MAKING MARRIAGE

Daniel R. Ortiz*

LET me start with a confession. Like many people outside of family law and evidence, I had never thought about the adverse testimony privilege. Indeed, I had no idea it even existed. I thus read Mitt Regan’s *Spousal Privilege and the Meanings of Marriage* with both innocence and skepticism. While lacking any knowledge of the privilege, I doubted that even a commentator as keen and insightful as Regan could say anything interesting about so seemingly mundane a doctrine. My mistake. Although the privilege may have only insignificant direct effects on marriage, it does express and deeply shape our underlying notions about it. If only a “detail,” the privilege is one that both reveals and helps make the whole structure. My only fear is that this insight is too powerful. Accepting it makes it difficult to cabin analysis, particularly political analysis, in the way Regan does.

On one level, Regan sides with modern critics of the privilege. Like them, he believes the privilege is difficult to defend in traditional terms—promoting marital harmony. As he and others point out, marital harmony has long disappeared by the time one spouse wishes to testify against the other, and it is unlikely that the privilege directly affects how

* Professor of Law, University of Virginia School of Law, and Visiting Professor of Law, University of Southern California Law Center.
1 As Regan defines it, the adverse testimony privilege, subject to certain exceptions, “precludes any testimony by one spouse that may adversely affect the interest of the other in proceedings that are criminal in nature.” Milton C. Regan, Jr., *Spousal Privilege and the Meanings of Marriage*, 81 Va. L. Rev. 2045, 2052-53 (1995) (footnotes omitted). Although in many jurisdictions the witness spouse alone may decide whether to invoke the privilege, a minority of jurisdictions requires the consent of both spouses for such testimony. Id. at 2053-54. Regan considers primarily the minority form of the privilege. Id. at 2054. The majority version, just like the other spousal privilege Regan considers, the communications privilege, see Id. at 2055-63, 2090-2101, serves values quite different from those he sees underpinning the minority version. Unlike the version of the privilege Regan focuses on, the majority version and the communications privilege both express an external view towards marriage.
2 By “political analysis” I mean inquiry into the power relations certain social structures entail. As Regan recognizes, the privilege’s disparate gender impact is an important subject of such political concern. See id. at 2144-53.
3 Id. at 2058-63 (discussing criticisms of traditional defense of adverse testimony privilege).
4 Id. at 2060.

2157
people act within marriage. But instead of calling for the privilege’s abolition, as the critics do, Regan asks whether we might justify it on other, more fundamental grounds. Its longevity and the uproar that would greet any attempt to abolish it make him wonder whether we have not seriously mistaken the function it serves.

To understand the privilege, Regan reconstructs it as a “narrative” about our background understandings of marriage. In doing so, Regan proceeds as a legal anthropologist. He reads doctrine, even the more obscure bits of it, as part of a complex cultural practice that tells us much about ourselves, particularly about the ways we view one of our central social institutions. The privilege interests him partly because it expresses culture. Although in itself a small part of the regulation of marriage, the privilege helps reveal that institution’s deep structure.

This deep structure is highly conflicted. To Regan, we find ourselves caught between two contradictory visions. First, we envision marriage as a contract between two sovereign individuals. From this perspective, the institution exists to serve the interests of the individual parties and it deserves respect only so long as it continues to serve those interests. In this view, spouses judge a marriage’s value according to how well it helps them achieve their individual ends—whatever those might be. This model, which Regan calls the “external stance,” is premised on the individuality, self-interest, and fundamental independence of the spouses. Marriage is useful because it enables individuals to achieve cooperative gains that would otherwise be unattainable. It functions much like a business partnership. That is, it provides a form of organization that individuals may adopt whenever it is in their individual interests to do so. But the organizational form does not lead the spouses to view themselves as anything more than individuals in a mutually beneficial relationship. During marriage, each spouse’s autonomy remains primary.

---

5 Id. at 2062-63.
6 See id. at 2063-65.
7 See id. at 2066-67.
8 Id. at 2050-51 (explaining “the effect of culture on law”).
9 See, e.g., id. at 2066-67.
10 Id. at 2068-69 (discussing centrality of contractarianism and consent to external stance).
11 Id. at 2075-77 (discussing “pure relationship” theory of marriage and “reciprocity of benefits” it aims for).
12 See id. at 2049.
13 See id. at 2051 (“[T]he external stance can be seen as closely associated with the liberal ideal of autonomy.”).
Second, we view marriage as a kind of private community where norms of unity, sharing and interdependence govern. From this perspective, marriage serves a quite different purpose. Instead of providing an organizational structure through which individuals can achieve gains through cooperation, it seeks to transform individuals into something beyond themselves. Together spouses become something greater than two individuals hitched in pursuit of parallel aims.

