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# AGAINST THE PEACE AND DIGNITY OF THE STATE: SPOUSAL VIOLENCE AND SPOUSAL PRIVILEGE

MALINDA L. SEYMORE†

*I cannot remember all the times he hit me.  
I might could count black eyes,  
how many times I said I ran into doors  
or fell down or stepped in the path  
of any flying object except his fist.  
Once I got a black eye playing softball.  
The rest were him. Seven, eight.  
I can name what of me he broke:  
my nose, my arm, and four ribs  
in the course of six years' marriage.  
The ribs were after I said divorce  
and in spite of a peace bond.  
I spent the night in the hospital.  
He did not even spend a night in jail.  
The sheriff I helped elect does not  
apply the law to family business.<sup>1</sup>*

Every indictment in Texas ends with the phrase, “[a]gainst the peace and dignity of the State.”<sup>2</sup> This phrase is in recognition of the fact that crimes are not purely personal matters between a defendant and a victim, but are offenses against society as a whole. By enacting changes to its spousal privilege statute, Texas has an opportunity to demonstrate that domestic violence offends the peace and dignity of the state.

As is true in the rest of the country, family violence has reached epidemic proportions in Texas. According to the Texas Department of Human Services, 639,712 Texas women were physically abused by their male intimate partners in 1992.<sup>3</sup> For more than 100,000 women, this abuse occurred at least once a week.<sup>4</sup> The fact that police are

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1. JO CARSON, *All the times he hit me*, in *STORIES I AIN'T TOLD NOBODY YET* 52 (Theatre Communications Group 1991).

2. TEX. CODE CRIM. PROC. ANN. art. 21.02 (West 1989).

3. TEX. DEP'T HUM. SERVS., 1992 ANNUAL REPORT 67 (1992).

4. *Id.* The Texas data matches national estimates of the pervasiveness of spousal violence. “Every eighteen seconds, a woman is beaten in the United States and between 2,000 and 4,000 women die every year because of this abuse.” Gretchen P. Mullins, *The Battered Woman and Homelessness*, 2 J.L. & POL’Y 237, 241 (1994) (citing *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1501 (1993) and Sylvia A. Law, *Every 18 Seconds a Woman is Beaten: What Judges Can Do in the Face of this Carnage*, 30 JUDGE’S J. 12, 14 (Winter 1991)). Some authorities estimate incidents of domestic violence affect four million women each year. *Women and Violence: Hearings Before the Senate Committee on the Judici-*

reluctant to arrest domestic violence offenders<sup>5</sup> and that states are reluctant to prosecute such cases<sup>6</sup> is well-documented. Prevalent societal attitudes diminishing the importance of spousal violence may help explain this reluctance.<sup>7</sup>

In Texas, reluctance to pursue criminal sanctions against married abusers is caused in part by the difficulty in procuring the battered spouse's testimony.<sup>8</sup> Although a victim spouse may testify voluntarily,

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ary, 101st Cong., 2d Sess. 116-17 (1990) (testimony of Angela Browne, Ph.D.). The FBI estimates one out of every two women in this country will be in an abusive relationship at some time in her life. *Hearing on Domestic Violence Before the Senate Committee on the Judiciary*, 103rd Cong., 1st Sess. 7 (1993) (statement of Sarah M. Buel).

5. Carolyn R. Hathaway, Case Comment, *Gender Based Discrimination in Police Reluctance to Respond to Domestic Assault Complaints*, 75 GEO. L.J. 667 (1986); Miriam H. Ruttenberg, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U. J. GENDER & L. 171 (1994); Sue Ellen Schuerman, Note, *Establishing a Tort Duty for Police Failure to Respond to Domestic Violence*, 34 ARIZ. L. REV. 355 (1992); *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498 (1993) [hereinafter *Legal Responses to Domestic Violence*]; Gary M. Bishop, Note, *Section 1983 and Domestic Violence: A Solution to the Problem of Police Officers' Inaction*, 30 B.C. L. REV. 1357 (1989); Lauren L. McFarlane, Note, *Domestic Violence Victims v. Municipalities: Who Pays When the Police Will Not Respond?*, 41 CASE W. RES. L. REV. 929 (1991).

6. Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853 (1994); Elena Salzman, Note, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. REV. 329 (1994); Lisa Memoli & Gina Plotino, *Enforcement or Pretense: The Courts and the Domestic Violence Act*, 15 WOMEN'S RTS. L. REP. 39 (1993); *Legal Responses to Domestic Violence*, supra note 5; Chief Justice A.M. "Sandy" Keith, *Domestic Violence and the Court System*, 15 HAMLINE L. REV. 105 (1991); Jane W. Ellis, *Prosecutorial Discretion to Charge in Cases of Spousal Assault: A Dialogue*, 75 J. CRIM. L. & CRIMINOLOGY 56 (1984).

7. The findings of the Texas Gender Bias Task Force with regard to attitudes about domestic violence are revealing:

More than half of female judges responding to the Judicial Attitudes Survey reported that, in their opinions, law-enforcement personnel do not take family violence seriously enough. Half of female respondents to the Attorney Survey and more than a third of female judges said that the attitudes of law-enforcement personnel discourage victim cooperation at least some of the time.

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More than a third of both male and female attorneys . . . said that prosecutors at least sometimes decline to prosecute domestic violence cases in criminal court, while a similar percentage of female attorneys and judges thought that the attitudes of prosecutors discourage victim cooperation.

STATE BAR OF TEXAS, THE GENDER BIAS TASK FORCE OF TEXAS, FINAL REPORT 73 (Feb. 1994).

8. I recognize that much battering occurs in intimate relationships not sanctioned by state-recognized marriages. However, the privilege does not apply to unmarried couples, and a discussion of battering in these relationships is beyond the scope of this article. For further information, see generally Sandra E. Lundy, *Abuse That Dare Not Speak Its Name: Assisting Victims of Lesbian and Gay Domestic Violence in Massachusetts*, 28 NEW ENG. L. REV. 273 (1993); Mac D. Hunter, J.S.C., *Homosexuals as a*

very few battered spouses actually do.<sup>9</sup> Furthermore, Texas prosecutors cannot compel a reluctant spouse's testimony because of the spousal privilege statute.<sup>10</sup> However, effective September 1, 1995, the Texas Legislature abolished the spousal privilege in cases where one spouse is charged with a crime against the other.<sup>11</sup> Today, in Texas, a spouse can be compelled to testify in such cases. With this new change, Texas joins the majority of states having a spousal crime exception to the marital privilege.

By amending the spousal privilege statute, the Texas Legislature sends a message that spousal violence is a crime against the state that society will not tolerate. As I discuss in a forthcoming article,<sup>12</sup> rules of evidence are more than simply neutral rules of procedure related to courtroom control and trial tactics. Rules of evidence, including the spousal privilege, illustrate the legal system's attitude toward women. Jurisdictions which refuse to give a prosecutor the right to compel testimony from spouses in domestic violence cases, as is possible in every other crime, send an obvious message — when a man beats his wife, it is not a crime which offends the state, it is simply a private matter between two parties.<sup>13</sup> Even those jurisdictions with a spousal violence exception often leave married women unprotected by the legal system because of very narrow and uninformed views of what *constitutes* spousal violence.

With the adoption of this new spousal crime exception, Texas takes an important step forward in fighting domestic violence. Giving prosecutors the authority to compel a victim's testimony in domestic violence cases, and thus treating spousal battering crimes in a manner consistent with other acts of violence, reinforces the principle that do-

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*New Class of Domestic Violence Subjects Under the New Jersey Prevention of Domestic Violence Act of 1991*, 31 U. LOUISVILLE J. FAM. L. 557 (1992/1993).

9. See *infra* text accompanying notes 14-44 for a discussion of the dynamics of domestic violence, which explains why battered wives are reluctant to testify.

10. TEX. R. CRIM. EVID. 504. A number of other terms are frequently used to refer to this privilege. Wigmore dubbed it *the privilege for anti-marital facts*. 8 JOHN H. WIGMORE, EVIDENCE 210 (McNaughton rev. 1961). Some commentators refer to it as the *adverse testimony privilege* as distinguished from the *communications privilege*. See, e.g., *Developments in the Law: Privileged Communications*, 98 HARV. L. REV. 1450, 1563 (1985) [hereinafter *Privileged Communications*]. This author uses the term *spousal immunity*, as do other authors, in recognition of the privilege's origin as a rule of incompetency to prevent a spouse from testifying. See, e.g., Richard Lempert, *Mason Ladd Lecture: A Right to Every Woman's Evidence*, 66 IOWA L. REV. 725, 726 (1981).

11. TEX. CODE CRIM. PROC. ANN. art. 38.10 (West 1995).

12. Malinda L. Seymore, *Isn't it a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NW. U. L. REV. 801 (1996).

13. ANN JONES, NEXT TIME, SHE'LL BE DEAD: BATTERING AND HOW TO STOP IT 51-52 (1994) (citing Amy Eppler, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 YALE L.J. 788, 801 (1986)). See also Elizabeth A. Stanko, *Fear of Crime and the Myth of the Safe Home: A Feminist Critique of Criminology*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 75, 78 (Kersti Yllo & Michele Bograd eds., 1988).

mestic violence offends the peace and dignity of the state. The next crucial step is for the Texas judiciary to interpret and apply the spousal crimes exception so as to take into account women's lives and avoid some of the pitfalls which have led to injustice in other states.

Part I of this article discusses the profiles of batterers and victims as a predicate for analyzing applications of the spousal immunity privilege in Texas. Part II briefly explores the origin and nature of the spousal privileges. Part III examines the history of the spousal privilege and spousal crime exception in Texas, and the recent statutory change. Part IV discusses the application of similar exceptions in other states. Part V briefly explores the application of the spousal crime exception to the communications privilege. Finally, Part VI suggests how Texas courts should properly apply this new rule of evidence in domestic violence cases.

### I. THE NATURE OF DOMESTIC VIOLENCE

Understanding the dynamics of domestic violence is critical when applying the spousal crime exception to the marital privilege.<sup>14</sup> Psychologist Lenore Walker found battering relationships go through a three-stage cycle of violence: *tension-building*, *acute battering*, and *contrition*.<sup>15</sup> During the tension-building phase, what is termed *minor battering* occurs; the wife<sup>16</sup> attempts to calm her abuser by becoming nurturing and compliant, by anticipating his every whim, or by simply staying out of his way.<sup>17</sup> Nonetheless, the abuse often escalates, becoming more frequent and more serious.<sup>18</sup> The second phase is characterized "by the uncontrollable discharge of the tensions that have built up during phase one."<sup>19</sup> This phase of severe battering typically lasts from two to twenty-four hours.<sup>20</sup> The third phase of loving contrition follows acute battering. The batterer begs forgiveness and

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14. I explore the dynamics of domestic violence more fully in Seymore, *supra* note 12, at 805-13.

15. LENORE E. WALKER, *THE BATTERED WOMAN* 55 (1979). See also DONALD G. DUTTON, *THE DOMESTIC ASSAULT OF WOMEN: PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES* 125 (1995).

16. In accord with current norms of gender-neutrality, authors often refer to batterers and victims generically as *spouses*. This tends to obscure the reality that wives are victims and husbands are perpetrators in the vast majority of cases. See LEWIS OKUN, *WOMAN ABUSE: FACTS REPLACING MYTHS* 39-40 (1986); SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* 214-15 (1982).

17. WALKER, *supra* note 15, at 56.

18. *Id.* at 59; DUTTON, *supra* note 15, at 125. The level of verbal and psychological abuse rises, and he becomes more possessive and jealous.

19. WALKER, *supra* note 15, at 59.

20. *Id.* at 60. During this phase, everything a victim does enrages the batterer. If she tries to defend herself, he beats her into submission; if she is passive, he beats her harder. *Id.* at 61-62. The beating stops only when the batterer exhausts himself or the victim gets away. *Id.* at 61.

promises to change, and never hit again.<sup>21</sup> This romantic stage lasts until the entire cycle starts over again.<sup>22</sup> And it will start over — in battering relationships, the cycle repeats, with the abuse continually escalating.<sup>23</sup>

The typical batterer<sup>24</sup> is a traditionalist who believes in male supremacy, in the stereotypical masculine sex role in the family,<sup>25</sup> and in his entitlement to use violence to discipline his wife.<sup>26</sup> The batterer's feelings of entitlement may be a learned response. Many batterers witnessed their fathers beating their mothers and/or were beaten themselves.<sup>27</sup> The typical batterer is driven by a desire to control his wife.<sup>28</sup> This desire often manifests itself in such behaviors as threatening her if she talks about leaving, tearing the telephone off the wall to prevent her from calling the police, spying on her house, and lying in wait to assault her new boyfriend.<sup>29</sup> Possessiveness and jealousy are often common traits of the batterer.<sup>30</sup> In order to feel secure the batterer must constantly monitor his wife's every activity, but even then he remains suspicious of her possible relationships with other men. His verbal abuse may include accusations that she is having an affair or affairs.<sup>31</sup> He has learned the best way to control his wife is by isolating her from others.

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21. *Id.* at 65. He brings flowers and candy; he is loving and charming. *Id.* at 65-66.

22. *Id.* at 69.

23. *Id.* "Most women report that before they know it, the calm, loving behavior gives way to little battering incidents again. The phase-one tension building recurs, a new cycle of battering behavior begins." *Id.*

24. Because the initial focus of the battered women's movement was on the victim, information about batterers is less extensive. With the growth of treatment programs for batterers, however, researchers and counselors have been able to construct more accurate portraits of batterers. Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solution*, 60 WASH. L. REV. 267, 286 n.95 (1985). According to Waits, early information about batterers came from victims' reports because of the perpetrators' reluctance to talk about their violent behavior and their tendency to deny or downplay their battering. *Id.* She notes the new information coming to light from batterers supports the accuracy of victim reports. *Id.*

25. WALKER, *supra* note 15, at 36.

26. *Id.* at 14; James Ptacek, *Why Do Men Batter Their Wives?*, in FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 13, at 133, 146.

27. WALKER, *supra* note 15, at 38. Walker discovered that even in batterers' childhood homes where overt violence was absent, a general lack of respect for women and children was evident. *Id.*

28. DUTTON, *supra* note 15, at 64. One researcher found power motivation in the batterers' "need to control or dominate the female, their belief that female independence meant loss of male control, and their attempt to persuade or coerce the female into adopting their definition of how the relationship should be structured and how it should function." *Id.*

29. Ptacek, *supra* note 26, at 151.

30. WALKER, *supra* note 15, at 37.

31. *Id.* at 37-38; DUTTON, *supra* note 15, at 30. The batterer's jealousy also leads him to drive away his wife's relatives and female friends; his pathological jealousy extends to the couple's own children. WALKER, *supra* note 15, at 37-38. His jealousy of their children helps explain the well-documented fact that battering frequently oc-

Lenore Walker further identifies a number of characteristics common to battered women.<sup>32</sup> The battered woman is also typically a traditionalist. Furthermore, she views her husband as the head of the family, and believes a woman's proper place is in the home even if she is employed outside the home.<sup>33</sup> She feels responsible for maintaining the peace at home and thus accepts the blame for her husband's violence.<sup>34</sup> Moreover, she minimizes the seriousness of the battering because her identity becomes submerged in her spouse's.

