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A FUNCTIONAL APPROACH TO THE SPOUSAL EVIDENTIARY PRIVILEGES

ABSTRACT

Most U.S. jurisdictions deem testimony regarding what one spouse tells the other in private inadmissible in most circumstances and most do not allow a person to be compelled to testify against his or her spouse. Although confidential communications and what a spouse knows about the other are both relevant and quite probative, triers of fact do not get to consider them. The scope, character, and very existence of these exceptions to the general principle of admitting everything into evidence have been questioned by legal commentators for centuries, but they remain in force in most U.S. jurisdictions. This paper reviews the justifications for the spousal evidentiary privileges and argues for recasting the spousal evidentiary privileges in functional terms.

I. INTRODUCTION

Under the typical rules of evidence in U.S. jurisdictions, relevant evidence is presumptively admissible at trial (see Federal Rules of Evidence 402). Intuitively, to best facilitate uncovering the truth, all relevant evidence needs to be before the trier of fact. In most circumstances, however, testimony regarding what one spouse tells the other in private is not admissible and, because a person can avoid testifying about anything he or she knows about his or her spouse simply by stating that he or she does not want to testify about it, many things a person knows about his or her spouse may not get into evidence either. While the scope, character, and very existence of these exceptions to the general principle of admitting everything into evidence have been questioned by legal commentators for centuries, they remain in force in most U.S. jurisdictions. In this paper, I revisit the justifications for these spousal evidentiary privileges and defend an alternative approach to the privileges that looks to the functional characteristics of relationships.[1]

The two commonly recognized spousal evidentiary privileges are the *confidential communication privilege* and the *adverse testimonial privilege*. The confidential communication privilege prohibits testimony about communications made in confidence between spouses unless both spouses consent. The communication can be spoken or non-verbal and it must have been made in confidence, that is, not in the presence of a third party. If the couple was married at the time of the

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communication, the testimony is prohibited forever; it even survives death and divorce. The three major exceptions to the privilege are when the spouses litigate against each other, in a criminal case against one spouse in which the victim is the other spouse or a child, or when spouses collaborate in a crime.

The adverse testimonial privilege precludes certain testimony against a person by his spouse. Under the Federal Rules of Evidence, as interpreted by the U.S. Supreme Court in *Trammel v. United States* (1980), and under the rules in many states, the witness spouse can decide whether or not to testify. Under the federal rule in effect before *Trammel* and still in effect in some states, the non-witness spouse controls the privilege, that is, a witness spouse can only testify if she wants to *and* the non-witness spouse consents. Unlike the confidential communication privilege, the adverse testimonial privilege requires that the couple be married at the time testimony is sought; if the couple divorces, the privilege does not apply. Like the confidential communication privilege, the adverse testimonial privilege does not apply when the spouses litigate against each other or if a victim of the crime about which testimony is sought was a spouse or an immediate family member.

II. ARGUMENTS FOR THE PRIVILEGES IN THEIR PRESENT FORM

Both spousal privileges precede the founding of the Unites States and were firmly rooted in the common law principles that an accused cannot testify on his or her own behalf and that husband and wife were a single legal entity (and thus the wife had no separate legal existence). Both principles have been undermined in the last century.

Although the original justifications for the spousal evidentiary privileges no longer remain, the privileges remain part of the common law. Various interrelated arguments are made in favor of these privileges. One argument is that they foster free and open communications between spouses. This argument involves a normative claim – marriages will be stronger and more stable if married couples communicate freely and openly – coupled with a descriptive claim – the privileges encourage married couples to communicate more freely. Together, the normative and the descriptive claims suggest that, since the state has the goal of encouraging and supporting good, stable, and long-lasting marriages, married couples deserve the spousal evidentiary privileges.

