# TRUTH AND JUSTICE VS. THE INTEGRITY OF THE FAMILY UNIT: FAMILY MEMBERS' TESTIMONIES FROM A COMPARATIVE AND NORMATIVE VIEWPOINT

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TABLE OF CONTENTS



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## I. INTRODUCTION

One of the main goals of criminal procedure is to expose the factual truth.[1] Exposure of the truth is essential so that justice can be done in a criminal procedure,[2] because it enables the court to determine whether the defendant is guilty or innocent. It is in society's interest to convict guilty defendants and to acquit those who are innocent.[3] The ability to convict guilty defendants and acquit the innocent depends on the court's ability to expose the factual truth.[4] However, revealing the factual truth is not a supreme and absolute value. There are cases in which the desire to reach the truth succumbs to other important values worthy of protection; for example, exclusionary rules of evidence or privileges may be granted for relevant information. These rules are intended to protect important values such as privacy, the right to due process or free communication between a lawyer and their client, even at the cost of a potential harm to the fact-finding task (since they prevent the court from obtaining evidence) and the court's ability to do justice.

In order to protect the values of domestic harmony and the integrity of the family unit, many jurisdictions have been prompted to determine special rules restricting the testimony of spouses and/or parents and children in criminal proceedings. In some legal systems, including in Israel, the witness's competence to give evidence (for the prosecution) against a family member is annulled, while other systems, like the USA, Australia and Germany, grant these witnesses privilege that enables them to avoid testifying against their family member.[5] The main purpose of these rules is to maintain the integrity of the family unit and to avoid compelling people, who are in the most natural close and trust-based relationship, to harm their family member.[6] Additionally, when family members have an interest in the matter, putting them on the witness stand presents them with a difficult dilemma: having to choose between

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[1] WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 117 (1985); Aharon Barak, *On Law, Judgment and Truth*, MISHPATIM 27 11, 13 (1996); Yaniv Vaki, BEYOND REASONABLE DOUBT: THE FLEXIBILITY OF PROOF IN CRIMINAL JUSTICE 146–151 (2013); Emanuel Gross, *The Adversarial Debate Method in Criminal Procedure–Does It Enable Judicial Activism*, STUDIES IN LAW 17 867, 874–75 (1993) (indicating that the important goal of criminal procedure is to administer justice for the sides in the trial, while one of the fundamental conditions for the realization of this goal is to permit the investigation of the truth).

[2] Barak, *supra* note 1.

[3] LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY 2 (Gerald Postema ed. 2006).

[4] Mordechai Kremnitzer, *Rethinking Criminal Process*, 17 MISHPATIM 475, 478 (1987).

[5] See discussion below, in Part Two.

[6] Memorandum to Amend the Evidence Law (Relatives' Testimony) cl. 3 (2013) [hereinafter Memorandum to the Law of 2013]; *see also* CA 500/77 Omri v. State of Israel 33(22) PD 681, 698–99 (1979) (Isr.); ELIAHU HARNON, THE LAW OF EVIDENCE 86–88 (1970); CrimC 4/84 State of Israel v. Balut**,** PM (1) 324, 328–29 (1985) (Isr.).

a duty of loyalty to the family member versus the duty of loyalty to the truth.[7] The assumption is that when the prosecution is entitled to compel witnesses to give evidence against their family members, this harms domestic harmony and the stability of the family. Thus, these rules, which prevent the witnesses from giving incriminating testimony against their family members, protect these values, even at the cost of harm to the aims of criminal law.

As a rule, there are two main models for the regulation of family members' testimony in different legal systems. I shall call these models the competence model and the privilege model. Under the competence model, family members do not have the competence to testify on behalf of the prosecution in certain cases. In these cases, the prosecution is not entitled to summon a person on its behalf to testify against a family member. Such an arrangement in which a person is not competent to testify against a family member is an exception to the competence rule that developed in common law and that was adopted by modern law, under which every person has the competence to testify in any legal proceedings.[8]

The rationale underpinning the competence rule is to enable the court to receive information that is relevant to the case independent of the identity of the person giving the information.[9] This helps the court in its work of revealing the truth and doing justice. When the family member's competence to testify for the prosecution is annulled, although the task of revealing the truth and doing justice is harmed, any possible harm to domestic harmony and the integrity of the family unit is avoided.[10]

The second model that developed in different legal systems is the privilege model. Under this model, the witness is granted the privilege to choose not to testify for the prosecution against their family member. In contrast to the competence model, a privilege does not annul a person's competence to testify against their family member, rather it gives them, as the holder of the

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[7] CA 500/77 Omri v. State of Israel 33(22) PD 681, 699 (1979) (Isr.); HARNON, *supra* note 6, at 87.

[8] HODGE M. MALEK, JONATHAN AUBURN, RODERICK BAGSHAW, PHIPSON ON EVIDENCE 257 (19th ed. 2018); RICHARD GLOVER, MURPHY ON EVIDENCE 164 (15th ed. 2017); JEFFERSON L. INGRAM, EVIDENCE 249–250 (12th ed. 2015); CROSS & TAPPER, ON EVIDENCE 223–224 (12th ed. 2010); *see also* KENNETH S. BROUN, MCCORMICK ON EVIDENCE, PRACTITIONER TREATISE SERIES 414–17 (17th ed. 2013); Evidence Ordinance, 5729–1971 § 2, (Isr.) (determining the general rule that everyone has the competence to testify in any trial, subject to what is said in Sections 3 and 4, and no one is disqualified as a witness because he is a litigant in a civil court case, or the complainant or accused in a criminal case, or because he is the employer, employee, spouse, or relative of the claimant, the complainant, the respondent or the accused, or because he was convicted or bears a punishment for a crime).

[9] *See* GABRIEL HALEVI, THEORY OF THE LAW OF EVIDENCE 413 (2013) [Hebrew].

[10] *See, e.g.*, *Marital Privilege*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/marital_privilege (last visited Nov. 8, 2019).

privilege, the right to refuse to give testimony.[11] In the case where the witness refuses to testify against a family member, it is impossible to compel them to do so by imposing a sanction on them due to the refusal.[12] The holder of this privilege is also entitled to waive their privilege and testify against their relative. Thus, whether the law annuls family members' competence or grants them privilege, it prevents the court from receiving relevant evidence that might advance the search for the truth. This may increase the risk for judicial mistakes that will be expressed in the acquittal of guilty defendants, when the single or principal evidence is the recollection of a family member whose evidence is not heard in court. Since the goal of criminal procedure is to convict guilty defendants and to acquit the innocent, these regulations harm the ability of the prosecution and courts to convict guilty defendants.

The aim of this Article is to present a discursive, normative, and critical discussion on the two main general models that have developed in different jurisdictions. Part One of the Article discusses the competence model in comparison with the privilege model. In this chapter, I discuss the advantages and disadvantages of each of these models. Part Two consists of a comparative discussion, in which I examine different methods of regulation employed around the world for family members' testimony in criminal proceedings. The purpose of this chapter is to provide a comparative, descriptive view of this issue, which will explain the normative tension existing between the protection of the search for the truth and protection of the integrity of the family unit, and the balance between them in each of the above-mentioned legal systems.

In light of these discussions and the conclusions reached in the first two sections of the Article, in Part Three I attempt to answer the question: What is the optimal model to appropriately and justly create a balance between the two conflicting values—the search for the truth in opposition to the integrity of the family unit?