In trying to explain why women stay in battering relationships, Donald Dutton developed the theory of traumatic bonding. *Traumatic bonding* refers to the strong emotional ties that develop in a relationship as a result of power imbalance and intermittent abuse.<sup>35</sup> Further, reinforcement from the contrition phase<sup>36</sup> — love, attention, romance — makes it difficult to leave.<sup>37</sup> Moreover, the beatings engender learned helplessness,<sup>38</sup> serious impairment of the wife's problem-solving abilities,<sup>39</sup> and clinical depression making it difficult to deal with even simple, everyday matters.<sup>40</sup> Also, low self-esteem is common among battered women.<sup>41</sup> The battered woman hates herself for being unable to leave.<sup>42</sup> Furthermore, the situation is exacerbated

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curs during pregnancy. RICHARD J. GELLES, *Violence and Pregnancy: A Note on the Extent of the Problem and Needed Services*, in FAMILY VIOLENCE 111, 111-13 (1987).

32. WALKER, *supra* note 15, at 31.

33. *Id.* at 33-34. Battered women who work outside the home often feel guilty about their work. *Id.* at 33.

34. *Id.* at 34.

35. DUTTON, *supra* note 15, at 191-92; see also Dee L. R. Graham, et al., *Survivors of Terror: Battered Women, Hostages, and the Stockholm Syndrome*, in FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 13, at 217, 220-21. Analogies have been drawn between battered women and hostages. *Id.* at 217, 222-26.

36. See *supra* note 21 and accompanying text.

37. WALKER, *supra* note 15, at 66-68.

38. The theory of learned helplessness was developed as a result of experiments on animals. When subjected to random electric shocks, animals become passive and compliant after realizing they can not control the punishment. *Id.* at 45-48.

39. *Id.* at 48; Jacquelyn C. Campbell, *Public-Health Conceptions of Family Abuse*, in ABUSED AND BATTERED: SOCIAL AND LEGAL RESPONSES TO FAMILY VIOLENCE 35, 43 (Dean D. Knudsen & JoAnn L. Miller eds., 1991).

40. WALKER, *supra* note 15, at 50; CHARLES P. EWING, BATTERED WOMEN WHO KILL 21 (1987).

41. WALKER, *supra* note 15, at 32. Walker notes low self-esteem often exists prior to the marriage and beatings:

Women are systematically taught that their personal worth, survival, and autonomy do not depend on effective and creative responses to life situations, but rather on their physical beauty and appeal to men. They learn that they have no direct control over the circumstances of their lives. Early in their lives, little girls learn from their parents and society that they are to be more passive than boys. Having systematically trained to be second best, women begin marriage with a psychological disadvantage.

*Id.* at 51.

42. Waits, *supra* note 24, at 283.

when she is financially dependent on the batterer.<sup>43</sup> Children may also hamper her ability to leave.<sup>44</sup>

## II. SPOUSAL PRIVILEGE

### A. *The Right to Compel Testimony*

"The power of government to compel persons to testify . . . is firmly established in Anglo-American jurisprudence."<sup>45</sup> Every state in the Union has a provision for compulsory process, recognizing the power of the state government to compel the testimony of witnesses.<sup>46</sup> Consequently, it is well established in Texas that courts have the inherent power to summon witnesses and compel their attendance.<sup>47</sup> As the Texas Supreme Court explained in *Lehnhard v. Moore*, every citizen has the testimonial duty to disclose information to a court of law.<sup>48</sup> The *Lehnhard* court quoted from Wigmore:

He who will live by society must let society live by him, when it requires to.

. . . .  
 . . . The pettiness and personality of the individual trial disappear when we reflect that our duty to bear testimony runs not to the parties in that present cause, but to the community at large and forever.<sup>49</sup>

43. See WALKER, *supra* note 15, at 33-34. Walker found even women who work outside the home and have an income typically turn their money over to their husbands. *Id.* They may also ultimately quit working to keep their batterers happy. *Id.* at 33. In explaining why it takes so long to leave a batterer, many women report that the batterer controlled the finances. *Id.* at 34.

44. Many battered women express the belief that children need their fathers, or say they stay in the relationship because of the children. *Id.* at 30.

45. *Kastigar v. United States*, 406 U.S. 441, 443 (1972) (citing 8 JOHN H. WIGMORE, EVIDENCE § 2190 (McNaughton rev. 1961)). English law provided that courts had the power to compel testimony as early as 1562. *Id.* (citing Statute of Elizabeth, 1562, 5 Eliz., ch. 9, § 12 (Eng.)). By 1742 it was considered an "indubitable certainty" that "the public has a right to every man's evidence." *Id.* (quoting the remarks of the Duke of Argyle and Lord Chancellor Hardwicke, reported in 12 T. HANSARD, PARL. HIST. ENG. 675, 693 (1812)). The Sixth Amendment to the U.S. Constitution refers to the right to compulsory process and the Judiciary Act of 1789 provides for compulsory process of witnesses in federal court. U.S. CONST. amend. VI; Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, 89 (1789). Texas recognizes a criminal defendant has a right of compulsory process under the Texas Constitution as well as under the U.S. Constitution. See *Green v. State*, 887 S.W.2d 230, 232 (Tex. App.—Texarkana 1994, no pet.) (citing TEX. CONST. art. I, § 10). The right of compulsory process also gives a defendant the right to use the power of the law to compel a witness' testimony. *Id.*; *Gonzalez v. State*, 714 S.W.2d 19, 25 (Tex. App.—Houston [1st Dist.] 1985, no pet.).

46. See, e.g., *Ambles v. State*, 383 S.E.2d 555, 556-57 (Ga. 1989); *Ex parte Weeks*, 456 So.2d 404, 408 (Ala. 1984); *Mason v. Robinson*, 340 N.W.2d 236, 242 (Iowa 1983); *People v. Schweitzer*, 187 Cal. Rptr. 696, 698 (Cal. Ct. App. 1982); *State v. Gilbert*, 326 N.W.2d 744, 746 (Wis. 1982).

47. *Burttschell v. Sheppard*, 69 S.W.2d 402, 403 (Tex. 1934).

48. *Lehnhard v. Moore*, 401 S.W.2d 232, 235 (Tex. 1966); see also *Mason v. Robinson*, 340 N.W.2d 236, 242 (Iowa 1983).

49. *Lehnhard*, 401 S.W.2d at 235 (quoting WIGMORE, *supra* note 10, § 2192).



Thus, testifying as a witness is the responsibility of every citizen, regardless of the odious nature of the evidence.<sup>50</sup> There are, however, exceptions to the power to compel testimony. The Fifth Amendment privilege against compelled self-incrimination is perhaps the most familiar.<sup>51</sup> Other privileges, including the spousal privilege, are exceptions as well.

### B. *Separating the Two Marital Privileges*

Two distinct testimonial privileges arise as a result of marriage, and some confusion ensues because the term *marital privilege* is often used to describe both. The *spousal immunity privilege* prevents the testimony of one spouse against the other,<sup>52</sup> while the *marital communications privilege* prevents testimony only regarding confidential communications made during a marriage.<sup>53</sup> Rule 504 of the Texas Rules of Criminal Evidence encompasses both the spousal immunity privilege and the marital communications privilege.<sup>54</sup>

In most jurisdictions, including Texas, spousal immunity applies only in criminal cases.<sup>55</sup> Both civil and criminal rules of evidence contain the communications privilege, but only the criminal rule contains the privilege to refuse to testify.<sup>56</sup> The privilege arises upon a marriage between the witness spouse and the defendant spouse, and terminates upon divorce.<sup>57</sup> Spousal immunity works as a complete bar to testimony, regardless of the subject matter.<sup>58</sup> The marital communications privilege only protects against disclosure of confidential communications made during marriage.<sup>59</sup> The marital status of the spouses at the time of the trial is immaterial, so long as the communication was made during marriage.<sup>60</sup>

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50. *Villarreal v. State*, 860 S.W.2d 647, 649 (Tex. App.—Waco 1993, no pet.).

51. The U.S. Supreme Court calls it the most important exception to the compulsory power. *Kastigar v. United States*, 406 U.S. 441, 444 (1972). See also *Bridge v. State*, 726 S.W.2d 558, 567 (Tex. Crim. App. 1986).

52. 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, *FEDERAL EVIDENCE* § 217 (1985).

53. *Id.*

54. TEX. R. CRIM. EVID. 504.

55. See David Medine, *The Adverse Testimony Privilege: Time to Dispose of a "Sentimental Relic,"* 67 OR. L. REV. 519, 520 n.8 (1988).

56. See TEX. R. CIV. EVID. 504; TEX. R. CRIM. EVID. 504.

57. See *Freeman v. State*, 786 S.W.2d 56, 58 (Tex. App.—Houston [1st Dist.] 1990, no pet.) (once divorced, a spouse is no longer disqualified from testifying); see also MCCORMICK ON EVIDENCE § 66, at 162 (Edward W. Cleary ed., 3d ed. 1984); 25 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE & PROCEDURE* § 5572 (1989).

58. LOUISELL & MUELLER, *supra* note 52, § 218.

59. *Id.*

60. TEX. R. CRIM. EVID. 504(1)(b) ("A person . . . has a privilege during their marriage and afterwards to refuse to disclose . . . a confidential communication made to his spouse while they were married."); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *MODERN EVIDENCE* § 5.33, at 603, § 5.34, at 609 (1995).

When discussing marital testimonial privileges, it is important to understand who holds each privilege, and thus who has the authority to invoke or waive the privilege. The testifying spouse is the holder of the immunity privilege,<sup>61</sup> while the defendant spouse is the holder of the communications privilege.<sup>62</sup> When a witness currently married to the defendant spouse is called to testify regarding confidential communications made during marriage, both privileges apply and either may be invoked to prevent testimony.<sup>63</sup> In a number of situations, however, there is no overlap of the two privileges. For example, if a former spouse is called to testify, the ex-spouse is barred from testifying about confidential communications made during marriage, even though the spousal immunity privilege does not apply.<sup>64</sup> If a communication between the spouses occurs in the presence of a third person, thus destroying confidentiality and rendering the communications privilege inapplicable,<sup>65</sup> a current spouse called to testify may still refuse to testify by invoking spousal immunity. If the testifying spouse waives the immunity privilege, but the defendant spouse invokes the communications privilege, the testifying spouse may testify but cannot reveal any confidential communications made during marriage.

### C. Justifications for the Marital Privileges

Privileges, which contravene the usual rule that the government is entitled to "every man's evidence,"<sup>66</sup> are usually justified on public policy grounds.<sup>67</sup> With respect to the marital privileges, the societal interests most often offered to justify excluding evidence include: 1)

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61. See TEX. R. CRIM. EVID. 504(2)(a) ("The spouse of the accused has a privilege not to be called [to testify]," which means the testifying spouse holds the spousal immunity privilege); *Johnson v. State*, 803 S.W.2d 272, 281 (Tex. Crim. App. 1990) (en banc); *Gibbons v. State*, 794 S.W.2d 887, 893 (Tex. App.—Tyler 1990, no pet.).

62. See TEX. R. CRIM. EVID. 504(1)(b)-(c). The Texas rule is quite typical. The holder of the communications privilege is generally the communicant spouse, that is, the spouse who made the statement. WRIGHT & GRAHAM, *supra* note 57, §§ 5586-5587.

63. "The testimonial privilege [spousal immunity] is the broader of the two in that it precludes all adverse testimony by the spouse, not merely disclosure of confidential communications." MUELLER & KIRKPATRICK, *supra* note 60, § 5.33, at 603.

64. See, e.g., *Freeman v. State*, 786 S.W.2d 56, 58 (Tex. App.—Houston [1st Dist.] 1990, no pet.); *Allen v. State*, 761 S.W.2d 384, 387 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd); see also *Pereira v. United States*, 347 U.S. 1, 6 (1954); MUELLER & KIRKPATRICK, *supra* note 60, § 5.33, at 603.

65. See TEX. R. CRIM. EVID. 504(1)(a) (confidential communication protected by the privilege is one "made privately by any person to his spouse"); *Gibson v. State*, 516 S.W.2d 406, 409 (Tex. Crim. App. 1974); see also *Wolfe v. United States*, 291 U.S. 7, 14 (1934); *United States v. Crouthers*, 669 F.2d 635, 642 (10th Cir. 1982).

66. *Kastigar v. United States*, 406 U.S. 441, 443 (1972) (quoting the remarks of the Duke of Argyle and Lord Chancellor Hardwicke, reported in 12 T. HANSARD, PARL. HIST. ENG. 675, 693 (1812)).

67. See *Privileged Communications*, *supra* note 10, at 1584-85; Steven Goode & M. Michael Sharlot, *Article V: Privileges*, 30 HOUS. L. REV. 489, 489 (1993).

fostering marital intimacy; 2) protecting privacy; and 3) preventing marital discord.<sup>68</sup>

### 1. Marital Intimacy

One Texas court eulogized the privilege in the following language:

The happiness of the married state requires that there should be the most unlimited confidence between husband and wife; and this confidence the law secures by providing that it shall be kept forever inviolable; that nothing shall be extracted from the bosom of the wife which was confided there by the husband.<sup>69</sup>

Another court added this bit of purple prose: "We will not incurber [sic] this opinion to panegyryze the sacred relation of married life and that wise rule of evidence that prohibits either one of the spouses, against the will of the other, to lift the screen of privacy to public gaze . . . ."<sup>70</sup>

This intimacy justification breaks down, however, under scrutiny. The obvious question is whether the existence of the spousal privilege significantly affects marital conduct, if at all. In order to accept the notion that spouses speak freely to each other because of the existence of the communications privilege, one must assume spouses know about the privilege. Robert M. Hutchins and Donald Slesinger argue the privilege has no effect on marital communications:

[V]ery few people ever get into court, and practically no one outside the legal profession knows anything about the rules regarding privileged communications between spouses. As far as the writers are aware . . . marital harmony among lawyers who know about privileged communications is not vastly superior to that of other professional groups.<sup>71</sup>

The difficulty in accepting the notion that the marital privilege fosters free communication is exacerbated by the narrowness of the privilege, which applies only in court.

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68. See *Privileged Communications*, *supra* note 10, at 1584-85; Jaymi B. Zwain, Note, *Evidence — Privilege Against Adverse Spousal Testimony — In a Federal Criminal Proceeding Choice of Whether to Testify Against a Defendant Spouse Belongs to Witness Spouse Alone*, 55 TUL. L. REV. 961, 970-71 (1981); Charles L. Black, Jr., *The Marital and Physician Privileges — A Reprint of a Letter to a Congressman*, 1975 DUKE L.J. 45, 47 (1975); Mark Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CAL. L. REV. 1353, 1370-71 (1973); David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 110 (1956). See also WRIGHT & GRAHAM, *supra* note 57, § 5572, at 493-95; Goode & Sharlot, *supra* note 67, at 542.

69. *Lanham v. Lanham*, 145 S.W. 336, 338 (Tex. 1912).

70. *Wiggins v. Tiller*, 230 S.W. 253, 254 (Tex. Civ. App.—San Antonio 1921, no writ).

71. Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675, 682 (1929).