A related argument about the adverse testimonial privilege is that if one can be compelled to testify against a defendant spouse, then the state can drive a wedge between the spouses, forcing one to testify against the other. As the Supreme Court said in *Hawkins v. United States* (1958):

> [T]he law has refused to pit wife against husband or husband against wife in a trial … to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well …. Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage. (77–8)

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Another argument for the privileges is that they provide a refuge for married people, what the district court in *United States v. Neal* (1982), called a "small island of privacy [that provides] a refuge for the human spirit where government may not intrude" (946). The idea is that having a *confidant* is both good for a person psychologically – providing support and a friendly ear – and good for society, because the confidant provides a second opinion that acts as a check on the confider's ideas. It is, however, bad for individuals and society for people to confide in just anybody. It is better for confiding to be in the context of stable, long-lasting, reliable relationships. As marriages are supposed to have these characteristics, it makes sense to associate this privilege with marriage.

Another argument in favor of the privileges is that they strengthen individual marriages and preserve the institution of marriage. The Supreme Court in *Wolfle v. United States* (1934) embraced the idea that the confidential communication privilege helps sustain marriage, saying that "[t]he basis of the immunity given to communications between husband and wife is … so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails" (14).

Another off-mentioned argument for the privileges is that spouses simply should not be forced to reveal marital secrets. As Charles McCormick (1954, 179) said in his treatise, "All of us have a feeling of indelicacy and want of decorum in prying into the secrets of husband and wife." And Chief Justice Warren said in his dissent to *Wyatt v. United States* (1960), there is "a natural repugnance … to compelling a wife or husband to be the means of the other's condemnation, and to compelling the culprit to the humiliation of being condemned by the words of his intimate life-partner" (535). Some have tried to buttress this intuition-based argument by connecting the privileges to the constitutional right to privacy (Reutlinger 1973, 1370; Krattenmaker 1976, 613). The idea is that privacy, a basic and core value in our society, entails that intimate secrets like those between spouses should not be forced to come out at trial and that a person should not be forced to testify against her spouse.

To summarize, the arguments for the spousal evidentiary privileges are that they encourage open communication between spouses, provide a safe haven for them, preserve the institution of marriage, strengthen individual marriages, fit with our ethical intuitions, and are supported by privacy considerations.

III. ARGUMENTS AGAINST THE PRIVILEGES IN THEIR CURRENT FORM

I turn now to a discussion of replies to arguments for spousal evidentiary privileges. Responding to the appeal to the intuition that there is something indecent or repugnant about forcing spouses to testify against each other or for them to reveal

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their confidential communications, John Henry Wigmore said:

> There is a natural repugnance in every fair-minded person to compelling a wife or husband to be the means of the other's condemnation, and to compelling the culprit of the humiliation of being condemned by the words of his intimate life-partner .... [Does] this feeling... suffice as a reason for the rule?... [I]t is not more than a sentiment. It does not posit any direct and practical consequences of evil. (1923, §2228, 756)

To put this point slightly differently, the law sometimes needs to authorize various repugnant and indecent things, such as taking children away from their parents or evicting people from their homes. That the spousal evidentiary privileges protect against something seemingly repugnant is not a strong argument for them.

Turning to the idea that the privileges are grounded in constitutional privacy, when confidential communications are not at issue, requiring adverse spousal testimony typically does not invade what the Supreme Court has called "the sacred precincts of the marital bedroom," so constitutional privacy is not arguably at stake. Turning to confidential marital communications, the right to privacy probably protects against the state listening in on marital communications (at least not without probable cause) or invading the private realm of the marital bedroom (or perhaps the home generally), but the constitutional right to privacy is not so broad as to require that spouses will be protected from having to testify about confidential communications. When presented with the argument that the constitutional right to privacy supports the spousal evidentiary privileges, courts have universally rejected them.[2]

A general reply to the arguments for the spousal evidentiary privileges is that spouses will behave in ways that the privileges are meant to encourage even without the privileges. For example, spouses will communicate with each other openly because they love each other, trust each other, and feel loyal to each other, not because of the confidential communication privilege. Noting that there is no empirical or psychological evidence to establish the connection between the privileges and better marriages or better spousal communication, this reply denies that the spousal evidentiary privileges encourage spouses to communicate or to do so more effectively.

