The Marital Testimony And Communications Privileges: Improvements And Uncertainties In California And Federal Courts

I. INTRODUCTION

The marital testimony and communications privileges are two distinct evidentiary rules designed to promote extrinsic social policies. The testimony privilege may be claimed to exclude adverse testimony by a witness against his[1] spouse in order to prevent the dissension such testimony would cause when marital partners are involved in litigation. The communications privilege may be claimed to exclude any testimony which would reveal a confidential communication between spouses without regard to whether it would be favorable or unfavorable to the spouses. It is designed to serve the more general policy of fostering confidence in all marriages. This article examines both of these marital privileges under California and federal law.

The privileges are discussed separately because they evolved for different reasons, apply in different situations, and enjoy different degrees of approval among legal scholars. The testimony privilege, which is the older and more criticized of the two, will be discussed first by tracing the history, policy, and criticisms, all of which are important to an understanding of the modern formulations of this privilege. Then follows a summary of California's unique and complicated statutory formulation of the testimony privilege which has answered many of the criticisms leveled at the privilege. The California scheme, however, has created some new problems in application and interpretation, which are discussed thereafter. A description of the federal privilege and its application will conclude the treatment of the testimony privilege. The communications privilege is discussed in a similar format.

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[1] Throughout this article the pronouns "he" and "his" are used to refer to both sexes.

II. TESTIMONY PRIVILEGE

A. COMMON LAW HISTORY

One of the earliest records of a privilege not to testify against a spouse is in *Bent v. Allot.*[2] The defendant-spouse was given the option of preventing his wife's testimony in response to plaintiff's subpoena and thereby forfeiting her previous testimony in his favor, or allowing such adverse testimony and preserving the record. Such a rule could only be interpreted as a party's privilege to prevent his spouse from testifying for an adverse party, a privilege which may be waived by calling the spouse to the stand in his favor.[3]

By the time of Coke's *Commentaries on Littleton* in 1628, the testimony privilege had become an exclusionary rule to prevent the introduction of unreliable evidence. Lord Coke described the rule as a general disqualification of a spouse to testify either for or against the party spouse.[4] At this point, the disqualification could best be described as two rules: incompetency to testify in favor of a spouse, and a privilege not to testify against a spouse.[5] The incompetency appears related to the disqualifications based on interest which also existed at the time of Coke's *Commentaries.*[6] An interested person was incompetent to testify because of the fear of perjury. Lord Coke extended this reasoning to the marital relationship because marital partners were ". . . two souls in one flesh."[7] This highly criticized approach[8] was later exchanged for the rationale that married persons had an identity of interest in the outcome of most proceedings[9] or that a witness-spouse would be biased in testimony because of presumed affections for the party-spouse.[10] Modern critics of the privilege have cited Lord Coke's unity of spouses language in attacking the basis of the privilege,[11] although Coke's reasoning was probably

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[2] 21 Eng. Rep. 50 (Ch. 1580).

[3] The waiver concept is similar to the modern California privilege. *See* CAL. EVID. CODE § 973, Law Rev. Comm'n Comment (West 1968), discussed in the next accompanying notes 61-62 *infra.*

[4] COKE, COMMENTARY UPON LITTLETON 6B (1628) [hereinafter cited as COKE]; 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2227 at 212 (McNaughton rev. 1961) [hereinafter cited as 8 WIGMORE].

[5] E. CLEARY *et al.*, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 66 at 144 (2d ed. 1972) [hereinafter cited as MCCORMICK (2d ed.)].

[6] 2 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 601 at 731 (3d ed. 1950) [hereinafter cited as WIGMORE (3d ed.)].

[7] COKE, *supra* note 4.

[8] MCCORMICK (2d ed.), *supra* note 5, § 66; 8 WIGMORE, *supra* note 4, § 2228 at 214.

[9] 2 WIGMORE (3d ed.), *supra* note 6, § 601 at 731.

[10] *Id.* at 732.

[11] Professor McCormick cited Lord Coke's phrase in describing the testimony privilege as "an archaic survival of a mystical religious dogma and of a way of

directed to the incompetency to testify in favor of a spouse rather than to the privilege portion of the rule. This criticism often overshadows the fact that Lord Coke originated the modern rationale for the privilege not to testify against a spouse, stating that such testimony ". . . might be a cause of implacable discord and dissension between the husband and the wife . . ."[12]

The rules of disqualification based on interest were abolished in England by the Evidence Amendment Act of 1853 and gradually disappeared in the United States as well.[13] The incompetency of spouses to testify in favor of each other thus became outdated and disappeared also,[14] leaving the privilege not to testify against a spouse. The privilege not to testify against a spouse, although sometimes limited to criminal proceedings, is retained in the majority of jurisdictions in the United States today,[15] based primarily on the policy of preserving domestic harmony.[16] In most jurisdictions the privilege belongs to the party, while in some it may be claimed by either spouse.[17]

B. POLICY AND CRITICISM

The most commonly accepted rationale for the privilege is that it is necessary to preserve domestic harmony. A secondary policy for the privilege is that society has a "natural repugnance" to force one spouse to condemn the other.[18] The privilege has been severely criticized because of these policies and their application. One of the earliest critics, Jeremy Bentham, argued that the possible destruction of domestic harmony was one of the consequences a wrongdoer must bear.[19] Dean Wigmore concurred in this approach, stating that the wrongdoer's marital peace should not impede the course of justice against him.[20] This argument presupposes the guilt of the "wrongdoer," contrary to the presumption of innocence in criminal trials.[21] It also ignores the availability of the privilege in civil matters.

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thinking about the marital relation that is today outmoded." MCCORMICK (2d ed.), *supra* note 5, § 66 at 145-46. Dean Wigmore regarded the rationale as "medieval scholasticism." 8 WIGMORE, *supra* note 3, § 2228 at 214.

[12] COKE, *supra* note 4. *Cf.* Hawkins v. United States, 358 U.S. 74, 77 (1958) (". . . such a policy is necessary to foster family peace . . .").

[13] MCCORMICK (2d ed.), *supra* note 5, § 65; 2 WIGMORE (3d ed.), *supra* note 6, § 602.

[14] 2 WIGMORE (3d ed.), *supra* note 6, § 602.

[15] MCCORMICK (2d ed.), *supra* note 5, § 66; and see statutes collected in 2 WIGMORE (3d ed.), *supra* note 6, § 488.

[16] Hawkins v. United States, 358 U.S. 74, 79 (1958); MCCORMICK (2d ed.), *supra* note 5, § 66; 8 WIGMORE, *supra* note 4, § 2228 at 214-16.

[17] MCCORMICK (2d ed.), *supra* note 5, § 66.

[18] 8 WIGMORE, *supra* note 4, § 2228 at 216-18.

[19] 7 J. BENTHAM, THE WORKS OF JEREMY BENTHAM 485 (Bowring ed. 1962).

[20] 8 WIGMORE, *supra* note 4, § 2228 at 216-18.

[21] MCCORMICK (2d ed.), *supra* note 5, § 342 at 805-06.

A similar argument is that the privilege does not preserve domestic harmony because the party spouse is not likely to claim the privilege solely to protect his marital peace, but rather to influence the outcome of the case.[22] While this may be true, the result of the privilege is to avoid dissension in the marriage, regardless of the party's motives in claiming it. California has greatly reduced the instances in which the privilege is claimed even though the relationship is in such a state as to reap no benefit from the privilege by giving the decision to the non-party spouse.[23] The federal courts limit this problem by giving the courts discretion to withhold the privilege in cases where it is clear the privilege will not serve its policy.[24]

Critics also claim there is a breakdown of the marriage relationship in modern society and there is thus no longer any need for protection. Dean Wigmore led this faction with the statement:

> 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 completely 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.[25]

There is no evidence that the increasing rights of women have adversely affected the marriage relationship. Nor did the original policy of the privilege require inequality in the relationship so as to render the privilege anachronistic when applied to a marriage in which the partners have equal rights. It is incongruous that Dean Wigmore, who so severely criticized the mystical idea of unity of spouses,[26] seemed to have an equally romanticized view of marriage in lamenting its "rationalization," "dechivalrization," and the independence of man and woman. If there is a general breakdown of marriage in our society, then it is even more important to protect those relationships that still remain harmonious.[27]

The privilege is also criticized as illogically applied. This charge is supported by examples of unjustifiable applications of the privilege as where the parties were separated,[28] or the crime was against the child of a spouse.[29] This is a legitimate criticism, but not one which mandates the abolition of the privilege. It can be met by establishing

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[22] 8 WIGMORE, *supra* note 4, § 2228 at 216-17.
[23] *See* text accompanying notes 78-80 *infra.*
[24] *See* text accompanying note 132 *infra.*
[25] 8 WIGMORE, *supra* note 4, § 2228 at 221.
[26] *Id.* at § 2227; *see* text accompanying notes 7-11 *supra.*
[27] Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege,* 61 CALIF. L. REV. 1353, 1372 (1973).
[28] R. v. Cliviger, 100 Eng. Rep. 143 (K.B. 1788), cited in 8 WIGMORE, *supra* note 4, § 2228 at 221.
[29] Hutchins & Slesinger, *Domestic Relations and the Law of Evidence,* 13 MINN. L. REV. 675, 676 (1929).

exceptions to the privilege as has been done in California.[30]

Weighing the advantages of the privilege against its disadvantages leads some to conclude that the obstruction of truth-seeking is too great a price for preserving marital harmony.[31] In this view, so few marriages would actually be exposed to the dangers of litigation that their possible disharmony would be of minimal concern to society.[32] One response to this contention is that litigation is increasing, more families are involved in its processes, and, therefore, it is of greater significance to society.[33] Furthermore, the legislatures of most states, whose responsibility it is to make such decisions for society, have made the evaluation, and determined that the privilege's policy of protecting domestic harmony outweighs any obstacles to enforcing justice.[34] This is true even though the Model Code of Evidence[35] and the Uniform Rules of Evidence[36] have recommended the abolition of the privilege.

Attempts have been made to modify the privilege in response to these criticisms. The history of the testimony privilege in California and the recent enactment of the California Evidence Code provide an example.