## II. PART ONE: THE REGULATION OF FAMILY MEMBERS' TESTIMONY ACCORDING TO THE "COMPETENCE MODEL" AS OPPOSED TO THE "PRIVILEGE MODEL"

The competence model annuls the witness's competence to testify against their family member. This model assumes that evidence given against the family member could disturb the integrity and the stability of the family unit. For this reason, spouses, and in some jurisdictions parents and children, should be prevented from testifying against one another, except in

[11] Except when the law allows the courts to compel the witness to testify, as in Australian law, which is discussed in the second chapter of this Article.

[12] *See* Paul F. Rothstein & Susan W. Crump, *Who May Claim the Adverse Spousal Testimonial Privilege*, FED. TESTIMONIAL PRIVILEGES § 4:5 (2019).

extraordinary cases. The advantage of the competence model is that it does not permit the prosecution to use an individual's testimony against their family member. In this manner, the model protects the integrity of the family unit from any possible harm that might be caused as a result of that person testifying against their spouse and/or child or parent.

However, in order to protect the family's unity, society must sacrifice other no less important values: truth and justice. The assumption is that if the competence of that individual-relative was not annulled, their evidence would assist the court in clarifying the truth while reducing the probability that the judge will make mistakes in fact-finding. The annulment of family members' competence harms public interest since it makes it difficult for the prosecution to bring guilty defendants to trial and to convict them in cases where the sole or main incriminating evidence against the defendant is that of their family member. While, as a rule, testimony that can benefit a family member is permitted—and may help their defense—evidence against the family member is forbidden, and its absence hinders the possibility of bringing guilty defendants to court and convicting them. Consequently, the prohibition prevents the court from receiving information against the accused and protects guilty defendants while frustrating attempts to prosecute and convict them.[13] As a result, the goals of penal law cannot be achieved.

From the deontological viewpoint of punishment, justice demands retaliation against guilty defendants who have committed a crime and harmed protected values.[14] Annulling the family member's competence to testify also obstructs the utilitarian purposes of punishment.[15] Additionally, failure to punish

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[13] Asaf Harduf, *Husband vs. Wife, Truth vs. Family, Or: The Fourth Gaze at Competency to Testify in Criminal Law*, HAIFA L. REV. 273, 302, 319, 324 (2007).

[14] One of the most important and influential theories of morality is the deontological morality theory originating from the Kantian philosophy school. Deontological theory emphasizes the internal value of an act, irrespective of the issue of its result. Accordingly, there is justification for the imposition of criminal responsibility on the condition that guilt adheres to the actor's behavior. The argument is that when a person chooses to harm social values, they deserve negative feedback from the society in the form of condemnation, conviction and punishment. All modern penal law systems demand the existence of guilt in order to constitute a crime. *See* IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS (Thomas Kingsmill Abbott trans. 1873) (1785); IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT (W. Hasti trans. 1887) (1796); IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE (John Ladd trans. 1965) (1797); GEORG WILHELM FREDERICH HEGEL, THE PHILOSOPHY OF RIGHTS (T.M. Knox trans. 1969); GABRIEL HALEVY, 1 THEORY OF CRIMINAL LAW 155–56 (2009); YORAM RABIN & YANIV VAKI, 3 CRIMINAL LAW 1429–30 (3d. ed. 2014) [Hebrew].

[15] According to the consequentialist theory of morality, developed in the 19th century by Jeremy Bentham and his follower, John Stuart Mill, actions should be evaluated according to the extent to which they produce happiness. This approach has its origins in the teachings of Aristotle and relies on the insight that the action itself has no moral value, and it should be evaluated according to its results. Since Bentham saw the search for maximal

guilty defendants prevents society's attempts to rehabilitate them and reintegrate them within society as a law-abiding citizen. Thus, failure to punish the offender impairs the punishment's deterring ability, because when there is no concrete threat of actual punishment, there is no deterrence for the offender's recidivism, nor will other potential offenders be deterred from committing the same crimes. The fact that the accused will not be prosecuted and will not be punished for this also harms the main goal of sentencing, since it does not allow society to incapacitate offenders, or at least limit their ability, to continue to harm society and its members. Clearly, the privilege model provides a response to these disadvantages. This model, as noted, does not annul family members' competence to testify one against the other, but rather it gives them the right to choose whether to testify against their relatives or not. When the witness chooses to testify against their family member, then it is possible to realize the proceedings against whoever has harmed society's values and to convict them.

The privilege model has an additional advantage over the competence model. In a world where information is limited and the transmission of information to the court is subject to legal restrictions such as exclusionary rules of evidence,[16] the grant of privilege[17] impedes the authorities' ability to obtain relevant information derived from the witness's senses and to transmit it to

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happiness as a supreme moral goal, then punishment should also be motivated by the same forward-looking rationale. It is therefore only possible to justify punishment when it is imposed in order to attain goals that are useful for society such as deterring criminals from committing additional offenses or educating or rehabilitating the criminal. *See* JOHN STUART MILL & JEREMY BENTHAM, THE UTILITARIANS 17 (1961); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 68–162 (1789); DAVID LYONS, FORMS AND LIMITS OF UTILITARIANISM 1–29 (1965); JOHN RAWLS, A THEORY OF JUSTICE 23–26 (1971); RABIN & VAKI, *supra* note 14, at 1422–23; HALEVY, *supra* note 14, at 173.

[16] *See, e.g.*, GLOVER, *supra* note 8, at 292; BROUN, *supra* note 8, at §§ 87–97 (discussing the rule against hearsay that prevents the court from receiving evidence that was brought to the knowledge of the witness because of second-hand testimony and was not absorbed through the witness's own senses).

[17] Privilege grants the witness the right to avoid passing on the information in the court proceedings. In general, privileges operate to protect communications made within the context of various professional relationship. The rationale advanced for these privileges is that public policy requires the encouragement of communication, without which these relationships cannot be effective. *See* BROUN, *supra* note 8, at 465–66. The following are examples of such privileges: privilege between clients and their lawyers; privilege for confidential information secured in the course of the physician-patient relationship; privileges for government secrets; the clergyman-confessor privilege; the journalist's privilege; executive and governmental privileges; privilege against self-incrimination which is defined in the Fifth Amendment to the U.S. Constitution; privilege for improperly obtained evidence; privilege for marital communications, etc. *See, e.g.*, CROSS & TAPPER, *supra* note 8, at 415 –75; MALEK ET AL., *supra* note 8, at 661–811; GLOVER, *supra* note 8, at 642–723; BROUN, *supra* note 8, at 465–992; *see also* SCOTT N. STONE & RONALD S. LIEBMAN, TESTIMONIAL PRIVILEGES (1983).

the court, while the passing of time also makes it difficult to clarify the truth. Thus, against the background of all these factors, the annulment of a person's competence to testify against their family member is yet another obstruction to the flow of information to the court and hinders its ability to reveal the factual truth. Even if it is claimed that protection of the family unit justifies the harm that is caused to the purposes of the substantive and procedural criminal law, it is difficult to justify those damages, when the witness is interested in testifying against their family member. In this situation, the witness has revealed that they are interested in prosecuting the defendant and doing justice with them, while also ensuring justice for themselves, despite the harm to the family unit. Moreover, giving incriminating evidence indicates that the family unit has already been disrupted. When witnesses express their consent to testify against family members, they are naturally aware of the implications of their testimony including the possible harm to their relationship with their family members. However, when witnesses are willing to sacrifice all of this so that justice can be done with their guilty family member, then they should be allowed to testify.

