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## §5.31 Spousal Testimonial Privilege

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### §5.31 Spousal Testimonial Privilege

There are two commonly recognized marital privileges. One is the spousal testimonial privilege, and the other is the marital confidences privilege.<sup>1</sup> The testimonial privilege gives witnesses the right to refuse to testify against their spouse in criminal proceedings, and, in some state jurisdictions, gives criminal defendants the power to prevent their spouses from testifying against them. The confidences privilege allows witnesses to refuse to reveal their own confidential marital communications and to prevent their spouse from doing so.

The testimonial privilege is the broader of the two in that it precludes all adverse testimony by the spouse, not merely disclosure of confidential communications. The testimonial privilege normally extends even to matters occurring prior to the marriage,<sup>2</sup> while the communications privilege covers only those confidential communications made during the course of the marriage.

The testimonial privilege is the narrower of the two, in that it applies only in criminal prosecutions where one spouse is a defendant.<sup>3</sup> In contrast, the communications privilege applies in both criminal and civil cases and does not require either spouse to be a party. Also the testimonial privilege lasts only as long as the marriage relationship, while the communications privilege provides ongoing protection for confidential communications uttered during the marriage. Thus former spouses may not assert a privilege to refuse to testify against one another, but they cannot testify to matters covered by the marital communications privilege.

#### Doctrine of spousal incompetency

The testimonial privilege evolved from the common law doctrine rendering a spouse incompetent to testify for or against the other. This incompetency resulted from the rule that a party was ineligible to testify on his own behalf, combined with the legal fiction that husband and wife were but one person.<sup>4</sup>

In the 1933 decision of *Funk v. United States*,<sup>5</sup> the Supreme Court abolished the doctrine of spousal incompetency so as to permit a defendant's spouse to testify in the defendant's behalf. However, *Funk* left unaltered the rule that either spouse could prevent the other from presenting adverse testimony. The rule thus evolved from a ground of incompetency to a spousal privilege.

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§5.31 1. The marital confidences privilege is discussed in §5.32, *infra*.

2. See URE 504(b) (1999). *But see* proposed-but-rejected FRE 505(c)(2) (containing an exception for “matters occurring prior to the marriage”).

3. See *United States v. Brock*, 724 F.3d 817, 822 (7th Cir. 2013) (spousal testimonial privilege is “both broader and narrower” than marital communications privilege); *United States v. Burks*, 470 F.2d 432, 435-436 (D.C. Cir. 1972) (wife had no privilege to refuse to testify about husband's violent character where husband was murder victim rather than defendant).

4. See Blackstone, *Commentaries on the Law of England*, Bk. 1 at 441 (1768) (“By marriage, the husband and wife are one person in law.”).

5. 290 U.S. 371 (1933).

## Rationale for privilege

The rationale for the testimonial privilege is to protect the harmony and sanctity of the marital relationship.<sup>6</sup> Testimony by one spouse against the other in a criminal prosecution would likely be an “unforgivable act” sealing the fate of any marriage.<sup>7</sup> Also, letting the state pit spouse against spouse without the consent of either would offend fundamental societal values. It is repellant to force husband or wife to breach the trust of marriage by becoming the instrument of the other’s criminal conviction.<sup>8</sup>

## Who holds privilege

In *Hawkins v. United States*,<sup>9</sup> the Court held that both spouses were holders of the privilege, and that each could prevent adverse testimony by the other. Most often a defendant in a criminal case claimed the privilege to keep the prosecutor from calling defendant’s spouse as a witness.<sup>10</sup> Twenty-two years after *Hawkins*, however, the Court in *Trammel v. United States*<sup>11</sup> reconsidered the issue, and decided that only the witness spouse holds the privilege. Under *Trammel*, the witness spouse may testify against the defendant spouse voluntarily, regardless of the wishes of the defendant, but cannot be compelled to do so against her own wishes.<sup>12</sup>

The *Trammel* Court noted the trend in state statutes away from vesting the privilege in the

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6. *Hawkins v. United States*, 358 U.S. 74, 77 (1958) (basic reason for refusing “to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well”).

7. *Id.* at 78-79 (law should not “force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences”).

8. See 8 Wigmore, Evidence §2228 at 217 (McNaughton rev. 1961). But see 5 Bentham, Rationale of Judicial Evidence 340 (1827) (spousal testimonial privilege goes far beyond making “every man’s house his castle” and permits a person to convert his house into “a den of thieves”; it “secures, to every man, one safe and unquestionable and ever ready accomplice for every imagineable crime”); Medine, The Adverse Testimony Privilege: Time to Dispose of a “Sentimental Relic,” 67 Or. L. Rev. 519 (1988). Both the Model Code of Evidence Rule 215 (1942) and the Uniform Rules of Evidence Rule 28 (1953) omitted the spousal testimonial privilege but included a spousal confidences privilege.