C. THE CALIFORNIA TESTIMONY PRIVILEGE

1. HISTORY[37]

The earliest statute on the subject in California, enacted in 1851, retained the common law disqualification of spouses.[38] In 1863 the incompetency was removed by legislation,[39] but was retained in

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[30] *See* CAL. EVID. CODE § 972 (West 1968).

[31] Dean Wigmore concluded the real policy behind the privilege is the "natural repugnance" society has to force one spouse to condemn the other. He argued this is nothing more than sentiment, and thus not sufficient to justify the obstacles the privilege presents at trial. 8 WIGMORE, *supra*, note 4, § 2228 at 216-18.

[32] *Id.* at 218-21; Hutchins and Slesinger, *supra* note 29, at 677.

[33] Reutlinger, *supra* note 27, at 1374.

[34] *See* statutes collected in 2 WIGMORE (3d ed.), *supra* note 6, § 488.

[35] The testimony privilege was dropped because,

> It is now generally agreed that these considerations [protecting domestic harmony] cannot justify the disqualification of a spouse as a witness or a privilege either in the witness-spouse to refuse to testify or in the party-spouse to prevent the other from testifying.

Model Code of Evidence, Comment to Rule 215 at 154 (1942).

[36] Uniform Rule of Evidence 23(2) (1953 version, superseded 1974).

[37] *See generally* Reutlinger, *supra* note 27, at 1364-66 (1973); Hines, *Privileged Testimony of Husband and Wife in California*, 19 CALIF. L. REV. 390, 391-92 (1931); Note, *The Marital "For and Against" Privilege in California*, 8 STAN. L. REV. 420, 426-33 (1956).

[38] Ch. 5, § 395 [1850-53] Cal. Stats. 591.

[39] Ch. 528, § 1 [1863] Cal. Stats. 771.

criminal actions by judicial decision.[40] By 1866 California had transformed the common law disqualification into a privilege by making spouses competent to testify in criminal proceedings, but only if both the party and witness spouses consented.[41] The privilege statutes which were to remain law in California until 1965 were enacted in 1872. In civil cases the privilege belonged to the party spouse,[42] which meant he could require his unwilling spouse to testify or prevent a willing spouse from testifying.[43] In criminal cases[44] the privilege belonged to both spouses. Thus, the testimony of the non-party spouse required the consent of both,[45] and the party spouse could not compel the other to testify as in civil cases.

2. CALIFORNIA EVIDENCE CODE PROVISIONS

The current codification of the testimony privilege is contained in California Evidence Code sections 970 to 973. The basic testimony privilege has been set out in two complementary provisions. Section 970 provides a privilege to a witness not to testify against a spouse in any proceeding,[46] and section 971 provides a privilege not to be called by an adverse party in a proceeding to which one's spouse is a party.[47] Both sections will hereinafter be referred to as the testimony privilege unless otherwise noted.

The testimony privilege as a whole is based on the policy of preventing dissension and preserving marital harmony.[48] The additional protection offered by section 971 against being called as a witness is justified on two grounds. It is an implicit recognition by the drafters

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[40] People v. McFlynn, 1 Cal. Unrep. 234 (1865); People v. Anderson, 26 Cal. 130 (1864).

[41] Ch. 64, § 1 [1865-66] Cal. Stats, 46; Reutlinger, *supra* note 27, at 1365; Note, *The Marital "For and Against" Privilege in California*, 8 STAN. L. REV. 420, 426 (1956).

[42] Ch. 129, § 5 [1939] Cal. Stats. 1246 (repealed 1965).

[43] Maple v. Jackson, 184 Cal. 411, 413, 193 P. 940, 941 (1920); B. WITKIN, CALIFORNIA EVIDENCE § 830 at 776 (2d ed. 1966) [hereinafter cited as WITKIN].

[44] Ch. 109, § 1 [1933] Cal. Stats. 565 (repealed 1965).

[45] People v. Langtree, 64 Cal. 256, 259, 30 P. 813 (1883); WITKIN, *supra* note 43, § 830 at 776.

[46] "Except as otherwise provided by statute, a married person has a privilege not to testify against his spouse in any proceeding." CAL. EVID. CODE § 970 (West 1968); Law Rev. Comm'n Comments to Repealed Sections, CAL. CODE CIV. P. § 1881 (West Supp. 1975).

[47] Except as otherwise provided by statute, a married person whose spouse is a party to a proceeding has a privilege not to be called as a witness by an adverse party to that proceeding without the prior express consent of the spouse having the privilege under this section unless the party calling the spouse does so in good faith without knowledge of the marital relationship.

CAL. EVID. CODE § 971 (West 1968).

[48] CAL. EVID. CODE § 970, Law Rev. Comm'n Comment (West 1968).

that any testimony requested by an adverse party has the possibility of being "against" a spouse, and therefore should be privileged. In some cases, even being called to the stand can constitute giving adverse testimony, as illustrated by *People v. Villarino*,[49] where the prosecutor called the defendant's wife to the stand merely for the purpose of identifying her as such. The identification of the wife incriminated her husband because she was subsequently identified by another witness as having negotiated fraudulent checks, which established a connection between her husband and the forgeries. Also, the drafters felt it necessary to avoid the prejudicial effect of forcing the witness to invoke the privilege not to testify against the spouse in the jury's presence.[50] Although there is confusion about the application of this rationale,[51] the drafters apparently recognized that the party spouse has an interest in the effect of the privilege.

There are two important changes in the testimony privilege. First, there is no longer a privilege not to testify in favor of a spouse, as section 970 limits the privilege to testimony "against" a spouse.[52] The companion statute, section 971, is likewise limited to a privilege not to be called by an "adverse party."[53] Thus, the spouse may not refuse to testify as to favorable matters when called by the party spouse.[54]

Second, the privilege now belongs to the witness. The party spouse may no longer prevent his spouse from testifying.[55] This very important change in the holder of the privilege was made because the non-party spouse is more likely to base his decision on the effect such testimony would have on his marrige, a criterion closely related to the policy of preventing dissension in the marriage.[56]

The privilege is limited to "married persons,"[57] and thus requires a valid marriage at the time of the trial. This requirement also is related to the policy of preventing dissension, a consideration no longer present if the parties are divorced before the trial.[58] If the parties are separated, the privilege may still be claimed, presumably because

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[49] 7 Cal. App. 3d 56, 86 Cal. Rptr. 338 (4th Dist. 1970).
[50] CAL. EVID. CODE § 971, Law Rev. Comm'n Comment (West 1968).
[51] *See* text accompanying notes 87-92 *infra*.
[52] CAL. EVID. CODE § 970 (West 1968).
[53] *Id.* § 971.
[54] People v. Coleman, 71 Cal. 2d 1159, 80 Cal. Rptr. 920, 459 P. 2d 248 (1969).
[55] People v. Dorsey, 46 Cal. App. 3d 706, 716, 120 Cal. Rptr. 508, 514 2d Dist. 1975); CAL. EVID. CODE § 970, Law Rev. Comm'n Comment (West 1968).
[56] Law Rev. Comm'n Comments to Repealed Sections, CAL. CODE CIV. P. § 1881 (West Supp. 1975).
[57] CAL. EVID. CODE § 970 (West 1968).
[58] People v. Bradford, 70 Cal. 2d 333, 343, 74 Cal. Rptr. 726, 731, 450 P.2d 46, 51 (1969); People v. Dorsey, 46 Cal. App. 3d 706, 716, 120 Cal. Rptr. 508, 514 (2d Dist. 1975).

of the possibility of reconciliation. If the parties married before the trial, testimony as to events occurring before the trial is still privileged, again, with reference to the policy of preventing dissension in an existing marriage.

The section 971 privilege not to be called as a witness may be waived by prior express consent.[59] Thus, the adverse party may not call the witness spouse unless he has obtained in advance an informed consent based on a full understanding of the privilege.[60]

While the witness spouse may expressly relinquish his right not to testify against a spouse or to be called as a witness under sections 970 and 971, he may also lose those privileges by actions described in section 973(a).[61] When the spouse is a party to the proceeding, any testimony by the non-party spouse in that proceeding will serve as a waiver. The Law Revision Commission Comment indicates that if a party calls his spouse to give favorable testimony, the spouse cannot claim the privilege to avoid giving unfavorable testimony.[62] Nor can the witness spouse testify to some matters and refuse to testify to others. This prevents the witness spouse from choosing which testimony he will give and which he will withhold.

Since section 970 applies the privilege not to testify against a spouse to "any proceeding,"[63] a spouse who has been compelled to testify in a proceeding to which his spouse is not a party may nonetheless invoke the privilege as to testimony which may be against his spouse. In such a case, only testimony against the spouse will waive the section 970 privilege. Section 973(a) provides that if the spouse neglects to invoke the privilege and gives adverse testimony, he

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[59] CAL. EVID. CODE § 971 (West 1968).

[60] The following is an example:

> Prosecutor: Ma'am, do you wish to answer any question that I may ask you in front of the jury with respect to what your husband was doing on December 9th? Do you wish to do that or not? You have the right not to.
>
> Answer: I will answer in front of the jury.

People v. Marsh, 270 Cal. App. 2d 365, 369, 75 Cal. Rptr. 814, 817 (2d Dist. 1969).

[61] Unless erroneously compelled to do so, a married person who testifies in a proceeding to which his spouse is a party, or who testifies against his spouse in any proceeding, does not have a privilege under this article in the proceeding in which such testimony is given.

CAL. EVID. CODE § 973(a) (West 1968).

[62] CAL. EVID. CODE § 973(a), Law Rev. Comm'n Comment (West 1968). This interpretation is not consistent with traditional concepts of waiver or with the change in the holder of the privilege, *see* text accompanying notes 93-96 *infra*.

[63] 'Proceeding' means any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given.

CAL. EVID. CODE § 901 (West 1968).

waives the privilege in that proceeding.[64] This waiver arises from a mere neglect to claim the privilege and the giving of adverse testimony.