In contrast, another argument—of principle—can be presented, supporting the competence model. It can be argued that the competence model assumes that the family unit is a social value worthy of protection, and that it is not the private value or interest of any witness. In other words, society has an interest in fostering and protecting the institution of the family, and it should not be "privatized" nor should whoever wishes to harm it be allowed to do so. For example, lawyer-client privilege applies even after the work relationship between them ends, to enable people to trust their lawyers with full confidence. This is a connection or relationship that society wishes to foster and protect, because the assumption is that people cannot completely trust their lawyers if the lawyer could one day testify against them.[18] Thus, it can be argued that allowing the relative to choose whether to testify against their family member or not, even after the event disturbed the family unit, could in general harm the institution of the family, which is an institution that society wishes to encourage. In this sense, the competence model provides a good safety-net for the general-social institution of the family in contrast to the privilege model, which sees the protection of the family unit as a personal matter.

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[18] *See, e.g.*, Evidence Order (New Version), 5731–1971, §48, 2 LSI 209 (1972) (Isr.) (arranging lawyer-client privilege and determining that: (a) for objects and documents exchanged between a lawyer and their client or between another person on behalf of the client, which has a relevant connection to the professional service provided by the lawyer to the client, there is no obligation that the lawyer should deliver them as evidence, unless the client waives their privilege; and this is also the rule for an employee of the lawyer when objects and documents given to the lawyer reached their hands as a result of their work in the service of the lawyer; (b) the stipulations of sub-clause (a) will also apply after the witness ceases to be served by the lawyer or by the lawyer's employee).

An additional advantage is the legal certainty offered by the competence model, improving the prosecutor's ability to handle criminal files. Once the witnesses are granted privilege, the choice whether to testify or not is left in their hands until the moment they testify. In such a situation, a state of uncertainty prevails that makes it difficult to manage the procedure because the decision whether to present a bill of indictment, or not, relies on the existence of a reasonable probability of conviction. This decision depends on the existence of evidence that incriminate the accused. Therefore, when this set of evidence includes a condemning assertion that is subject to the witness' discretion at trial, such circumstances make it more difficult for the prosecutor to estimate the probability of conviction both for the presentation of the bill of indictment and the consolidation of a plea bargain. Moreover, it is difficult to impose detention when the main consideration for this is the uncertain ability of the main witness to testify.

Another justification for the competence model is that when the delivery of the testimony is given to the discretion of the witnesses, the witness is exposed to pressure by those who wish to persuade them not to testify. In my opinion, this argument by itself cannot support the annulment of the family member's competence. The fact that the witness may endure improper pressures and influences creates a difficulty that the court should cope with. Insofar as the testimonies of family members are subject to the witness' consent, rules can be determined to minimize those improper pressures and influences. For example, in the Australian legal system, discussed in Part Two below, it is possible to grant the court the authority, in certain cases, to rule that privilege is removed and that the witness must appear in court, despite their refusal to testify.[19] Another way is to grant the court the authority to compel the witness to give evidence when the prosecutor proves that the refusal of the witness to appear in court to testify stems from external pressure. Yet another way is to ask the witness to agree to testify at the end of their interrogation in the police station, without leaving them the possibility of retracting this consent to testify later on. Alternatively, when the witness agrees to testify but afterwards alters their intention, and it is proven that their refusal to testify stems from external pressure, it may be possible to find a solution by asking

[19] See *infra* pp. 400–02 for a consideration of Australian law. In English law, legal professional privilege is absolute and potentially permanent. It does not end even with the death of the client and continues indefinitely unless waived. *See* GLOVER, *supra* note 8, at 695. A similar situation exists in American law, where "the accepted theory is that the protection afforded by the privilege will in general survive the death of the client." BROUN, *supra* note 8, § 94, at 581; *see also* State v. Macumber, 544 P.2d 1084, 1086 (Ariz. 1976); Swidler & Berlin v. United States, 524 U.S. 399, 401 (1998). In Swidler, the court emphasized that the knowledge that communications will remain confidential even after death "encourages the client to communicate fully and frankly with counsel." *Id.* at 407. *But see* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2314, 2329 (John T. McNaughton ed. 1961) (pointing out a narrow exception to attorney-client privilege surviving death in the case of wills).

the court to summon the witness to appear in court and to testify. It follows, that it will be possible to provide a response to the fear that the witness will be subject to pressure that will deter them from testifying, and there is nothing in this fear of itself to constitute a consideration against the adoption of the privilege model.

From the above review it seems that each of the models has its own advantages. If the advantages of the competence model are expressed in the protection of the integrity of the family unit, legal certainty and stability that it provides, then the main advantages of the privilege model are expressed in advancing the fact-finding task and doing justice and also in better realization of the goals of penal law and the purposes of criminal procedure.

In the next section, I examine various overseas rules relating to family members' testimony. Each of these arrangements subdues the state of normative tension between the fact-finding task and the integrity of the family unit in a different manner, and determines the point of balance between them in a different position along the normative spectrum.

## III. PART TWO: FAMILY MEMBERS' TESTIMONY IN COMPARATIVE LAW–A DISCURSIVE AND NORMATIVE PERSPECTIVE

In this section, I discuss the legal status of family members' testimony in comparative law. Within its pages, I note extant arrangements in English, American, Australian and Israeli law. Each of these legal systems regulates family members' testimony in a different manner. This comparative discussion is restricted to these states, since it aims to compare the different ways in which different jurisdictions subdue the normative tension between striving for the truth on the one hand and the integrity of the family unit on the other hand, and set the point of balance between these two values at different points.

### *A. England*

In England, the law distinguishes between competence to testify and compellability to testify.[20] English law stipulates that any person has the competence to testify and can be compelled to testify.[21] This rule is subject to exceptions, a remnant of English common law and other exceptions anchored in legislation. The exception that relates to family members' testimony in a criminal procedure is anchored in the terms of Section 80(2)–80(4) of The Police and Criminal Evidence Act (1984) (PCEA).[22] In English law, the definition of "spouse" for the matter of the duty to testify, includes a person who is

[20] RICHARD GLOVER & PETER MURPHY, MURPHY ON EVIDENCE 552 (13th ed. 2013).

[21] *Id.*

[22] The Police and Criminal Evidence Act 1984, c. 60, § 80 (UK), http://www.legislation.gov.uk/ukpga/1984/60/section/80.

legally married to the accused according to English law on the date when the evidence is heard[23] or a partner of the same sex recognized by law as a "civil partner" on the date when the evidence is heard.[24] According to the stipulation of Section 80(2A) of the PCEA, it is possible to compel a person to testify in the trial of their accused spouse, but only in two cases: the first, when the accused summons their spouse to testify to their benefit in respect of any specified offense[25] and the second, when the prosecutor summons the spouse to testify against their spouse in offences of domestic violence, or sex offences and violence against minors under the age of 16.[26] English law, in contrast to Israeli law, does not relate to parents' and children's competence to testify. Consequently, parents have the competence to testify in the trial of their children and vice versa. Additionally, in criminal trials in England, the prosecuting authorities have broad administrative discretion to summon parents to testify against their children and also children against their parents.[27]

### *B. United States of America*

In U.S. federal law, a spouse's testimony is regulated under the privilege model. Rule 601 of the Federal Rules of Evidence states "every person is competent to be a witness unless these rules . . . provide otherwise," setting forth a competency rule.[28] Rule 501 provides that "the privilege of a witness [or] person . . . 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."[29] In federal law, restrictions on relatives' testimony is governed by case law, while in the various states, they are governed both by statute and

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[23] GLOVER & MURPHY, *supra* note 20, at 566. According to this definition, a "spouse" whose marriage is in principle void, spouses who married under foreign law, in a place where the marriage is not recognized as valid by English law, and also "cohabiting spouses" are not considered to be "spouses" for the purpose of this definition.

