*

233. *Id.*

234. *See* Seymore, *supra* note 176.

235. *See id.*

236. *See* Young v. State, 603 S.W.2d 851, 851-52 (Tex. Crim. App. 1980) (holding that husband's driving into car occupied by wife and two others is not an offense against wife because the indictment did not allege injury to her); *see also* Jenkins v. Commonwealth, 250 S.E.2d 763, 765 (Va. 1979) (holding that husband's shooting at wife and missing, but killing third person, is not an offense against wife because no formal charge of attempted murder of wife was brought).

237. *See* Seymore, *supra* note 176, at 1071-73, 1080-82; *see also* Schneider, *supra* note 177, at 988-89.

238. *See* Schneider, *supra* note 177, at 976.

on the rare occasion of a conviction.[239] The marital privileges can be seen as a vestige of these outmoded views.[240]

Reconceptualizing the marital privileges to accord with the doctrine of excuse transforms the legal rule entitling a witness-spouse to remain silent to one that merely tolerates that silence, assuaging some of the objections to the privileges. Viewed from an excuse perspective, a witness-spouse's refusal to testify is wrong, even if understandable. In order to properly express disapproval, there should be no *privilege* to remain silent. Referring to this legal excuse as a privilege sends the wrong message, for it implies that a witness has a judicially approved right to refuse to testify at a spouse's trial. Instead, the witness-spouse should be made aware that the justice system condemns her choice to remain silent, even if she is not subject to penalty for refusing to testify.

In place of a privilege, laws punishing contempt should be altered to exempt witness-spouses who refuse to testify. This excuse-based alternative to the privileges would operate as follows: first, if a witness-spouse indicates an intention to violate a subpoena, the judge must determine whether the witness falls within the category of protected persons (that is whether the witness is legally married to the defendant and is being asked to testify against him); second, even if the witness qualifies for the exemption, the court should require that the witness take the stand, outside the presence of the jury, and state her refusal on the record; and third, the court should instruct the witness that she has an obligation to testify and should hold the witness in contempt if she continues to refuse. Thus far, the witness-spouse has been treated like any other uncooperative witness. However, her status as the defendant's spouse would prevent the court from imposing a penalty for contempt of court.[241] In short, the marital privilege would be transformed into a rule immunizing[242] the witness-spouse from penalty for contempt of court.[243]

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239. *See id.*

240. *Cf.* Seymore, *supra* note 176, at 1071-72; Chriss, *supra* note 8, at 227.

241. Perjury, however, should never be immunized, because it would prevent truthful witness-spouses from bonding their testimony with the threat of perjury charges, and because permitting classes of witnesses to perjure themselves without penalty might do damage to the legal system. *See* Stuntz, *supra* note 204, at 1256. In any case, it is unnecessary to immunize perjury. Once the witness-spouse is exempted from penalties for contempt, she no longer is faced with the pressure to lie when she has the alternative of remaining silent without risking imprisonment.

242. The term "spousal immunity" is in fact one name for the marital privileges, but as currently formulated the privileges do not simply immunize the witness from punishment, but instead give her a right not to testify.

243. There is no question that federal courts have the authority to alter the form of the marital privileges in the manner I suggest. Federal Rule of Evidence 501 permits courts to modify the privileges at their discretion. *See* Trammel v. United States, 445 U.S. 40, 47 (1980). Likewise, the "power to punish for contempt is inherent in all courts." Michaelson v. United States *ex rel.* Chicago, St.P., M. & O. Ry. Co., 266 U.S.

Functionally, the result under this new system would be nearly identical to asserting a privilege, but the difference in procedure would have symbolic importance, not only to the witness and defendant, but also to the general public. The lack of penalty would acknowledge that the witness' relationship with the defendant placed her under great duress, excusing her refusal to testify. In all other respects however, the witness-spouse would face judicial disapproval of her decision to remain silent. She would be made uncomfortably aware that by refusing to testify she was violating the law. She would suffer the stigma of being convicted of contempt, even if that stigma were somewhat lessened by the absence of a penalty.