Section 973(b) provides that in a civil proceeding which is for the immediate benefit of the non-party spouse or both spouses, the privilege is not applicable.[65] Prior cases held that spouses waived the privilege as the result of some affirmative action, such as, both spouses joining as plaintiffs in an action for personal injury to one,[66] or both spouses as defendants pleading an affirmative defense.[67] Section 973 (b) could be interpreted to expand this rule by withholding the privilege if both spouses are real parties in interest. Thus, whether or not both spouses are named parties to the action, the statute appears to direct the courts to determine if the claim or defense is "for the immediate benefit" of the non-party spouse or both spouses. If the proceeding is for the benefit of both, they should not be allowed to take "unfair advantage of their marital status to escape their duty to give testimony"[68] on relevant issues.

The exceptions to the testimony privilege are codified in section 972,[69] and are largely designed to further the policy of the privilege. Thus, section 972(a)[70] provides the privilege is not applicable in proceedings between spouses. Domestic harmony already has been jeopardized by the filing of the action, and bringing the action could be considered a waiver of the privilege. Given the adversary posture of the spouses, the privilege would have little utility in this situation. This exception could serve to prevent frivolous actions or harrassment which might occur if a spouse were allowed to make a complaint, then refuse to testify.

Section 972(b) is the exception for a commitment proceeding and section 972(c) for a proceeding to establish competence.[71] The ra-

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[64] CAL. EVID. CODE § 973(a) (West 1968).

[65] There is no privilege under this article in a civil proceeding brought or defended by a married person for the immediate benefit of his spouse or of himself and his spouse.
CAL. EVID. CODE § 973(b) (West 1968).

[66] *In re* Strand, 123 Cal. App. 170, 11 P.2d 89 (1st Dist. 1932).

[67] Tobias v. Adams, 201 Cal. 689, 699-700, 258 P. 588, 592 (1927); Hagen v. Silva, 139 Cal. App. 2d 199, 202-03, 293 P.2d 143, 145-46 (1st Dist. 1956); Schwartz v. Brandon, 97 Cal. App. 30, 35-36, 275 P. 448, 451 (1st Dist. 1929).

[68] CAL. EVID. CODE § 973(b), Law Rev. Comm'n Comment (West 1968).

[69] CAL. EVID. CODE § 972 (West 1968).

[70] "A married person does not have a privilege under this article in: (a) a proceeding brought by or on behalf of one spouse against the other spouse." CAL. EVID. CODE § 972(a) (West 1968).

[71] (b) A proceeding to commit or otherwise place his spouse or his spouse's property, or both, under the control of another because of the spouse's alleged mental or physical condition.
(c) A proceeding brought by or on behalf of a spouse to establish his competence.
CAL. EVID. CODE § 972(b), (c) (West 1968).

tionale is that such proceedings are actually for the benefit of the party they concern. Hence no testimony in such a proceeding is "against" the spouse, and the privilege is not applicable.[72] However, such proceedings are in many significant ways so similar to criminal proceedings that this reasoning is unconvincing. But the exception can be characterized as one of necessity. The evidence from the spouse is likely to be the most accurate and complete, and often the only available evidence. The exception can also be justified in terms of the policy of the privilege, as domestic harmony may be so adversely affected by the existence of the conditions necessitating such proceedings that the privilege would be of no benefit.

Section 972(d)[73] excepts juvenile court proceedings. Although the policy behind this exception has not been stated, the reasoning was probably similar to the exception for commitment and competency proceedings, that the purpose of the Juvenile Court Law is not penal[74] and the proceedings are not "against" the parents. Due to the importance of the interests involved, this rationale would also fail to support this exception. Again, necessity is an important factor in justifying this exception. It is also possible that family harmony may already be damaged by the circumstances precipitating these proceedings so that the privilege would not serve its purpose. But a more plausible basis for the juvenile court exception is that society's solicitude for the welfare of children far surpasses the need for the privilege in this situation.

Section 972(e)[75] provides that the testimony privilege cannot be claimed in prosecutions for crimes against the spouse or children of either spouse. This general exception has long been recognized,[76] based on the rationale that such crimes have already seriously damaged the relationship.[77] The factors of availability of evidence and other

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[72] CAL. EVID. CODE § 982, Law Rev. Comm'n Comment (West 1968).

[73] "(d) A proceeding under the Juvenile Court Law, Chapter 2 (commencing with Section 500) of Part 1 of Division 2 of the Welfare and Institutions Code." CAL. EVID. CODE § 972(d) (West 1968).

[74] CAL. WELFARE AND INST. CODE § 502 (West Supp. 1976).

[75] (e) A criminal proceeding in which one spouse is charged with: (1) A crime against the person or property of the other spouse or of a child of either, whether committed before or during marriage. (2) A crime against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse, whether committed before or during marriage. (3) Bigamy. (4) A crime defined by Section 270 or 270a of the Penal Code.

CAL. EVID. CODE § 972(e) (West Supp. 1976).

[76] Young v. Superior Court, 190 Cal. App. 2d 759, 12 Cal. Rptr. 331 (1st Dist. 1961); People v. Rader, 24 Cal. App. 477, 484, 141 P. 958, 961 (2d Dist. 1914).

[77] People v. Seastone, 3 Cal. App. 3d 60, 82 Cal. Rptr. 907 (5th Dist. 1969); People v. Batres, 269 Cal. App. 2d 900, 903, 75 Cal. Rptr. 397, 399 (2d Dist. 1969).

important societal interests undoubtedly support the policy of this exception also.

3. CRITICISMS RECONSIDERED

The major criticisms of the testimony privilege have been met by California's current statute which makes the non-party spouse the holder of the privilege. The drafters reasoned that the decision by the non-party spouse more likely would be made in consideration of the possible damage to the marriage rather than the effect on the outcome of the proceeding.[78] A party would be inclined to prevent adverse testimony by his spouse even if the marriage were already deeply troubled and the testimony could not further damage the relationship. This is a persuasive reason for the change in the holder of the privilege because it satisfies the criticism that the privilege does not serve its policy.[79] It also answers the criticism that the alleged wrongdoer should not be consulted in determining whether his marital peace should interfere with the course of justice against him[80] since the decision is no longer his.

California's detailed statutory exceptions to the privilege[81] also serve to answer the criticism that the stated policy of the privilege is not served in practice. The examples[82] that most critics have given in this regard involve situations in which California has provided an exception, as where the crime is against the child of a spouse.[83] Thus, California has developed a marital testimony privilege that meets the major criticisms.

4. SPECIFIC PROBLEMS IN APPLICATION AND INTERPRETATION

While the change in the holder of the privilege from the party to the witness spouse has gone far to meet the criticisms of the testimony privilege, it has created some new problems. Additionally, the statutes contain ambiguities which have not yet been resolved by judicial decision. The following discussion will identify some of these problems and propose judicial solutions.

a. Problems created by the change in the holder of the privilege

The party spouse no longer has any right to claim the privilege, yet has a definite interest in whether the non-party spouse's privilege is

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[78] Law Rev. Comm'n Comment to Repealed Section 1881 of CAL. CODE CIV. P. (West 1966).
[79] *See* text accompanying note 22 *supra*.
[80] *See* text accompanying notes 19-21 *supra*.
[81] *See* text accompanying notes 69-77 *supra*.
[82] *See* text accompanying notes 28-29 *supra*.
[83] CAL. EVID. CODE § 972(e) (West Supp. 1976).

recognized because his spouse's testimony may affect the outcome of the case. Section 918[84] of the California Evidence Code provides that a party can base an appeal on denial of the testimony privilege to his spouse. To date, no reported cases have dealt with this provision.

One context in which section 918 becomes important is if the adverse party calls the witness spouse to the stand without obtaining his prior consent. In cases decided before the enactment of the Evidence Code, it was held error for an adverse party to call the spouse as a witness without first obtaining the party's consent, forcing the party to object in open court,[85] although it was recognized that a judge's admonition to the jury to disregard the occurrence would render such error nonprejudicial.[86] Difficulty arises because under the code, consent must be obtained from the witness spouse rather than from the party.

In *People v. Chavez*[87] the court implied that the Evidence Code overruled these cases and that a party cannot object if his spouse is called as a witness in violation of section 971. The prosecutor called defendant's wife to the stand without obtaining her prior consent. On defendant's objection, the privilege was explained to the wife in chambers, and she declined to testify. The judge admonished the jury to disregard the occurrence, and defendant appealed from the denial of a mistrial. The appellate court reasoned that since the section 970 privilege not to testify runs to the witness spouse, the defendant did not have "legislative sanction"[88] to object. By making the unwarranted objection, he was responsible for creating any prejudice that may have resulted in the minds of the jurors.

The court did not reconcile the statement that the defendant did not have legislative sanction to object with section 918, which allows a party to predicate error on the denial of privilege to his spouse,[89] nor did it cite section 918 in the opinion. The comment to section 918 states that the existing law was left unchanged,[90] which indicates that the code was not intended to overrule prior cases. The marital testimony privilege is identified as the only privilege not held

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[84] A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege, except that a party may predicate error on a ruling disallowing a claim of privilege by his spouse under Section 970 or 971.
CAL. EVID. CODE § 918 (West 1968).

[85] People v. Ward, 50 Cal. 2d 702, 712-13, 328 P.2d 777, 783 (1958); People v. Wilkes, 44 Cal. 2d 679, 687-88, 284 P.2d 481, 485-87 (1955); People v. Solis, 193 Cal. App. 2d 68, 77-78, 13 Cal. Rptr. 813, 819-20 (2d Dist. 1961).

[86] People v. Klor, 32 Cal. 2d 658, 662-64, 197 P.2d 705, 707-08 (1948).

[87] 262 Cal. App. 2d 422, 68 Cal. Rptr. 759 (4th Dist. 1968).

[88] *Id.* at 429, 68 Cal. Rptr. at 763.

[89] CAL. EVID. CODE § 918 (West 1968).

[90] CAL. EVID. CODE § 918, Law Rev. Comm'n Comment (West 1968).

by the party which can be used as a basis of appeal.[91] This demonstrates the legislative intent to preserve the party spouse's rights in the testimony privilege, and should be construed as giving the party "legislative sanction" to object to a denial of the privilege to his spouse.