[A] married person must recognize that no guarantee exists to ensure that his or her confidences will not . . . be divulged to any and all. Intimate marital communications . . . are inevitably at risk of disclosure to the other spouse's relatives, workmates, and friends without the State taking any action to prevent or redress the "injury."<sup>72</sup>

Nor can a spouse expect the state to redress his or her injury when the other spouse discloses confidential matters to the police.<sup>73</sup>

## 2. Privacy

Proponents argue marital privileges are necessary expressions of a right to privacy. This argument presumes a spouse testifying voluntarily violates a defendant spouse's privacy interest in "prevent[ing] dissemination of any personal information."<sup>74</sup> Proponents also contend the use of contempt powers to compel a reluctant spouse's testimony constitutes "blatant governmental intrusion into private relationships."<sup>75</sup> However, when presented with a constitutional privacy argument in support of the privilege, courts have consistently rejected it.<sup>76</sup> Feminist legal scholars have long realized that the absence of law in the private sphere contributes to male dominance and female subordination.<sup>77</sup> "The rhetoric of privacy that has insulated the female world

72. Goode & Sharlot, *supra* note 67, at 544.

73. See *Perkins v. State*, 698 S.W.2d 762 (Tex. App.—Austin 1985, no pet.). In *Perkins*, the defendant told his wife he had killed two men that night. *Id.* at 763. Mrs. Perkins told her brother, who told Floyd Chambers, who told the Austin Police Department. *Id.* The police conceded that without hearing from Chambers, they would not have considered Mr. Perkins a suspect. *Id.* Perkins argued the police violated the spousal privilege by using his comment as a basis for focusing an investigation on him, and by using that statement for probable cause on which to base a warrant. *Id.* The appellate court readily rejected his argument because the privilege applies only to testimony and only in a criminal proceeding. Neither of these were applicable in this case. *Id.* at 763-64.

74. *Privileged Communications*, *supra* note 10, at 1583.

75. *Id.* at 1584.

76. See *Port v. Heard*, 764 F.2d 423, 430 (5th Cir. 1985); *United States v. Lefkowitz*, 618 F.2d 1313, 1319 (9th Cir. 1980); *United States v. Doe*, 478 F.2d 194, 195 (1st Cir. 1973). Nonetheless, arguments regarding privacy are frequently offered as rationales for one or both of the marital privileges. See *Privileged Communications*, *supra* note 10, at 1584-85; Zwain, *supra* note 68, at 970; Black, *supra* note 68, at 47; Reutlinger, *supra* note 68, at 1370-71; Louisell, *supra* note 68, at 110. See also WRIGHT & GRAHAM, *supra* note 57, § 5572, at 493-95.

77. "Historically, the dichotomy of 'public' and 'private' has been viewed as an important construct for understanding gender." Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 976 (1991) [hereinafter Schneider, *The Violence of Privacy*]. See also Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 967 (1993). Early struggles for women's rights, exemplified by the suffrage movement, protested women's exclusion from the public sphere. Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 392-93 (1984); Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 151, 151-52 (David Kairys ed., rev. 1990). The private sphere, the home, was seen as a place of refuge, a haven in a heartless public world of politics and business. Dailey, *supra*, at 966-67

from the legal order sends an important ideological message to the rest of society. It devalues women and their functions and says women are not important enough to merit legal regulation."<sup>78</sup>

Spousal immunity, especially in cases of domestic violence, may be viewed as a way to keep violence hidden in the private sphere. Courts' interpretations of spousal violence exceptions rely on distinctions between private and public harm. While recognizing that many crimes may harm the public, courts tend to view domestic violence as personal to the victim. Courts applying the spousal violence exception fall back on traditional notions of the public/private dichotomy. Moreover, the argument that the government should not compel a reluctant spouse to testify merely reinforces the traditional notion that the law does not belong in the private sphere of family relations. "The freedom promised by the right to privacy runs up against women's right[s] to security in the home, and rights rhetoric cannot decide the conflict. . . . [A]ny effort to keep the state out of our personal lives will leave us subject to private domination."<sup>79</sup>

### 3. Marital Harmony

Preventing marital discord is the justification most often cited for the spousal immunity privilege. Marital harmony is threatened when one spouse testifies against the other.<sup>80</sup> The United States Supreme Court discounts this justification in cases where one spouse is willing to testify against the other. In such cases, there is no marital peace to preserve.<sup>81</sup> Professor Wigmore also readily rejects the marital harmony justification:

That is to say, if the promotion of marital peace, and the apprehension of marital dissension, are the ultimate ground [sic] of the privilege, it is an overgenerous assumption that the wife who has been beaten, poisoned or deserted is still on such terms of delicate good feeling with her spouse that her testimony must not be enforced lest the iridescent halo of peace be dispelled by the breath of disparaging testimony. And if there were, conceivably, any such peace, would it be a peace such as the law could desire to protect? Could it be any other peace than that which the tyrant secures for himself by oppression?<sup>82</sup>

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(citing CHRISTOPHER LASCH, *HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED* (1979)). Even the U.S. Constitution was interpreted to recognize a "private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (cited in Dailey, *supra*, at 984). For further explanation, see Seymore, *supra* note 12, at 840-42.

78. Schneider, *The Violence of Privacy*, *supra* note 77, at 978.

79. Olsen, *supra* note 77, at 393.

80. *Privileged Communications*, *supra* note 10, at 1568.

81. *Trammel v. United States*, 445 U.S. 40, 52 (1980).

82. WIGMORE, *supra* note 10, § 2239, at 243.

One author even suggests the existence of the privilege itself may disrupt marital harmony:

[T]he privilege to refuse to testify may be more disruptive to family harmony than a rule compelling spousal testimony. With compelled testimony, the state is responsible for forcing a spouse to testify, thus removing any blame that might be aimed at a testifying spouse. When a spouse voluntarily testifies, however, the blame for the testimony is directed at the spouse, with certain disruption of the marriage.<sup>83</sup>

Nonetheless, marital harmony remains a popular justification. One commentator on the Texas rule of spousal immunity explains as follows:

Many believe it would be against the public interest to force a spouse to testify against his or her partner in such a situation. . . . [M]any wives do reconcile with their husbands and drop the charges. To compel them to testify in a case they no longer wish to see prosecuted would interfere with marital harmony, and would probably disrupt the very relationship that the privilege was developed to protect. As with all privileges, it is a trade-off, but one which is probably worthwhile in the long run.<sup>84</sup>

This trade-off seems "worthwhile in the long run" only because the legal system, created by privileged white men, ignores the reality of women's lives: "[W]omen suffer in ways which men do not, and . . . the gender-specific suffering that women endure is routinely ignored or trivialized in the larger (male) legal culture."<sup>85</sup> To suggest that reconciling with a battering spouse and dropping criminal charges is proof that marital harmony exists and should be preserved ignores what is known about the dynamics of domestic violence, and the effect such violence has upon the lives of women.<sup>86</sup> "One of the reasons for the infrequent prosecution of spousal assault is that the defendant spouse coerces the victim spouse into invoking the privilege against her own desires . . . ."<sup>87</sup>

The existence of a number of exceptions allowing for compelled spousal testimony illuminates the hypocrisy of the marital harmony

83. Debbie S. Holmes, *Marital Privileges in the Criminal Context: The Need for a Victim Spouse Exception in Texas Rule of Criminal Evidence 504*, 28 HOUS. L. REV. 1095, 1109 (1991).

84. Royal L. Mullins, *Texas Developments: The Texas Rules of Criminal Evidence: 501 to 504; Privileges*, 13 AM. J. CRIM. L. 221, 237 (1986).

85. Seymore, *supra* note 12, at 834 (quoting Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987)). See also Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413, 414; Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations For Our Judges*, 61 S. CAL. L. REV. 1877, 1906 (1988); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 619 (1990).

86. See *supra* text accompanying notes 14-44.

87. Goode & Sharlot, *supra* note 67, at 562.

justification. The same marital discord feared as a result of compelling a battered spouse to testify also exists when a spouse is compelled to testify about injury to a child or any other member of the household.<sup>88</sup> There are, of course, strong public policy reasons for requiring testimony in cases where children are victimized. These exceptions, however, go further by allowing the state to compel testimony when any adult member of the household — “aged parents, aunts, uncles, adult children, adults in foster care, perhaps even the English butler”<sup>89</sup> — is the victim of a crime committed by a spouse. While this apparent concern for the welfare of live-in housekeepers is commendable, the blatant disregard for the welfare of wives is disturbing. As to the housekeeper, the law’s message is that a crime against this victim is an offense that offends the peace and dignity of the state. As to the wife, the law’s message is that this is a purely private matter between husband and wife, and the state will not intervene unless the wife marshals the evidence and prosecutes the case. Thus, wife abuse becomes a species of tort, rather than crime.<sup>90</sup>

### III. HISTORY OF THE SPOUSAL CRIME EXCEPTION IN TEXAS

#### A. *Spousal Immunity: 1856 to 1965*

Texas had a spousal crime exception to the spousal privilege as early as 1856. Article 648 of the Code of Criminal Procedure, reenacted in 1879, 1895, 1911 and again in 1925 under new article designations, originally provided, “The husband and wife can in no case testify against each other, except in a criminal prosecution for an offence committed by one against the other; but they may, in all criminal prosecutions, be witnesses for each other.”<sup>91</sup> This rule of incompetency

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88. TEX. R. CRIM. EVID. 504.

89. Goode & Sharlot, *supra* note 67, at 564.

90. The author explores this theme more fully in a forthcoming article. See Seymore, *supra* note 12, at 824.

91. TEX. CODE CRIM. PROC. art. 648 (1856) (repealed by TEX. CODE CRIM. PROC. art. 735 (1879)). Article 648 was reenacted with no substantive change as article 735. TEX. CODE CRIM. PROC. art. 735 (1879) (repealed by TEX. CODE CRIM. PROC. art. 775 (1895)). Less than seventeen years later, article 735 was reenacted with no substantive change as article 775. TEX. CODE CRIM. PROC. art. 775 (1895) (repealed by TEX. CODE CRIM. PROC. art. 795 (1911)). Article 775 was reenacted, again with no substantive change, as article 795. TEX. CODE CRIM. PROC. art. 795 (1911) (repealed by TEX. CODE CRIM. PROC. art. 714 (1925)). The marital communications privilege has existed since 1856 and was similarly reenacted through the years until 1925. See TEX. CODE CRIM. PROC. art. 647 (1856) (repealed by TEX. CODE CRIM. PROC. art. 734 (1879)); TEX. CODE CRIM. PROC. art. 734 (1879) (repealed by TEX. CODE CRIM. PROC. art. 774 (1895)); TEX. CODE CRIM. PROC. art. 774 (1895) (repealed by TEX. CODE CRIM. PROC. art. 794 (1911)); TEX. CODE CRIM. PROC. art. 794 (1911) (repealed by TEX. CODE CRIM. PROC. art. 714 (1925)). The 1925 repeal occurred so the two statutes could be reenacted in combined form:

Neither husband nor wife shall, in any case, testify as to communications made by one to the other, while married; nor shall they, after the marriage relation ceases, be made witnesses as to any such communication made

did not allow the wife to testify even *voluntarily* against her husband except in cases of spousal crime.<sup>92</sup> The statute did, however, allow the state to *compel* the wife's testimony when a crime was committed by the husband against her.<sup>93</sup>

Historically, courts read these statutes narrowly, interpreting "offense committed by one against the other" to include only crimes of violence against the person of the spouse.<sup>94</sup> These interpretations did not include property crimes, such as when the husband stole the wife's mule,<sup>95</sup> or nonviolent offenses against the wife, such as slander,<sup>96</sup> bigamy,<sup>97</sup> or adultery.<sup>98</sup> Nor did they include crimes of violence against other family members, such as aggravated assault against a stepchild.<sup>99</sup>

### B. Spousal Immunity: 1965 to 1986

Major amendments to the spousal immunity statute came in 1965, reading in pertinent part:

The husband and wife may, in all criminal actions, be witnesses for each other, but except as hereinafter provided, they shall in no case testify against each other in a criminal prosecution. However, a wife or husband may voluntarily testify against each other in any case for an offense involving any grade of assault or violence committed by

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while the marriage relation existed, except in a case where one or the other is prosecuted for an offense; and a declaration or communication made by the wife to the husband, or by the husband to the wife, goes to extenuate or justify an offense for which either is on trial. The husband and wife may, in all criminal actions, be witnesses for each other; but they shall in no case testify against each other except in a criminal prosecution for an offense committed by one against the other.

TEX. CODE CRIM. PROC. art. 714 (1925), *repealed* by Act of June 18, 1965, 59th Leg., R.S., ch. 722, 1965 Tex. Gen. Laws 317, 467. For application of these statutes, see *Johnson v. State*, 11 S.W. 667, 668 (Tex. Crim. App. 1889); *Miller v. State*, 40 S.W. 313, 314 (Tex. Crim. App. 1897); *Eads v. State*, 170 S.W. 145, 147 (Tex. Crim. App. 1914); *Norwood v. State*, 192 S.W. 248, 254 (Tex. Crim. App. 1917); *Vickers v. State*, 242 S.W. 1032, 1038 (Tex. Crim. App. 1922); *Hilton v. State*, 191 S.W.2d 875, 875-76 (Tex. Crim. App. 1945); *Morris v. State*, 198 S.W.2d 901, 904 (Tex. Crim. App. 1946).

92. See *Spivey v. State*, 77 S.W. 444 (Tex. Crim. App. 1903).

93. See *Bramlette v. State*, 2 S.W. 765, 766 (Tex. Ct. App. 1886); *Hall v. State*, 21 S.W. 368 (Tex. Crim. App. 1893).

94. See *Purdy v. State*, 97 S.W. 480, 480 (Tex. Crim. App. 1906); *Murray v. State*, 86 S.W. 1024, 1024 (Tex. Crim. App. 1905); *Baxter v. State*, 31 S.W. 394, 394 (Tex. Crim. App. 1895); *Navarro v. State*, 6 S.W. 542, 543 (Tex. Ct. App. 1887); *Bramlette*, 2 S.W. at 766; *Overton v. State*, 43 Tex. 616, 618-19 (1875).

95. *Overton*, 43 Tex. at 618-19.

96. *Baxter*, 31 S.W. at 394.

97. *Boyd v. State*, 26 S.W. 1080 (Tex. Crim. App. 1894).

98. *McLean v. State*, 24 S.W. 898 (Tex. Crim. App. 1894).

