

“I Do” Not Want To Testify Against My Fiancé: Why Spousal Privilege and Incompetence Rules Should Apply to Engaged Couples and Cohabiting Couples

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Two federal common-law rules govern a person’s ability to testify against their current or former: spousal privilege and spousal incompetence. At the core of both of these rules is the protection of marital harmony and the benefits that society reaps from that harmony.¹ Courts have held these rules “are ‘necessary to foster family peace, not only for the benefit of husband, wife, and children, but for the benefit of the public as well.’”² Spousal privilege covers communications made in private between spouses; so long as the communication was made while the spouses were married and was not a threat against the other spouse or a child, the words can be excluded from trial.³ This does not bar an individual from testifying about any actions their spouse took, only non-threatening words. This rule applies to statements made during marriage permanently; therefore, even if the marriage eventually ends, statements made during it remain privileged after the divorce.⁴

In contrast, spousal incompetence is when a married person can refuse to testify against their spouse.⁵ For someone to claim spousal incompetence, they must be currently married.⁶ This rule is fundamentally rooted in public policy as a “preservation of marital harmony and the resultant benefits to society from that harmony.”⁷ This absolute privilege allows a person to

¹ See Steven N. Gofman, Note, “*Honey, the Judge Says We’re History*”: *Abrogating the Marital Privileges Via Modern Doctrines of Marital Worthiness*, 77 CORNELL L. REV. 843, 843 (1992).

² *Id.* (quoting *Hawkins v. United States*, 358 U.S. 74, 77 (1958)).

³ *United States v. White*, 974 F.2d 1135, 1138 (9th Cir. 1992) (“When balancing these interests we find that threats against spouses and a spouse's children do not further the purposes of the privilege and that the public interest in the administration of justice outweighs any possible purpose the privilege serve in such a case.”).

⁴ See *supra* Gofman note 1, at 867 n.124.

⁵ *Id.* at 848.

⁶ *Id.* at 850.

⁷ *Emmi v. Deangelo*, 261 F. Supp. 3d 556, 559 (E.D. Pa. 2017) (quoting *Ebner v. Ewiak*, 484 A.2d 180, 183 (Pa. Super. Ct. 1984)).

refuse to testify against their spouse; however, it is important to note that after the Supreme Court’s decision in *Trammel v. United States*,⁸ it is the person who is called to testify against their spouse who holds the privilege.⁹ Therefore, a person could still voluntarily elect to testify against their spouse.¹⁰

There are certainly circumstances where both spousal privilege and spousal incompetence overlap.¹¹ When planning for a trial it is important to consider both of these rules and how they will play off each other. Accordingly, it is critical to know the marital status of the potential witness and the defendant not only at the time of trial but also at the time any statements which the adversary seeks to use against the defendant spouse were made.

Critics of these rules call them “sentimental relic[s].”¹² While this Article examines the rules in the context of federal common law, many states have imposed their own spousal incompetence and privilege laws.¹³ Some of these laws have been heavily criticized because the ability to invoke spousal incompetence lies with the spouse on trial.¹⁴ Others have been critical of spousal privilege generally.¹⁵ In fact, New Mexico abolished spousal privilege in state courts in August of 2019.¹⁶ New Mexico is the first state to do this through its Supreme Court, which said that spousal privilege was a “vestige of a vastly different society than the one we live in today.”¹⁷ The Court

⁸ 445 U.S. 40 (1980).

⁹ See *Trammel*, 445 U.S. at 53.

¹⁰ Gofman, *supra* note 1, at 847 (citing *Trammel*, 445 U.S. at 53).

¹¹ *Id.* at 849.

¹² David Medine, *The Adverse Testimony Privilege: Time To Dispose of a ‘Sentimental Relic’*, 67 OR. L. REV. 519, 519 (1998).

¹³ Jan Hoffman, *When Love Is Blind, but So Is Justice*, N.Y. TIMES (July 12, 1992), <https://www.nytimes.com/1992/07/12/weekinreview/when-love-is-blind-but-so-is-justice.html>.

¹⁴ *Id.*

¹⁵ Elie Mystal, *New Mexico Abolishes Spousal Privilege and I Have No Idea Who To Talk to About That*, ABOVE THE LAW (Sept. 6, 2019), <https://abovethelaw.com/2019/09/new-mexico-abolishes-spousal-privilege/>.