[24] The Civil Partnership Act 2004, c. 33 P. 1 § 1 (UK), http://www.legislation.gov.uk/ukpga/2004/33/section/1 (defining "civil partners," which applies to Clause 80 of the PCEA).

[25] The Police and Criminal Evidence Act 1984, c. 60, § 80 (UK), http://www.legislation.gov.uk/ukpga/1984/60/section/80.

[26] *Id.* at § 80(3), (7).

[27] *See* HALEVI, *supra* note 9, at 624.

[28] FED. R. EVID. 601. The Federal Rules of Evidence are binding on federal courts, and many states have adopted the rules in their present composition or with alterations. *See* THE KNESSET—RESEARCH & INFO. CTR., FAMILY MEMBERS' EVIDENCE-COMPARATIVE REVIEW 2a (2007), *available in Hebrew at* https://fs.knesset.gov.il/globaldocs/MMM/194e6b58-e9f7-e411-80c8-00155d010977/2_194e6b58-e9f7-e411-80c800155d010977_11_7021.pdf [hereinafter The Knesset Report].

[29] 29 C.F.R. § 18.501 (2009).

case law. [30] The Supreme Court has recognized two types of privileges. The first type is privilege in the face of evidence against an accused spouse in a criminal trial (known as spousal/marital [adverse] testimonial privilege). This privilege grants the person the right to refuse to testify against their spouse, usually when the spouse is accused of committing an offense.[31] In order to claim this type of privilege, the spouses must be married at the time of the trial.[32] The holder of the privilege is the spouse who is to testify, and so, only they are eligible to waive the privilege,[33] and to testify against the spouse-defendant, without the latter being able to prevent them from doing so. It is noted that in addition to its appearance in federal law, this privilege exists in thirty-one U.S. states.[34] Most of these states only implement the privilege in criminal law, while some of them apply it in civil proceedings as well.[35] In the decisive majority of the states, the holder of this type of privilege is the testifying spouse.[36] In the states of Arizona, Minnesota, Washington, and Colorado, the privilege holder is the accused.[37] In the states of Kentucky, Mississippi, Nebraska, Virginia, and Wyoming, both spouses hold the privilege.[38] This means that in order for the spouse to be able to testify against their accused spouse, the consent of both spouses is required.[39] In these states, if a spouse is interested in testifying against their accused spouse, the accused has the power to prevent this evidence against them from being heard. However, even when the accused does not oppose the hearing of this testimony, their spouse is entitled to refuse to testify against them.[40] Most of the states that recognize privilege of this type also determine exceptions, in which privilege will not apply and the spouse must testify against their accused spouse, such

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[30] The Knesset Report, *supra* note 28, at cl. 2.b.1. In different states, the privileges are derived from both case law and legislation. *See also* R. Michael Cassidy, *Reconsidering Special Privileges After Crawford*, 33 AM. CRIM. L. 339 (2006).

[31] Trammel v. United States, 445 U.S. 40 (1980). In this case the Supreme Court affirmed the existence of an adverse testimonial privilege under federal law.

[32] United States v. Snyder, 707 F.2d 139, 147 (5th Cir. 1983). A valid marital relationship includes same-sex marriage. *See, e.g*., Obergefell v. Hodges, 135 S. Ct. 2584 (2015); VT. STAT. ANN. tit. 15, §1204(e)(15) (2008); N.H. REV. STAT. ANN. §457:45 (2014).

[33] Trammel v. United States, 445 U.S. at 53; Cassidy, *supra* note 30, at 357; *see also* United States v. Brock, 724 F.3d 817, 823 (7th Cir. 2013) (holding that marital privilege belongs to testifying spouse only).

[34] Cassidy, *supra* note 30, at 364 n.192 (indicating that these states include Alaska, Arizona, California, Colorado, Connecticut, Hawaii, Idaho, Maryland, Massachusetts, Minnesota, Michigan, Nevada, New Jersey, Nebraska, Ohio, Pennsylvania, Texas, Utah, Washington, Oregon and Wyoming).

[35] *Id.* at 365.

[36] *Id.*; The Knesset Report, *supra* note 28, at 2b.1.

[37] Cassidy, *supra* note 30, at 365 n.196. These states apply the approach that preceded the decision in *Trammel*, in which the privilege holder is the accused.

[38] *Id.* at 365 n.197.

[39] The Knesset Report, *supra* note 28, at 2.b.1.

[40] Cassidy, *supra* note 30, at 365.

as in sex and violent offenses perpetrated within the family.[41] In those states, the defendant is not entitled to prevent their spouse from testifying against them.[42] In a few states such as Massachusetts, Missouri, and the District of Columbia, no exceptions to privilege exist,[43] making it difficult for the prosecution to prove the perpetration of the offense in the absence of a third side who was witness to the event under trial.

The second type of privilege, less relevant to the issue under discussion here, is Marital Communications Privilege. This privilege grants the individual the right to refuse to testify in court (in either criminal or civil proceedings) regarding confidential statements between the individual and their spouse in their marital relationship, in conversation or in writing. This is in order to protect the privacy of marital communications.[44] This privilege is recognized both in federal law and in state law,[45] and it applies in both criminal and civil proceedings. The conditions for the application of the privilege are the existence of an exchange of communication between the couple who were married at the time of the said communication, and that the communication was intended to remain confidential.[46] Each spouse holds the privilege and each of them is entitled to prevent the exposure of the information that they shared.[47] There is no need for one of the spouses to be a side in the legal proceedings in order to be able to use the privilege.

Regarding the testimony of parents against their children or vice-versa, American federal law and most state laws do not recognize privilege between parents and children.[48] Given this, as a rule, it is possible to oblige a parent to testify against their child and vice-versa.[49] In 2005, a bill intended to amend

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[41] *Id.* at 367; The Knesset Report, *supra* note 28, at 2.b.1.

[42] Cassidy, *supra* note 30; The Knesset Report, *supra* note 28, at 2.b.1.

[43] Cassidy, *supra* note 30, at 367–68 n.207.

[44] United States v. Brock, 724 F.3d 817, 820–21 (7th Cir. 2013) (holding the marital communications privilege "exists to ensure that spouses . . . feel free to communicate their deepest feelings to each other without fear of eventual exposure in a court of law."); *see* Cassidy, *supra* note 30, at 356–58; The Knesset Report, *supra* note 28, at 2.b.2.

[45] *See* Trammel v. United States, 445 U.S. 40, 45 n.5 (1980); Wolfle v. United States, 291 U.S. 7 (1934); Blau v. United States, 340 U.S. 332 (1951); Cassidy, *supra* note 30, at 365–66.

[46] Cassidy, *supra* note 30, at 357–58; The Knesset Report, *supra* note 28, at 2.b.2.; *see* United States v. Termini, 267 F.2d 18, 19–20 (2d Cir. 1959); United States v. Rivera, 527 F.3d 891, 906 n.4 (9th Cir. 2008); People v. Daghita, 86 N.E.2d 172, 174 (1949); United States v. Lewis, 433 F.2d 1146, 1151 (D.C. Cir. 1970); Pereira v. United States, 347 U.S. 1, 6 (1954); United States v. Taylor, 92 F.3d 1313, 1332 (2d Cir. 1996).