99. *Johnson v. State*, 11 S.W. 34 (Tex. Ct. App. 1889) (1879 version of the statute); *Rogers v. State*, 368 S.W.2d 772 (Tex. Crim. App. 1963) (1925 version of the statute) (wife's written statement describing husband's assault on their child was not admissible even though husband injured wife during same episode); *Robbins v. State*, 200 S.W. 525 (Tex. Crim. App. 1918) (1911 version of statute) (wife's dying declaration inadmissible in trial where husband was charged with killing his boss, not his wife who was shot and killed in same episode).



one against the other or against any child of either under sixteen years of age, . . . or in any case where either is charged with an offense . . . pertaining to wife or child desertion or wilful failure or refusal to support his or her minor children.<sup>100</sup>

These amendments broadened the type of criminal offenses in which the wife could serve as a competent witness, and codified the courts' rigid interpretations of crimes against a spouse to encompass only "assault or violence committed by one against the other."<sup>101</sup> Although the state could compel the wife's testimony under the prior law, the amended statute permitted the spouse to refuse to testify even in cases of violence against her or her children.<sup>102</sup> The apparent rationale for restricting the state's power to compel testimony and leaving the matter in the hands of the testifying spouse was that compulsion was no longer needed once the wife had the right to testify voluntarily. Surely the battered spouse wanted to testify! And if she did not, then one must assume marital harmony existed and should be preserved.<sup>103</sup> This view exhibits an almost deliberate ignorance of the nature and

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100. Act of June 18, 1965, 59th Leg., R.S., ch. 722, 1965 Tex. Gen. Laws 317, 467 (codified at TEX. CODE CRIM. PROC. ANN. art. 38.11 (West 1979)). The statute was further amended in 1974 to include the right to testify voluntarily "in any case where either is charged with bigamy, or in any case where either is charged with interference with child custody," and to modify the provision regarding nonsupport to include both the children and the spouse. Act of June 14, 1973, 63rd Leg., R.S., ch. 399, § 2(4), 1973 Tex. Gen. Laws 883, 972. Cases decided after the effective date of the 1965 change differ little from cases decided under the former statutes. *See, e.g.,* Carabajal v. State, 477 S.W.2d 640 (Tex. Crim. App. 1972); Johnigan v. State, 482 S.W.2d 209 (Tex. Crim. App. 1972); Burns v. State, 556 S.W.2d 270 (Tex. Crim. App. 1977).

101. In exploring the history of the spousal violence exception, the Texas Court of Criminal Appeals wrote:

While there was a change in language [between article 714 and article 38.11], it appears the change was to write into the statute the interpretation given the former statutes. A search of the various commentaries on the 1965 revision of the Code and some of the drafts of the State Bar's Committee on the Revision of the Code of Criminal Procedure did not indicate any alteration in the law was intended. And since the 1965 amendment the courts have not interpreted the language as having a different meaning than the former language. . . .

Article 38.11, as enacted in 1965 and as amended in 1973, like the preceding statutes, continued to provide a privilege that may be waived and a disqualification that is absolute.

*Willard v. State*, 719 S.W.2d 595, 599 (Tex. Crim. App. 1986) (en banc) (citations omitted). Under this new version of the statute, Texas courts uniformly held the wife's testimony was not admissible in crimes of violence against third persons, even when the violence occurred against the wife. *See, e.g.,* Velasquez v. State, 727 S.W.2d 580 (Tex. Crim. App. 1987); *Young v. State*, 603 S.W.2d 851 (Tex. Crim. App. [Panel Op.] 1980); *Acker v. State*, 421 S.W.2d 398 (Tex. Crim. App. 1967).

102. *See, e.g.,* *Wall v. State*, 417 S.W.2d 59 (Tex. Crim. App. 1967) (wife may refuse to testify, and cannot be compelled to testify, where husband is charged with raping their daughter).

103. *See supra* text accompanying notes 14-44 discussing the dynamics of domestic violence, which explains why battered wives are reluctant to testify.

consequences of domestic violence. In limiting the spousal crime exception to crimes of violence against the spouse, the Texas Legislature disregarded the significance of conduct true to common patterns of battering relationships. Moreover, leaving the decision to testify in the hands of a victim ignored the well-documented behavior of victims of spousal violence.

### C. *Spousal Immunity: 1986 to 1995*

As part of the codification of the 1986 Rules of Criminal Evidence, the rule of spousal immunity changed again.<sup>104</sup> Rule 504 of the Texas Rules of Criminal Evidence repealed and replaced article 38.11:

(2) Privilege not to be called as a witness against spouse.

(a) *General rule of privilege.* The spouse of the accused has a privilege not to be called as a witness for the state. This rule does not prohibit the spouse from testifying voluntarily for the state, even over objection by the accused. . . .

(b) *Exceptions.* Except in a proceeding where the accused is charged with a crime committed during the marriage against the spouse, there is no privilege under this rule (1) in a proceeding in which an accused is charged with a crime against the person of any minor child or any member of the household of either spouse. . . .<sup>105</sup>

Unlike Article 38.11, which was limited to voluntary testimony only in crimes of violence against the spouse, Rule 504 allows one spouse to testify voluntarily against the other in *any* proceeding. Nonetheless, this enactment recognizes not all spouses will testify voluntarily. Consequently, the state has the power to compel testimony when the crime involves minor children or any member of the household except the testifying spouse. Construing Rule 504, the *Fuentes v. State*<sup>106</sup> court held that a wife assaulted by her husband may refuse to testify against him.<sup>107</sup> Again, the rationale was that a spousal violence exception is unnecessary when the victim spouse voluntarily testifies.

### D. *Spousal Immunity as of September 1, 1995*<sup>108</sup>

The previous discussion sets forth the state of the law prior to the 1995 legislative enactment of article 38.10. The application of the spousal immunity privilege in domestic violence cases in Texas engen-

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104. Act of May 26, 1985, 69th Leg., R.S., ch. 685, § 9(b)(2), 1985 Tex. Gen. Laws 2472, 2474 (current version at TEX. R. CRIM. EVID. 504).

105. TEX. R. CRIM. EVID. 504.

106. 775 S.W.2d 64 (Tex. App.—Houston [1st Dist.] 1989, no pet.).

107. *Id.* at 66.

108. The new rule applies in trials after September 1, 1995, regardless of when the offense was committed. In other words, applying the new rule to offenses committed before September 1, 1995, will not be a prohibited retroactive application of the law. See *Freeman v. State*, 786 S.W.2d 56, 59 (Tex. App.—Houston [1st Dist.] 1990, no pet.).

dered some criticism.<sup>109</sup> The Final Report of the Gender Bias Task Force of Texas<sup>110</sup> indicates a growing awareness among social workers, lawyers, and judges of the difficulties associated with leaving the choice to testify in the hands of the battered spouse:

I'm working with a client right now who was battered by her husband severely. . . . She did file charges against the man. However, because of his threats, he was able to convince her to drop the charges.

In our judicial system, as it stands, a spouse cannot be forced to testify against the other spouse unless it's a case of child abuse. . . . Therefore, the court puts the burden on the woman for going through with the charges, which gives the batterer a wedge to use. If the courts took the decision out of the woman's hands and the courts went ahead and said, "No, it's the state that's filing charges. It's out of your hands. It's the state that files the charges," she would then have a little protection from his, and sometimes his attorney's threats.<sup>111</sup>

A number of attorney respondents suggested victim behavior is partially responsible for some prosecutors' attitudes toward family violence cases.<sup>112</sup> As one respondent commented, "The problem is most wives invoke [the] marital privilege and refuse to testify."<sup>113</sup> A judge responding to the Gender Bias Task Force's Judicial Attitudes Survey commented:

[T]he law would be more effective if the prosecutors had some way to force a spouse to testify to the abuse. In the circle of domestic violence, the abuser becomes immediately apologetic and the abused quickly loses her resolve to prosecute. The privilege in Rule 504 [of the Rules of Criminal Evidence] should be changed, i.e., eliminate the privilege regarding spousal abuse.<sup>114</sup>

In response to the findings of the Gender Bias Task Force, the Texas Senate created an Interim Committee on Domestic Violence. The Senate Committee initially produced three proposals with regard to spousal immunity:

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109. See, e.g., Goode & Sharlot, *supra* note 67; Holmes, *supra* note 83.

110. On June 1, 1991, the Supreme Court of Texas entered an order creating the Gender Bias Task Force. Barbara B. Aldave, *Letter of Introduction to STATE BAR OF TEXAS, THE GENDER BIAS TASK FORCE OF TEXAS, FINAL REPORT* (Feb. 1994). The court asked the Task Force "to consider whether gender bias [exists] in the judicial system in Texas, and, if such gender bias does exist, to determine the nature and extent of such bias and to propose measures for its reduction and ultimate elimination." *Id.* (alteration in original). For two and one-half years, the Task Force surveyed judges and lawyers for their opinions, and held public hearings to gather testimony of hundreds of attorneys, judges, professors, advocates, former litigants, and members of the general public. *Id.*

111. STATE BAR OF TEXAS, *supra* note 7, at 70-71 (testimony of Peggy Salinas).

112. *Id.* at 74.

113. *Id.* (Attorney Survey, male, age 42).

114. *Id.* at 71 (Judge Survey, female, age 39) (alteration in original).

- Option 1:* Modify the statutes to remove the spousal privilege in cases where the spouse is the victim of domestic violence.
- Option 2:* Modify the statutes to remove the spousal privilege in cases where the spouse is the victim of domestic violence and the incident was witnessed by a minor child.<sup>115</sup>
- Option 3:* Send a resolution to the Court of Criminal Appeals requesting they re-visit Rule 504 in the context of a spouse-victim.<sup>116</sup>

The version reported from the Committee was Option 1. In the Final Report of the Senate Interim Committee on Domestic Violence, the Committee made the following recommendation:

The Committee requests the Court of Criminal Appeals to modify spousal privilege only in cases where the spouse is also the victim of domestic violence. Should the Court not respond by February 1, 1995, the Committee will file legislation to modify the Code of Criminal Procedure to create this exception.<sup>117</sup>

The Committee made this recommendation after public hearings, telephone conversations, and correspondence with hundreds of Texas citizens.<sup>118</sup> "Persons in the criminal justice system testifying before the Committee suggested [the rule of spousal immunity] often allow[s] some of the worst perpetrators of violence to go free, with no hope of meaningful intervention."<sup>119</sup> Many domestic violence cases have only one witness, the victim, and prosecutors are often forced to drop cases because the victim witness invokes the privilege.<sup>120</sup> The Committee

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115. This option was wisely rejected. Adoption of such an exception would have reinforced the notion that spousal violence is not a crime unless someone other than the spouse suffers, that is, the children witnessing the assault. Such an exception would also be difficult to administer. From where would we find proof that the assault happened in front of the children? If the victim spouse can claim a privilege not to testify, and the defendant spouse can claim a Fifth Amendment privilege not to testify, then that testimony could only come from the child. Calling children to testify against their parents is always problematic.

116. SENATE INTERIM COMMITTEE ON DOMESTIC VIOLENCE, SUMMARY OF PROPOSED RECOMMENDATIONS 4.

117. SENATE INTERIM COMMITTEE ON DOMESTIC VIOLENCE, REPORT TO THE 74TH LEGISLATURE 74 (Dec. 1994) [hereinafter SENATE REPORT].

118. Letter from Senator Mike Moncrief, Chairman, Senate Interim Committee on Domestic Violence, to Bob Bullock, Lieutenant Governor of Texas 1 (Nov. 3, 1994) (on file with author).

119. SENATE REPORT, *supra* note 117, at 73.

120. *Id.* at 73-74. The committee held public hearings in San Antonio, Texas, at which participants discussed a number of topics including spousal immunity. One witness, a criminal district attorney, suggested there would be no need for modifying the spousal immunity rule if a case was properly documented. SENATE INTERIM COMMITTEE ON DOMESTIC VIOLENCE, SAN ANTONIO PUBLIC HEARING 2 (testimony of Steven Hilbig, Bexar County Criminal District Attorney). A judge suggested police officers should take more pictures of victims' injuries, and should document family violence calls. According to the judge, this diminishes the need for requiring a victim to testify. *Id.* (testimony of Judge Reed). Nonetheless, the Committee found in many cases the victim's testimony is indispensable, and the existence of the privilege prevented prosecution of the case. SENATE REPORT, *supra* note 117, at 73.

found even where the prosecuting attorney's office adopts a "No Drop Policy,"<sup>121</sup> more than fifty percent of domestic violence cases are dismissed because the victim spouse claims his or her privilege.<sup>122</sup>

The Committee affirmed the principle that domestic violence is a crime against the state as well as a crime against the person.<sup>123</sup> Thus, a victim does not have control over filing the charges. However, the victim may invoke the privilege and refuse to testify. When this occurs, the victim gains control of the proceeding and hinders the prosecution's ability to pursue the crime against the state. Further, as the Committee noted, "[d]efense attorneys may inform the batterer of this provision in the law allowing them to conduct a campaign, with the help of family and friends, to persuade or threaten the victim not to testify."<sup>124</sup> Thus, the Committee believed that removing the spousal privilege relieves the pressure on married victims by placing the responsibility for dropping charges or prosecuting the case in the hands of the prosecuting authority, where it belongs.<sup>125</sup>

The Committee acknowledged that removing the privilege might subject testifying victims to retaliation from their abusers,<sup>126</sup> render victims powerless within the system,<sup>127</sup> and give prejudiced courts the power to further victimize spousal assault victims by jailing them for contempt. In response, the Committee reported that no backlash or

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121. See Corsilles, *supra* note 6. The Committee explained "no drop policies" as follows:

While the actual policy statements differ, there is one main philosophy behind such policies. The victim of a domestic violence case can submit a signed affidavit to the prosecuting attorney's office that he or she would like the charges dropped, but the prosecuting attorney continues to prosecute the case if at all possible.

SENATE REPORT, *supra* note 117, at 73.

122. SENATE REPORT, *supra* note 117, at 74.

123. *Id.*

124. *Id.*

125. *Id.*

126. Women faced with deciding whether to testify frequently express fear of retaliation. Corsilles, *supra* note 6, at 873. While this fear should not be minimized, some current empirical data suggests prosecutions do not increase a victim's risk of being subjected to repeat violence. David A. Ford, *Preventing and Provoking Wife Battery Through Criminal Sanctioning: A Look at the Risks*, in ABUSED AND BATTERED: SOCIAL AND LEGAL RESPONSES TO FAMILY VIOLENCE, *supra* note 39, at 207-08. In fact, one study by David Ford and Mary J. Regoli found prosecutorial action through an initial court hearing significantly reduced the chance of further violence during the first six months after a case was disposed. David A. Ford & Mary J. Regoli, *Preventive Impacts of Policies for Prosecuting Wife BATTERERS*, in INTRODUCTION TO DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 181, 193 (Eve S. Buzawa & Carl G. Buzawa eds., 1992). While the Ford/Regoli study does not specifically address the issue of whether a victim testifies, its results lend support to the notion that requiring a victim to testify will not subject her to further violence. See Seymore, *supra* note 12, at 848. In fact, some batterers may cease harassing their victims after they realize the victim no longer controls the case. Corsilles, *supra* note 6, at 873-74.