The *Chavez* court also based its analysis on section 970 rather than on section 971, the applicable provision in a proceeding to which one's spouse is a party.[92] If the wife's prior express consent were obtained as section 971 requires, there would be no need to object. Furthermore, the court, while holding that the party spouse has no standing to object, referred to the Law Revision Commission's comment to section 971 to indicate that it would have been prejudicial if the wife had been forced to object. There is no logical reason to assume that the jury would be any less prejudiced by the party's objection to the denial of the testimony privilege than it would be by the same objection raised by the witness spouse.

The court's analysis also overlooks the fact that it is not practical to expect the non-party spouse to object. The party spouse will usually have the benefit of counsel, while the non-party will not. The *Chavez* court's interpretation therefore would in effect reserve the privilege for those who are knowledgeable. Mrs. Chavez did not learn of her privilege not to testify until her husband's attorney objected and the judge explained the privilege to her in chambers.

Under the provisions of section 918 and in view of the lack of representation by counsel of the non-party spouse, this interpretation of the testimony privilege should be re-examined. The same result on appeal could have been reached correctly on the ground that the error was cured by the judge's admonition to the jury to disregard the prosecution's attempt to call the witness. In any event, the practitioner can avoid the problem in *Chavez* by informing the client's spouse of the privilege before the trial or proceeding.

The Law Revision Commission's interpretation of section 973(a) presents an additional problem concerning the waiver of the privilege by a spouse who gives any testimony in a proceeding to which his spouse is a party. As discussed above,[93] the statute provides that ". . .a married person who testifies in a proceeding to which his spouse is a party . . . does not have a privilege under this article . . ."[94] The Law Revision Commission notes that ". . . a married person cannot call his spouse as a witness to give favorable testimony and have that spouse invoke the privilege provided in section 970 to keep from

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[91] CAL. EVID. CODE § 918 (West 1968).
[92] CAL. EVID. CODE § 971 (West 1968).
[93] *See* text accompanying notes 61-62 *supra*.
[94] CAL. EVID. CODE § 973(a) (West 1968).

testifying on cross examination to unfavorable matters."[95]

However, the privilege now belongs to the non-party spouse, and there is no privilege to refuse to testify for a spouse. Consequently, the party spouse may force the non-party to give favorable testimony and thus waive his privilege through no voluntary action of the non-party spouse. This is contrary to traditional concepts of waiver. It is apparently a conceptual oversight by the drafters, who failed to take into account the change in the holder of the privilege. The privilege should be deemed waived only if the non-party spouse, as holder of the privilege, has voluntarily testified.

People v. Marsh[96] provides an example of how the privilege and its waiver should work, although section 973 was not the issue on appeal and the case is not controlling on this point. The defendant called his wife to give favorable testimony. On cross-examination, the prosecutor attempted to question her as to matters potentially unfavorable to the defendant. The defense objection that this questioning was beyond the scope of the direct examination was sustained, whereupon the prosecutor obtained express consent of the wife to call her as his own witness. If the Law Revision Commission interpretation were followed, the prosecutor would not need to follow this procedure. However, it would be necessary if the privilege statutes were consistently applied. The party would then be able to obtain favorable testimony of the non-party spouse without risking adverse testimony by carefully limiting the scope of the direct examination. The privilege would be waived only to the extent of the areas touched in direct examination. This would be consistent with the policy of the privilege also, in that the party who finds it necessary to call his spouse to testify in his favor will not then risk adverse testimony destructive of marital harmony.

Comment by the prosecutor in a criminal case drawing adverse inferences from the failure of defendant's spouse to testify raises similar problems. The courts held this to be misconduct before enactment of the Evidence Code.[97] The leading case on this subject since the effective date of the Evidence Code is *People v. Coleman*,[98] in which the California Supreme Court held that the prosecutor's comment on the failure of defendant's wife to testify on his behalf did not constitute misconduct. The court reasoned that under former California Penal Code section 1322, the non-party spouse had a privilege not to testify either for or against his spouse, and neither the

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[95] CAL. EVID. CODE § 973, Law Rev. Comm'n Comment (West 1968).
[96] 270 Cal. App. 2d 365, 75 Cal. Rptr. 814 (2d Dist. 1969).
[97] People v. Wilkes, 44 Cal. 2d 679, 687-88, 284 P.2d 481, 485-87 (1955); Note, *Evidence: Criminal Prosecution: Prosecuting Attorney's Comment on Failure of Defendant's Wife to Testify*, 2 U.C.L.A.L. REV. 576 (1955).
[98] 71 Cal. 2d 1159, 80 Cal. Rptr. 920, 459 P.2d 248 (1969).

prosecution nor the defense could compel testimony. However, under the Evidence Code, the non-party spouse has a privilege only as to testimony against his spouse, and the defendant can now compel favorable testimony by his spouse. The court held that since this failure to call his spouse was a failure to call a material and important witness, it could be commented on by the prosecutor and considered by the jury.

Since the party can compel favorable testimony by his spouse, this decision is correct because no privilege is exercised directly in such a case. If the privilege is not waived unless the witness spouse testifies voluntarily,[99] this decision is consistent with the change in the holder of the privilege. However, if the Law Revision Commission's interpretation of section 973(a) is followed, this approach unduly burdens the party, who may be taking a grave risk in calling his spouse to the stand. Under the Commission's interpretation, a spouse who gives testimony in a proceeding to which his spouse is a party, does waive his privilege not to testify or be called as a witness by an adverse party under sections 970 and 971.[100] Allowing an adverse inference to be drawn from a party's reluctance to take this risk presents the party spouse with the dilemma of whether to take the risk or to accept an adverse inference from the failure to call his spouse. In this regard, the failure to call a spouse may be an indirect exercise of the privilege by the witness spouse because it may be for the purpose of avoiding a waiver. This would be true if the party intended to call his spouse, but upon the spouse's insistence that he had adverse information which he did not wish to reveal in court, the party decided not to call his spouse to the stand. Thus, the prosecutor's comment would be prohibited by the Evidence Code section 913,[101] which forbids comment on or inferences from the exercise of a privilege.

b. Areas left unclear by statutory wording

Some of the uncertainties in interpreting the testimony privilege arise from the statutory language or its interpretation in light of prior

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[99] *See* text accompanying notes 93-96 *supra*.

[100] CAL. EVID. CODE § 973, Law Rev. Comm'n Comment (West 1968).

[101] (a) If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding . . .

CAL. EVID. CODE § 913 (West 1968); MCCORMICK (2d ed.), *supra* note 5, § 76; WITKIN, *supra* note 43, § 792 at 737-38.

case law. If *People v. Villarino*,[102] in which the prosecutor was allowed to call the non-party spouse to the stand without prior consent, is not recognized as a pre-code case, it could create an unwarranted and broad exception to section 971, the privilege not to be called as a witness. The prosecutor in that case called defendant's wife to the stand for the purpose of identifying her as such with the stated intention of eliciting no other testimony. The defendant objected and the wife was excused. On appeal, although prior law was to the contrary,[103] the court held that merely asking the witness to identify herself as defendant's wife did not violate the privilege not to testify on the theory that a witness is bound to show his features to the jury.[104] Although Witkin describes this as a "strained interpretation" of section 971,[105] the trial in this case took place in November, 1966,[106] prior to the effective date of the Evidence Code.[107] If the question were to arise now, it could be argued that section 971 dictates a contrary result since it precludes an adverse party from calling the spouse "as a witness,"[108] and not from calling the spouse "to testify."

Read in conjunction with prior decisions, the statute also leaves unclear whether the privilege applies in proceedings to which neither spouse is a party. Section 970 extends the testimony privilege to "any proceeding."[109] The Law Revision Commission Comment indicates the legislative intent was to include grand jury inquiries[110] and other non-trial proceedings.[111] On its face the statute may overrule the prior view that the testimony privilege is not applicable in a proceeding to which neither spouse is a party because such testimony was not "against" a spouse.[112] The testimony could not be used at a subsequent trial against one not a party in the former proceeding and thus would have no legal effect against the spouse.[113] This argument is equally applicable under the current formulation. In cases where neither spouse is a party, this goes to the basic definition of the privilege, "not to testify against his spouse." Once it is determined the

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[102] 7 Cal. App. 3d 56, 86 Cal. Rptr. 338 (4th Dist. 1970).
[103] People v. Solis, 193 Cal. App. 2d 68, 77-78, 13 Cal. Rptr. 813, 819-20 (2d Dist 1961).
[104] *See* MCCORMICK (2d ed.), *supra* note 5, § 124 at 264-65.
[105] WITKIN, *supra* note 43, § 831 (Supp. 1974).
[106] 7 Cal. App. 3d at 60, 86 Cal. Rptr. at 340.
[107] ". . . This code shall become operative on January 1, 1967 . . ." CAL. EVID. CODE § 12 (West 1968).
[108] *Id.* § 971.
[109] *Id.* § 970.
[110] CAL. EVID. CODE § 971, Law Rev. Comm'n Comment (West 1968).
[111] CAL. EVID. CODE § 910, Law Rev. Comm'n Comment (West 1968).
[112] People v. Langtree, 64 Cal. 256, 30 P. 813 (1883).
[113] *Id.*; and *see* CAL. EVID. CODE § 1292 (West 1968).

testimony is not privileged under the statute, the following qualification of "in any proceeding" is not reached. It is therefore untenable to suggest the legislature intended the privilege could be asserted by a witness in a proceeding against a third party.