[47] *See* United States v. Montgomery, 384 F.3d 1050 (9th Cir. 2004) (holding that either spouse may invoke marital confidence privilege); Cassidy, *supra* note 30, at 358.

[48] Tovia Smith, *Should Parents Have to Testify Against Kids in Court?*, NPR (July 30, 2010), https://www.npr.org/templates/story/story.php?storyId=128797358.

[49] Minnesota and Idaho are the exceptions, extending the privilege to communications between parents and children. *See* The Knesset Report, *supra* note 28, at 2.c. Gabriel Halevi notes that the legal technique for the adoption of limitations on the testimony of parents

the Federal Rules of Evidence and to add "parent and child" privilege that is similar to the existing spouse privilege was proposed, but this has been archived.[50]

### *C. Australia*

Another example of a state in which family members' testimony is regulated under the privilege model is Australia. The Evidence Act 1995 determines that, apart from certain exceptions, every individual has the competence to testify and is even obliged to do so.[51] Specifically, section 18 of the Evidence Act regulates family members' testimony.[52] According to this section,

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and their children is within the discretion granted to states as part of their creation of rules of evidence. The federal courts may adopt the arrangements in the laws of evidence that were accepted in different states within Rule 501 of the Federal Rules of Evidence, which stipulates:

> [t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court. But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

FED. R. EVID. 501.

As a result of the authority granted by this rule, since the 1980s, the state courts have created privilege rules for parents' and children's testimony, but they have not determined rules defining competence for this matter. *See* HALEVI, *supra* note 9, at 625. *See generally* Catherine Chiantella Stern, *Don't Tell Mom the Babysitter's Dead: Arguments for a Federal Parent–Child Privilege and a Proposal to Amend Article V*, 99 GEO. L. J. 605 (2011); Hillary B. Ferber, *Do You Swear to Tell the Truth, the Whole Truth, and Nothing but the Truth Against Your Child?*, 43 LOY. L.A. L. REV. 551 (2010).

[50] The Knesset Report, *supra* note 28, at 2.c. According to this same proposal, step parents and step children are considered "parents" and "children" for purposes of the law. *See* Parent-Child Privilege Act of 2005, H.B. 3433, 109th Cong. (2005). With regard to privilege between "parent" and "child," the proposed bill said that, in any criminal or civil proceeding where the Federal Rules of Evidence apply, neither a parent nor a child shall be compelled to testify against each other, unless the parent or the child serve as a witness, and knowingly and out of their free choice, waive the right to avoid testifying. *Id.* at § 2(b). With regard to privilege concerning communications that were intended to remain confidential between parents and children, the bill states that in any civil or criminal proceedings to which the Federal Rules of Evidence apply, a parent or child will not be compelled to divulge private, confidential communications between them as part of the parent-child relationship, unless both sides (parent and child) knowledgeably and out of free choice, waive the use of this privilege. *Id.* at § 2(c). The bill also sets out a list of exceptions in which the said privileges will not apply. *Id.* at § 2(d).

[51] Evidence Act 1995 ch 2 pt 2.1 div 1 s 12. This clause stipulates: "Clause 12 - Competence and compellability. Except as otherwise provided by this Act: (a) every person is competent to give evidence; and (b) a person who is competent to give evidence about a fact is compellable to give that evidence."

[52] *Id.* at s 18.

in criminal law, a spouse, partner, parent, or child of the defendant, is entitled to refuse to testify against them (as a witness for the prosecution) or to testify about communications between them.[53] A witness who refuses to testify must express their opposition before giving evidence or close to the date on which they learned about their right to refuse to testify.[54] In a case in which the court believes that the witness is entitled to refuse to testify, it should ensure that the witness knows and understands this right.[55] However, their right to refuse to testify against their family member is not absolute. The court may order them to testify, unless the judge finds that direct or indirect harm will be caused to the witness or to their relations with the accused family member, and that the damage that may occur would outweigh any benefit of the testimony that would be delivered.[56]

Although the court has discretion in this matter, the law determines that the court must, as part of its decision, consider the following considerations: the nature and severity of the offense of which the defendant is accused; the content and importance of the evidence that the witness is expected to deliver and the weight that the court is likely to attribute to this evidence; and the possibility that the prosecutor can back this evidence with other evidence or testimony from a different source for the same matters that are in the evidence of the said witness.[57] It should also consider the nature of the relationship

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[53] *Id.*

[54] According to the rule in Clause 18(3) of the Act: "The objection is to be made before the person gives the evidence or as soon as practicable after the person becomes aware of the right so object, whichever is the later." *Id.* at para 3; *see also* The Knesset Report, *supra* note 28, at 4.b.

[55] According to Clause 18(4) of the Act: "If it appears to the court that a person may have a right to make an objection under this section, the court is to satisfy itself that the person is aware of the effect of this section as it may apply to the person." *Id.* at para 4; *see* also The Knesset Report, *supra* note 28, at 4.b.

[56] According to Clause 18(6) of the Act:

> A person who makes an objection under this section to giving evidence or giving evidence of a communication must not be required to give the evidence if the court finds that: (a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant, if the person gives the evidence; and (b) the nature and extent of that harm outweighs the desirability of having the evidence given.

*Id.* at para 6.

[57] According to Clause18(7) of the Act, as translated in The Knesset Report, *supra* note 28, at 3.b.1:

> Without limiting the matters that may be taken into account by the court for the purposes of subsection (6), it must take into account the following: (a) the nature and gravity of the offence for which the defendant is being prosecuted; (b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it; (c) whether any other evidence concerning the matters to which the evidence of the person would relate is reasonably available to the prosecutor; (d)

between the witness and the defendant and whether in giving the testimony the witness will be obliged to expose a matter that was made known to them by the defendant in confidence and as part of the trust relations between them. The court's decision on this matter is final and cannot be appealed.[58] Apart from the court's power to compel the witness to testify, the privilege does not apply when the defendant is accused of the following offenses: violent offenses in the family;[59] sex offences against a minor who is under the age of 16,[60] employment of a minor in work that endangers their health,[61] neglect of a minor[62] and unauthorized transfer of a minor from legal custody to another custody.[63]

### *D. Germany*

Germany regulates family members' testimony under the privilege model. The German Criminal Procedure Code (*Strafprozeßordnung*, StPO) determines that a person, generally, has the competence to testify and even is obliged to testify in the trial of a family member.[64] Nevertheless, in a criminal trial, a person is not obliged to testify and the judge is not entitled to compel

> the nature of the relationship between the defendant and the person; (e) whether, in giving the evidence, the person would have to disclose matter that was received by the person in confidence from the defendant.

[58] According to Clause 18(8) of the Act: "If an objection under this section has been determined, the prosecutor may not comment on: (a) the objection; or (b) the decision of the court in relation to the objection; or (c) the failure of the person to give evidence." *Id.* at para 8.

[59] An offence that is a domestic violence offence within the meaning of the Domestic Violence Act 1986 of the Australian Capital Territory Domestic Violence Act 1986 (ACT) (Austl.).

[60] Crimes Act 1900 (6th) pt 3 (Austl.)

[61] Children's Services Act 1986 (ACT) ss 133–35 (Austl.).

[62] *Id.* s 139.

[63] *Id.* s 140.

[64] STRAFPROZEßORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], § 48, *translation at* https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html (Ger.).

them to testify in the trial of their "family member" despite their competence to do so.[65] Similar arrangement can be found in Finland[66] and in Sweden.[67]

### *E. Israel*

In Israel, the testimony of family members is regulated according to the competence model. The rules of evidence in Israel regulate the testimony of family members in a very comprehensive manner. They set out the general rules for this matter, exceptions to the rules, and restrictions to the exceptions.