In this second view, we judge marriage not according to how well it serves the interests of individuals, but rather according to how well it allows individuals to attain a different conception of themselves, a conception of themselves as part of a larger human couple. This view places the married couple first and demands that the spouses serve its interests. In short, the married couple enjoys priority over the individuals who make it up. Regan calls this view the "internal stance" since it requires people to accept and internalize the norms of relationship rather than constantly evaluate the relationship according to how well it continues to serve the spouses' individual interests.

Regan finds us caught between these two views of marriage. Despite their contradiction, we cannot give either up; both stances have a deep hold on us. We might, with a nod to Duncan Kennedy, refer to our condition as the "fundamental contradiction of familialism." Just as Kennedy famously found liberal legal culture caught between the irreconcilable demands of individualism and community, Regan finds marriage caught between these same demands. Regan recognizes that the family is not the sole site of this conflict, just one of the most pressing ones.

The adverse testimony privilege represents one side of this conflict. By preventing one spouse from betraying another in a criminal trial, it expresses the strong judgment that spouses should not put their individual interests first. Spousal loyalty is so important to us that we demand it even in the face of crime. To Regan, other legal doctrines, particularly

14 See id. at 2083-88.
15 See id. at 2083-85.
16 See id. at 2085 (discussing "'larger relational unit' that represents a shared way of life whose viability is a collective concern") (footnotes omitted).
17 See id. at 2049.
19 See Regan, supra note 1, at 2052 (noting tension between these two perspectives in many areas but claiming "[t]he need to reconcile or mediate between [them] is particularly pronounced in family law").
20 See id. at 2111-13.
the spousal communications privilege, represent the opposite view.\textsuperscript{21} They express the judgment that spouses are individuals who should constantly assess how well the marriage is serving them individually. The overall package of rules regulating marriage is incoherent because our own vision of marriage straddles two contradictory views. So long as law reflects culture and culture remains riven, we cannot expect the law to cohere.

Explaining the privilege's cultural roots is, however, only part of Regan's project. The law is no passive partner: just as law reflects culture, culture reflects law.\textsuperscript{22} Culture is constantly (and often consciously) shaped by many forces, law among them. This insight leads to the major argument in Regan's paper, his defense of the adverse testimony privilege. To him, the privilege not only expresses values present in culture but also shapes those values. In other words, the privilege performs a double function: It both expresses and maintains the conflict between the external and internal stances. The privilege is both effect and cause.

In viewing law as cause in addition to effect, Regan switches his role from anthropologist to pragmatist. That is, after analyzing the privilege descriptively to see what it tells us about ourselves, he evaluates it normatively and instrumentally. Is it a good thing, he asks? Should we retain, reform, or, following most of the commentators, abolish it?\textsuperscript{23} How would our world look without the privilege? In particular, how would our views of marriage change?

To answer these questions, Regan explores how the privilege works to shape our understandings of marriage, and he finds that it plays an important role in preserving the internal stance from corrosion by our culture's pervasive individualism.\textsuperscript{24} Without the symbolic support the privilege lends it, the internal stance, along with the unique human possibilities it makes available, might be lost.

The adverse testimony privilege works to bolster the internal stance in several ways. First, by making a symbolic statement about the importance of loyalty in marriage, the privilege encourages spouses to internalize loyalty as the ruling norm within marriage.\textsuperscript{25} By signaling that one spouse should not betray the other by testifying in return for a reduced plea, the privilege sets up loyalty in marriage as a "regulative ideal"\textsuperscript{26} and