There is precedent for loosening or eliminating legal penalties in order to accommodate relationships among family members. Several jurisdictions do not penalize the close family members of a fugitive when they assist him in evading justice, while other jurisdictions reduce the grade of that offense.[244] These laws operate in much the same way as the marital privileges should. Certainly, there is no right to aid a fugitive who is also a close relative, but the law lightens the penalty out of compassion for the special relationship that motivated the family to protect the offender.[245]

For the past 400 years, the marital privileges have deferred to the relationship between husband and wife, accepting that it takes precedence over the couple's obligations as citizens. Transforming the privileges into immunity from contempt continues to serve that purpose. The very basis for excusing contempt is the likelihood that, without the privilege, witness-spouses would not be transformed into eager witnesses for the prosecutor, but would instead perjure themselves to protect the defendant.

B. *Defining the Parameters of the Exemption*

The notion of excuse can also be applied to determine when, and to whom, the privilege (or rather, the exemption from contempt) should be applied. Currently, the two privileges guarding the marital relationship can be invoked at different times and they cover different

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42, 65 (1924). Congress codified the courts authority in 18 U.S.C. § 401(1994), but left the punishment for contempt up to the discretion of individual courts. *Id.*

In some states, the privileges remain under the common law authority of the courts. Those states that have codified the privileges have altered them in the past to accord with federal practice, and might do so again if the federal courts took the lead in restructuring the privileges.

244. *See* MODEL PENAL CODE § 242.3 comment 5, at 236-37 (1980) (describing statutes).

245. Transforming the marital privileges into immunity for contempt could be criticized as undermining the authority of the court because judges would be unable to penalize the witnesses they hold in contempt. Certainly, that is a danger any time that legal violations go unpunished. The effect here is minimized by the fact that assertions of the marital privileges are not an everyday occurrence, so that courts would not frequently be so disabled.

types of testimony. Although the adverse testimony privilege and the confidential communications privilege often overlap, courts have conceived of the two privileges as serving quite different purposes. Protecting privacy has been the primary justification for the confidential communications privilege, while the adverse testimony privilege has been supported by some variation on the theme of promoting or preserving marital relationships.[246] In *Trammel*, the Supreme Court appeared to differentiate the justifications behind the two privileges, giving up on any attempt to unite them in support of a single goal.[247] Cleaving the rationales for the two privileges has weakened both. Moreover, retaining two separate privileges to guard one relationship unnecessarily complicates this area of the law. Conceptualizing the marital privileges as a legal excuse for the crime of contempt unifies the privileges so that they apply in only one set of circumstances.

The adverse testimony privilege and the confidential communications privilege differ in significant ways when viewed from the excuse perspective. The latter can be exercised even after the marriage has ended, and applies in civil as well as criminal proceedings.[248] Furthermore, the confidential communications privilege is controlled by the communicator, creating a situation in which a defendant can invoke the privilege to prevent his willing spouse from testifying against him.[249]

The scope of the adverse testimony privilege is consistent with the excuse rationale, while the confidential communications privilege is not. To accord with the excuse theory, the decision to testify must be controlled by the witness-spouse, because excuse focuses on the witness-spouse's dilemma concerning whether or not to testify. Once it is recognized that the privileges do not protect privacy or promote marital communication, there is no reason to grant the defendant the power to silence a spouse who chooses to speak against him. The confidential communications privilege, which rests the privilege in the hands of the communicator — who is oftentimes the defendant — is at odds with excuse.

Granting the privilege to a witness who is divorced from the defendant also conflicts with the excuse rationale. The excuse rationale assumes that the "cruel trilemma" facing a witness results from an allegiance between the spouses that exists *at the time the witness is testifying*, which places the witness-spouse under so much pressure to lie that she is excused from the obligation to testify altogether. The exemption from penalty for contempt should be reserved for the witness who is married to the defendant when the case goes to trial. Furthermore, the exemption should be limited to criminal cases in which a witness-spouse's testimony could bring about the conviction, and possibly the

246. *See supra* Part I.
247. *See* 445 U.S. 40, 51 (1980).
248. *See supra* Part I.
249. *See id.*

imprisonment, of the defendant-spouse. Civil penalties, which are less severe and are not as stigmatizing, do not place the kind of pressure on the witness-spouse that would cause "a person of reasonable firmness" to commit perjury.[250]