The second clause of the Israeli Evidence Ordinance (1971) creates a fundamental rule requiring any person who has the competence to testify in court.[68] However, the competence rule is not absolute and there are several exceptions listed in the Evidence Ordinance.[69] These exceptions are set out in the rules of Clauses 3 and 4 of the Order, and they relate to the testimony of "spouses" and "parent" and "child" in criminal proceedings. The rule set out by Clause 3 of the Order determines that in a criminal trial, a spouse does not

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[65] *Id.* at § 52.

[66] Section 20 of chapter 17 of the Finnish Code of Judicial Procedure regulates family members' testimony under the privilege model. Section 20 of the Code provides that certain family members are entitled but not obliged to testify. *See* CODE OF JUDICIAL PROCEDURE (Fin.) ch. 17, § 20 (2015), *translation at* http://www.finlex.fi/en/laki/kaannokset/1734/en17340004.pdf. Giving evidence is subject exclusively to the discretion of the witness, and the court is not entitled to compel the witness to testify. This arrangement applies to the following family members: whoever is married, engaged or was married to one of the sides in the proceedings; fathers or direct descendants of one of the sides to the proceedings, and also whoever is married or was married to the fathers or direct descendants of one of the sides to the proceedings; brothers and sisters, or the spouse of brothers or sisters of a side to the proceedings and also adoptive parents or adoptive children of one of the sides. *Id.*

[67] In Sweden the consideration of family members' testimony is also regulated under the privilege model. The rule in Section 3 of chapter 36 of the Swedish Code of Judicial Procedure determines that the following family members are not obliged to testify against their family member: current or past spouses of a side to the proceedings; direct ancestors, descendants, or their spouses of a side to the proceedings; brothers and sisters, or whoever is married to or was married to a brother or sister of one of the sides to the proceedings. RÄTTEGÅNGSBALKEN [RB] [CODE OF JUDICIAL PROCEDURE] 36:3 (Swed.). Insofar as the witness is not interested in testifying, it is not possible to compel the witness to testify, irrespective of which crime the family member is accused of committing. *Id.*

[68] Evidence Order, 5731–1971, cl. 2 (1971) (as amended) (Isr.).

[69] Apart from the exceptions to the competence rule determined in Clauses 3 and 4 of the Evidence Order, there is an additional exception relating to the judge's testimony on a matter that was subject to their judicial authority. This exception stems from case law determining that a judge should not testify as a witness on the witness stand on a matter connected to their judicial role, and they should not even be summoned to testify on this. This rule prevents a judge from testifying on what occurred in a trial in which they presided. *See* CA 364/73 Zeidman v. State of Israel 28(2) PD 620, 627 (1974) (Isr.) [Hebrew]; State of Israel v. Yosef 58(3) PD 541, 552–553 (2004) (Isr.) [Hebrew].

have the competence to testify against their spouse, and it is not possible to compel them to testify against the person accused with their spouse under the same writ of indictment.[70] The rule in Clause 4 of the Order provides specific exceptions that in a criminal trial, a parent and child do not have the competence to testify against each other and that it is not possible to compel one of them to testify against a person who is accused with the other in the same writ of indictment.[71] While testimony against a relative is regulated according to the competence model, testimony against the relative's accomplice, who appears in the same writ of indictment, is regulated according to the privilege model. When the testimony is regulated under the privilege model, the witness has the competence to testify but cannot be compelled to do so.[72] It is noted that these limitations do not apply when relatives are summoned to testify for the defense[73] or when they are called to testify in a civil case.

In addition to the exceptions that forbid family members from testifying against one another, Clause 5 of the Evidence Ordinance sets out restrictions on the application of the Clause 4 exceptions.[74] When the evidence falls within the boundaries of a restricted exception, the witness has the competence to testify and can even be compelled to do so.[75] In fact, the restricted exception brings us back to the starting point—the rule that everyone has the competence to testify.

Amendment 16 to the Evidence Ordinance (1971), enacted in December 2015, re-arranged family members' testimony in criminal proceedings. In the discussion below, I shall relate in brief to the legal status that existed before Amendment 16 to the Evidence Ordinance and the legal status that exists after the amendment went into force.

#### *i. The Legal Status of Family Members' Testimony Before Amendment 16 to the Evidence Ordinance*

Clause 3 of the Evidence Ordinance determines that in a criminal trial, a spouse does not have the competence to testify against their spouse and cannot be compelled to do so.[76] Before Amendment 16, the Evidence Ordinance avoided defining who is considered a spouse. The courts filled in this gap in

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[70] Evidence Order, 5731–1971, cl. 3.

[71] *Id.* at cl. 4.

[72] The inability to compel such testimony is shown by the absence of punitive or coercive sanctions in the Evidence Order. *See id.*

[73] *See* Evidence Order, cl. 6 ("[W]hen a spouse is called to testify on behalf of their spouse, or a parent or child is called to testify to the benefit of the other, then the testimony, either in initial examination or in cross-examination by the prosecution can serve as evidence to prove the guilt of the accused.")

[74] *See id.* at cl. 5.

[75] *Id.*

[76] Evidence Order, 5731–1971, cl. 3.

legislation with case law and interpreted the term "spouse" to include only married spouses, whether they lived together or apart, without recognizing an unmarried spouse for this purpose.[77] This situation engendered a double difficulty. On the one hand, since the purpose of the exception that prohibits the spouse's testimony is to prevent forcing a person to harm another person who is close to them, this purpose also exists when a "cohabiting spouse" is involved, although the individuals are not married. On the other hand, the said purpose is not achieved when the spouse (either married or not) is separated or when they are in the process of divorce proceedings. This is the case, for example, when the husband refuses to give his wife a divorce (a possibility in Jewish law)[78] and the couple lives apart. In such a case, there is no family unit or family harmony worthy of protecting with the laws of evidence. However, according to the law before the Amendment, there was no possibility of bringing the husband to testify against his wife and vice-versa, so long as they remained married.

Moreover, the Evidence Ordinance before Amendment 16 annulled the competence of family members to testify against each other, even in situations where the defendant harmed a member of his family or when the family member filed a complaint at the police station against their relative. This not only harms the fact-finding task but also causes injustice and absurd situations since it prevents victims from being able to realize proceedings against those who have harmed them.[79] Hypothetically, in a case where a son perpetrated a financial offense against his elderly parents, the parents had no competence to testify against the son who harmed them, even in a case where they complained about his acts at the police station and want to testify against him. In another matter that reached the Jerusalem court, a woman complained that her husband kidnapped her children from her custody, but she could not testify against him due to her lack of competence.[80] Logic, common sense and a sense of justice made it clear that when a person chooses to bring a complaint against a member of his or her family, that person actually indicates that the family unit has already been disrupted and so there is no justification in preventing the witness from testifying under the argument of protecting the integrity of the family unit.[81] However, the rules of evidence determined otherwise. This legal status continued until December 28, 2015, when Amendment 16 of the Evidence Ordinance came into force.

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[77] *See* Memorandum to the Law of 2013, *supra* note 6, at cl. c; *see also* CrimC 4/84 State of Israel v. Balut**,** PM (1) 324, 328–29 (1985) (Isr.).