9. 358 U.S. 74, 77-79 (1958).

10. See proposed-but-rejected FRE 505(a) (making defendant spouse the sole holder of privilege).

11. 445 U.S. 40, 53 (1980).

12. *United States v. Brock*, 724 F.3d 817, 823 (7th Cir. 2013) (defendant lacks standing to appeal trial court’s finding that spousal testimonial privilege was waived; privilege belongs to testifying spouse only).

defendant spouse and concluded that modification of the federal rule was appropriate because “[w]hen one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve.”<sup>13</sup> When both spouses are potentially subject to prosecution, however, *Trammel* makes it more likely that they will be pitted against each other in negotiating with the prosecutor for favorable individual treatment. It is at least doubtful that testimony given by a spouse in exchange for leniency is voluntary in any realistic sense of that term, or that caving in to pressure from the prosecutor indicates a breakdown of the marriage,<sup>14</sup> and *Trammel’s* views on this subject seem shortsighted.<sup>15</sup>

The *Trammel* holding is binding only on federal courts, although URE 504 was amended in 1986 to conform with the holding.<sup>16</sup> Since *Trammel*, some states have amended their testimonial privilege statutes to make the witness spouse the sole holder of the privilege.<sup>17</sup>

The testimonial privilege only allows the witness spouse to refuse to give adverse testimony, and does not entitle the witness spouse to refuse to give testimony that would be helpful to the defendant spouse.<sup>18</sup> According to the clear weight of authority, the spousal testimonial privilege applies only in criminal cases,<sup>19</sup> including grand jury proceedings and criminal forfeiture proceedings.<sup>20</sup>

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13. *Id.* at 52. Compare *Hawkins v. United States*, 358 U.S. 74, 77 (1958) (“[N]ot all marital flare-ups in which one spouse wants to hurt the other are permanent.”).

14. See Lempert, *A Right to Every Woman’s Evidence*, 66 Iowa L. Rev. 725, 733-737 (1981).

15. *Cf.* *United States v. Bad Wound*, 203 F.3d 1072, 1075 (8th Cir. 2000) (spouse’s plea agreement promise to provide “complete and truthful testimony before grand juries, at trial, and at other proceedings as required” was sufficient to waive spousal testimonial privilege).

16. See URE 504(b) (1999) (spouse of an accused “has a privilege to refuse to testify against the accused spouse”).

17. See, e.g., Or. Rev. Stat. §40.255.

18. *Trammel v. United States*, 445 U.S. 40, 51 (1980) (privilege applies only to “adverse spousal testimony”). See also *United States v. Brock*, 724 F.3d 817, 823 (7th Cir. 2013) (providing helpful testimony to the defendant spouse may result in waiver of the privilege, making it “especially important for defense counsel to stay alert”).

19. See proposed-but-rejected FRE 505(a); URE 504(c) (1999). *Cf.* *Ryan v. Commissioner*, 568 F.2d 531 (7th Cir. 1977) (leaving open question whether spousal testimonial privilege can ever apply in civil cases), *cert. denied*, 439 U.S. 820.

20. See *United States v. Yerardi*, 192 F.3d 14 (1st Cir. 1999) (adverse spousal testimony privilege applicable in criminal forfeiture proceeding); *In re Grand Jury Matter*, 673 F.2d 688, 692-694 (3d Cir. 1982) (if integrity of privilege is to be maintained, “a wife who asserts the privilege should not be compelled to testify before a grand jury when her spouse is a target of the same underlying investigation as the party against whom she is called to testify and her testimony is sought with the expectation that it may lead to his indictment by a subsequent grand jury”), *cert. denied*, 459 U.S. 1015.

## Lawful marriage

The privilege generally applies only to couples who are lawfully married (and not to persons who simply live together),<sup>21</sup> and lawful marriages include same-sex marriages.<sup>22</sup> The Supreme Court's decision in *Obergefell* affords same-sex couples the right to marry in all 50 states, and this decision certainly supports (and may even require) extending the marital confidences privilege to same-sex marriages. Indeed, it may well be that persons in same-sex marriages under *Obergefell* can claim the protection of the confidences privilege for communications made while they were living in their committed domestic arrangements before *Obergefell* recognized these as constitutionally protected.<sup>23</sup> Prior to *Obergefell*, some states extended the privilege to persons in civil unions or domestic partnerships, that were sometimes created as a measure to add status and security to same-sex couples while not calling the relationship "marriage" and not extending to such relationships the full panoply of rights and legal understandings that traditionally apply to marriages.<sup>24</sup> What the future may hold for civil unions and domestic partnerships after *Obergefell*, to the extent that they continue to define or recognize relationships that differ in some significant way from marriages, is less certain, and it is hard to predict how privilege issues in such relationships might be resolved.<sup>25</sup> Common law marriages are covered too, but only if they are recognized as valid by the jurisdiction where the couple resides.<sup>26</sup> Courts have not extended the privilege to other intimate relationships,<sup>27</sup> even where the parties are living together and are "for

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21. *United States v. Snyder*, 707 F.2d 139, 147 (5th Cir. 1983) (privilege requires "a valid marital relationship").