127. SENATE REPORT, *supra* note 117, at 74.

contempt charges have resulted against unmarried victims where no privilege existed.<sup>128</sup> Further, prosecutors testified before the Committee that nonspouse victims of domestic violence are often relieved when the decision to testify rests with the court rather than the victim.<sup>129</sup>

The Senate Committee concluded by stating only the Texas Court of Criminal Appeals may change the Rules of Criminal Evidence. Witnesses testified that the Texas Court of Criminal Appeals was asked to consider changing or modifying spousal immunity in Rule 504, but at the time of the Final Report, the court had taken no action.<sup>130</sup> The Committee further concluded, "The Legislature could affect [sic] the same changes by passing statutory exceptions in the Texas Code of Criminal Procedure."<sup>131</sup> Consequently, Senate Bill 128 amended the Code of Criminal Procedure by adding article 38.10 to read as follows:

Art. 38.10 Exceptions to the Spousal Adverse Testimony Privilege. The privilege of a person's spouse not to be called as a witness for the state does not apply in any proceeding in which the person is charged with a crime committed against the person's spouse, a minor child, or a member of the household of either spouse.<sup>132</sup>

Senate Bill 128 included a number of provisions relevant to domestic violence cases. Section 1 of the bill amended the Texas Code of Criminal Procedure to include language in witness' summons informing the witness that coercion, threats, and retaliatory harm to the witness are criminal offenses.<sup>133</sup> Further, Section 3 requires trial courts to give priority docket settings to criminal actions involving family vi-

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128. *Id.*

129. *Id.* at 75. During a survey to discuss the new change in Texas law, this author discovered married victims of spousal assaults experience the same sense of relief when the decision to testify rests with the court rather than the victim. See Seymore, *supra* note 12. Battered women were asked about a pending change in Texas law to create a spousal violence exception to the spousal immunity privilege. Almost all the women stated that they felt the new rule was a good idea, and all stated that they would tell the truth if they did testify. *Id.* While some commentators express concern that compelling a victim's testimony undermines battered women's attempts at empowerment, see, e.g., *Legal Responses to Domestic Violence*, *supra* note 5, at 1541, several interviewees considered it liberating that the state was removing the choice from them. Seymore, *supra* note 12, at 846-48. Their responses are consistent with other commentators who believe victims are empowered by seeing their abusers prosecuted. Cf. Angela West, *Prosecutorial Activism: Confronting Heterosexism in a Lesbian Battering Case*, 15 HARV. WOMEN'S L.J. 249, 255 (1992) ("I believe that the victim is empowered by seeing the defendant prosecuted. . . . Seeing the abuser in a position of social disapproval may be the first step toward realizing that there is help available . . .").

130. SENATE REPORT, *supra* note 117, at 75.

131. *Id.*

132. Act of May 11, 1995, 74th Leg., R.S., ch. 67, § 2, 1995 Tex. Gen. Laws 446, 446 (codified as TEX. CODE CRIM. PROC. ANN. art. 38.10 (West 1995)).

133. *Id.* § 1.

olence.<sup>134</sup> Last, Section 4 relates to domestic violence training for prosecuting attorneys.<sup>135</sup> The Texas House readily passed the bill, and the new spousal immunity provision became effective September 1, 1995, giving the state the power to compel testimony in cases where one spouse is charged with a crime against the person of the other spouse.<sup>136</sup>

Texas courts now have an opportunity to write on a clean slate when interpreting the spousal crime exception to spousal immunity. Although Texas previously had a spousal crime exception, article 38.10 is a new legislative enactment. Thus, prior Texas case authority is not necessarily helpful in interpreting the new statute. Texas may, however, look to other states in deciding how best to apply the new statute.

#### IV. LESSONS FROM OTHER STATES

The language of spousal crime exceptions, structured in terms of crimes against a spouse, has posed problems in other jurisdictions in a number of common situations. For example, in a case where the husband shoots his wife and another man, does the privilege apply to the wife's testimony in the trial for shooting the other man? Does the privilege apply in a case where the husband is charged with an offense other than assault, such as disorderly conduct, when the charge arises out of an incident of spousal violence? Is violation of a domestic violence protective order a crime against the spouse when the violation falls short of assault? Does the privilege apply to crimes where one spouse victimizes the other in some way other than a crime of violence? Texas will inevitably confront these problems when interpreting its new spousal crime exception.

##### A. *Brief Overview of Spousal Crime Exceptions in Other States*

###### 1. States With No Spousal Immunity

A number of states have no spousal immunity statute.<sup>137</sup> In most of these states, the common law doctrine of spousal incompetency was in

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134. *Id.* § 3, at 446-47.

135. *Id.* § 4, at 447.

136. *Id.* § 8.

Passed the Senate on March 13, 1995: Yeas 28, Nays 1; April 19, 1995, Senate refused to concur in House amendments and requested appointment of Conference Committee; April 21, 1995, House granted request of the Senate; April 27, 1995, Senate adopted Conference Committee Report by the following vote: Yeas 31, Nays 0; passed the House, with amendments, on April 12, 1995, by a non-record vote; April 21, 1995, House granted request of the Senate for appointment of Conference Committee; May 1, 1995, House adopted Conference Committee Report by a non-record vote.

*Id.*

137. Arkansas, Delaware, Florida, Indiana, Kansas, Maine, New Hampshire, New Mexico, New York, North Dakota, Oklahoma, South Carolina, South Dakota, Ver-

force until a confidential communications privilege was adopted. Once the communications privilege was in place, the prevailing notion became that it was sufficient to merely protect the confidentiality of communications, and the common law doctrine was abrogated.

In a state with no spousal immunity doctrine, a spouse is a competent and compellable witness in all criminal proceedings. The only remaining question is to what extent the spouse can reveal confidential marital communications on the witness stand. A number of states have included a statutory spousal violence exception to the confidential communications privilege,<sup>138</sup> or created one by judicial action.<sup>139</sup>

## 2. States With No Spousal Crime Exception

Prior to the September 1, 1995, enactment, Texas belonged in this category. Now, only Missouri,<sup>140</sup> the District of Columbia,<sup>141</sup> Georgia,<sup>142</sup> Louisiana,<sup>143</sup> Massachusetts,<sup>144</sup> and Alabama<sup>145</sup> have no

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mont and Wisconsin do not have a spousal immunity privilege. All, however, preserve the spousal communications privilege. See ARK. R. EVID. 501, 504; DEL. R. EVID. 504; FLA. STAT. ANN. § 90.504 (West 1979); *id.* § 914.07 (West 1985); IND. CODE ANN. § 34-1-14-5 (Burns 1986); KAN. STAT. ANN. §§ 60-407, 60-423 (1994); ME. REV. STAT. ANN. tit. 15, § 1315 (West 1980); ME. R. EVID. 504; N.H. R. EVID. 504; N.M. R. EVID. 11-501, 11-505; N.Y. CIV. PRAC. L. & R. 4502, 4512 (McKinney 1992); N.Y. CRIM. PROC. LAW § 60.10 (McKinney 1992); N.D. R. EVID. 501, 504; OKLA. STAT. tit. 12, §§ 2501, 2504 (1993); Act of June 7, 1995, 1995 S.C. Acts 104 (amending S.C. CODE ANN. § 19-11-30 (Law. Co-op. Supp. 1994)); S.D. CODIFIED LAWS ANN. §§ 19-13-12 to -15 (1995); VT. STAT. ANN. tit. 12, § 1605 (1973); VT. R. EVID. 504; WIS. STAT. ANN. § 905.05 (West 1993).

138. See *infra* text accompanying notes 209-12.

139. See, e.g., *State v. Klindt*, 389 N.W.2d 670, 675-76 (Iowa 1986). Iowa's spousal immunity statute included a spousal violence exception. IOWA CODE § 622.7 (1983) (repealed by 1983 Iowa Acts ch. 37, § 7). The confidential communications statute contained no spousal violence exception. IOWA CODE § 622.9 (1950). Noting a literal interpretation of the communications privilege in many cases forbids an inquiry into the personal wrongs committed by one spouse against the other, the *Klindt* court created a spousal violence exception. *Klindt*, 389 N.W.2d at 676. See also *People v. McCormack*, 104 N.Y.S.2d 139, 145 (1951); *State v. Moxley*, 491 P.2d 1326, 1329 (Wash. 1971).

140. Missouri's privilege reads in pertinent part:

No person shall be incompetent to testify as a witness in any criminal cause or prosecution . . . by reason of being the husband or wife of the accused . . . provided, that . . . [no] wife or husband of [a person on trial], shall be required to testify, but any such person may testify at his or her option either on behalf of or against the defendant . . . .

MO. ANN. STAT. § 546.260 (1987).

141. The District of Columbia statute reads as follows: "In civil and criminal proceedings, a husband or his wife is competent but not compellable to testify for or against the other." D.C. CODE ANN. § 14-306(a) (1981).

142. "Husband and wife shall be competent but shall not be compellable to give evidence in any criminal proceeding for or against each other." GA. CODE ANN. § 24-9-23(a) (1987).

143. Louisiana provides "[i]n a criminal case . . . a witness spouse has a privilege not to testify against the other spouse." LA. CODE EVID. ANN. 505 (West 1995).

144. The Massachusetts statute reads as follows:



spousal crime exception to the spousal immunity privilege. In these jurisdictions, an abused wife may testify voluntarily against her husband, even over his objection, but she cannot be compelled to testify.<sup>146</sup> These jurisdictions contend the spousal crime exception is unnecessary when the wife has the right to testify voluntarily.<sup>147</sup>

### 3. States With a Spousal Violence Exception

A majority of states recognize an exception to the spousal immunity privilege when one spouse perpetrates violence upon the other.<sup>148</sup> For example, in Maryland, an exception exists when one spouse commits "assault and battery" against the other,<sup>149</sup> and in Connecticut the exception applies when a spouse "receive[s] personal violence from the other."<sup>150</sup> In other jurisdictions, the language is more ambiguous. Ohio's spousal immunity statute reads "[e]very person is competent to

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Any person . . . may testify in any proceeding, civil or criminal . . . except as follows:

. . . [e]xcept as otherwise provided in [child neglect statutes] and except in any proceeding relating to child abuse, including incest, neither husband nor wife shall be compelled to testify in the trial of an indictment, complaint or other criminal proceeding against the other . . . .

MASS. GEN. LAWS ch. 233, § 20 (Law. Co-op. 1986).

145. ALA. CODE § 12-21-227 (1986).

146. See e.g., *DeBardeleben v. State*, 77 So. 979, 980 (Ala. 1918).

147. See, e.g., *State v. Taylor*, 642 So.2d 160, 164-65 (La. 1994).

148. See ALASKA R. EVID. 505(a)(2)(D)(i); ARIZ. REV. STAT. ANN. § 13-4062 (1989); CAL. EVID. CODE §§ 972, 985 (West 1995); COLO. REV. STAT. § 13-90-107(1)(a)(I) (1989); CONN. GEN. STAT. ANN. § 54-84a (West 1994); HAW. R. EVID. 505; IDAHO CODE § 9-203 (1990); IDAHO R. EVID. 504 (d)(2)(A); ILL. REV. STAT. 125/6 § 6 (1993); IOWA CODE ANN. §§ 622.8, 9 (West 1950); MD. CODE ANN., CTS. & JUD. PROC. § 9-106 (1995); MICH. COMP. LAWS ANN. § 600.2162(1) (West 1995); MINN. STAT. ANN. § 595.02(1)(a) (West Supp. 1995); MISS. CODE ANN. § 13-1-5 (Supp. 1995); MISS. CODE ANN. § 93-21-19 (1994); MONT. CODE ANN. § 46-16-212 (1991); NEB. REV. STAT. § 27-505(3)(a) (1989); N.J. STAT. ANN. § 2A:84A-17(2)(b) (West 1994); N.C. GEN. STAT. § 8-57(b)(2) (1986); OHIO REV. CODE ANN. § 2945.42 (Anderson 1994); OHIO REV. EVID. ANN. § 2945.42 (Anderson 1995); OHIO R. EVID. 601; OR. REV. STAT. § 40.255 (1993); 42 PA. CONST. STAT. ANN. § 5913(2) (Supp. 1995); R.I. GEN. LAWS § 12-17-10.1 (1994); UTAH CODE ANN. § 78-24-8(1)(b)(ii) (1992); VA. CODE ANN. § 19.2-271.2(i) (Michie 1995); Act of May 5, 1995, ch. 240, 1995 Wash. Legis. Serv. 240 (West) (amending WASH. REV. CODE ANN. § 5.60.060(1) (West 1995)); W. VA. CODE § 57-3-3 (1966); WYO. STAT. § 1-12-104 (1988). At least one jurisdiction reads the violence exception to require intentional harm to the spouse. See *Commonwealth v. Dungan*, 539 A.2d 817 (Pa. Super. Ct. 1988). In *Dungan*, the husband was driving while intoxicated and caused an accident in which five people were killed. His wife, a passenger in his vehicle, was seriously injured. The *Dungan* court held the wife was not a competent witness: "We believe the statute was not enacted to apply to the facts of this case . . . but instead are persuaded the exception . . . was designed to protect those spouses victimized by an act of intentional violence committed upon them by an accused spouse." *Id.* at 824.

149. MD. CODE ANN., CTS. & JUD. PRO. § 9-106 (1995).

150. CONN. GEN. STAT. ANN. § 54-84a (West 1994). See also IDAHO CODE § 9-203 (1990) ("a crime committed by violence of one against the person of the other"); N.C. GEN. STAT. § 8-57 (1986) ("assaulting or communicating a threat to the other

be a witness except . . . [a] spouse testifying against the other spouse charged with a crime *except . . . crime[s] against the testifying spouse* or the children of either . . . ”<sup>151</sup> These statutes appear broad enough to deal with any number of crimes where a spouse is victimized. However, some jurisdictions interpret statutes using such language as limited to cases involving personal violence committed by one spouse against the other.

#### 4. States With a Spousal Crime Exception

Some states have created exceptions to the spousal privilege for other crimes against the testifying spouse.<sup>152</sup> Some jurisdictions interpret statutes using the language “crime against the other” to include certain property crimes. For example, under similar statutory language, Washington overruled a line of cases requiring personal violence to apply the exception to burglary of the wife’s residence.<sup>153</sup> Arson also frequently falls within this “crime against the spouse” language, particularly if the wife was on the premises at the time of the fire.<sup>154</sup>

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spouse”); 42 PA. CONS. STAT. ANN. § 5913 (Supp. 1995) (“criminal proceeding against either for bodily injury or violence attempted, done or threatened upon the other”).

151. OHIO R. EVID. 601 (emphasis added).

152. See ALASKA R. EVID. 505(a)(2)(D)(i); ARIZ. REV. STAT. ANN. § 13-4062 (1989); CAL. EVID. CODE §§ 972, 985 (West 1995); COLO. REV. STAT. § 13-90-107(a)(a)(I) (1989); HAW. R. EVID. 505; ILL. ANN. STAT. ch. 725, para. 125-6 § 6 (Smith-Hurd 1992) (formerly ILL. ANN. STAT. ch. 38, para. 155-1 § 6 (Smith-Hurd 1990)); IOWA CODE ANN. §§ 622.8, .9 (West 1950); KY. R. EVID. 504(c)(2)(A); NEB. REV. STAT. § 27-505(3)(a) (1989); N.J. STAT. ANN. § 2A:84A-17(2)(b) (West 1994); N.C. GEN. STAT. § 8-57(b)(2) (1994); OHIO REV. CODE ANN. § 2945.42 (Anderson 1993); OHIO R. EVID. 601; OR. REV. STAT. § 40.255 (1988); UTAH CODE ANN. § 78-24-8(1)(b)(ii) (1992); VA. CODE ANN. § 19.2-271.2(i) (Michie 1995); WASH. REV. CODE ANN. § 5.60.060(1) (West 1995); W. VA. CODE § 57-3-3 (1966); WYO. STAT. § 1-12-104 (1988).