If the statute were not interpreted in this way, the privilege would suppress evidence in a proceeding to which neither spouse is a party. When rights of a third party are at stake, the statute should not be applied mechanically to exclude relevant evidence. In each case the courts should consider whether application of the privilege would promote its policy, that is, whether the testimony could actually adversely affect the legal interests of the non-testifying spouse.[114]

D. THE FEDERAL TESTIMONY PRIVILEGE

1. THE FEDERAL COMMON LAW PRIVILEGE

The federal testimony privilege differs from California's in several important respects. Principally, it remains uncodified, a product of judicial decision.[115] The leading case discussing the federal testimony privilege is *Hawkins v. United States*,[116] in which the Supreme Court reaffirmed the existence of the privilege and society's interest in preventing marital dissension.[117]

The federal privilege is held by both the party and the non-party spouse.[118] Thus, the party can prevent his spouse from testifying. This differs significantly from the California privilege, which can be claimed by the non-party spouse only.[119] Therefore, in federal courts the privilege is more beneficial to the party, who, as holder of the privilege, is able to object and predicate an appeal on the denial of the privilege.[120]

The party may be able to prevent his spouse from being called to the stand in federal courts. The Ninth Circuit Court of Appeals held that if the party made a timely claim of privilege to preclude his spouse from being called to the stand and sworn as a witness,

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[114] Such was the approach in United States v. Burks, 470 F.2d 432, 435-36 (D.C. Cir. 1972), where the court stated the privilege should apply only if the testimony would disfavor the "legal interests" of the other spouse.

[115] . . . The privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

FED. R. EVID. 501.

[116] 358 U.S. 74 (1958).

[117] *Id.* at 77.

[118] Hawkins v. United States, 358 U.S. 74 (1958); Wyatt v. United States, 362 U.S. 525, 527-29 (1960).

[119] *See* text accompanying notes 55-56 *supra*.

[120] Because the witness spouse alone holds the privilege in California the party's rights to object to the denial of privilege to his spouse are uncertain. *See* text accompanying notes 87-92 *supra*.

he could avoid claiming the privilege in open court.[121] This is similar to the protection of section 971 of the California Evidence Code,[122] the privilege not to be called as a witness by an adverse party. Since the party spouse is the joint holder of the privilege in federal courts, comment and adverse inferences on the failure of the non-party spouse to testify are not allowed.[123] As discussed above, this may be no longer the rule in California.[124]

Unlike California, where there is no longer a privilege not to testify in favor of a spouse,[125] the federal courts still recognize such a privilege. The witness spouse is competent to testify, but may not be compelled to do so. Courts do not ascertain whether a witness spouse refusing to testify is withholding favorable or unfavorable testimony.[126]

As in California, the federal courts require a valid marriage at the time of trial.[127] Thus, the privilege cannot be claimed if the marriage has ended by divorce or death.[128] A fraudulent marriage, such as a sham marriage for immigration purposes,[129] will not sustain the privilege. Although some courts are reluctant to question the validity of a marriage contracted immediately before the trial,[130] a recent Tenth Circuit case disallowed the privilege because the marriage was adjudged a fraud on the court.[131] Other courts have shown a willingness to look behind the policy of the valid marriage requirement in allowing or disallowing the privilege. Thus, in a recent decision the Second Circuit Court of Appeals, "viewing the matter before us in light of 'reason and experience,'. . ."[132] declined to determine whether a divorce decree had become final, but denied the privilege to the defendant because the marital relationship had so deteriorated that the policy of the privilege could not possibly be served.

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[121] Courtney v. United States, 390 F.2d 521 (9th Cir,) *cert. denied* 393 U.S. 857 (1968); *accord*, San Fratello v. United States, 340 F.2d 560, 566 (5th Cir. 1965).

[122] CAL. EVID. CODE § 971 (West 1968).

[123] Graves v. United States, 150 U.S. 118, 120-21 (1893); Courtney v. United States 390 F.2d 521, 526-28 (9th Cir.), *cert. denied* 393 U.S. 857 (1968).

[124] *See* text accompanying notes 97-101 *supra*.

[125] *See* text accompanying notes 52-54 *supra*.

[126] Mills v. United States, 281 F.2d 736 (4th Cir. 1960); Bisno v. United States, 299 F.2d 711 (9th Cir.), *cert denied*, 370 U.S. 952 (1962).

[127] Pereira v. United States, 347 U.S. 1, 6 (1954); United States v. McElrath, 377 F.2d 508, 510 (6th Cir. 1967).

[128] United States v. Burks, 470 F.2d 432, 436 (D.C. Cir. 1972).

[129] Lutwak v. United States, 344 U.S. 604, 614-15 (1953).

[130] Courtney v. United States, 390 F.2d 521 (9th Cir.), *cert. denied* 393 U.S. 857 (1968); San Fratello v. United States, 340 F.2d 560, 566 (5th Cir. 1965).

[131] The defendant had contacted the government's key witness in violation of a condition of bail, and married her three days before the trial. United States v. Apodaca, 522 F.2d 568 (10th Cir. 1975).

[132] United States v. Fisher, 518 F.2d 836, 840 (2d Cir. 1975).

Whether the privilege may be claimed in "any proceeding" is an open question in the federal courts as in California.[133] At least one decision has mechanically applied the privilege to allow a witness to refuse to answer questions which reflected badly on her non-party husband's character.[134] No inquiry was made as to whether the testimony could be used against her husband. However, most courts have framed the issue in terms of whether the testimony could be used against the nontestifying spouse.[135] Thus, one court has suggested the test in the case of a grand jury witness should be whether the spouse is a "target" of the inquiry.[136] The Ninth Circuit seems to use the broader criterion of whether the information could conceivably implicate the spouse.[137]

As in California, the spouses may expressly waive the privilege by consenting to the testimony, or impliedly waive the privilege by failing to object at trial.[138] The major exception to the privilege recognized in federal courts is that it may not be claimed in a criminal trial for a crime against the spouse.[139] Mann Act violations where the wife is transported for immoral purposes are considered crimes against the spouse within this exception.[140] A recent Eighth Circuit case expanded the exceptions to the federal privilege to include crimes against a child of either spouse.[141] The privilege cannot be claimed in bankruptcy proceedings as to a transaction to which the witness spouse is a party.[142]

Generally, the federal privilege is more favorable to the party spouse than the California privilege. The federal rules are thus susceptible to the criticism that the privilege does not promote its policy because of the party spouse's motives for claiming it.[143] However, to the extent that the federal courts are not bound to a detailed codification and attempt to analyze each application of the privilege in light of its policy,[144] the federal privilege avoids the criticism that the privilege is often applied in situations in which its policy could not be served.

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[133] *See* text accompanying notes 109-114 *supra*.
[134] United States v. Hoffa, 349 F.2d 20, 47 (6th Cir.), *aff'd* 385 U.S. 293 (1966).
[135] United States v. Burks, 470 F.2d 432, 435-36 (D.C. Cir. 1972); United States v. Armstrong, 476 F.2d 313, 315 (5th Cir. 1973).
[136] In re Snoonian, 502 F.2d 110, 112 (1st Cir. 1974).
[137] United States v. Weinberg, 439 F.2d 743 (9th Cir. 1971).
[138] Ollender v. United States, 210 F.2d 795, 800 (9th Cir. 1954); United States v. Figueroa-Paz, 468 F.2d 1055, 1057 (9th Cir. 1972).
[139] Wilkerson v. United States 342 F.2d 807, 809-10 (8th Cir. 1965).
[140] Wyatt v. United States, 362 U.S. 525, 526-30 (1960); Wilkerson v. United States, 342 F.2d 807, 809-10 (8th Cir. 1965).
[141] United States v. Allery, 526 F.2d 1362 (8th Cir. 1975).
[142] 11 U.S.C. 44(a).
[143] *See* text accompanying notes 22-24, *supra*.
[144] *See, e.g.*, United States v. Fisher, 518 F.2d 836, 840 (2d Cir. 1975).

2. *APPLICATION OF STATE PRIVILEGES IN FEDERAL COURTS*

The most troublesome aspect of the privilege in federal courts concerns the application of state-created privileges. Because this is true of both the marital testimony and communications privileges, this discussion applies to both.

Prior to the enactment of the Federal Rules of Evidence in 1975,[145] the federal approach to state privileges was governed by two separate rules. In criminal cases the federal courts were not bound to follow state rules of privilege but were to develop and apply the federal common law of privilege.[146] Civil cases were governed by Federal Rule of Civil Procedure 43(a), which required the courts to determine rules of competency "under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held."[147] According to the statute the rule favoring the reception of evidence was to govern. This left the decision of when to apply state privilege law in civil cases largely to the courts.

In diversity cases courts interpreted this rule to require an application of the principles of *Erie Railroad v. Tompkins.*[148] Many federal courts found the rules of privilege substantive for Erie purposes, and thus applied state law,[149] although there was never any consensus among the federal circuits.

In federal question cases, the federal common law of privilege was found controlling in the majority of cases.[150] However, the Ninth Circuit, in *Baird v. Koerner*[151] held that in a federal question case the court was to follow the forum state's law in applying the attorney-client privilege because the attorney-client relationship is subject to state control. This reasoning could also be applied to the marital privilege, and some commentators have argued that the recognition

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[145] 28 U.S.C. FED. R. EVID. 101 *et seq.* (1975).

[146] . . . The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience.

FED. R. OF. CRIM. P. 26, 5 F.R.D. 539, 560-61 (1946).

[147] FED. R. OF CIV. P. 43(a), 308 U.S. 645, 718 (1939).

[148] 304 U.S. 64 (1938).

[149] J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE ¶ 501[03] (1975) [hereinafter cited as WEINSTEIN]; WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 93 at 414 (2d ed. 1970); Reutlinger, *supra* note 27, at 1367.

[150] WEINSTEIN, *supra* note 149, § 501[03] at 501-37 and 501[02] at 501-18.

[151] 279 F. 2d 623 (9th Cir. 1960).

of state-created privileges is constitutionally required under *Erie* principles, even in federal question cases.[152]

In drafting the Proposed Federal Rules of Evidence, the Advisory Committee on Rules of Evidence, appointed by the Supreme Court, proposed that state privileges not be recognized in federal courts and that the federal privileges be codified. Their recommended codification deleted several commonly recognized privileges including the marital communications privilege.[153] When this version of the rules, which was approved by the Supreme Court,[154] was sent to Congress, there was immediate unfavorable reaction to the privileges section.[155] In response, Congress abandoned the section on privileges and developed Rule 501 of the Federal Rules of Evidence which provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.[156]

This approach left intact the federal law of privilege.[157] The statute contains the same language as Federal Rule of Criminal Procedure 26, that the federal privilege will be interpreted "in light of reason and experience." It also provided for recognition of state law of privilege. However, the rule creates questions as to when state law is to be applied in federal courts and which state's law is to be applied.