¹⁶ *State v. Gutierrez*, No. S-1-SC-36394, slip op. at ¶ 2 (N.M. Aug. 30, 2019), <https://nmonesource.com/nmos/nmsc/en/item/420927/index.do>; see also Mystal, *supra* note 15.

¹⁷ *Gutierrez*, slip op. at ¶ 38; see also Debra Cassens Weiss, *Spousal Communication Privilege ‘Has Outlived Useful Life,’ State Supreme Court Says*, ABA JOURNAL (Sept. 4, 2019, 10:55 AM), <http://www.abajournal.com/news/article/spousal-communication-privilege-has-outlived-its-useful-life-state-supreme-court-says>.

explained that the “privilege is rooted in misogyny”¹⁸ and “perpetuates gender imbalances.”¹⁹

These criticisms, especially in the application of the federal spousal incompetence rule are misplaced. The marital protections exist to promote trust and openness between married persons, and these protections, in a way, advocate for individuals to get and remain married. The rationales that support these two distinct benefits for married individuals also support both rules applying to engaged couples who are not yet married and individuals who cohabit. In fact, some scholars have gone as far as saying that these privileges should apply to entire nuclear families.²⁰

First, this Article will examine how the policy reasons for the existence of these rules and how they apply to engaged individuals and intimate partners cohabiting. Next, it will discuss how, in theory, these rules’ applications could offer less protection to individuals who are of a lower socioeconomic background based on data about who is able to get married. Finally, it will argue that the rules rooted in marital relationships should be expanded to include those who are engaged or are living with their partner.

These rules were designed to protect the strength of marital unions.²¹ Courts justified this common law-based protection by claiming it would benefit society for couples to remain married.²² The rationales that justify these rules also apply to couples who are engaged or have lived together. Not offering these protections to engaged or cohabiting couples makes any nuclear family unit, like these unmarried couples, vulnerable to being considered less worthy of the government’s protection than those of a

¹⁸ Paul Davenport, *New Mexico Ruling Abolishes Privilege on Spousal Testimony*, U.S. NEWS (Aug. 31, 2019), <https://www.usnews.com/news/best-states/new-mexico/articles/2019-08-31/new-mexico-ruling-abolishes-privilege-on-spousal-testimony>.

¹⁹ *Gutierrez*, slip op. at ¶ 32.

²⁰ See generally Deborah A. Ausburn, *Circling the Wagons: Informational Privacy and Family Testimonial Privileges*, 20 GA. L. REV. 173 (1985).

²¹ Gofman, *supra* note 1, at 844.

²² See *Emmi v. Deangelo*, 561 F. Supp. 3d 556, 559 (E.D. Pa. 2017) (“The purpose of the spousal privileges is generally said to be the preservation of marital harmony and the resultant benefits to society from that harmony.” (citing *Ebner v. Ewiak*, 484 A.2d 180, 183 (Pa. Super. Ct. 1984))).

married couple.²³ Who are courts to say that the “family peace” fostered in a home with two unmarried parents is not as deserving of a stable home?²⁴

In terms of an engaged couple, these individuals have made clear their intent to fully commit to one another.²⁵ Any number of reasons could underlie why they have not gotten married yet: finances, timing, and familial concerns are just a few of a myriad of possible reasons.²⁶ Just because two people cannot justify getting married at an earlier time does not make their relationship any less valid or worthy of protection. Based on how the law is currently structured, if a man is arrested the day before his wedding and is kept in custody—and thus unable to marry his fiancée—his fiancée would have to testify against him.²⁷

An even stronger argument can be made for individuals cohabitating. A signed marriage license should not be the difference between being able to refuse to testify against someone that has made a clear commitment to another. Courts have seen facts such as these and refused to extend the marital protections if the couple lacks the “formality of a ceremony.”²⁸ Therefore, a couple could be “married” for all intents and purposes in the way they live their lives, handle their finances, raise any children, distribute responsibilities—but without being considered married under the law, no protections normally afforded to formally “married” couples will apply.²⁹

²³ *Cf.* *Fitzsimmons v. Mini Coach of Boston, Inc.*, 799 N.E.2d 1256, 1257 (Mass. 2003) (recognizing the merits of the claim that “social mores regarding cohabitation between unmarried parties have changed dramatically in recent years and living arrangements that were once criticized are now relatively common and accepted” (quoting *Wilcox v. Trautz*, 693 N.E.2d 141, 144 (1998))).