153. State v. Thornton, 835 P.2d 216, 217-18 (Wash. 1992) (en banc). Thornton entered his wife’s home while she was at work by breaking a window to gain entry. *Id.* at 217. Thornton proceeded to slash his wife’s waterbed with a butcher knife and steal her suitcase. *Id.* See also State v. Kilponen, 737 P.2d 1024, 1026-27 (Wash. Ct. App. 1987) (The exception applies where husband broke into wife’s residence intending to tie her up and make her watch him commit suicide with the rifle he had with him because he attempted a crime of personal violence against his wife — unlawful imprisonment.).

154. See, e.g., Commonwealth v. John, 596 A.2d 834, 837 (Pa. Super. Ct. 1991) (arson where wife was in the building constituted attempted violence against her); People v. Butler, 424 N.W.2d 264, 267 (Mich. 1988) (arson where husband set fire to wife’s apartment); State v. Johnson, 621 P.2d 992, 993 (Kan. 1981) (arson where husband set fire to residence of another where he knew wife was residing); State v. Moxley, 491 P.2d 1326, 1328 (Wash. Ct. App. 1972) (arson where wife and child were in the residence).

## B. Common Problems in Applying Spousal Crime Exceptions

### 1. Crimes Involving Spouse and Nonspouse Victims

In *People v. Love*,<sup>155</sup> Abner Love accused his estranged wife, Sue, of "fooling around" with a co-worker, Johnny McQueen. He called McQueen over to his wife's house to discuss the relationship with Sue Love. As the three sat in McQueen's car, Abner Love shot McQueen at close range in the temple. He then pushed McQueen's body out of the car, took the driver's seat, pointed the gun in his wife's direction, and threatened to harm her if she tried to leave. Love was charged with murder in the death of McQueen and with the kidnapping of his wife.<sup>156</sup> The Michigan spousal immunity statute included a spousal violence exception with the following language: "A husband shall not be examined as a witness for or against his wife without her consent; or a wife for or against her husband without his consent, except . . . in a cause of action that grows out of a personal wrong or injury done by one to the other."<sup>157</sup> Consequently, a majority of the Michigan court held Sue Love's testimony was admissible in the kidnapping prosecution. The court further held Mrs. Love's husband could assert the spousal privilege to prevent his wife from testifying in the murder case.<sup>158</sup> Rather than viewing the murder of Sue Love's supposed boyfriend and her kidnapping as one continuous act of spousal violence, the court held killing McQueen in Sue Love's presence was not a "personal wrong or injury done by one [spouse] to the other" within the meaning of the statute.<sup>159</sup> This narrow interpretation of spousal

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155. 391 N.W.2d 738, 740 (Mich. 1986).

156. *Id.* at 739.

157. MICH. COMP. LAWS ANN. § 600.2162 (West 1986) (prior to amendment by 1994 MICH. PUB. ACTS 67). The Michigan statute also includes exceptions for criminal prosecution of a crime committed against the children of either or both, for suits for divorce, and for criminal prosecution of bigamy. *Id.* The Michigan courts interpret the *personal wrong or injury* language very narrowly. The Supreme Court of Michigan held bigamy is not included within the statutory definition of "personal injury":

The language of the rule at common law was as broad as the language 'personal injury' in our statute, and that language meant, and was held to mean, violence, either actual or constructive, to the person. . . . [T]he wife was not allowed to give testimony in . . . any . . . crime not involving personal violence or corporeal injury to her. . . . A cause of action growing out of a personal wrong is one designed to protect or secure some individual right. The right, as well as the wrong, must pertain to the person. It must be one that is purely personal in its character, and in no sense can the exception here be said to embrace public wrongs, which are personal only in the sense that they wound the feelings or annoy or humiliate, but inflict no injury upon the person.

*People v. Quanstrom*, 53 N.W. 165, 166 (Mich. 1892). In response, the Michigan Legislature amended the spousal privilege statute to except bigamy prosecutions. 1897 Mich. Pub. Acts 212. See *Love*, 391 N.W.2d at 743.

158. *Love*, 391 N.W.2d at 745.

159. *Id.* at 743. The court noted some jurisdictions hold otherwise. *Id.* at 744 (citing John A. Glenn, Annotation, *Competency of One Spouse to Testify Against Other*

violence fails to recognize commonly recurring patterns in battering relationships — the batterer's threats and assaults against men he believes are having affairs with his wife.<sup>160</sup>

Texas has taken the same position as the *Love* court when interpreting the spousal crime exception embodied in former article 38.11, which provided each spouse "may voluntarily testify against each other in any case for an offense involving any grade of assault or violence committed by one against the other."<sup>161</sup> In *Young v. State*,<sup>162</sup> the defendant drove his car into a car occupied by his wife, her brother, and another man. Mrs. Young was injured in the deliberate collision, and went to the hospital as a result. Young was indicted for aggravated assault of Tommy Gould, his wife's brother.<sup>163</sup> The court held the spousal violence exception did not apply because the wife was not the injured party in the case being tried.<sup>164</sup> The *Young* court stated:

What must be looked to here is not the "involving" feature of the statute; certainly the instant offense involved an assault [because] appellant drove his automobile into a smaller car and thereby . . . did "threaten imminent bodily injury to Tommy Lee Gould," an occupant of the car along with wife of appellant . . . Plainly and simply, this is not a "case for an offense . . . committed by one [spouse] against the other." Rather it is a case for an offense allegedly committed by appellant against Gould.<sup>165</sup>

The Texas Court of Criminal Appeals reached a similar conclusion six years later in *Willard v. State*.<sup>166</sup> In *Willard*, Mrs. Willard filed for divorce. She and her adult daughter, Lynn, went to Mr. Willard's home to retrieve some of Mrs. Willard's belongings. Mrs. Willard tes-

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in *Prosecution for Offense Against Third Party as Affected by Fact that Offense Against Spouse was Involved in Same Transaction*, 36 A.L.R.3d 820 (1971)).

160. See *supra* text accompanying notes 28-31.

161. See *supra* text accompanying note 100.

162. 603 S.W.2d 851 (Tex. Crim. App. [Panel Op.] 1980).

163. *Id.* at 851.

164. *Id.* at 852.

165. *Id.* at 853 (alteration in original). The prosecution argued the crime involved any grade of assault or violence by one spouse against the other spouse, and the statute should apply when facts and circumstances showed such an assault regardless of the allegations in the charging instrument. As authority, the State relied on *Garcia v. State*, 573 S.W.2d 12 (Tex. Crim. App. [Panel Op.] 1978). *Garcia* dealt with the provision in article 38.11 which allows a wife to testify when the offense is against a minor child. *Id.* at 15. In *Garcia*, the court held that whether the offense against the minor child "involves any grade of assault" is to be determined by reference to the underlying facts and circumstances, not by reference to the charging instrument. *Id.* The defendant was charged with indecency with a child, and the court looked to the facts and circumstances in determining the crime involved assault. *Id.*

166. 719 S.W.2d 595 (Tex. Crim. App. 1986) (en banc). See also *Velasquez v. State*, 727 S.W.2d 580, 581 (Tex. Crim. App. 1987) (en banc) (per curiam) (disqualifying a wife from testifying because the exception does not apply where the husband approached the wife and another man sitting together in car, shot the man "around six times" in the head, shot the wife in the hip, and was charged with murder of the other man). *Id.*

tified that while they were at Mr. Willard's house, Mr. Willard hit her and Lynn with his fists, then got a gun and shot Lynn. Mr. Willard thereafter forced Mrs. Willard to accompany him as he left the premises, threatening to kill her if she did not go to Mexico with him. Mrs. Willard was released later that night. Mr. Willard was charged with murder and convicted in the shooting death of Lynn. Mrs. Willard testified in the murder trial and the appellate court reversed, holding the spousal crime exception did not apply since Mrs. Willard was not the victim in the charged offense.<sup>167</sup> Judge White dissented in *Willard*, arguing the exception should apply in a case where a defendant violently assaults his wife and her adult daughter during the same course of conduct.<sup>168</sup>

Other jurisdictions interpret their spousal violence exceptions broadly enough to include crimes committed by husbands against third persons, so long as the wife was victimized in the same transaction.<sup>169</sup> In *State v. Mowery*,<sup>170</sup> the defendant broke into the house of Harley Laughlin, where Laughlin and Mowery's estranged wife were sleeping. Mowery shot Laughlin and Mrs. Mowery five times. Laughlin was killed, but Mrs. Mowery survived, although severely injured. Mowery was charged with aggravated burglary, aggravated murder of Laughlin, and attempted murder of his wife.<sup>171</sup> The three charges were tried together, and the trial court allowed Mrs. Mowery to testify to the burglary of Laughlin's residence and Laughlin's murder, as well as to her husband's attempt to murder her. On appeal, the Ohio Supreme Court held Mrs. Mowery was competent to testify in all three charges.<sup>172</sup> The statute interpreted by the Ohio Supreme Court

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167. *Willard*, 719 S.W.2d at 598. The court noted, however, Rule 504 of the Texas Rules of Criminal Evidence was adopted after the trial of the case at bar, and under that rule, Mrs. Willard could choose to testify. *Id.* at 600. The court further noted "[i]n the event of retrial the wife may be permitted to testify under said Rule 504." *Id.* at 601.

168. *Id.* at 601. (White, J., dissenting).

169. Some states explicitly provide in their spousal privilege statutes that the privilege may not be claimed in a criminal proceeding where a spouse is charged with a crime against a third person committed in the course of a crime against the other spouse. See HAW. R. EVID. 505(c)(1)(D); OR. REV. STAT. § 40.255(4)(a) (1993); WIS. STAT. ANN. § 905.05(3)(b) (West 1993). Other jurisdictions have achieved the same result through judicial construction. See, e.g., *State v. Briley*, 251 A.2d 442 (N.J. 1969); *State v. Bleeker*, 327 N.W.2d 728 (Iowa 1982); *People v. McGregor*, 635 P.2d 912 (Colo. Ct. App. 1981); *State v. Thompson*, 564 P.2d 315 (Wash. 1977).

170. 438 N.E.2d 897 (Ohio 1982).

171. *Id.* at 898.

172. The court reasoned as follows:

It is undisputed Mrs. Mowery was competent to testify as to the three shots fired by appellee at her which resulted in the attempted murder charge. Once it is established Mrs. Mowery is competent to testify as to the second, fourth and fifth shots fired by the appellee, it would be ludicrous to fabricate a justification for excluding Mrs. Mowery's testimony about the first and third shots, or the mechanics of appellee's entrance into the Laughlin residence. These three crimes constitute *one continuous transaction* or happen-

in *Mowery*, like the Texas statute, provides an exception to the privilege where a defendant spouse is charged with crimes against the testifying spouse.<sup>173</sup>

In *State v. Briley*,<sup>174</sup> a New Jersey court reached a similar result interpreting another Texas-like statute. The New Jersey statute provided: "The spouse of the accused in a criminal action shall not testify in such action . . . unless . . . the accused is charged with an offense against the spouse . . . ."<sup>175</sup> In *Briley*, John Lee Briley was charged with the murder of Benjamin Reaves, Jr., and with the commission of an atrocious assault and battery upon Mrs. Briley, both offenses arising out of a single event.<sup>176</sup> Noting "[p]rivileges which enable a person to prevent another from testifying against him . . . are obstacles in the path of the normal trial objective of a search for ultimate truth," the court reasoned these privileges should be construed and applied so as to accommodate justice.<sup>177</sup> The court opined, "[W]hen a greater public interest is served by recognizing the competency of one spouse to testify against the other and no violence is done to the privilege as expressed in a statutory or judicial rule of evidence, the testimony

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ing culminating in offenses against two individuals. The three offenses were not well-defined and separate, but rather, were overlapping and intertwined. Any attempt to extricate testimony from Mrs. Mowery relating only to the attempted murder charge would be highly artificial in view of the instant facts.

*Id.* at 900.

173. OHIO R. EVID. 601(B).

174. 251 A.2d 442 (N.J. 1969).

175. N.J. R. EVID. 23(2).

176. *Briley*, 251 A.2d at 443. The court described the facts as follows:

When this criminal event occurred on November 6, 1966, defendant, age 28, and Paulette, age 18, had been married for three years. Their marriage was stormy; he was suspicious of her fidelity although his own constancy apparently left much to be desired. On Thursday November 3 they quarreled because defendant found his wife and Reaves embracing. She then left their home with her baby and stayed for the next three nights at the Rainbow Motel . . . .

On Sunday morning, November 6, Reaves came to the motel and picked up Mrs. Briley and the baby. They got into his car and Reaves was about to start it when Briley, who had been looking for his wife, observed them. According to Mrs. Briley he ran toward the car, armed with a shotgun, part of the stock and barrel of which had been sawed off. . . . [T]he gun was discharged, and Reaves died shortly thereafter from a gunshot wound in the abdomen.

. . . .  
Mrs. Briley put her baby on the seat of the car, got out of the passenger side and started to run down the road. Briley pursued, intending to hit her because she had gone to the motel with Reaves. She tripped and fell and he overtook her as she lay on the ground. He was still carrying the shotgun which was then empty. Apparently while asking what she was doing at the motel "with that man," he struck at her with the gun, causing the injuries which resulted in the indictment for atrocious assault and battery.

*Id.* at 444.

177. *Id.* at 446.

should be received."<sup>178</sup> The *Briley* court believed the language of the statute, when sensibly construed, did not restrict the testimony of the wife to cases in which she alone was the victim of her husband's crime.<sup>179</sup> Thus, the court held:

If there is a single criminal event in which she and others are targets or victims of the husband's criminal conduct in the totality of the integrated incident and formal charges are made against the husband for some or all the offenses committed (one of which charges is for an offense against the spouse), the wife should be a competent and compellable witness against her husband at the trial of all the cases regardless of whether they are tried separately or in one proceeding. And, in this connection, it should be immaterial that the offense against the wife does not reach the same dimensions of criminality as it does against the third-party victim.<sup>180</sup>

A number of other jurisdictions have ruled in accord with the *Mowery* and *Briley* courts, holding a victim spouse can testify where the defendant spouse has committed offenses against her and others in the same criminal transaction.<sup>181</sup> For example, in *State v. Thompson*,<sup>182</sup> a Washington court held that a wife is a competent and compellable witness at the trial of all the cases arising from the same criminal transaction, regardless of whether the cases are tried separately or together.<sup>183</sup> The *Thompson* court interpreted broadly the requirement that the offense against the non-spouse must arise from the same criminal transaction in which the other spouse is injured.