Of the three classes of cases in federal courts: criminal, civil nondiversity, and diversity cases, the rule's application to criminal cases is clearest. Rule 501 indicates that a state privilege applies only where state law supplies a rule of decision. In federal criminal cases involving purely federal law, federal common law will apply. Since the language is the same as in Rule 26 of the Federal Rules of Criminal Procedure, federal courts are to continue to develop and apply the federal common law of privilege.[158] A literal reading of the

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[152] Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TULANE L. REV. 101, 117 (1956); Reutlinger, *supra* note 27.

[153] WEINSTEIN, *supra* note 149, ¶ 501[01] at 501-12.

[154] Reutlinger, *supra* note 27.

[155] WEINSTEIN, *supra* note 149, ¶ 501[01] at 501-13; and *see generally* Reutlinger, *supra* note 27; Black, *The Marital and Physician Privileges - A Reprint of a Letter to a Congressman*, 1975 DUKE L. J. 45.

[156] FED. R. EVID. 501.

[157] FED. R. EVID. 501, Notes of Committee on the Judiciary, H. Rpt. No. 93-650.

[158] WEINSTEIN, *supra* note 149, ¶ 501[02] at 501-18.

statute leads to the conclusion that this is also true in non-diversity cases involving only federal questions. In cases where federal statutes incorporate state law by reference, federal law of privilege applies.[159] State law is not supplying a rule of decision in such cases, but is only an aspect of the federal statute in issue. This is also true in federal question cases when state law is given effect by the courts.[160]

However, in pendent jurisdiction cases and in diversity cases, it must be conceded the wording of Rule 501 is indeed "pregnant with litigious mischief" as the Senate Judiciary Committee feared.[161] The application of rule 501 in non-diversity pendent jurisdiction cases, which contain claims based on both state and federal law, presents a special problem. Because rule 501 refers to state law concerning any "element of a claim," and speaks of "the privilege of a witness, person, etc. . ." rather than the law of privilege to be applied in a given case, it indicates a piecemeal approach. One witness, testifying to establish an element of a state law claim, may be accorded or denied a privilege as determined by state law. Another witness' privilege may be tested under federal common law, depending on the portion of the case to which the testimony pertains.[162] The Senate Judiciary Committee suggested that the rule favoring reception of the evidence should apply.[163] This approach would resolve the potential problems, but fails to recognize the state's interest in having its law of privilege recognized within its borders or in matters which concern its citizens. As most privileges, including the marital privileges, are designed to foster confidence in designated relationships, the state has an important interest in having the privilege recognized in all proceedings in which its citizens are involved. The lesser the number of situations in which the privilege is applied, the less will be the effect of the privilege in avoiding disharmony or promoting confidences.

Some commentators have suggested a balancing test to determine if the state's interest outweighs the federal interest.[164] Federal courts could also resolve the issue by weighing the importance of the *Erie* rule against the desirability of pendent jurisdiction. If the desire for uniformity among cases controlled by state law is seen as paramount,

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[159] United States v. Allery, 526 F.2d 1362 (8th Cir. 1975); FED. R. EVID. 501, Conference Committee Notes, H. Rpt. No. 93-1597.

[160] FED. R. EVID. 501, Conference Committee Notes, H. Rpt. No. 93-1597; WEINSTEIN, *supra* note 149, ¶ 501[01].

[161] FED. R. EVID. 501, Notes of Committee on the Judiciary, Senate Rpt. No. 93-1277, *cited* in WEINSTEIN, *supra* note 149, ¶ 501[01].

[162] WEINSTEIN, *supra* note 149, ¶ 501[02] at 501-18.

[163] *Id.* at 501-19.

[164] WEINSTEIN, *supra* note 149, ¶ 501[02] at 501-19; Kaminsky, *State Evidentiary Privileges in Federal Civil Litigation*, 43 FORDHAM L. REV. 923, 930 (1975).

federal courts may choose to dismiss pendent claims rather than proceed with a bifurcated trial in federal court with trial of the state claim aspects of the case controlled by one law of privilege and federal claims by another. To the extent that the state privilege and the federal common law of privilege coincide, joint trial poses no special problems. Indeed, the federal courts may well choose to articulate the federal common law rule as equivalent to the state rule in any event.[165]

In diversity cases the statute clearly provides for the application of the state law of privilege, but the question becomes which state's law will be applied. Although Rule 501 has avoided the question of *Erie's* impact on privilege by legislating an *Erie* result, it still must be determined if the privileges are substantive or procedural under the rule of *Klaxon Co. v. Stentor Manufacturing Co.*[166] Under *Klaxon*, a federal court sitting in diversity must follow the choice of law rules of the state in which it sits. How state courts will deal with privilege choice of law questions is unclear. To the extent that they consider the matter to be procedural, they will apply forum law. To the extent that they consider it substantive, the normal choice of law doctrines used by the forum will control which state's privilege is applied.

Because there is no agreement among commentators as to whether privileges are substantive or procedural,[167] it is difficult to predict which approach would be most typically employed. The courts are not bound to find them substantive for *Klaxon* purposes merely because Congress has ostensibly determined them to be substantive for *Erie* purposes.[168] Therefore, although the rule requires the federal courts to apply state law of privilege, the courts are free to determine the question of whether the privileges are substantive or procedural for choice of law purposes.

If the privileges are procedural, then the law of the forum state should apply. The argument that they are procedural is that the claim of privilege is not related to the substantive issue of the case, but is an accident of the status of the parties or witnesses. Therefore, the claim of privilege enters the litigation by chance, and is merely a

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[165] United States v. Allery, 526 F.2d 1363, 1365 (8th Cir. 1975).

[166] 313 U.S. 487 (1941).

[167] *See generally* Black, *supra* note 155; Kaminsky, *supra* note 164; Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEORGETOWN L. J. 61, 104-16 (1973); Korn, *Continuing Effect of State Rules of Evidence in the Federal Courts*, 48 F.R.D. 65, 75 (1969); Louisell, *supra* note 152; Moore and Bendix, *Congress, Evidence, and Rulemaking* 84 YALE L. J. 9, 19-27 (1974); Reutlinger, *supra* note 27; Schwartz, *The Proposed Federal Rules of Evidence: An Introduction and Critique*, 38 U. CINN. L. REV. 449, 470-71 (1969).

[168] Sampson v. Channell, 110 F.2d 754, 762 (1st Cir. 1940), *cert. denied* 310 U.S. 650 (1940).

procedural rule of evidence.[169]

The alternative is to find that the privileges are substantive. This is the better reasoned approach, but leads to more complicated results. Writers have stated that privileges are substantive, primarily with the view of urging that federal courts recognize state created privileges.[170] Privileges are substantive in the sense that they are designed to effect definite policy objectives which a state has deemed important.[171] The fact that Congress did provide for the application of state privilege law in federal courts in situations involving state law can be taken as some support for the view that privileges are substantive in any context. If the privileges are substantive, then under *Klaxon* the federal courts must apply the conflicts rules of the forum state.

The Second Restatement of Conflicts calls for a rule of invalidation, favoring the rule which admits the evidence.[172] Thus, if either the forum state or the state with the most significant relationship with the marriage or communication did not recognize the privilege, the privilege would not be allowed. However, if the policy decision which a state has made in providing a privilege is to be given effect, the conflicts rule should favor the law of the state which provides the most liberal privilege. In granting a privilege a state has determined that the policy it wishes to promote is more important than the possible suppression of truth in litigation. That another state does not recognize that privilege does not necessarily indicate that its legislature has decided the opposite, only that the question may not have been considered. In such cases no conflicting policies exist. In fact, in the case of marital privileges, the majority of states facing the issue have chosen to recognize the privileges, valuing the interest in promoting external social policies above the interest of eliciting truth in litigation.

Since the marital communications privilege is designed to foster confidence in marriages throughout the state, a choice of law rule

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[169] Korn, *supra* note 167; Moore and Bendix, *supra* note 167.

[170] Black, *supra* note 155, at 145; Kaminsky, *supra* note 164, at 930; Reutlinger, *supra* note 27, at 1358.

[171] WEINSTEIN, *supra* note 149, ¶ 501[02].

[172] (1) Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.
(2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission would not be given effect.
RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 (1971).

that looks to the state of residence at the time of the communication would protect the reasonable expectations held by parties at the time of the communication. Similarly, the marital testimony privilege might well be applied if it is recognized under the law of the state of residence of the spouses at the time of the trial because that state would have an interest in the preservation of harmony that the privilege is designed to accomplish. Therefore, the better rule would be one of validation unless the public policy of the state not recognizing the privilege would be greatly offended by the withholding of the evidence. This would only be true if the legislature or the courts had made a clear determination that the state's interest in fact-finding outweighed the policy of the privilege. The questionable policy basis for the Restatement position may explain the fact that courts have largely ignored its purported rule.[173]

III. COMMUNICATIONS PRIVILEGE

The communications privilege is designed to protect marital confidences and may be claimed by either spouse. It is a creation of statute, unlike the testimony privilege which existed at common law. This section will first examine the historical development of the privilege and policy supporting it, then the few criticisms which have been made. This will be followed by a description of the California codification and a discussion of problem areas. A brief description of the federal communications privilege will conclude this section.

A. HISTORY OF THE COMMUNICATIONS PRIVILEGE

The development of the distinct privilege for confidential marital communications is fused with the disqualification of spouses, as such evidence was necessarily excluded by the exclusion of the spouse as a witness[174] except in situations in which neither spouse was a party. The confidential communications privilege first appeared in the English Evidence Amendment Act of 1853,[175] which also abolished the incompetency to testify in favor of a spouse. Although commentators had been proclaiming the existence of the privilege as early as 1842,[176] it did not seem to have a basis in case law. The English decision of *Shenton v. Tyler*[177] carefully traced the history of the privilege, concluding it was statutory in origin. The justices determined that cases decided prior to the Evidence Amendment Act indicating

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[173] *See* People v. Carter, 34 Cal. App. 3d 748, 753, 110 Cal. Rptr. 324, 328 (1973).