A reply to the argument that the spousal evidentiary privileges provide a necessary refuge is that *everyone* deserves a person who is their legally recognized confidant. Further, given the high percentage of marriages that end in divorce, a person's relationship with his or her mother or best friend is likely to be more long-lasting and stable than his or her marriage. Why not give the privileges to such relationships? Granting the privileges to spouses but not to other close relationships fails to provide many people with the refuge or the confidant they deserve.

Another reply to the arguments for the privileges cuts in the opposite direction, saying that privileges actually encourage crimes by giving every married person

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a testimony-proof collaborator. Jeremy Bentham famously made the following sarcastic comment:

> Let us … grant to every man a license to commit all sorts of wickedness, in the presence and with the assistance of his wife[;] … let us make every man's house his castle; and, as far as depends upon us, let us convert that castle into a den of thieves. (1827, 340)

Although the exception for when spouses are partners in crime takes away some of the sting of Bentham's comment, the potential for abuse still exists as spouses may use the privileges to keep bad acts secret.

A reply to the argument that the adverse testimonial privilege preserves marital harmony is that there is just as much reason to think that, rather than blaming his spouse for testifying against him after being compelled to do so, a defendant will instead blame the prosecutor, the legal system, the government, or himself. Further, even with the adverse testimonial privilege in place and even after *Trammel* held that the witness-spouse controls the privilege, spouses may still be effectively compelled to testify. This is precisely what happened in *Trammel*. Although the Supreme Court held that the wife of the defendant controlled the privilege and could decide whether to testify, the government was able to pressure her to testify against her husband by offering her leniency with respect to the charge that she conspired to distribute illegal drugs. Despite the privileges, spouses can still be pitted against each other.

The final argument against the spousal evidentiary privileges is that they get in the way of the quest for the truth, a primary goal of the rules of evidence (see Federal Rules of Evidence 102). Wigmore called the confidential communication privilege "an indefensible obstruction to truth" (§2228, 761). Learning the truth does not, however, trump all other policies, as indicated by exceptions to "truth-tropic" principles of evidence law when other important policies are at stake, for example, the attorney-client privilege or the priest-penitent privilege. If there are strong arguments for the spousal evidentiary privileges, then some abrogation of the goal of truth may be warranted. The question remains, however, whether there are such strong arguments.

IV. ABOLITION OF THE PRIVILEGES

Some scholars have argued for the abolition of the spousal evidentiary privileges, noting the original justifications of the privileges are no longer applicable and the justifications presently offered are weak. In this short paper, I cannot fully engage all of the considerations in favor of the spousal evidentiary privileges. Although basing the privileges on privacy is not promising as a matter of constitutional law, privacy and related non-constitutional considerations in favor of the privileges do seem fairly strong. This argument supports the confidential communication privilege more than it supports the adverse testimonial privilege, because confidential

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communications between couples are typically private in a way that most other things spouses know about each other are not.

Practically speaking, it seems unlikely that the privileges will be abolished or even significantly curtailed in jurisdictions that presently have them. In 1972, an Advisory Committee to the Committee on Rules of Practice and Procedure of the Judicial Conference, established by the Supreme Court, proposed abolishing the confidential communication privilege and limiting the adverse testimonial privilege to criminal proceedings against a spouse. Although the Supreme Court supported it, Congress, after extensive hearings, decided not to approve these changes, instead adopting Federal Rule of Evidence 501, which reads, in part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Further, in the current political atmosphere, in which "defending marriage" is a rallying cry for preventing any changes to existing marriage laws that would seem to make them more "liberal," it seems unlikely that either spousal evidentiary privilege will be abolished. A more pragmatic approach to the privileges is to consider whether the justifications for them and related considerations support a different approach to the spousal evidentiary privileges.