[78] *In Israel, Jewish Divorce is Granted Only by Husband's Permission*, NPR (Mar. 1, 2015), https://www.npr.org/sections/parallels/2015/03/01/389873594/in-israel-jewish-divorce-is-only-granted-by-husbands-permission.

[79] This is on condition that Clause 5 of the Order is not applicable, which restricts the application of the exceptions. *See* Evidence Order, cl. 5.

[80] *See* CrimC 4/84 State of Israel v. Balut, PM(1) 324, 328–29 (1985) (Isr.).

[81] *See* Memorandum to the Law of 2013, *supra* note 6, at cl. c.

*ii. Family Members' Testimony After Amendment 16 to the Evidence Ordinance*

*a. Spouses' Testimony*

The rules of Clause 3 of the Evidence Ordinance determine that in a criminal trial the prosecution is not entitled to enlist the testimony of one spouse against the other spouse.[82] Before discussing the content of the exception, I would like to proffer several important clarifications.[83] First, since this involves a rule of competence, it cannot be conditioned or bypassed by the consent of the parties. Secondly, the exception only applies to criminal proceedings in court and does not apply to the taking of statements at the police station. When a spouse is required to go to the police station for the taking of evidence, they are obliged to do so even if the taking of evidence would incriminate their spouse regarding the perpetration of an offense.[84] This statement cannot serve as evidence in a court case against an accused spouse. Although it is possible to use it to deepen the investigation, attaining evidence and summoning other witnesses, it cannot be presented as evidence in court since the witness who gave it does not have the competence to testify on the same matter. Thirdly, in order to annul the testifying competence of a spouse against their accused-spouse, the witness and the accused should comply with the definition of "spouse" on the day when the testimony is delivered and not on the day when the offense was committed.

One of the main innovations accepted as a result of the amendment is expressed in the fact that for the first time the term spouse was defined, with regard to competence to testify, in the terms of Clause 8 of the Order, as follows: "'spouse' – includes a cohabiting partner as a spouse, except for a person living separately from his spouse, who does not manage a common

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[82] The discussion will consider the first part of the rule in Clause 3. The end of the rule in this clause determines that a spouse cannot be compelled to testify against a person accused together with their spouse in the same writ of indictment. Evidence Order, 5731–1971, cl. 3. According to this rule, the prosecution cannot force the witnessing spouse to testify against someone who is accused together with their accused spouse in the same writ of indictment. *Id.* Giving testimony in this situation is subject to the discretion of the spouse who was asked to testify. *Id.* This rule does not engender difficulty and it also was not altered by the amendment.

[83] These clarifications are correct also for the exception regarding "parent" and "child" testimony as determined in Clause 4 of the Order, with the necessary adjustments.

[84] This is with the exception of the case in which the spouse of the accused, their parent or child, has filed a complaint against them at the police station. According to Clause 5(b) and (c) of the Evidence Order, that was legislated as part of Amendment 16 to the Order, the witness will have the competence to testify in the trial of the accused in the same matter and can even be obliged to testify. *See* discussion *infra* Part Two, Sec. E.ii.c.1.2.

household together with him out of the intention to permanently disband their family life, even if they live under one roof."[85]

Although this definition enlarges the term "spouse" to include a cohabiting partner, it also reduces it in contrast to the situation before the amendment so that it does not apply to separated couples or those who intend to disband the family unit. The word "including" signifies that the definition of a spouse, which had become enrooted in case law before the amendment, continues to stand as valid alongside the exclusion of separated couples and the inclusion of cohabiting partners. Consequently, in order to know who is included in the definition of a spouse, it is not sufficient to refer to the rules of Clause 8; rather it is necessary to also refer to the case law that circumscribed and delineated the term spouse before the amendment, which continues to be valid even today. The case law determined that spouses, in the context of the Evidence Ordinance, are partners who are married one to the other on the day of delivery of the testimony in marriages that are valid under Israeli law.[86] In Israel, conjugal matters are under the exclusive authority of the religious courts, which only apply religious law.[87] For Jews, Section 2 of the Rabbinical Courts Jurisdiction Law (Marriage and Divorce) (1953) says that marriage and divorce of Jews [irrespective of their nationality] will be carried out in Israel according to the law of the torah.[88] For members of other recognized religious sectors in Israel, if they are Israeli nationals, then their conjugal affairs are under the unique authority of their religious courts.[89] For this reason, Israeli law recognizes marriages that were performed according to religious law. Thus, the definition of spouse in Clause 8 of the Evidence Ordinance relates primarily to

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[85] Evidence Order, 5731–1971, cl. 8.

[86] *See* CA 78/62 Darshani v. State of Israel, D 16(3) 1814 (1962); CA 500/77 Omri v. State of Israel 33(2) PD 681, 698–99 (1979); CrimC 4/84 State of Israel v. Balut, 5745 324, 328–29 (1985) ("[t]he legislator's duty is that in a criminal trial a spouse does not have the competence to testify against their spouse and it makes no difference if this involves spouses who live together or spouses who live apart. So long as the spouses are husband and wife at the time of giving testimony, they are incapacitated as witnesses to testify against one another. Incapacitation of the spouse to testify continues according to the rule in the clause as long as the conjugal connection exists between the spouses, and only disappears if they untie it."); *see also* HCJ 3045/05 Ben Ari v. Director of Population Administration in the Ministry of Interior 61(3) PD 537 (2006) (holding that registration with the Population Administration is not determinative on whether the registering individuals are legally married).

[87] BENZION SCHERESCHEWSKY & MICHAEL CORINALDI, FAMILY LAW IN ISRAEL 195 (2015).

[88] Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713–1953, § 2, 139 (1951–1953) (Isr.). When a man and woman did not marry according to the laws of Israel, but instead underwent a marriage ceremony according to other laws, Israeli laws do not recognize their marriage, because "the woman is not considered to be the man's wife unless it [the wedding] is properly consecrated." SCHERESCHEWSKY & CORNINALDI, *supra* note 87, at 197.

[89] SCHERESCHEWSKY & CORNINALDI, *supra* note 87, at 195.

marriage that was performed in Israel according to religious law and not, for example, to civil "mixed marriages," which were performed in Israel. Civil marriages mean marriages that are not performed in compliance with religious law but instead according to the secular civil law of the state in which it was performed.[90] In Israel, it is not possible to perform a civil marriage between Jews, and the only way to do this is to travel outside Israel, for example to Cyprus, Malta or other European or Latin American states.[91] Consequently, spouses who married in a civil ceremony in Israel are not considered to be "spouses" for the matter covered by Clause 8 of the Evidence Ordinance. With regard to civil marriages performed abroad, the courts in Israel recognize civil marriages of Jews performed abroad, when they were lawful according to local law in the place where the ceremony was held.[92] Since Amendment 16 expanded the definition of "spouse" to include cohabiting spouses, married couples in civil marriages (invalid under Israeli law) would be recognized as spouses. This is also true for couples in "mixed marriages."