²⁴ *See* Gofman, *supra* note 1, at 843, 845 (“When a court or legislature denies the privileges to a legal marriage, that denial in effect says that a legal marriage lacks unique qualities and does not deserve protection in all cases.”).

²⁵ *See* Barbara Frazier, “*But I Can’t Marry You*”: *Who is Entitled to the Engagement Ring When the Conditional Performance Falls Short of the Alter?* 17 AM. ACAD. MATRIM. L. 419, 437 (2001).

²⁶ Sherry Amatenstein, *Real Brides Reveal the Stories Behind Their Long Engagements*, BRIDES (May 27, 2016) <https://www.brides.com/story/real-brides-reasons-for-long-engagements>.

²⁷ *See* Gofman, *supra* note 1, at 850.

²⁸ *E.g.*, *People v. Delph*, 94 Cal. App.3d 411, 415 (Cal. Ct. App. 1979) (refusing to extend spousal privilege and spousal incompetence to a couple who lived together and lived a life consistent with the “trappings of a marriage”).

²⁹ *See id.* at 416 (“The decision provides a method for equitable resolution of property disputes in situations where the parties not only carried on a relationship that, except for the formal ceremony, was marriage-like, but where they also entered into an implied contract or agreement as to the ownership of property, thus protecting the reasonable expectations of the parties. This in no way signals a general elevation of meretricious relationships themselves to the level of marriages for any

Applying these laws only to couples who are married will disproportionately impact individuals from lower socioeconomic means.³⁰ Fewer Americans are getting married, and those that are getting married tend to have greater incomes and higher education levels.³¹ “When it comes to coupling, poor and working-class Americans are more likely to substitute cohabitation for marriage.”³² This means that, in application, the laws of spousal incompetence and spousal privilege are most likely to benefit individuals who already have privilege by virtue of their membership in the upper or middle classes.³³ While marriage rates in the United States have declined, the childbearing rate has remained consistent.³⁴ Therefore, more children could be born into homes where parents cohabit rather than get married.³⁵ Researchers have said, “[I]t’s stability, not a marriage license, that matters for children.”³⁶ Why then are the laws that could throw a family unit into disarray based on a marriage certificate rather than the need for familial stability?

Ultimately, as currently applied, spousal privilege and spousal incompetence protections have a good underlying purpose—protecting couples, their children, and the public from what could create fallout and an undue and unnecessary burden on family units.³⁷ But, these rules are so narrow in their application that it lessens their effectiveness. Many couples that would benefit from these federal common-law protections do not

and all purposes. It is for the legislature to determine whether such relationships, because of their commonness in today's society or for other policy reasons, deserve the statutory protection afforded the sanctity of the marriage union.”).

³⁰ See W. Bradford Wilcox & Wendy Wang, *The Marriage Divide: How and Why Working-Class Families Are More Fragile Today*, INST. FOR FAMILY STUDIES (Sept. 25, 2017), <https://ifstudies.org/blog/the-marriage-divide-how-and-why-working-class-families-are-more-fragile-today>.

³¹ Claire Cain Miller, *How Did Marriage Become a Mark of Privilege?*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/upshot/how-did-marriage-become-a-mark-of-privilege.html>.

³² Wilcox & Wang, *supra* note 29.

³³ *Id.*

³⁴ See Miller, *supra* note 31.

³⁵ *Id.*

³⁶ *Id.*

³⁷ See *Hawkins v. United States*, 358 U.S. 74, 77 (1958); see also *Trammel v. United States*, 445 U.S. 40, 48 (1980) (“[T]he long history of the privilege suggests that it ought not to be casually cast aside. That the privilege is one affecting marriage, home, and family relationships—already subject to much erosion in our day—also counsels caution.”).

qualify because their relationship lacks a literal government stamp of approval.³⁸ To truly preserve the policy rationales that justified the creation of marital protections, the federal judiciary should expand the application of spousal privilege to include couples that are engaged to be married as well as those couples who cohabit. By expanding the law, courts will offer more safeguards to lower-income individuals who are less likely to get married, while also fostering the family peace these rules are designed to protect.

³⁸ See Gofman, *supra* note 1, at 850.