V. "DESIGNATION" AS AN ALTERNATIVE TO THE CURRENT WAY PRIVILEGES ARE ASSIGNED

Sanford Levinson offers a thought experiment about the spousal evidentiary privileges that:

> [i]magine[s] a society that assigns each of its members an equal number – say 20 to 30 – of 'privilege tickets,' which could be distributed to those with whom a person wished to assure a relationship that could not be vulnerable to State intervention and forced testimonial disclosure. (1984, 655)

More recently, a *New York Times* op-ed suggested "let[ting] Americans name one person (other than their lawyer, priest, or therapist) who can't be forced to testify against them in court" (Conley 2007). Such proposals expand the spousal evidentiary privileges by allowing people to designate one (or more) person who can claim the privileges as their legally registered confidant. A central virtue of such "designation" proposals is that everyone is treated equally; every person, whether married or not, can claim the same number of confidants. Everyone – not just married people – can claim a legally-recognized confidant, a refuge, a person to confide in without fear of intrusion. The same reasons that it might be valuable for married people to have a confidant apply to unmarried people as well. Relatedly, designation proposals fit nicely with the privacy justification for the spousal

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evidentiary privileges. Insofar as privacy considerations support the privileges, as everyone has a prima facie claim to privacy, everyone has a prima facie claim to the privileges.

There are, however, problems with these designation proposals. First, designation proposals allow people in sham or moribund relationships to claim the privilege. If a person has been designated as a confidant, he or she can still claim the privilege whether or not he or she is (or has been) a confidant. To put the point slightly differently, such designation proposals are *overinclusive*. In fact, such proposals fly in the face of the justifications for the privileges. There is no guarantee that any designated person will fulfill the justifications for granting the privilege, for example, that he or she will provide a refuge.

Further, if a person can pick any person as a confidant, regardless of the nature of their relationship, then this proposal does seem, to use Bentham's words (1827, 340), to grant everyone "license to commit all sorts of wickedness in the presence and with the assistance of" one person (or perhaps twenty to thirty people). In fact, this worry is greater than in marriage: allowing one to designate a confidant without the typically associated duties and obligations of marriage creates an even greater potential for abuse. The potential for abuse is even worse the more people one may designate as a legal confidant. Also, a designation proposal will exclude more evidence from trials, thus further hindering the quest for truth. So although there are reasons to support designation proposals, the arguments against such proposals seem stronger.

VI. A FUNCTIONAL APPROACH TO THE PRIVILEGES

Another alternative approach to the spousal evidentiary privileges is to adopt a functional approach to who gets the privileges. A functional approach to the privileges looks at characteristics of a relationship to determine how it should be treated under the law. I propose the following version of functionalism. Under my proposal, to determine whether a relationship between two people qualifies for spousal evidentiary privileges, a court looks to the couple's emotional commitment and entanglement; their financial commitment and entanglement; their mutual reliance for personal services including shelter, food, clothing, utilities, health care, etc.; the way they have conducted themselves in their personal life and held themselves out to the society; the level of intimacy between them; and the totality of their relationship as evidenced by their dedication, caring, and self-sacrifice. The presence or absence of one or more of these factors would not alone be determinative of whether a couple can claim the privileges. Rather, the question would be whether the character of their relationship is, on the whole and all things considered, deserving of the spousal evidentiary privileges.[3] If so, then a court should grant them the privileges. Further, an unmarried couple has the burden of establishing that their relationship has the relevant functional attributes. In contrast, a married couple or a couple registered as domestic partners has a strong,

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but rebuttable, presumption for claiming the privilege. This presumption could be rebutted if their relationship was moribund or a sham, but the burden of rebutting the presumption would be on the party who thinks the married or registered couple does not deserve the privilege.