Undoubtedly, there are divorced couples who retain strong attachments to one another and would find it intolerable to betray their former spouses. Likewise, some civil penalties are as harsh as those for criminal violations. Nevertheless, bright lines must be drawn both to prevent strategic behaviors and to streamline the legal process. If every witness is free to argue that his attachment to the defendant excuses him from testifying, courts would be faced with the impossible task of analyzing the emotional intensity of these relationships. Coconspirators would routinely attempt to qualify for such an amorphous privilege in order to insulate themselves from the compulsion to testify. Marriage and divorce are fairly accurate proxies for the forging and breaking of powerful emotional ties, as well as for the distress the witness would feel at the thought of incriminating the defendant. A finding of civil liability is generally less damaging than a criminal conviction, and thus the civil-criminal distinction also serves as a rough index of the pressure on the witness-spouse. The marriage/divorce, civil/criminal boundaries are easily administrable by the courts, which need only look to the laws of the state to determine whether witness and defendant are legally married,[251] and whether the defendant-spouse is charged with a civil or criminal violation. Applying the privileges to these categories of relationships and cases is a practical method of identifying the situations in which a witness typically would feel the requisite level of distress at the thought of assisting in the defendant's conviction.

I began this article with a discussion of the *Enriquez* case — one of several cases responsible for giving the marital privileges a bad name.[252] Levina Enriquez was prevented from testifying about the phone call she received from her husband, in which he apologized for abusing her and promised to seek help, because her husband was able

250. *See* MODEL PENAL CODE § 2.09 (1980).

251. At their discretion, courts can refuse to recognize the exemption for those marriages entered into shortly before trial if the couple is attempting to evade the obligation to testify. *See* United States v. Apodaca, 522 F.2d 568, 571 (10th Cir. 1975) (denying exercise of privilege because marriage occurred three days before trial, and there was evidence that defendant coerced witness to marry him in order to assert privilege); *In re* Grand Jury Proceedings, 777 F.2d 508, 509 (9th Cir. 1985) (Although the privilege does not apply to "sham" marriages, mere suspicious timing of a marriage doesn't support a finding of a sham marriage alone.); United States v. Mathis, 559 F.2d 294, 294 (5th Cir. 1977); United States v. Clark, 712 F.2d 299, 302 (7th Cir. 1983) ("The public interest in discouraging a criminal from enlisting the aid of his or her spouse as an accomplice outweighs the interest in protecting the marriage."). However, judges should not scrutinize the relationship between husbands and wives, but should rely instead on the couples' marital status as the most efficient, and least intrusive, means of determining their emotional attachment.

252. *See supra* notes 1-8 and accompanying text.

to bar her testimony by asserting the confidential communications privilege.[253] The marital privileges, as reformulated under the doctrine of excuse into an exemption from contempt of court, would never operate to silence a spouse such as Levina Enriquez who was willing to testify against the defendant.

* * *

Thus far, this article has explained how the excuse theory transforms the privilege into an exemption from contempt, and limits that exemption to witnesses in criminal cases who are married to the defendant at the time of trial. Some questions remain. Should the exemption apply to witnesses who served as their spouse's partner-in-crime? Should the exemption be abrogated in cases in which the defendant-spouse is charged with a crime against the witness-spouse or a member of the household? Finally, should the exemption be extended beyond spouses to cover children, siblings, and other close family members? These are a few of the major areas over which courts have differed in applying the adverse testimony privilege.[254] Although there is unlikely to be perfect consensus in hard cases, the excuse rationale provides a guiding principle from which courts can attempt to craft a consistently applied rule.

1. Partners-in-Crime

Federal circuit courts differ over whether married couples' criminal collaboration abrogates the adverse testimony privilege. The Seventh and Tenth Circuits have embraced an exception for "partners-in-crime."[255] These courts have concluded that such marriages are not "socially beneficial," and therefore not worth saving.[256] The Second and Third Circuits disagree, arguing that the marriage may be the only "restraining influence" in these couples' lives.[257]

The doctrine of excuse provides a new perspective from which to examine the problem. Under an excuse theory, it is irrelevant whether the marriage is a socially valuable one. The real issue is whether the pressure on the witness-spouse merits excusing her false testimony. If so, she should be granted an exemption from contempt if she refuses to testify. At first glance, it appears the accomplice-spouse merits the exemption. After all, a loving spouse who participated in the crime should be just as distraught at the thought of incriminating her partner as an innocent spouse, and should therefore

253. *See* State v. Enriquez, 609 A.2d 343, 347 (Md. Ct. Spec. App. 1992).