22. *See, e.g.*, Vt. Stat. Ann. tit. 15, §1204(e)(15) (2008); N.H. Rev. Stat. Ann. §457-A:6 (2008). In 2015, the Supreme Court extended the right to marry to same-sex couples in all 50 states. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

23. *See* Peter Nicolas, *Backdating Marriage*, 105 Cal. L. Rev. 105 (2017); Steven A. Young, *Retroactive Recognition of Same-Sex Marriage for the Purposes of the Confidential Marital Communications Privilege*, 58 Wm. & Mary L. Rev. 319 (2016).

24. *See, e.g.*, N.J. Stat. Ann. §37:1-32(o) (2008) (civil union); Or. Rev. Stat. §106.340(1) (2007) (domestic partnership).

25. *See* David Pimentel, *The Impact of Obergefell: Traditional Marriage's New Lease on Life?*, 30 BYU J. Pub. L. 251, 269 (2016) (noting that some states have abolished civil unions upon legalizing marriage for all; now that "marriage is available to everyone, there may be little continuing reason to recognize domestic partnerships, or other, lesser alternatives to the marriage contract").

26. *See* *United States v. Lustig*, 555 F.2d 737, 747-748 (9th Cir. 1977) (privilege depends upon "existence of a valid marriage, as determined by state law"), *cert. denied*, 434 U.S. 926.

27. *See* *United States v. Acker*, 52 F.3d 509, 514 (4th Cir. 1995) (court refuses to recognize marital communications privilege or spousal testimonial privilege for couple who had lived together for 25 years but had not gotten married).

all practical purposes husband and wife.”<sup>28</sup>

### **Sham marriages**

The privilege does not apply to “sham” marriages, where the parties do not intend to live or remain as husband and wife but are using their temporary marital status for a fraudulent purpose such as to violate immigration laws.<sup>29</sup> The fact that the parties married shortly before trial of one spouse on criminal charges, thereby preventing the other spouse from being a witness, does not necessarily prove that the marriage is a sham.<sup>30</sup> Proposed-but-rejected Rule 505(c)(2) would have created an exception for “matters occurring prior to the marriage,” thereby preventing a defendant from “suppressing testimony by marrying the witness.”<sup>31</sup> This provision was not enacted, and the privilege applies not only to testimony on acts, events, or conditions occurring during marriage, but to acts, events, or conditions occurring prior to the marriage.

### **Moribund marriages**

Some courts have held that the privilege is inapplicable to marriages that are moribund,<sup>32</sup> although most courts are justifiably reluctant to undertake a detailed inquiry into the health of a marriage.<sup>33</sup> The privilege has also been held inapplicable where the government grants immunity

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and states in which they had lived did not recognize common law marriage; court rejects Equal Protection challenge to rule limiting privilege to married couples).

28. *United States v. Snyder*, 707 F.2d 139, 147 (5th Cir. 1983).

29. *Lutwak v. United States*, 344 U.S. 604, 614-615 (1953) (war brides case where defendants and aliens had apparently married abroad without intending to live together as spouses; such “sham, phony, empty ceremony” rendered testimonial privilege unavailable).

30. *In re Grand Jury Proceedings No. 84-5*, 777 F.2d 508 (9th Cir. 1985) (privilege upheld where parties lived together two years and got married after partner was served with subpoena); *United States v. Davis*, 237 F. Supp. 3d 1361, 1372 (N.D. Ga. 2017) (marriage was not a sham despite the fact that defendant married wife shortly after her statement to the FBI and his indictment; evidence showed committed long-term relationship).

31. ACN, proposed-but-rejected FRE 505. Such an exception seems overly broad, because it allows compulsion of one spouse to incriminate the other on premarital matters even where the privilege was not a motive for the marriage.

32. *In re Witness Before the Grand Jury (Carter)*, 791 F.2d 234 (2d Cir. 1986) (witness spouse and defendant had been married 23 years but had lived apart for last 11 years; court held they “did not have the kind of vital marriage for which the privilege was created”).