\begin{itemize}
  \item \textsuperscript{21} See id. at 2092-2100.
  \item \textsuperscript{22} Id. at 2050-51 (noting "effects of law on culture").
  \item \textsuperscript{23} Id. at 2058-59 (describing views of commentators).
  \item \textsuperscript{24} See, e.g., id. at 2111 (discussing "potentially corrosive effects of incessant reflexivity").
  \item \textsuperscript{25} Id. at 2113-15.
  \item \textsuperscript{26} Id. at 2114-15.
\end{itemize}
so encourages loyal behavior throughout the marital relationship.\(^{27}\) Second, by reducing the danger of betrayal of one spouse by another, the privilege may encourage the kind of openness that makes unity in marriage truly possible.\(^{28}\) When spouses may act without fear of betrayal they are more likely to achieve the kind of intimacy and communion that typifies the internal stance. Third, the privilege identifies the marriage, not the individual, as the appropriate unit of identity. The privilege encourages each spouse to regard [the other] as a constituent of identity, rather than as a distinct person from whom she seeks to distance herself. This demarcation of the self’s boundaries draws attention to the ways in which spouses’ lives are intertwined and to the distinctive capacity for injury that such involvement makes possible.\(^{29}\)

In each of these ways, the privilege functions not directly but indirectly through its expressive spillovers. In other words, the privilege’s effect derives from the attitudes and behavior it inculcates in marriage generally, not in the narrow criminal context where it actually operates. Its purpose is more to bolster an overall internal ideology in marriage than to regulate criminal testimony, although of course it does that too.

I am less certain than Regan that such symbolic reinforcement represents the right response to corrosive individualism. Does regulating marriage to avoid visible disruption to the internal stance actually move us closer to that ideal? In particular, does presenting ourselves as loyal, when we often are not, increase loyalty? Would marriage perhaps be a better institution if we admitted that our primary instincts are sometimes external ones and so fashioned rules that regulated the marital opportunism that the external stance makes possible?

Also, what of those irredeemably fallen among us whom individualism has so deeply touched that they cannot assume the internal stance? Should we impose an internal model of marriage on them even if they cannot fit it? Can we justify doing so just for the benefit of others who might fit it if we encourage them enough? Perhaps we should strive instead for less symbolically laden rules that would allow particular married couples to assume their own stances—whatever those might be.

Furthermore, might not symbolically reinforcing the internal stance in the way Regan suggests actually move many people further away from it? The privilege may send a signal about marriage telling people they are

\(^{27}\) Id. at 2114 ("[S]ending the message that loyalty is required in one setting may induce loyal behavior in other circumstances.").

\(^{28}\) Id. at 2115.

\(^{29}\) Id. at 2122.
more selfless and interdependent than they actually are. By comforting them through flattery, it may ease the worries that would cause them to work harder to assume the internal stance. If this occurred, the privilege would not shape our values in any positive sense, but would, in fact, frustrate beneficial change in our attitudes and behavior by allowing us to avoid facing our shortcomings.

Even one who thinks such symbolic expressions do work to shape us into better people might worry more than Regan about the costs. In order to make the symbolism work we must sacrifice at least a few victims to it. How troubled should we be? Regan considers these objections and ultimately decides—not without some ambivalence—that we should support the privilege.30 The greatest cost, he feels, is the cost to women.31 Under present gender conditions the privilege does not really operate to prevent spouse from testifying against spouse, but to prevent wife from testifying against husband.32 To Regan's mind, this poses two distinct dangers to women.

First, it imposes "direct costs" on some particular women.33 Whenever the privilege prevents a wife from testifying against her husband, it effectively prevents her from plea-bargaining with the prosecutor. Regan downplays this cost by arguing that it is hardly unfair to convict a person of a crime they actually committed.34 But from the wife's perspective, the privilege surely does appear a penalty. As Regan recognizes, this is especially troubling when in many marriages men hold power over women and may coerce them into becoming accomplices.35 Still, Regan would not abolish the privilege on this ground because doing so would "adopt the dangerous assumption that wives categorically are incapable of acting autonomously with respect to criminal behavior in which their husbands are involved."36 Such a rule would have a particularly pernicious spillover. It would signal that women lack agency generally and so would hurt them in the long run.

Second and more seriously, the privilege may impose less concrete but still sizable costs on women as a class. In particular, the privilege may "reinforc[e] the traditional idea that a woman should stand by her man

---

30 Id. at 2154-56.
31 Id. at 2105-06 ("[T]he most serious concern may be the symbolic potential of the privilege to perpetuate an ethic of self-sacrifice for women within marriage.").
32 Id. at 2144.
33 Id. at 2145.
34 Id.
35 Id. at 2145-46.
36 Id. at 2145.
regardless of the personal costs that she incurs by doing so."