254. *See supra* Part I.

255. *See, e.g.*, United States v. Keck, 773 F.2d 759, 767 (7th Cir. 1985); United States v. Clark, 712 F.2d 299, 300-01 (7th Cir. 1983); United States v. Trammel, 583 F.2d 1166, 1169-70 (10th Cir. 1978), *aff'd on other grounds*, 445 U.S. 40 (1980).

256. *See* cases cited *supra* note 255.

257. *See, e.g., In re* Grand Jury Subpoena United States, 755 F.2d 1022 (2d Cir. 1985); United States v. Ammar, 714 F.2d 238 (3rd Cir. 1983); *In re* Malfitano, 633 F.2d 276 (3d Cir. 1980).

be released from the obligation to testify. However, there are a few wrinkles in the excuse doctrine that prevent a witness-spouse from asserting the privilege when her knowledge of the crime arose from her own participation in it.

The doctrine of excuse is available only to those who are under extreme pressure through no fault of their own.[258] If the pressure on the witness-spouse arises from a situation of his own making, he cannot rely on the excuse doctrine to protect him. The Model Penal Code gives the example of a defendant who knowingly involved himself in a criminal enterprise, attempted to withdraw at the last moment, but was forced to go through with the crime by his co-conspirators.[259] Although he may have continued to carry out the crime under duress, the pressure placed on him by his fellow criminals resulted from his own culpable conduct in joining their conspiracy, and therefore his crime cannot be excused. Likewise, a witness-spouse whose knowledge of the defendant's criminal actions arises from the witness' own participation in the crime should not be excused from testifying truthfully because she has culpably created the conditions of her own excuse.[260]

Realistically, however, prosecutors faced with married co-conspirators will often bring charges against both. If there is not enough evidence to convict at least one of them of the crime, the prosecution may then offer one spouse a plea bargain in return for his testimony against the other. Critics of the Court's decision in *Trammel* contend that pressure brought to bear by a prosecutor offering a reduced sentence in return for the witness' cooperation is really no different than the pressure on an innocent spouse: he must either incriminate his wife or face jail time for his refusal to do so.[261] However, from an excuse perspective, the dilemma facing an accomplice-spouse is distin-

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258. *See* MODEL PENAL CODE § 2.09(2) (1980).

259. *See id.*

260. In this scenario, the witness-spouse resembles a defendant asserting the privilege against self-incrimination. Professor Stuntz, in his attempt to explain the privilege against self-incrimination using the theory of excuse, explained that the defendant's culpable conduct in committing a crime is separate and distinct from the choice he faces if forced to testify — to commit perjury or to incriminate himself — for which the defendant merits the defense of excuse. *See* Stuntz, *supra* note 204, at 1296 n.99. I disagree. If the incriminating information arises from the defendant's (or from the defendant's spouse's) participation in a crime, then the pressure to lie on the witness stand arises directly from the culpable conduct, disqualifying the defendant (or the spouse) from relying on excuse. In any case, Professor Stuntz was not using excuse as a normative framework for the privilege against self-incrimination, he merely believed that the legal development of the privilege could be explained by excuse doctrine. *See id.* at 1230. In this article, I argue that excuse theory provides a rationale for the marital privileges by focusing the privilege on the witness-spouse, who is placed in a painful predicament that is not of her own making. There is no justification for excusing witness-spouses from testifying when they themselves participated in the crime.

261. *See supra* notes 198-99 and accompanying text.

guishable because it arises from his own illegal actions. An innocent spouse should reject the plea bargain and defend against the charges. A guilty spouse does not deserve to be excused from his dilemma. He is free to reject the deal and refuse to testify, asserting his Fifth Amendment privilege against self-incrimination. True, a jail term possibly awaits him should he remain silent, but it is a penalty resulting from his conviction as an accomplice to a crime, not a charge of perjury or contempt arising from his refusal to betray his spouse.