In *Thompson*, the defendant was charged with the murder of Jan Cygan, as well as assault on Mrs. Thompson.<sup>184</sup> Mrs. Thompson testified she came home around 5 p.m. to find Thompson and some friends there. After the friends left, Thompson accused her of adultery with Cygan. At first Mrs. Thompson denied the adultery, but later she admitted her infidelity when Thompson threatened to torture her. The defendant then hit her in the face, causing her nose to bleed, and hit her across the legs with a rubber hose.<sup>185</sup> Cygan, who had been living at the Thompsons' house, returned home about 8:30 the same evening. Thompson tied him to a set of metal bed springs and beat him with the rubber hose. The Thompsons left the house around 10 p.m.,

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178. *Id.*

179. *Id.*

180. *Id.*

181. *People v. Vieau*, 357 N.W.2d 736, 738 (Mich. Ct. App. 1984); *State v. Thompson*, 564 P.2d 315, 318 (Wash. 1977) (en banc); *State v. Bleeker*, 327 N.W.2d 728, 731 (Iowa 1982); *State v. Crow*, 457 P.2d 256, 263 (Ariz. 1969) (en banc); cf. *Fortes v. Sacramento Mun. Court Dist.*, 170 Cal. Rptr. 292, 293-94 (Cal. Ct. App. 1980) (California statute provided explicitly for an exception when a crime is committed against another in the course of committing a crime against the spouse).

182. 564 P.2d 315 (Wash. 1977) (en banc).

183. *Id.* at 318.

184. *Id.* at 316.

185. *Id.*

leaving Cygan tied to the bed springs.<sup>186</sup> When they returned at 1 a.m., Mrs. Thompson saw Cygan lift his head from where he was tied to the bed. She later saw Thompson carrying Cygan in a sleeping bag out of the house, and she heard Cygan moan when Thompson hit Cygan's head against the door frame.<sup>187</sup> Thompson returned home around 7 a.m., covered with dirt. He told his wife that he killed Cygan.<sup>188</sup> Cygan's body was later found buried in a shallow grave, wrapped in a sleeping bag, with his hands and feet bound.<sup>189</sup>

The court rejected Thompson's argument that the assault on his wife and the murder of Cygan did not arise out of the same transaction. The court reasoned:

Both the assault upon Mrs. Thompson and the murder of Jan Cygan apparently stemmed from defendant's discovery of his wife's infidelity. Although he may have suspected her marital misconduct before [the date of the offense], it was then that she admitted the same. And while there was some passage of time between the assault and the murder, the logical relationship of the crimes is more important than any immediateness of connection in time in this case.<sup>190</sup>

Thus, the *Thompson* court held that Mrs. Thompson could testify in the murder case as well as in the assault case.

Both *Briley* and *Thompson* make clear that for the exception to apply in cases involving both spouse and non-spouse victims, a defendant spouse must be charged with an offense against the victim spouse.<sup>191</sup> At least one California court explored the question of the bona fide nature of the charge involving a victim spouse.<sup>192</sup> That case involved the California privilege rule, which explicitly provides that the privilege is inapplicable when a defendant spouse is charged with "[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 . . . ."<sup>193</sup>

In *Fortes v. Sacramento Municipal Court Dist.*,<sup>194</sup> Paul Fortes entered his wife's residence, shooting and killing a male visitor. Paul was charged with burglary of his wife's abode and with murder. The prosecution contended the spousal privilege was inapplicable because Paul committed the murder in the course of committing a property

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186. *Id.* at 317.

187. *Id.*

188. *Id.*

189. *Id.* at 316.

190. *Id.* at 318.

191. *State v. Briley*, 251 A.2d 442, 446 (N.J. 1969); *State v. Thompson*, 564 P.2d 315, 318 (Wash. 1977) (en banc).

192. *Fortes v. Sacramento Mun. Court Dist.*, 170 Cal. Rptr. 292 (Cal. Ct. App. 1980).

193. CAL. EVID. CODE § 972(e)(2) (West 1995).

194. 170 Cal. Rptr. 292 (Cal. Ct. App. 1980).



offense (burglary) against his wife, Sharon.<sup>195</sup> There was some question, however, of the legitimacy of the burglary charge. Paul and Sharon Fortes lived together in the home until three weeks prior to the burglary. Paul left voluntarily, and Sharon filed for divorce, obtaining a temporary restraining order barring Paul from the residence. However, the restraining order expired by its terms two days before the burglary and murder.<sup>196</sup> At trial, the magistrate held that notwithstanding the fact he would not make Paul answer for the burglary of his own family dwelling,<sup>197</sup> the exception to the privilege applied on the "concededly literal" ground that the defendant was "charged with burglary."<sup>198</sup>

The appellate court reversed, holding that where the factual or legal basis of an exception to a privilege has been put in issue, the prosecution must make at least "a prima facie showing of violation of the offense or offenses giving rise to the exception."<sup>199</sup> Because the prosecution failed to show Paul could validly be convicted of burglarizing his residence, the exception to the privilege did not apply.<sup>200</sup>

## 2. Crimes Other Than Assaults or Violence

The phrase *domestic violence* usually calls to mind beatings — typically, a husband beating his wife.<sup>201</sup> Nevertheless, domestic violence may encompass conduct other than assaultive behavior.<sup>202</sup> From a brief review of case law, stories can be extracted of abusive spouses who commit burglary, arson, theft, forgery, disturbing the peace, or stalking. Consider, for example, the case of Robert Thornton.<sup>203</sup> Thornton broke into his estranged wife's home, slashed her waterbed with a butcher knife, and stole her suitcase. In another case, Wesley Moxley set fire to his estranged wife's home after threatening to kill her.<sup>204</sup> In some jurisdictions, it is questionable whether these inci-

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195. *Id.* at 293.

196. *Id.*

197. In a 1975 case, the California Supreme Court held an individual cannot commit burglary in his own home. *People v. Gauze*, 542 P.2d 1365, 1367 (Cal. 1975). An earlier case decided by the same court was distinguished because the defendant spouse did not have the right to enter his wife's house without her permission. *People v. Sears*, 401 P.2d 938, 944 (Cal. 1965).

198. *Fortes*, 170 Cal. Rptr. at 293.

199. *Id.* at 296.

200. *Id.* at 297.

201. See, e.g., UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE, REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS (1982), noting states typically define domestic violence or domestic abuse as "causing or attempting to cause bodily injury or serious bodily injury," "physical injury, sexual abuse or forced imprisonment." *Id.* at 5.

202. See *supra* text accompanying notes 28-31 concerning abusive spouses' typical controlling behaviors.

203. *State v. Thornton*, 835 P.2d 216 (Wash. 1992) (en banc).

204. *State v. Moxley*, 491 P.2d 1326 (Wash. Ct. App. 1971).

dents are "crimes against a spouse" so as to allow a victim wife's testimony.

Under Texas' former spousal crime exceptions, property crimes, such as when a husband stole his wife's mule,<sup>205</sup> or nonviolent offenses against a wife, such as slander,<sup>206</sup> bigamy,<sup>207</sup> or adultery,<sup>208</sup> were not included within the spousal crime exception. The modern trend, however, is to include more causes of action under the *crimes against a spouse* umbrella. For example, in *Michigan v. Butler*,<sup>209</sup> the Michigan Supreme Court distinguished prior authority in order to bring arson within its exception, requiring that "the cause of action grow[ ] out of a personal wrong or injury done by one [spouse] to the other."<sup>210</sup>

In *Butler*, the lower court held the victim "could testify against [the] defendant only if the cause of action arises from a wrong which is purely personal in character, in no sense embracing a public wrong."<sup>211</sup> The intermediate appellate court concluded arson was not a wrong purely personal in character.<sup>212</sup> The Michigan Supreme Court rejected the lower court's interpretation as "illogical and unreasonable."<sup>213</sup> The *Butler* court reasoned that setting fire to a person's residence places the person in great danger and threatens or destroys personal property. "Other than a physical beating directly inflicted upon a victim, it is difficult to imagine anything that would more clearly be a 'personal wrong or injury.'"<sup>214</sup>

205. *Overton v. State*, 43 Tex. 616 (1875).

206. *Baxter v. State*, 31 S.W. 394 (Tex. Crim. App. 1895).

207. *Boyd v. State*, 26 S.W. 1080 (Tex. Crim. App. 1894).

208. *McLean v. State*, 24 S.W. 898 (Tex. Crim. App. 1894).

209. 424 N.W.2d 264 (Mich. 1988) (per curiam).

210. *Id.* at 264 (quoting MICH. COMP. LAWS ANN. § 600.2162 (West 1986)) (second alteration in original).

211. *People v. Butler*, 408 N.W.2d 532, 535 (Mich. Ct. App. 1987). The court relied on *People v. Love*, 391 N.W.2d 738 (Mich. 1986), and *People v. Quanstrom*, 53 N.W. 165 (Mich. 1892). See *supra* notes 155-60 and accompanying text for a discussion of the *Love* case.

212. *Butler*, 408 N.W.2d at 535. The Michigan Court of Appeals explained:

It is plain that the [arson] statute means to prevent not the injury of others nor the destruction of the property of others, but the public wrong of burning any dwelling house, any time, anywhere for any reason. This is not a cause of action "designed to protect or secure some individual right," nor to prevent "personal violence or corporeal injury" to any person.

The cause of action was arson of a dwelling house, which is a public wrong.

Under the terms of the statute, therefore, as interpreted by both *Love* and *Quanstrom*, the exception does not apply in this case, and the privilege stands.

*Id.*

213. *Id.* at 266.

214. *Butler*, 424 N.W.2d at 267. For courts reaching a similar result, see *State v. Moxley*, 491 P.2d 1326, 1329 (Wash. Ct. App. 1971); *Commonwealth v. John*, 596 A.2d 834 (Pa. Super. Ct. 1991); *Peters v. District Ct. of Iowa*, 183 N.W.2d 209, 212 (Iowa 1971); but see *Creech v. Commonwealth*, 410 S.E.2d 650 (Va. 1991). Creech threatened to "torch" his wife's belongings when she told him she was leaving him.

Washington has taken similar steps in overruling prior authority to bring burglary within the crime exception.<sup>215</sup> As the Washington Supreme Court noted, the Washington statute excepted the spousal privilege from "a criminal action or proceeding for a crime committed by one [spouse] against the other."<sup>216</sup> The *Thornton* court reasoned that under the plain language of the statute, the privilege does not apply because the burglary victim was the defendant's spouse.<sup>217</sup> The court noted, however, that earlier courts had interpreted the statute to apply only in cases where the charged offense was a crime of personal violence by one spouse against the other.<sup>218</sup> The court viewed these interpretations to be contrary to the plain meaning of the statutory enactment, which does not limit the exception to crimes of violence. As a judge-created engraftment to the statute, the court determined it had authority to overrule precedent.<sup>219</sup>

#### V. SPOUSAL CRIME EXCEPTION TO COMMUNICATIONS PRIVILEGE

Texas has a communications privilege as well as a spousal immunity privilege. The communications privilege reads, in pertinent part:

(b) *General Rule of Privilege.* A person . . . has a privilege during . . . marriage and afterwards to refuse to disclose and to prevent another from disclosing a confidential communication made to his spouse while they were married.

(d) *Exceptions.* There is no privilege under this rule:

(2) In a proceeding in which an accused is charged with a crime against the person of any minor child or any member of the household of either spouse, except in a proceeding where the accused is charged with a crime committed during the marriage against the spouse.<sup>220</sup>

These exceptions to the communications privilege are identical to the exceptions to spousal immunity prior to the enactment of article 38.10.

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*Id.* at 651. He set fire to his own house, which contained furniture Mrs. Creech had brought to the house when she married Creech. *Id.* The court held "[t]his case lacks an element essential for invocation of the statutory exception to the general rule of spousal immunity — prosecution of an offense committed by Creech against Mrs. Creech." *Id.* Here, Creech was charged only with burning down his own house, not with any crime against his wife. *Id.*

215. *State v. Thornton*, 835 P.2d 216, 218 (Wash. 1992) (en banc) (holding policy reasons set out in previous cases are no longer accepted).

216. *Id.* at 217 (alteration in original) (quoting WASH. REV. CODE ANN. § 5.60.060(1) (West 1989) (prior to amendment by 1995 Wash. Legis. Serv. 240 (West))).

217. *Id.* at 217.

218. *Id.*

219. *Id.* at 219 (quoting *State v. Thompson*, 564 P.2d 315, 322 (Wash. 1977) (Utter, J., dissenting) (en banc)).

220. TEX. R. CRIM. EVID. 504(1)(b), (d)(2).

However, the legislative enactment of article 38.10 created a spousal crime exception only to the spousal immunity privilege in Rule 504.<sup>221</sup> The Texas Legislature did not change the communications privilege to include a "crimes against the spouse" exception.

Communications privileges tend to provide less difficulty in spousal abuse cases than spousal immunity privileges. Courts generally have held threats and violence are not communicative, or are not induced by the confidence incident to marriage, and thus do not come within the privilege.<sup>222</sup> Some jurisdictions have a spousal violence exception to their confidential communications privilege as well as to their spousal immunity privilege, thus allowing a wife to testify concerning confidential communications made during domestic abuse.<sup>223</sup>

Texas takes the position that assaultive conduct is not a confidential communication within the meaning of Rule 504. In *Sterling v. State*,<sup>224</sup> the defendant's wife testified Sterling struck her with his fists, a tape recorder, a brick, and a telephone. The court held Rule 504 applies to "utterances and not to acts,"<sup>225</sup> and thus, the defendant's abusive treatment of his wife was not a confidential communication.<sup>226</sup> This holding solves most of the problems presented by the communications privilege in spousal abuse cases. There are, however, a number of cases in which testimony of utterances as well as acts would be helpful.

Consider, for example, a case in which a defendant spouse is charged with the attempted murder of his wife. In such a case, the state must establish beyond a reasonable doubt that the defendant

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221. Article 38.10 states explicitly "[t]he privilege . . . not to be called as a witness . . ." TEX. CODE CRIM. PROC. ANN. art. 38.10 (West 1995). This cannot be reasonably interpreted to apply to anything other than spousal immunity. Further, the title to the article is "Exceptions to the Spousal Adverse Testimony Privilege." *Id.* Nor is there anything in the Senate Committee's Final Report indicating the legislature intended to create an exception to both privileges.

222. See, e.g., *People v. Thompson*, 314 N.W.2d 606, 610 (Mich. Ct. App. 1981); *State v. Johnson*, 586 S.W.2d 437, 441 n.3 (Mo. Ct. App. 1979); *Harris v. State*, 376 A.2d 1144, 1146 (Md. Ct. Spec. App. 1977); *Morgan v. United States*, 363 A.2d 999, 1004 (D.C. 1976); *State v. Americk*, 256 P.2d 278, 279 (Wash. 1953).

223. See, e.g., ILL. REV. STAT. 125/6 § 6 (1993); LA. CODE EVID. ANN. art. 504 (West 1995).

224. 814 S.W.2d 261, 261 (Tex. App.—Austin 1991, pet. ref'd).

225. *Id.* The court quoted cases under the 1965 statute for that proposition, noting "[t]here is nothing in rule 504(1) to indicate that it was intended to abrogate that holding . . ." *Id.* at 262. The court also noted "[to] say that the privilege extends only to 'utterances' is not strictly correct, as the privilege has been applied to letters and diary entries." *Id.* at 262 n.1.