The privilege embodies an ideal of selflessness which when applied exclusively to women is of debatable value. Although some women celebrate this ideal as specially feminine, others argue its dangerousness instead. To this latter group, this ideal represents nothing more than the celebration of the traditional terms of women's oppression. In short, these groups argue over whether this moral ideal expresses women's true voice or a voice that men have given them. But whatever one's views on this general debate, one might be very suspicious of how the ideal is invoked here. Even those believing that selflessness represents a feminine ideal might worry when it is being enforced against many women and few men. Such disparate application runs the danger of making women prisoners of their own special virtue.

In response, Regan argues that the ideal's genealogy should not necessarily condemn it. That men may have led women to think of themselves in relational terms is no reason to abjure relational thinking entirely, especially as a quality of spouses, not just of wives to husbands. This is true, but should we not worry whether a rule that enforces this virtue primarily against women will really help men achieve it?

Regan's insight into how law both expresses and shapes culture suggests further complications. What if the symbolically expressive realm on which he focuses reflects less the emerging state of culture than the interests of those who enjoy power within it? What if some people have more control over the symbolically expressive realm than do others? In other words, what happens if we view Regan's anthropology and pragmatism through the lens of politics?

Regan's most powerful insights might offer ammunition to someone, like the friend who told him that the privilege "sounds like something men thought of," who suspects that the internal stance is itself gendered. One could argue, in fact, that the internal stance is critical to maintaining the ideology of marital privacy, an ideology that insulates some of our most central social interactions from state intervention and supervision. Many, believing that the family and its members cannot flourish under state supervision, feel such insulation completely appropria-

37 Id. at 2148.
38 See id. at 2072-73.
39 The primary text is Carol Gilligan, In A Different Voice (1982).
40 Catherine MacKinnon is the primary example here. See Difference and Dominance, in Feminism Unmodified 32, 39 (1987).
41 See id. at 2150-52.
42 Id. at 2149.
Others, however, believe that the institution of marital privacy exists largely so that those with power in the private sphere may wield it freely over those without it. Marriage as presently constructed exacerbates these fears because it exclusively pairs one member of the superior gender class—men—with one member of the inferior one—women.

This objection to the adverse testimony privilege worries that the symbolically expressive content of the privilege works to create private spaces safe for gender oppression. Just as the privilege’s symbolic spills-overs help keep violations of the ideal of marital unity and interdependence out of cultural consciousness, they also keep the state more safely outside the marital relationship. Marital privacy can thus make it easier for those with power inside marriage to exploit those without it. For many years, for example, the internal stance was invoked to justify the marital exemption in rape law. The worry is that by preventing marital betrayal in public the privilege may actually facilitate it in private. By outlawing public opportunities for women to betray men the privilege may create safer private opportunities for men to betray women.

I mention these possibilities not by way of criticism. Although they may complicate Regan’s picture and call his ultimate, if ambivalent, defense of the privilege into question, they are possibilities that his own insights enable us to see. Viewing law in terms of how it both expresses and shapes culture gives us a vantage not only on the privilege but also on our conflicted views of marriage itself. It is a great credit to Regan that his insights enrich both these subjects even more than his analysis sug-

---


44 See e.g., Mary Ann Glendon, The Transformation of Family Law 145-46 (1989) (“Underneath the mantle of privacy that has been draped over the ongoing family, the state of nature flourishes.”).

45 Regan recognizes as much when he states, “The suggestion that the adverse testimony privilege contributes to an understanding of marriage that reinforces asymmetries of power and opportunity along gender lines should lead us to be cautious in embracing the privilege as a vehicle for fostering the internal stance toward marriage.” Regan, supra note 1, at 2149.

46 As the New Jersey Supreme Court has described it: 

[T]he common law once included the concept that a husband and wife were one person, that after marriage a man and woman no longer retained separate legal existence. As a result of this concept, some have argued that a husband could not be convicted of, in effect, raping himself.

State v. Smith, 426 A.2d 38, 44 (N.J. 1981); see also People v. Liberta, 474 N.E.2d 567, 573 (N.Y. 1984) (reporting that historically the exemption was premised on the notion of “irrevocable implied consent.”).
gests. I have only one caution. As helpful as legal anthropology and pragmatism can be, especially in hands as skilled as Regan's, there is a danger to doing either without constant attention to politics.