2. Crimes Against Members of the Household

From the very beginning, the marital privileges could not be invoked in cases involving a crime of violence against a spouse.[262] Initially, this exception was vital because the defendant-spouse controlled the application of the privilege. If he could silence the only witness to his crimes, he was free to abuse members of his household without legal sanction.

There would be no need for such an exception if the witness retained complete control over the exemption from contempt. She would voluntarily waive the privilege and testify against the defendant if he were charged with committing a violent crime against her or against one of their children. However, the reality is that victims of domestic violence often protect their abusers by refusing to cooperate with the prosecution.[263] Commentators argue that giving the witness-spouse the option not to testify transforms domestic violence into a private problem, in which the state stands as a neutral party between the disputing spouses.[264] They worry that granting control over the privilege to the witness-spouse sends a message to these victims/witnesses that the state is not serious about punishing crimes of domestic violence.[265] Furthermore, commentators argue that victims of abuse choose silence for all the wrong reasons: out of fear, psychological debilitation, or a desire to continue the relationship with the abuser.[266] As these commentators themselves acknowledge, their position is somewhat paternalistic, for they argue that these women do not know what is best for them.[267] Courts and commentators also admit to feeling discomfort at the thought of jailing the witness-spouse, herself the alleged victim of the crime, for contempt because she re-

262. *See supra* notes 82-83 and accompanying text.

263. *See* Seymore, *supra* note 176, at 1041-44.

264. *See id.* at 1071-73, 1080-82; *see also* Schneider, *supra* note 177, at 988-89.

265. *See* Seymore, *supra* note 176, at 1077; *cf.* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 323 (1985) (arguing that prosecutor's policies against dropping charges in domestic violence cases sends the message that domestic violence is a crime against not only the victim, but the public as well).

266. *See* Seymore, *supra* note 176, at 1077.

267. *See id.* at 1078.

fused to testify against her husband — as has happened in the past.[268] Nevertheless, at least one commentator has argued that treating domestic violence seriously requires compelling spouses to testify.[269]

Once the privilege is abolished and replaced with an exemption for contempt, however, there is no longer an aura of state approval surrounding the witness' silence. The witness-spouse is forced to take the stand and warned that her refusal to testify violates the law and subjects her to the charge of contempt. The witness-spouse can no longer remain entirely passive. She must either testify truthfully or state her refusal to testify on the record, for which she will be held in contempt of court. She will see that the state is serious about pursuing the defendant and that the state condemns, rather than condones, her refusal to testify.

Moreover, forcing the witness-spouse to testify in such cases is more likely to injure the witness than aid in convicting the defendant. If the witness lies, or refuses to testify, she — not her abusive spouse — is subject to imprisonment. Nor can the state ensure her safety if she does testify against the defendant. If he is acquitted, there is little the state can do to prevent the defendant from exacting revenge on the witness. If he is convicted, he will have even greater motivation to harm the victim-spouse after serving his sentence. Fear of the defendant is a significant issue for victims of domestic violence, who struggle with the decision of whether to testify against their abuser, and their fear is not an irrational one. Unlike other violent criminals, abusers are likely to seek out their victims and harm them further if they aid the prosecution.[270] If the state cannot adequately protect these witnesses, it should grant them an exemption from legal penalty if they choose not to testify.

3. Extending the Exemption Beyond Spouses

If silence should be immunized whenever witnesses are under great pressure to commit perjury, then friends and lovers should also be exempted from the obligation to testify against each other. The reach of the excuse rationale logically applies to all close, personal relationships. Limiting the privilege to spouses alone is difficult to justify under any theory,[271] and therefore restricting the exemption to spouses does not weaken the excuse doctrine relative to competing

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268. *See id.* at 1072. *See, e.g.*, Ohio v. Karnes, No. WD-81-24, 1981 WL 5749 (Ohio Ct. App. Aug. 7, 1981) (unpublished opinion) (finding wife in direct contempt of court and ordering her to be jailed until she was willing to, and did, testify in a pending domestic violence case against her husband).