[174] 8 WIGMORE, *supra* note 4, § 2333 at 644; Reutlinger, *supra* note 27, 1364.

[175] 8 WIGMORE, *supra* note 4, § 2333 at 644; MCCORMICK, (2d ed.), *supra* note 5, § 78 at 161-62.

[176] Shenton v. Tyler, L.R. 1939, Ch.D. 620; 8 WIGMORE, *supra* note 4, § 2333.

[177] L.R. 1939, Ch.D. 620.

the communications privilege existed were adequately explained by the rule of spousal incompetency, so any reference to a communications privilege was dictum.

B. POLICY AND CRITICISM

The communications privilege has not been criticized as widely as has the testimony privilege. While the testimony privilege is intended to prevent marital dissension and necessarily is applicable only if litigation arises, the communications privilege is based on the fostering of confidence and free communications between spouses and applies to all marriages regardless of whether litigation occurs.

Dean Wigmore, although denouncing the testimony privilege, approved the marital communications privilege as meeting his criteria for a valid privilege:

> (1) The communications originate in confidence. (2) The confidence is essential to the relation. (3) The relation is a proper object of encouragement by the law. And (4) the injury that would inure to it by disclosure is probably greater than the benefit that would result in the judicial investigation of truth.[178]

As Wigmore noted, the only weakness of the marital communications privilege is that it might not serve the purpose of fostering confidence if its existence is not generally known.[179] This is the major premise of an article written in 1929.[180] However, even if that argument were valid in 1929, there is no reason to believe it holds true today. Litigation is increasing and affecting a greater number of people, and, as one writer has stated, ". . . the media, especially television, lead to increased public awareness of legal concepts such as privileges."[181]

Some commentators believe the communications privilege has a constitutional basis.[182] The Supreme Court opinion in *Griswold v. Connecticut*,[183] holding unconstitutional a state statute prohibiting the use of contraceptives suggested a close relationship between the constitutional right to privacy and the marital relationship:

> We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system . . .
>
> The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.[184]

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[178] 8 WIGMORE, *supra* note 4, § 2332 at 642.
[179] *Id.* at 643.
[180] Hutchins and Slesinger, *supra* note 29.
[181] Reutlinger, *supra* note 27, at 1374.
[182] Black, *supra* note 155, at 45; Reutlinger, *supra* note 27, at 1356.
[183] 381 U.S. 479 (1965).
[184] *Id.* at 486.

The constitutional argument first appeared in articles protesting the elimination of the privilege in the proposed federal rules of evidence.[185] However, since the privilege was not abolished by the federal code as ultimately enacted and is currently recognized in most states,[186] it is sufficient at this point to recognize that there is a possible constitutional basis for the marital communications privilege.

C. THE CALIFORNIA COMMUNICATIONS PRIVILEGE

1. CALIFORNIA EVIDENCE CODE PROVISIONS

Section 980 defines the privilege for confidential marital communications.[187] It is more restrictive than the testimony privilege in that it is applicable only to communications rather than all adverse testimony, yet more expansive in that it refers to any confidential communication, not only those which would be unfavorable to either spouse.

"Communication" is narrowly defined in California.[188] Facts, conditions, and conduct of the party spouse which are not communicative are not protected.[189] The fact that a communication occurred also is not privileged,[190] so that a spouse, without revealing the contents of a communication, may testify that the other spouse made a communication at a certain time, or identify the other spouse's handwriting in a confidential communication.[191]

To be privileged, the communication must be confidential. Communications between spouses are presumed confidential by statute.[192]

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[185] Black, *supra* note 155, at 45; Reutlinger, *supra* note 27, at 1356.

[186] *See* statutes collected in 2 WIGMORE, *supra* note 6, § 488.

[187] Subject to Section 912 [waiver] and except as otherwise provided in this article, a spouse (or his guardian or conservator when he has a guardian or conservator), whether or not a party, has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was made in confidence between him and the other spouse while they were husband and wife.
CAL. EVID. CODE § 980 (West 1968).

[188] Tanzola v. DeRita, 45 Cal. 2d 1, 5-6, 285 P.2d 897, 899 (1955).

[189] People v. Bradford, 70 Cal. 2d 333, 342, 74 Cal. Rptr. 726, 730, 450 P.2d 46, 50 (1969).

[190] Estate of Pusey, 180 Cal. 368, 373-74, 181 P. 648, 650 (1919); Tanzola v. DeRita, 45 Cal. 2d 1, 6-7, 285 P.2d 897, 899-900 (1955).

[191] People v. Saidi-Tabatabai, 7 Cal. App. 3d 981, 985-86, 86 Cal. Rptr. 866, 869 (1970).

[192] Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the . . . husband-wife relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.
CAL. EVID. CODE § 917 (West 1968).

The presumption is rebuttable by a showing that the parties realized their conversation was being overheard,[193] or that the communication was made under any other condition which would preclude a reasonable expectation of confidentiality.[194]

The current codification provides additional protection by allowing a party to prevent testimony by an eavesdropper if other requirements of the privilege are met.[195] Under prior law, an eavesdropper could reveal the contents of an otherwise confidential communication.[196] Allowing an eavesdropper, who is by definition one who listens without consent or knowledge of the communicating parties, to reveal a communication did violence to the policy behind the privilege by withdrawing assurances the communication will remain confidential if the parties reasonably believe it to be so.

The communications privilege may be claimed by either spouse,[197] and a party may prevent his otherwise willing spouse from testifying to a confidential marital communication,[198] unlike the testimony privilege which leaves the determination to the non-party spouse.[199] The party spouse therefore has more control over the operation of the communication privilege.

The privilege may not be claimed by the non-party spouse, however, in a criminal case where the defendant spouse seeks to introduce a communication into evidence.[200] The rationale for this exception is that a spouse should not be privileged to withhold information which the defendant considers material to his criminal defense.

The communication must be between husband and wife;[201] the existence of the privilege depends on the validity of the marriage at

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[193] People v. Santos, 26 Cal. App. 3d 397, 402, 102 CAl. Rptr. 678, 681 (2d Dist. 1972).

[194] *See, e.g.*, People v. Worthington, 38 Cal. App. 3d 359, 113 Cal. Rptr. 322 (3rd Dist. 1974), where the court held the defendant destroyed the confidentiality of a communication to his wife by accusing her of the crime he had described to her.

[195] North v. Superior Court, 8 Cal. 3d 301, 310, 104 Cal. Rptr. 833, 838, 502 P.2d 1305, 1310 (1972).

[196] People v. Peak, 66 Cal. App. 2d 894, 903-04, 153 P.2d 464, 468 (1st Dist. 1944); People v. Mitchell, 61 Cal. App. 569, 573, 215 P. 117, 119 (2d Dist. 1923).

[197] CAL. EVID. CODE § 980 (West 1968).

[198] Although the defendant's wife had waived the testimony privilege, the defendant was able to invoke the section 980 communications privilege to prevent testimony concerning specific communications in People v. Dorsey, 46 Cal. App. 3d 706, 716-17, 120 Cal. Rptr. 508, 514-15 (2d Dist. 1975).

[199] CAL. EVID. CODE §§ 970-71 (West 1968).

[200] "There is no privilege under this article in a criminal proceeding in which the communication is offered in evidence by a defendant who is one of the spouses between whom the communication was made." CAL. EVID. CODE § 987 (West 1968).

[201] CAL. EVID. CODE § 980 (West 1968).

the time of the communication and not at the time of the trial.[202] Even though the parties are divorced at the time of the trial, an otherwise qualified communication made during marriage is still privileged.[203] This element of the privilege highlights the policy difference between the testimony and communications privileges. Since the testimony privilege exists to prevent after-the-fact dissension, the marital status at the time of the trial is critical. In contrast the communications privilege, based on a policy of encouraging confidences in all marriages, looks to the marital status at the time of the communication. If divorce could mean that one's prior confidences were no longer protected, communication would be inhibited.[204]

Section 980 provides that a spouse has a privilege "if he claims the privilege . . ."[205] Again, as in the testimony privilege under section 970, the privilege may be lost by mere inaction. Failure to claim the privilege was held by one California District Court of Appeals to be ground for reversal due to incompetency of counsel.[206] Section 912 of the Evidence Code provides that if a spouse discloses a confidential communication to a third party, the privilege will be waived.[207] The rule that a spouse who reveals the contents of a communication to a third party waives the privilege[208] is closely related to the confidentiality requirement. Disclosure can be viewed as a subsequent destruction of confidentiality. The waiver applies only to the party who has breached the confidence by revelation to a third party. The other spouse is still entitled to claim the privilege.[209] Of importance

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[202] CAL. EVID. CODE § 980, Law Rev. Comm'n Comment (West 1968).

[203] People v. Dorsey, 46 Cal. App. 3d 706, 717, 120 Cal. Rptr. 508, 515 (2d Dist. 1975).

[204] CAL. EVID. CODE § 980, Law Rev. Comm'n Comment (West 1968).

[205] CAL. EVID. CODE § 980 (West 1968).

[206] People v. Dorsey, 46 Cal. App. 3d 706, 719, 120 Cal. Rptr. 508, 516 (2d Dist. 1975).

[207] (a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section . . . 980 (privilege for confidential marital communications) . . . is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating his consent to the disclosure, including his failure to claim the privilege in any proceeding in which he has the legal standing and opportunity to claim the privilege.

CAL. EVID. CODE § 912 (West 1968).

[208] People v. Carter, 34 Cal. App. 3d 748, 753, 110 Cal. Rptr. 324, 328 (1973).

[209] (b) . . . In the case of the privilege provided by Section 980 (privilege for confidential marital communications), a waiver of the right of one spouse to claim the privilege does not affect the right of the other spouse to claim the privilege.