Functional approaches are not unheard of in family law. Eleven U.S. jurisdictions recognize *common law marriages*, legally valid marriages not solemnized in the usual ceremonial manner but that instead come into existence when two people capable of marrying cohabitate, intend and agree to be married, and hold themselves out to their community as married. The *sham marriage doctrine* exhibits another functional aspect of marriage law. Under this doctrine, even if a couple has satisfied all the formal requirements for marriage, including filing the appropriate documents with the state, having a ceremony, and the like, their marriage is void if the couple has no intention of living together as husband and wife, but rather got married only for health benefits, the legitimization of children, immigration or naturalization purposes, or some other limited purpose.

Not only does the functional approach play a role in family law generally, the functional approach also plays a role, although a limited one, in the context of spousal evidentiary privileges. Various courts have refused to allow married couples to invoke the privileges because their marriages lacked certain functional characteristics. In many of these cases, courts have found spousal evidentiary privileges inapplicable to couples who, though still married, were permanently separated or living separately with no chance of reconciliation.[4] Other courts refused to apply a spousal evidentiary privilege because the marriage at issue was a sham, that is, because the court found that the couple got married only for some limited purpose.[5] When a court determines that a married couple cannot claim a spousal evidentiary privilege because their marriage is dead, moribund, or a sham, it has invoked functional factors.

The functional approach to the spousal evidentiary privileges has various virtues. Under this approach, the characteristics of a relationship that determine whether a couple qualifies for the privileges closely match the various justifications for the spousal evidentiary privileges. For example, consider the argument that the confidential communication privilege encourages open communication and provides a refuge. Couples that have the functional characteristics that, under this approach, qualify them for the privileges, are in fact likely to communicate openly and provide each other with a refuge; those couples who do not satisfy these characteristics are less likely to be communicating with each other openly and providing each other with a refuge; they thus would not qualify for the privilege. Or, looking at this in a different way, if the confidential communication privilege is adequately justified by the goal of encouraging free and open communications between couples that cohabitate and are emotionally and economically interdependent, then the functional approach to the privilege would look to whether a couple is cohabitating and is emotionally and economically interdependent to determine whether they qualify for the privilege. The same holds

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true for other justifications for the privileges: insofar as a justification supports the privileges, the characteristics that determine whether a couple qualifies for the privileges under the functional approach would fit with this justification for the spousal evidentiary privileges.

Unlike the designation proposal, the functional approach is not overinclusive: only couples who have the appropriate functional characteristics get the privileges; couples in sham or moribund marriages do not qualify for the privileges, even if they are in fact married. Further, the functional approach is not underinclusive: couples who have the appropriate functional characteristics can claim the privilege even if they are not married (although they have the burden to prove that they have these characteristics).

Various scholars have described marriage law as a form of social engineering or "channeling." Creating the legal institution of marriage, providing certain rights, benefits, duties, and responsibilities that go along with it, and offering other incentives to enter into marriages encourages and socializes people to get married. This both helps them and the state. Giving married couples the spousal evidentiary privileges is part of using marriage to channel people into certain types of relationships. The functional approach to the privileges fits nicely with this account: people get the benefits of the privileges only insofar as they have the specific sort of relationship that the privileges are meant to encourage.

Finally, the functional approach has the additional virtue of treating what seem like similarly-situated relationships equally. Under this approach, some unmarried couples will receive the same evidentiary privileges that married couples do under the current approach to the privileges. Equality will prevail as all couples in relationships that fulfill the goals of the privileges will qualify for them.

There are, however, various problems facing the functional approach to spousal evidentiary privileges. Under the current approach to the privileges, to determine whether a couple gets the privileges, a court simply looks to whether there is a marriage. Under the functional approach, there is no clear line determining which relationships get the privileges. Whenever a party wants to invoke a privilege, a court must assess the characteristics of a relationship. Many courts have explicitly resisted the functional approach to the privileges for precisely this reason. For example, the Court of Appeals for the Ninth Circuit, in *United States v. Lustig* (1977, 747–8), refused to grant one of the privileges to a couple who had been living together for seven years, had two children, held themselves out as husband and wife, and erroneously believed they were common law married (the state where they lived did not allow for common law marriages). Rejecting a functional approach to their relationship, the court held that a communication between the couple was not privileged. Some courts have even resisted taking the functional approach to moribund marriages and sham marriages in determining whether the spousal evidentiary privileges apply, because they want a clear line that demarcates who gets the privilege. Although a handful of courts have expressed sympathy for