226. *Id.* at 261. See also *State v. Mireles*, 904 S.W.2d 885, 890 (Tex. App.—Corpus Christi 1995, pet. ref'd) (wife may testify about husband's actions she observed, but not about husband's statements made to her during marriage); *Freeman v. State*, 786 S.W.2d 56, 59 (Tex. App.—Houston [1st Dist.] 1990, no pet.) (ex-wife's testimony that her ex-husband carried weapons with him all the time during their marriage does not violate the communications privilege).

specifically intended to cause death.<sup>227</sup> If the defendant beat his wife with his bare hands, his intention to kill rather than merely injure her may be ambiguous, or may be difficult to infer from his conduct.<sup>228</sup> It would be a very different case, however, if the jury could hear that the defendant was screaming, "I'm going to *kill* you!" while he pounded her with his fists.<sup>229</sup> If the confidential communications privilege is interpreted so as to prevent the wife's testimony concerning what her husband said while beating her, some of the worst perpetrators of violence will not be appropriately punished for their actions.

The Texas Legislature's failure to provide a spousal crime exception to the confidential communications privilege may well be an oversight. If so, the Legislature should consider amending article 38.10 to extend the exception to the communications privilege.

## VI. RECOMMENDATIONS AND CONCLUSION

An appropriate spousal immunity statute must 1) allow a spouse's testimony in the broadest possible circumstances of domestic violence

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227. See TEX. PENAL CODE ANN. §§ 15.01, 19.02 (West 1995); *Graves v. State*, 782 S.W.2d 5, 6 (Tex. App.—Dallas 1989, writ ref'd) (phrase "with specific intent to commit an offense" in criminal attempt statute means the accused must have intended to bring about the desired result); see also *Flanagan v. State*, 675 S.W.2d 734, 741 (Tex. Crim. App. [Panel Op.] 1984, no pet.) (specific intent to kill is necessary element of attempted murder).

228. Juries typically infer a person's state of mind, for example, intent to cause death, from his or her conduct. See, e.g., *Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991) (en banc), cert. denied, 504 U.S. 974 (1992); *Moreno v. State*, 702 S.W.2d 636, 641 (Tex. Crim. App. 1986) (en banc); *Dues v. State*, 634 S.W.2d 304, 305 (Tex. Crim. App. [Panel Op.] 1982); *Turner v. State*, 600 S.W.2d 927, 929 (Tex. Crim. App. [Panel Op.] 1980); *Beltran v. State*, 593 S.W.2d 688, 689 (Tex. Crim. App. [Panel Op.] 1980); *Dillon v. State*, 574 S.W.2d 92, 94-95 (Tex. Crim. App. [Panel Op.] 1978); *Bowles v. State*, 550 S.W.2d 84, 85 (Tex. Crim. App. 1977); see also *Graves*, 782 S.W.2d at 7 (evidence that defendant deliberately aimed and fired gun at complainant was sufficient to show defendant had specific intent to kill); *Godsey v. State*, 719 S.W.2d 578, 581 (Tex. Crim. App. 1986) (en banc) (deadly weapon used in a deadly manner almost conclusively supports the inference that accused intended to kill); *Berry v. State*, 579 S.W.2d 487, 489 (Tex. Crim. App. [Panel Op.] 1979) (threats may be communicated by actions, words, or deeds). Even in cases dealing with the use of a deadly weapon, courts concede *intent* can be ambiguous. As the *Flanagan* court noted, "Simply because a man shoots at another [with a shotgun] does not necessarily make it an assault with intent to murder." *Flanagan*, 675 S.W.2d at 737 (quoting *Cooper v. State*, 132 S.W. 355, 356 (Tex. Crim. App. 1910)) (alteration in original).

229. See *Castillo v. State*, 899 S.W.2d 391, 393 (Tex. App.—Houston [14th Dist.] 1995, no pet.); *Michel v. State*, 834 S.W.2d 64, 67 (Tex. App.—Dallas 1992, no pet.) (jury may infer intent from words, acts, and deeds); *Branson v. State*, 825 S.W.2d 162, 168 (Tex. App.—Dallas 1992, no pet.); *Henderson v. State*, 825 S.W.2d 746, 749 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd); *Martinez v. State*, 844 S.W.2d 279, 283 (Tex. App.—San Antonio 1992, pet. ref'd); *Bartley v. State*, 789 S.W.2d 288, 292 (Tex. App.—Dallas 1990, pet. ref'd); *Brown v. State*, 704 S.W.2d 506, 507 (Tex. App.—Dallas 1986, pet. ref'd); *Ercanbrack v. State*, 646 S.W.2d 480, 481 (Tex. App.—Houston [1st Dist.] 1982, no pet.). Cf. *Gardner v. State*, 736 S.W.2d 179, 182 (Tex. App.—Dallas 1987), *aff'd*, 780 S.W.2d 259 (Tex. Crim. App. 1989) (proof of culpable mental state may generally rest on circumstantial evidence) (en banc).

and 2) signify the importance of domestic violence to the state by allowing prosecutors to use all available measures to prosecute wrongdoers, including compelled spousal testimony.<sup>230</sup> With the legislative enactment of article 38.10, Texas now has the opportunity to show that domestic violence offends the peace and dignity of the state. This opportunity will be lost, however, if courts disregard what is commonly known about battering behavior and ignore the reality of battered women's lives. Crimes against third parties which are motivated by the husband's desire to control his wife, as well as manipulative, violent behavior not rising to the level of physical battering, must be considered *crimes against the spouse* and thus within the exception to spousal immunity.

Because rules of privilege are in derogation of the search for truth, a basic rule of construction when interpreting rules of privilege is that they should be interpreted narrowly.<sup>231</sup> Narrow application of a privilege requires broad interpretation of the exceptions to the privilege. The judiciary's responsibility in interpreting a new statute is to effectuate the intent of the legislature.<sup>232</sup> In attempting to discern legislative intent, courts may consider 1) the object sought to be attained, 2) the circumstances under which the statute was enacted, 3) legislative history, 4) consequences of a particular construction, and 5) title (caption), preamble, and emergency provision.<sup>233</sup>

The evil the Texas Legislature sought to remedy is clear — the difficulty in prosecuting crimes between spouses because of the effect of the marital privilege. The Senate Committee on Domestic Violence informed the Legislature in its Final Report that such cases often have only one witness, the spouse victim, and prosecutors are hampered in building strong cases because the privilege prevents them from com-

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230. Seymore, *supra* note 12, at 851-52.

231. *University of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (inasmuch as privileges contravene the fundamental principle that the public "has a right to every man's evidence," any such privilege must "be strictly construed") (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1950)); *United States v. Nixon*, 418 U.S. 683, 710 (1974); *Lehnhard v. Moore*, 401 S.W.2d 232 (Tex. 1966) (trade secret privilege should be strictly construed because "no man is to be denied the enforcement of his rights merely because another possesses the facts without which the right cannot be ascertained and enforced") (quoting JOHN H. WIGMORE, EVIDENCE § 2212, at 156 (McNaughton rev. 1961)); *Wade v. Abdnor*, 635 S.W.2d 937, 938 (Tex. App.—Dallas 1982, no writ) (psychotherapist-patient privilege should be strictly construed because of limitations on disclosure in judicial proceedings); see also MUELLER & KIRKPATRICK, *supra* note 60, § 5.1, at 333 ("[A] privilege should be construed to exclude no more evidence than is necessary to accomplish the purposes for which it was created.").

232. *Patterson v. State*, 769 S.W.2d 938, 940 (Tex. Crim. App. 1989) (en banc); *Camacho v. State*, 765 S.W.2d 431, 433 (Tex. Crim. App. 1989) (en banc); see also *Lanford v. Fourteenth Court of Appeals*, 847 S.W.2d 581, 586 (Tex. Crim. App. 1993) ("[O]ur constitutional duty is to ascertain and give effect to the apparent intent of the legislators who voted for [the statute].").

233. TEX. GOV'T CODE ANN. § 311.023 (West 1988); see also *State v. Arellano*, 801 S.W.2d 128, 131 (Tex. App.—San Antonio 1990, no pet.).

elling a victim's testimony.<sup>234</sup> The Senate Committee held public hearings, where members of the public and officials of the criminal justice system testified. The Committee's Final Report makes it clear that the new law is intended to "relieve the pressures [to drop charges] placed on the married victim."<sup>235</sup> Thus, it appears the Texas Legislature intended to provide a remedy best designed to "remove the burden from the victim."<sup>236</sup> Interpreting the new statute liberally, so as to allow the prosecution to compel victim spouses' testimony in the broadest possible circumstances of domestic violence, best effectuates legislative intent.

The Texas statute does not limit the exception to crimes of violence. The statute allows the state to compel testimony "in any proceeding in which the person is charged with a crime committed against the person's spouse."<sup>237</sup> The Texas Legislature did not adopt the language which appeared in the 1965 spousal crime exception, which provided an exception "in any case for an offense involving any grade of assault or violence committed by one against the other."<sup>238</sup> Nothing on the face of the most recent statute indicates the Legislature intended the exception to apply only to crimes of violence. The rejection of the *assault or violence* language of the 1965 exception manifests clear legislative intent not to limit the application of the exception. An examination of Senate Bill 128, which includes the provision for article 38.10, confirms that the Legislature deliberately used the *crime against the spouse* language to avoid limiting the statutory exception to violent crimes. Senate Bill 128 twice refers to "family violence, as defined by section 71.01, Family Code."<sup>239</sup> Section 71.01 defines "family violence" as:

an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm,

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234. SENATE REPORT, *supra* note 117, at 73.

235. *Id.* at 74. The Committee further stated, "This provision removes the burden from the victim and reduces the likelihood that the perpetrator will batter the victim for pressing charges." *Id.*

236. *Id.*

237. TEX. CODE CRIM. PROC. ANN. art. 38.10 (West 1995).

238. Act of June 18, 1965, 59th Leg., R.S., ch. 722, 1965 Tex. Gen. Laws 317, 467 (codified as TEX. CODE CRIM. PROC. ANN. art. 38.11 (West 1979) (repealed by Act of June 14, 1985, 69th Leg., R.S., ch. 685, § 9, 1985 Tex. Gen. Laws 2472, 2474)). This was Texas' most recent spousal crime exception prior to article 38.10.

239. Act of May 11, 1995, 74th Leg., R.S., ch. 67, §§ 3-4, 1995 Tex. Gen. Laws 446, 446-67. In section three, when referring to priority settings of certain criminal cases, the bill refers to "criminal actions involving a charge that a person committed an act of family violence, as defined by Section 71.01, Family Code." *Id.* § 3. In section four, the bill requires training of prosecuting attorneys relating to "cases involving a charge that a person committed an act of family violence as defined by Section 71.01, Family Code." *Id.* § 4, at 447.

bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself . . . .<sup>240</sup>

Rather than referring to crimes of *family violence* in article 38.10, the Legislature chose to use the phrase *crime against the spouse*. This suggests intent for the privilege exception to extend beyond assaultive conduct.

Furthermore, where a husband's crime against his wife also involves an offense against a third party, the new Texas statute does not preclude compelling the victim spouse's testimony in the second case. The Texas statute is clearly susceptible to the same interpretation as the New Jersey statute in *Briley*.<sup>241</sup> The *Love* case is distinguishable on the ground that, unlike the Texas statute, the Michigan statute requires the crime to originate in a personal wrong or injury committed by one spouse against the other. Further, the *Love* court's narrow interpretation of spousal violence fails to account for commonly recurring patterns in battering relationships. These patterns include fits of pathological jealousy, and threats and assaults against men who the batterer believes are his wife's lovers. Moreover, these threats and assaults often extend to anyone else the batterer believes might interfere with his complete domination over his spouse.

The Texas Legislature clearly intended for courts to read the spousal crime exception broadly enough to effectuate the legislative purpose behind the statute, to help combat domestic violence. If a spouse and a third party are victims of the other spouse's criminal conduct in the same criminal episode, the victim spouse should be a competent and compellable witness against the other spouse at the trial of all the cases.<sup>242</sup> Crimes involving a victim spouse and other individuals are rarely well-defined and separate, rather, they are overlapping and intertwined. As the Ohio court reasoned in *Mowery*, "[o]nce it is established [the victim spouse] is competent [and compellable] to testify as to the second, fourth and fifth shots fired by the

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240. Act of June 17, 1995, 74th Leg., R.S., ch. 1024, 1995 Tex. Sess. Law Serv. 5095, 5096 (to be codified as an amendment to TEX. FAM. CODE ANN. § 71.01(a)(2)(A)). The definition of family violence in section 71.01 includes abuse as defined elsewhere in the Family Code. *Id.* That definition, however, refers to abuse of children, not spouses. *See id.*

241. *State v. Briley*, 251 A.2d 442 (N.J. 1969).

242. The notion of *the same criminal episode* is not foreign in Texas jurisprudence. A Texas defendant may be prosecuted in a single criminal action for all offenses arising out of the same criminal episode. TEX. PENAL CODE ANN. § 3.02 (West 1994).

"Criminal episode" means the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, under the following circumstances:

- (1) the offenses are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan; or
- (2) the offenses are the repeated commission of the same or similar offenses.

*Id.* § 3.01.



[defendant spouse], it would be ludicrous to fabricate a justification for excluding [the victim spouse's] testimony about the first and third shots . . . ."<sup>243</sup> Interpreting article 38.10 so as to compel the victim spouse's testimony in the first incident and except it as to the second presumes the Texas Legislature intended an absurd result. This interpretation would violate the well-established tenet that courts will not construe statutes in a manner that produces absurd results.<sup>244</sup>

The new Texas statute should be construed to give the state power to compel a victim spouse's testimony to the same extent the state may compel the testimony of any other crime victim. Any other interpretation reduces the importance of domestic violence by treating it as a species of tort rather than crime. As Ann Jones concisely states:

Today in the eyes of the law, any assault is both a criminal offense and a personal tort, or wrong; any assault may be the basis for a criminal prosecution or a civil action, or both. If you attack me in the street, the state can put you on trial and send you to jail for assault and battery, and I can sue you for damages. But in a great many jurisdictions, even today, a domestic assault is not regarded as a *real* assault — that is, not really criminal. When police refuse to arrest, prosecutors to prosecute, and judges to sentence a man because the victim he assaulted is (or was) his wife or girlfriend, the state redefines this criminal assault against a woman as a special category of violence immune from criminal law. The state magically transforms a crime into a noncrime.<sup>245</sup>

A change in the evidentiary rule of spousal immunity cannot single-handedly solve the problem of domestic violence. Nor will criminal prosecution, by itself, solve the problem. However, "the fact that the criminal justice system cannot solve a problem is not usually accepted as a justification for lawlessness."<sup>246</sup> "The law is an important social force — it can lead as well as follow. We cannot ignore the symbolic value of the law."<sup>247</sup> The Texas Legislature took an important symbolic step in enacting article 38.10. The Texas courts must now take the next step and make this symbol meaningful in the lives of battered women.

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243. *State v. Mowery*, 438 N.E.2d 897, 900 (Ohio 1982).

244. *Basden v. State*, 897 S.W.2d 319, 321 (Tex. Crim. App. 1995) (en banc); *Muniz v. State*, 851 S.W.2d 238, 244 (Tex. Crim. App. 1993) (en banc); *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) (en banc). The *Boykin* court stated it would not apply a statute literally where doing so would lead to absurd consequences. *Id.* The court held this would not be an intrusion on the lawmaking powers of the legislature, but rather a demonstration of respect for the government branch, which is presumed not to enact absurd laws. *Id.*

245. JONES, *supra* note 13, at 27-28.

246. Seymore, *supra* note 12, at 852.

247. *Id.*