CAL. EVID. CODE § 912(b) (West 1968); CAL. EVID. CODE § 980, Law Rev. Comm'n Comment (West 1968).

to attorneys is section 912(c), providing that a privileged communication is not considered a disclosure for purposes of this section. There is therefore no waiver if a spouse reveals the contents of a marital communication to his lawyer or to any other protected professional.[210]

A communication made to aid in the commission or planning of a crime or fraud is not privileged.[211] This exception was not previously recognized in California for the marital communications privilege, although it was for the attorney-client privilege.[212] The Law Revision Commission comment to section 981 indicates that the exception is to be strictly construed to apply only where the communication actually aids in the commission of a crime.[213] Statements as to "what he intended to do or why he intended to do it or how he intended to do it" are not within this exception.[214] But, the spouses were not allowed to claim the privilege in a case where the defendant told his wife where a gun was hidden, thus enabling her to find it and commit the crime of concealing evidence.[215]

The other exceptions to the communications privilege are contained in sections 982-986 of the Evidence Code[216] and parallel in

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[210] CAL. EVID. CODE §§ 994 (physician), 1014 (psychotherapist), 1034 (clergyman) (West 1968).

[211] "There is no privilege under this article if the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or a fraud." CAL. EVID. CODE § 981 (West 1968); People v. Santos, 26 Cal. App. 3d 397, 401-02, 102 Cal. Rptr. 678, 681 (2d Dist. 1972); People v. Dorsey, 46 Cal. App. 3d 706, 717-18, 120 Cal. Rptr. 508, 515 (2d Dist. 1975).

[212] CAL. EVID. CODE § 981, Law Rev. Comm'n Comment (West 1968); CAL. EVID. CODE § 956, Law Rev. Comm'n Comment (West 1968).

[213] CAL. EVID. CODE § 981, Law Rev. Comm'n Comment (West 1968).

[214] People v. Dorsey, 46 Cal. App. 3d 706, 718, 120 Cal. Rptr. 508, 515 (2d Dist. 1975).

[215] People v. Santos, 26 Cal. App. 3d 397, 402, 102 Cal. Rptr. 678, 681 (2d Dist. 1972).

[216] "There is no privilege under this article in a proceeding to commit either spouse or otherwise place him or his property, or both, under the control of another because of his alleged mental or physical condition." CAL. EVID. CODE § 982 (West 1968);

"There is no privilege under this article in a proceeding brought by or on behalf of either spouse to establish his competence." CAL. EVID. CODE § 983 (West 1968);

"There is no privilege under this article in: (a) A proceeding brought by or on behalf of one spouse against the other spouse. (b) A proceeding between a surviving spouse and a person who claims through the deceased spouse, regardless of whether such claim is by testate or intestate succession or by inter vivos transaction." CAL. EVID. CODE § 984 (West 1968);

"There is no privilege under this article in a criminal proceeding in which one spouse is charged with: (a) A crime committed at any time against the person or property of the other spouse or of a child of either. (b) A crime committed at any time against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse. (c) Bigamy. (d) A crime defined by Section 270 or 270a of the Penal Code." CAL. EVID. CODE § 985 (West Supp. 1976);

policy and effect the exception to the testimony privilege.[217]

2. SPECIFIC PROBLEMS

In determining whether the marital communication was confidential, it is often necessary to examine the context in which the communication is made. Jail communications between husband and wife would not be protected under the line of authorities holding there is no reasonable expectation of privacy in jail.[218] However, in *North v. Superior Court*,[219] because the arresting detective allowed the defendant to use his office to visit his wife, left them alone and closed the door, the court held he created an expectation of confidentiality. The detective's tape recording of that conversation was held inadmissable under section 980.[220]

The requirement of a valid marriage at the time of the communication has raised problems concerning void and voidable marriages. The case of *People v. Mabry*[221] is illustrative. The defendant complained of error in the admission of his wife's testimony as to a confidential communication. Although the issue was resolved by the defendant's failure to make timely objection, the court went on to discuss the effect of their void marriage. The wife had married defendant before her divorce became final, and the relationship was annulled some time before the trial. Following prior case law the court determined the communications privilege was inapplicable in the case of a void marriage.[222]

The court distinguished *People v. Godines*,[223] in which the privilege was allowed for a communication made before an annulment of the marriage for fraud, on the ground that the Godines' marriage relationship was voidable rather than void. Thus, the applicability of the privilege turns on whether the annulled marriage was void or

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"There is no privilege under this article in a proceeding under the Juvenile Court Law, Chapter 2 (commencing with Section 500) of Part 1 of Division 2 of the Welfare and Institutions Code." CAL. EVID. CODE § 986 (West 1968).

[217] *See* text accompanying notes 69-77 *supra*.

[218] Lanza v. New York, 370 U.S. 139, 142-44 (1962); People v. Santos, 26 Cal. App. 3d 397, 401-02, 102 Cal. Rptr. 678, 681 (2d Dist. 1972).

[219] 8 Cal. 3d 301, 311-12, 104 Cal. Rptr. 833, 839-40, 502 P.2d 1305, 1311-12 (1972).

[220] This decision has been criticized because the court relied on the marital privilege rather than on a constitutional right to privacy, although the decision is easily explained under the rubric of the communications privilege. Note, *Privacy of Communication Between Prisoner and Spouse*, 61 CALIF. L. REV. 457 (1973).

[221] 71 Cal. 2d 430, 78 Cal. Rptr. 655, 455 P.2d 759 (1969), *cert denied* 406 U.S. 972 (1971).

[222] People v. Keller, 165 Cal. App. 2d 419, 423-24, 332 P.2d 174, 176 (2d Dist. 1958); People v. Glab, 13 Cal. App. 2d 528, 535, 57 P.2d 588, 591 (2d Dist. 1936).

[223] 17 Cal. App. 2d 721, 726-27, 62 P.2d 787, 790 (2d Dist. 1936).

voidable. The *Mabry* court relied on the policy that the law should not foster confidence in illegal relationships.[224]

However, if one recognizes the possibility in *Mabry* that the defendant, who had made the communication and was claiming the privilege while on trial for his life, may have been entirely ignorant of the illegality of the marriage, the distinction made by the court seems unfair and contrary to the policy of the privilege. It was the wife who was responsible for the bigamous marriage, and at the time of the communication, the defendant husband may have had a good faith belief in the validity of the marriage. Thus, one putative spouse, unaware of the other's fraud, is allowed a privilege for a communication made under an expectation of marital confidentiality, while another putative spouse, unaware of the other's bigamy, is not allowed the privilege. The policy of the communications privilege, fostering "free and open communications between spouses,"[225] is hardly served when it is possible that marital confidences will be revealed because of some prior act of one spouse beyond the control and knowledge of the other spouse. A good faith belief in the validity of the marriage on the part of the spouse asserting the privilege would be a criterion more in keeping with the policy of the privilege. It will not promote bigamous relationships if the innocent party but not the party responsible for the bigamy is allowed to claim the privilege.

An analogy can be drawn from the professional communications privileges, which are allowed on the basis of the client's reasonable belief that the practitioner is authorized.[226] The comment to section 950, the lawyer-client privilege, indicates that, "since the privilege is intended to encourage full disclosure, the client's reasonable belief that the person he is consulting is an attorney is sufficient to justify application of the privilege.[227] This reasoning applies equally to the marital communications privilege, which is designed to foster "free and open communication between spouses."[228] The artificial distinction between void and voidable marriages does not serve this policy.

D. THE FEDERAL COMMUNICATIONS PRIVILEGE

The federal marital communications privilege closely parellels the California privilege. As in California, "communication" has been strictly construed to apply only to verbal communications or communicative acts.[229] The communication must be confidential, a re-

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[224] People v. Mabry, 71 Cal. 2d 430, 78 Cal. Rptr. 655, 455 P.2d 759 (1969), *cert. denied* 406 U.S. 972 (1971).
[225] CAL. EVID. CODE § 980, Law Rev. Comm'n Comment (West 1968).
[226] CAL. EVID. CODE §§ 950, 990, 1010, 1032 (West 1968).
[227] CAL. EVID. CODE § 950, Law Rev. Comm'n Comment (West 1968).
[228] CAL. EVID. CODE § 980, Law Rev. Comm'n Comment (West 1968).
[229] United States v. Lewis, 433 F.2d 1146, 1151 (D.C. Cir. 1970).

quirement supported by a rebuttable presumption of confidentiality.[230] The federal law also prevents disclosure of a privileged communication by an eavesdropper.[231]

The communications privilege may be claimed by either spouse, and the federal courts, unlike the California courts,[232] have made no exception in criminal cases where the defendant seeks to introduce a communication in his own defense. The federal privilege may be claimed by persons who were legally married at the time of the communication without regard to their marital status at the time of trial.[233]

The privilege will be waived by failure to object.[234] The exceptions recognized are the same as major California exceptions. The privilege may not be claimed when the crime for which the spouse is being tried is against the other spouse.[235] The recent exception made to the testimony privilege for crimes against the child of either spouse[236] might well be extended to the communications privilege in the future. Federal courts also parallel California courts in denying the privilege when the communication was regarding the commission of a crime, but may not be as restrictive in requiring the communication to aid in the commission of the crime.[237]

IV. CONCLUSION

Although the marital testimony and communications privileges have been subject to criticism, they survive in California and federal courts today. California has developed a testimony privilege which meets many criticisms yet creates some new problems in interpretation and application. The federal rules have likewise attempted to deal with a major problem presented by the privileges, the *Erie* issue, but their effect on the courts remains to be seen. Both legislatures and courts have recognized that the marital privileges promote valid public policy, and have reaffirmed their value in our system of justice.

Diana Constantino

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[230] Blau v. United States 340 U.S. 332, 333 (1951); United States v. Wolffe, 291 U.S. 7, 14 (1934).

[231] United States v. Hoffa, 349 F.2d 20 (6th Cir.), *aff'd* 385 U.S. 293 (1966).

[232] CAL. EVID. CODE § 987 (West 1968).

[233] Pereira v. United States, 347 U.S. 1, 6-7 (1954).

[234] United States v. Figueroa-Paz, 468 F.2d 1055 (9th Cir. 1972).

[235] United States v. Walker, 176 F.2d 564, 568 (2d Cir. 1949), *cert. denied*, 388 U.S. 891 (1949).

[236] United States v. Allery, 526 F.2d 1362 (8th Cir. 1975).

[237] The privilege was not allowed where the communication "had to do" with the commission of a crime in United States v. Kahn, 471 F.2d 191, 194-95 (7th Cir. 1972).