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granting spousal evidentiary privileges to certain unmarried couples,[6] no reported case, not even from a court willing to take the functional approach to moribund and sham marriages, has given a spousal evidentiary privilege to an unmarried couple, even if that couple exhibits marriage-like characteristics.[7]

A related concern is that the functional approach will necessitate "mini-trials within trials" to assess the functional characteristics of a relationship in order to determine whether a couple can claim a spousal evidentiary privilege. The concern is that this will be inefficient and a waste of judicial resources. The functional approach is not as difficult to apply as this suggests. Some courts already apply functional factors in the context of sham marriages and moribund marriages. Courts now have experience applying functional factors to families in various contexts like rent control law, domestic violence law, and child custody and visitation determinations. Although courts were initially concerned about the difficulties of applying functional approaches, many jurisdictions now regularly use such approaches in family law. There is every reason to think that courts could similarly get used to the functional approach to decide when to apply the spousal evidentiary privileges. Further, the version of the functional approach discussed here, because of the way it assigns the burdens associated with invoking the privileges, is easy for courts to apply.

Another argument against the functionalist approach to the spousal evidentiary privileges is a slippery slope argument. The concern is that if unmarried couples are allowed to claim the spousal evidentiary privileges, then, for example, mere roommates, people involved in polygamous relationships, and people involved in incestuous relationships will be allowed to claim the privileges. This argument is not strong; the slope is not so slippery. Insofar as a characteristic is important to determining whether a couple should be able to claim the privileges, this characterization can be included among the functional characteristics that determine whether a couple qualifies for the privileges. For example, if it is important for the policy that underlies the privileges that they be limited to two people only, then exclusivity can be included among the functional characteristics required to qualify for the privileges as it is in domestic partnership laws in some jurisdictions. As applied to roommates or siblings, the appropriate reply to this argument is to bite the bullet, namely to say that two siblings or two roommates who meet the functional characteristics appropriate to granting the privilege should be eligible to try to satisfy the relevant burden and claim the privilege. Given the functional characteristics involved in the version of functionalism proposed herein, it seems that few roommates will be able to meet this burden.

Another problem with the functional approach to the spousal evidentiary privileges is that the different burdens associated with claiming the privileges for married or otherwise registered couples as compared to unmarried couples will make it harder for same-sex couples to claim the privilege in jurisdictions that do not have civil unions, domestic partnerships, or another legal structure for the recognition of same-sex relationships. Under the functional approach presented

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here, the burden is on unmarried, non-registered couples to establish that they have the functional characteristics that warrant receiving the spousal evidentiary privileges. In jurisdictions that provide no legal recognition for same-sex couples, it will be much harder for same-sex couples to get the privileges than it is for different-sex couples because trial judges, who have a strong preference in favor of admitting evidence, will be unlikely to find that unmarried, non-registered couples meet the burden for claiming the privileges. This problem will be especially prominent in states with laws or with amendments to their respective state constitutions that explicitly refuse to recognize same-sex relationships or to give any of the rights or benefits associated with marriage to same-sex couples. These states will be hostile to the functional approach to spousal evidentiary privileges because they prohibit the recognition of same-sex relationships. However, a full appreciation of the actual provisions involved in the patchwork of recognition and non-recognition of same-sex relationships in the United States and the details of the functional approach advocated here reveals that this objection is not as strong as it might first seem. While it may be hard, it will not be *impossible* for same-sex couples to claim the spousal evidentiary privileges in most jurisdictions.