33. *Appeal of Malfitano*, 633 F.2d 276, 279 (3d Cir. 1980) (doubting that courts “can assess the social worthiness of particular marriages” or their need for protection of privilege); *United States v. Lilley*, 581 F.2d 182, 189 (8th Cir. 1978) (refusing to condition privilege “on a judicial determination that the marriage is a happy or successful one”).

against use of a spouse's testimony or any fruits thereof against the other spouse.<sup>34</sup>

## Extrajudicial statements

Most courts hold that the privilege applies only to testimony by the spouse and does not block admission of extrajudicial statements of one spouse offered against the other, where such statements are admissible under the hearsay doctrine.<sup>35</sup> However, some authorities view the privilege as barring introduction of extrajudicial disclosures of a spouse,<sup>36</sup> and such extrajudicial statements are of course often excludable on hearsay grounds.<sup>37</sup>

## Exceptions

There are several generally recognized exceptions to the privilege. The privilege is inapplicable in proceedings where one spouse is charged with a crime or tort against the person or property of the other or a minor child of either.<sup>38</sup> URE 504 recognizes an exception where a spouse is charged with a crime or tort against the person or property of "an individual residing in the household of either" and also where the victim is a third person "if the crime or tort is committed in the course of committing a crime or tort" against the spouse, a minor child of either, or an individual residing

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*See generally* Note, "Honey, the Judge Says We're History": Abrogating the Marital Privileges via Modern Doctrines of Marital Worthiness, 77 Cornell L. Rev. 843 (1992).

34. *In re Grand Jury*, 111 F.3d 1083 (3d Cir. 1997) (privilege against being compelled to testify against spouse defeated where government grants use and derivative use immunity thereby promising wife that neither her testimony or any fruits thereof will be used against her husband).

35. *See, e.g.*, *United States v. Chapman*, 866 F.2d 1326, 1333 (11th Cir. 1989) (extrajudicial statements "are not excludable on the basis of the spousal privilege"), *cert. denied*, 493 U.S. 932; *United States v. Tsinnijinnie*, 601 F.2d 1035, 1037-1039 (9th Cir. 1979), *cert. denied*, 445 U.S. 966 (marital privilege "should not be extended to bar a witness from relating an excited utterance by a spouse").

36. *See* 8 Wigmore, *Evidence* 225-226 (McNaughton rev. 1961) (it can be argued that privilege extends to "testimonial utterance in any form" and therefore hearsay statements "are equally privileged with testimony on the stand").

37. *United States v. Hall*, 989 F.2d 711, 715 (4th Cir. 1993) (where wife asserted privilege to refuse to testify against defendant, error for prosecutor to cross-examine defendant about "statement" wife allegedly gave to prosecutor because such statement was inadmissible hearsay).

38. *Trammel v. United States*, 445 U.S. 40, 46 n.7 (1980) (recognizing exceptions to testimonial privilege where "one spouse commits a crime against the other" or "crimes against the spouse's property" or "crimes against children of either spouse"). *But see* *United States v. Jarvison*, 409 F.3d 1221, 1231 (10th Cir. 2005) (declining to recognize exception allowing court to compel adverse spousal testimony relating to child abuse within household).

in the household of either.<sup>39</sup>

### **Joint participants**

Some courts recognize an exception for situations in which spouses were joint participants in the crime about which testimony is sought,<sup>40</sup> but most hold that the privilege continues even if both spouses were involved in criminal activity.<sup>41</sup> In any case, recognition of a joint -participants' exception to the testimonial privilege would not necessarily make a spouse's testimony available, because the spouse could assert the Fifth Amendment privilege to block inquiries that would be personally incriminating.

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39. URE 504(d)(3) (1999). *See also* proposed-but-rejected FRE 505(c)(1).

40. *See, e.g.,* United States v. Clark, 712 F.2d 299, 300-301 (7th Cir. 1983) (recognizing joint participant exception; "rehabilitative effect of a marriage, which in part justifies the privilege, is diminished when both spouses are participants in the crime").

41. *See* In re Grand Jury Subpoena (Koecher), 755 F.2d 1022, 1026-1027 (2d Cir. 1985) (court "unable to accept the proposition that a marriage cannot be a devoted one simply because at some time the partners have decided to engage in a criminal activity"), *vacated as moot*, 475 U.S. 133; United States v. Ramos-Oseguera, 120 F.3d 1028, 1041 (9th Cir. 1997) (rejecting exception); United States v. Davis, 237 F. Supp. 3d 1361, 1371 (N.D. Ga. 2017) (same). *See generally* Note, Partners in Crime: The Joint Participants Exception to the Privilege Against Adverse Spousal Testimony, 53 Fordham L. Rev. 1019 (1985).