269. *See* Seymore, *supra* note 176, at 1080-82.

270. *See* Schneider, *supra* note 177, at 986.

271. *See Privileged Communications, supra* note 11, at 1492; *see also* Krattenmaker, *supra* note 114, at 94 (arguing that a general privilege should be extended to all confidential communication within intimate relationships or by those "in a position of close personal trust").

rationales. In an effort to overcome the illogical boundaries of the privilege, one commentator mused in a self-described "thought experiment" that everyone should be granted a certain number of "privilege tickets" that would allow him or her to distribute privileges to close friends or family, whichever their preference.[272] Realistically, however, clear lines must be drawn to avoid strategic behavior by criminals, who would arrange legal privileges for all of their accomplices if they could.

Acknowledging the need for line-drawing does not preclude questioning the limited scope of the current privilege. Admittedly, clear boundaries are necessary to forestall manipulation of the system, even if they leave out important categories of relationships worthy of protection under the excuse rationale. Nevertheless, courts should extend application of the exemption as far as possible in order to fulfill its purpose, and at the same time maintain an administrable boundary. Granting immunity from contempt to parents and children, as well as spouses, would fulfill both these objectives

Granting the exemption from contempt to close family members living in the same household supplies the most efficient, administrable, and accurate boundary. Excepting dependent children and their parents from compulsion to testify is not unprecedented; a few jurisdictions already recognize a parent-child privilege.[273] It is a simple matter to verify that two individuals are currently married, or are parent and child. More importantly, privileging the familial relationship and not those of friends or unmarried domestic partners makes sense from an excuse perspective because, in general, people have stronger emotional ties and more intense feelings of loyalty for family than for other relationships.[274] Friendships rarely come with the responsibilities and long-term commitments that are normally associated with kinship. The law has traditionally assumed that a greater degree of attachment exists within the family and assigns caretaking duties accordingly: spouses must support one another during the marriage and even after divorce, parents are required to provide for their children, and on occasion, courts have even required children to support their parents.[275] The law forces the fulfillment of these obligations only when the care-taking instincts of family members break down. With this heightened sense of obligation comes a correspondingly greater suffering if one family member is forced to incriminate

272. *See* Levinson, *supra* note 193, at 635.

273. *See, e.g., In re* Agosto, 553 F. Supp. 1298 (Nev. 1983); *In re* Greenburg, 11 Fed. R. Evid. Serv. 579 (Conn. 1982).

274. Homosexual couples are the obvious exception to this general observation. Lacking the ability to form a legal union, such couples must demonstrate the significance of their commitment in non-legally binding ways. The solution to the dilemma created by gay couples is not to alter all existing rules to encompass enduring gay relationships, but instead simply to legalize gay marriage.

275. *See* Note, *Parent-Child Loyalty, supra* note 169, at 924.

the other. Extending the boundaries of the immunity from contempt to encompass parents and children, as well as spouses, comports well with the excuse rationale.

CONCLUSION

The law of marital privileges is sorely in need of a legitimating rationale applicable to the modern marriage. I have attempted to provide a new, witness-centered rationale for the privileges that acknowledges that some marriages —particularly those in which the privileges are invoked — are less than ideal unions, and therefore the privileges cannot be justified as a means of preserving these relationships. Nor is it realistic to view the marital privileges as encouraging or promoting the institution of marriage, for such intimate relationships should be shaped by love, not by laws guaranteeing spousal silence in court. As I described in Part IV, an excuse theory would eliminate a privilege altogether and, instead, exempt witness-spouses from penalty for contempt, leaving the choice not to testify entirely within the witness-spouse's control. These changes are major alterations to make in a privilege that has been remarkably static over four centuries, even as marriage itself has undergone a myriad of legal and cultural changes. However, as the Supreme Court commented in *Trammel*, "the reality [is] that the law on occasion adheres to doctrinal concepts long after the reasons which gave them birth have disappeared and after experience suggests the need for change."[276] Alterations to the law of marital privileges are long past due. If not made soon, the privileges may be whittled away by increasingly strident criticism. Saving the marital privileges requires updating them to accord with the modern marriages to which they are applied.

276. 445 U.S. at 48.