The relevant provisions in states that do not allow or recognize same-sex marriages vary widely. Some states simply prohibit same-sex couples from marrying in that state, but do not say anything about prohibiting same-sex couples from obtaining some of the rights and benefits that married couples receive. For example, Vermont, and Hawaii each have either a law or a constitutional amendment prohibiting same-sex marriage, but both provide legal recognition (of varying degree) to same-sex relationships. Other states, for example, Mississippi and Colorado, prohibit marriages between people of the same sex in the state and withhold recognition for marriages between people of the same sex contracted outside the state. Nothing in any of these provisions prevents the recognition of other relationships between people of the same sex besides marriage (namely, civil unions, domestic partnerships, reciprocal beneficiaries, or functional spouses), and some of the states with more limited non-recognition policies do recognize such non-martial relationships between people of the same sex. Other states, like Virginia and Arkansas, have, however, gone further and passed provisions that prohibit the recognition of relationships "similar to" marriages. Andrew Koppelman (2006, 142–8) has argued that such provisions are so broad that they may well be unconstitutional. They may, for example, prohibit two people from entering private cohabitation contracts, putting one's same-sex partner in one's will, and the like. But even if they are not found unconstitutional, these provisions are probably not in tension with the functional approach to spousal evidentiary privileges. If a state adopts this approach to spousal evidentiary privileges, not all married couples will be able to claim the spousal evidentiary privileges (namely, people in sham marriages and moribund marriages, although still married, will not get the privileges) and thus it is not clear that the privileges will, under this regime, constitute a benefit of marriage. Rather, the spousal evidentiary privileges

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will be a benefit of having a relationship with certain functional characteristics. Thus, allowing some same-sex couples to claim such privileges would not be in tension with broad anti-same-sex marriage provisions.

There is still, however, some inequality. Under the functional approach advocated here, different-sex couples in states that don't recognize same-sex relationships have a choice to qualify for the privileges: they can either get married or, if unmarried, try to meet the burden of showing that their relationship satisfies the relevant functional tests. In contrast, same-sex couples do not have this choice: if they want to claim the privilege, they will have to show that their relationship satisfies the relevant functional test. This is an inequality, but it is not an inequality that results from evidentiary rules.

A final argument against the functional approach is that expanding the privilege to include unmarried couples will further hinder the quest for truth, because it will increase the number of people who can prevent testimony about certain of their confidential communications and about certain things they know about their partners. There are two replies to this argument. First, because some married couples will not be able to claim the privilege under the functional approach (for example, those with moribund marriages), the amount of truth "lost" because the functional approach allows some unmarried or unregistered couples to claim the privileges will be somewhat "offset" because this approach prevents some married couples from claiming the privilege. Second, the idea behind the spousal evidentiary privileges is that some policy considerations justify constraints on the quest for truth. It may be that the arguments for having the spousal evidentiary privileges are weak and the privileges should be abolished. If, however, one or more of the arguments for the privileges is strong, then the quest for truth should be accordingly constrained. A properly-crafted functional approach will constrain the quest for truth no more than necessary to accomplish the public policy behind the strong arguments for the privileges.

VII. CONCLUSION

At the start of this paper, I reviewed various arguments for the confidential communication privilege and the adverse testimonial privilege. If none of these arguments are successful, then the privileges should be abolished. I have suggested that there may be some reasons to keep the privileges and that they are unlikely to be abolished. If the spousal evidentiary privileges are retained, then the functional approach is a better way to retain them. The functional approach to the spousal evidentiary privileges has several virtues, including that there is an especially close fit with the various arguments in favor of the privileges, that it is neither overinclusive nor underinclusive, and that it brings consistency and fairness in the rules of evidence and the law of domestic relations. As the arguments against the functional approach are not especially strong, this approach should be embraced.

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CASES CITED

Braschi v. Stahl Associates Co., 543 N.E. 2d 49 (NY 1989).
Greenwald v. H & P 29th Associates, 659 NYS 2d 473 (NY App. Div. 1997).
Hawkins v. United States, 358 U.S. 74 (1958).
In re Grand Jury Proceedings (Witness Ms. X), 562 F. Supp. 486 (N.D. Cal. 1983).
LaRoche v. Wainwright, 599 F.2d 722 (5th Cir. 1979).
Lutvak v. United States, 344 U.S. 604 (1953).
People v. Stanford, 242 N.W.2d 56 (Mich. App. 1976).
Trammel v. United States, 445 U.S. 40 (1980).
United States v. Acker, 52 F.3d 509 (4th Cir. 1995).
United States v. Apodaca, 522 F.2d 568 (10th Cir. 1975).
United States v. Lefkowitz, 618 F.2d 1313 (9th Cir. 1980).
United States v. Lustig, 555 F.2d 737 (9th Cir. 1977).
United States v. Mathias, 559 F.2d 294 (5th Cir. 1977).
United States v. Murphy, 65 F.3d 758 (9th Cir. 1995).
United States v. Neal, 532 F. Supp. 942 (D. Colo. 1982).
United States v. Porter, 986 F.2d 1014 (6th Cir. 1993).
United States v. Singleton, 260 F.3d 1295 (11th Cir. 2001).
Wolfle v. United States, 291 U.S. 7 (1934).
Wyatt v. United States, 362 U.S. 525 (1960).

REFERENCES

Bentham, Jeremy. 1827. *Rationale of Judicial Evidence*. Vol. 5. London: Hunt and Clarke.

Conley, Dalton. 2007. "Spread the Wealth of Spousal Rights." *New York Times*. May 20.

Koppelman, Andrew. 2006. *Same Sex, Different States: When Same-Sex Marriages Cross State Lines*. New Haven, CT: Yale University Press.

Krattenmaker, Thomas. 1976. "Interspousal Testimonial Privileges under the Federal Rules of Evidence: A Suggested Approach." *Georgetown Law Journal* 64(3): 613–68.

Levinson, Sanford. 1984. "Testimonial Privileges and the Preferences of Friendship." *Duke Law Journal* 1984(4): 631–62.

McCormick, Charles. 1954. *Handbook of the Law of Evidence*. St. Paul, MN: West Publishing.

Reutlinger, Mark. 1973. "Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege." *California Law Review* 61(6): 1353–93.

Stein, Edward. Forthcoming. "Spousal Secrets." In A. Sarat et al. (eds.), *Secrets of Law*. Stanford: Stanford University Press.

Wigmore, John Henry. 1923. *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*. 2nd ed. Boston: Little, Brown.

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NOTES

1 For a more detailed discussion of some of the issues discussed herein, see Edward Stein (forthcoming).
2 See, e.g., *LaRoche v. Wainwright* (1979, 726); *United States v. Lefkowitz* (1980, 1319).
3 This proposal draws on, without quotation, *Braschi v. Stahl Associates Co.* (1989, 55).
4 See, e.g., *United States v. Singleton* (2001), *United States v. Murphy* (1995), *United States v. Porter* (1993).
5 *Lutvak v. United States* (1953, 614–5) (no privilege because couple married for immigration purposes); *United States v. Mathias* (1977) (no privilege because defendant coerced witness to remarrying him so he could claim spousal privilege); *United States v. Apodaca* (1975, 571) (no privilege because defendant married witness three days before trial.
6 See, e.g., *In re Grand Jury Proceedings* (Witness Ms. X) (1983, 487), "it might be appropriate to allow [a person who has been cohabitating with a defendant for over six years, raising four children together, and "liv[ing] together as a family"] to invoke the marital privilege."; *People v. Stanford* (1976, 58): finding "cogent" the suggestion "not [to] rigidly apply the requirement of a legal marriage but, instead, [to] look to the relationship of the parties to determine whether the incidents of that relationship are those which the statute was intended to protect."
7 See, e.g., *Greenwald v. H & P 29th Associates* (1997, 474) (rejecting privilege for cohabitating same-sex couple); *United States v. Acker* (1995, 514) (no privilege for cohabiting different-sex couple living together for 25 years).

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