In Israeli law "mixed marriages" are marriages between Jews and gentiles, where "gentiles" means persons who are not Jewish. According to the laws of Israel, mixed marriages are inconsequential[93] and have no validity even if they are performed abroad and are valid there.[94] Although Israeli law does not recognize mixed marriages, as a result of Amendment 16, these couples will be recognized as spouses under the expanded definition that includes cohabiting spouses, insofar as they comply with the definition of that term. Similarly, same-sex couples, whose marriage is not recognized under Israeli law, should also be recognized as spouses insofar as they comply with such definition. It seems to me that any other interpretation that would cause same sex couples not to be recognized as spouses for the purpose of the Evidence Ordinance fails to realize the goal of the prohibition determined in Section 3 of the Order, but also is not in line with the fundamental principles of the system, and thus would not stand up to a constitutional test. One of the main innovations following Amendment 16 was expressed in the inclusion of cohabiting couples as "spouses" with regard to their competence to testify. Cohabiting couples include relationships similar to marriage, including social-familial components, which entitle the partners internally to have inheritance rights according

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[90] *Id.*

[91] *See* Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713–1953, § 2 (determining that "marriage and divorce of Jews will take place in Israel [according to the law of the Torah]"); SCHERESCHEWSKY & CORNINALDI, *supra* note 87, at 210–21.

[92] SCHERESCHEWSKY & CORNINALDI, *supra* note 87, at 209; MENASHE SHAWA, PERSONAL LAW IN ISRAEL (4th ed. 2001); *see also* CA 191/51 Scornik v. Scornik, 8 PD 83, 89 (1954) (Isr.); CA 238/53 Cohen Buslik v. Attorney General, 8 PD 4 (1954) (Isr.); HCJ 301/63 Shtreit v. Chief of Rabbi of Israel, 18(1) PD 598, 633–35 (1964) (Isr.).

[93] SCHERESCHEWSKY & CORNINALDI, *supra* note 87, at 183.

[94] *Id.* at 187–88.

to law and obligations relating to assets, and externally—to have social rights as spouses, as if they had the status of marriage.[95]

Cohabiting couples manage their family life in a shared household, and the recognition of the Evidence Ordinance of these couples as spouses constitutes the natural and direct consequence of Israeli law's recognition of this institution.[96] It should be noted that the Evidence Ordinance does not define who should be considered a cohabiting couple, but rather it simply determines that cohabiting spouses are considered to be spouses.

Another innovation accepted as part of Amendment 16 and that relates to the definition of spouses in the terms of Section 8 of the Evidence Ordinance is expressed in the fact that couples who live apart and do not manage a shared household together out of the intention to permanently disband their married life, even if they live under a common roof, are no longer considered to be spouses. These couples were considered spouses according to the law that preceded the amendment. As noted, the main reason for the rule that disqualifies a person's competence to testify against their relative is to avoid forcing people in a naturally close relationship from harming their relatives. If the relationship between two spouses has ended and they are not in a close family relationship at the time of giving evidence, then there is no reason to disqualify them from giving testimony and they should be seen as any other witness.

### *b. Parents' and Children's Testimony*

The rule in Section 4 of the Evidence Ordinance determines that in a criminal trial, a parent or child does not have the competence to testify against one another and they cannot be compelled to testify against a person accused together with their child or parent in the same writ of indictment.[97] The purpose

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[95] BENZION SCHERESCHEWSKY & MICHAEL CORINALDI, *supra* note 87, at 1074.

[96] The move to reinforce the institution of cohabiting couples began in social legislation that granted rights to cohabiting couples. Examples of such legislation are legislation dealing with the protection of tenants, laws giving rights to benefits from the National Insurance, regulations dealing with eligibility to allowances from various bodies, and also legislation that arranges the right to compensation. Alongside this social legislation, there are additional laws that grant rights for "married persons" and "cohabiting couples", outstanding among these is the Succession Law (1965), at cl. 63. Consideration that equates the status of cohabiting spouses with the status of married spouses also exists in laws that do not focus especially on the acquisition of rights, such as the Prevention of Family Violence Law (1991), cl. 138. *See* SHAHAR LIFSHITZ, COHABITATION LAW IN ISRAEL IN LIGHT OF THE CIVIL LAW THEORY OF THE FAMILY 23–25 (2005) (noting that over the years, case law has broadened the various possibilities that can be considered as "cohabiting spouses" and reduced the gap between the legal status of "cohabiting spouses" and that of married spouses).

[97] Like the last part of Clause 3 of the Order, the last part of Clause 4 stipulates that it is impossible to compel a parent to testify against a person who is accused together with their child in the same writ of indictment. Evidence Order, 5731–1971, cl. 3, 4 (1971) (as

of the disqualification, like the disqualification that applies to the testimony of spouses, is to protect the integrity of the family unit and harmony in the home that might be undermined in the case where a parent incriminates their child or vice versa. It is noted that in order to annul the competence of parents and children to testify one against the other, they must be included within the definition of "parents" and "children" according to the Evidence Ordinance. They also need to comply with this status on the day when the evidence is delivered and not on the day when the offense was committed, insofar as their status changed. Here is the place to clarify that the term "child" may be thought mistakenly that the exception applies to children who are minors, but this is not so.[98] First, there is no condition in prohibition determined in Clause 4 of the Evidence Ordinance concerning the age of the child. Moreover, the purpose of this rule is to protect parent-child relations and to prevent parents from testifying against their children and vice versa. Thus, this purpose exists and should be promoted, irrespective of the question whether the "child" is an adult or a minor and what their age is.[99] The rule in Clause 8 of the Evidence Ordinance does not determine who is considered a parent or child, but rather it determines that "'child'—includes an adopted child, and 'parent'—includes an adoptive parent." This means that the Order recognizes biological parents and also adoptive parents and adopted children, under the condition that the adoption was legal in compliance with the Children's Adoption Act (1981),[100] and it was valid at the time that the evidence is delivered. However, stepparents and stepchildren are not included in the definition of "parent" and "child".[101]

*c. Restrictions to the Exceptions—"Permitted Testimony" (Clause 5 of the Evidence Ordinance)*

The rule in Clause 5 of the Evidence Ordinance restricts the application of exceptions or prohibitions determined in Clause 3 (testimony of spouses) and Clause 4 (parents'/children's testimony).[102] While the exceptions prohibit the

amended) (Isr.). It is also impossible to compel a child to testify against a person accused together with their parent in the same writ of indictment. This rule means that the prosecution cannot compel a witness to testify and deliver testimony, a matter which is given to the discretion of the child or parent who is asked to testify. Since this rule does not involve any difficulty and was also not altered as a result of the amendment, the rest of the discussion will refer to the first part of Clause 4.

[98] Because in most of Israeli legislation, a "child" is defined as someone who has not yet reached 18 years of age. Capacity and Guardianship Law, 5722–1962, § 16, 106 (Isr.).

[99] *See, e.g.*, HALEVI, *supra* note 9, at 630.

[100] Adoption of Children Law, 5741–1981, 35 (1981) (Isr.).

[101] *Id.*

[102] The Law of Evidence, 5731–1971, §5 (1971) (Isr.):

prosecution from bringing relatives to testify against one another, the restrictions set out in Clause 5 annul the prohibitions and permit evidence to be heard in court. In fact, when the testimony complies with the conditions of one of the restrictions determined in the section, the testimony is permitted in the sense that it becomes possible to compel the witness to testify against their relatives.

The rules of Clause 5 of the Evidence Ordinance were altered under Amendment 16.[103] Sub-section (A) includes offenses to which the exceptions do not apply.[104] According to the amendment, sub-section (B) expands the cases in which family members are permitted to testify against their relatives.[105]

*1. Offences Which Are Not Subject to the Exceptions (Restrictions to the Exceptions)*

The rule in Clause 5(A) of the Evidence Ordinance relates to offenses that are not subject to the exceptions determined in Clauses 3 and 4. I will now briefly discuss each of these restrictions. The rule in Clause 5(A)(1) of the Order determines that there is no application of the exceptions prohibiting spouses, parents, and children from testifying against one another when the

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a. The restrictions in sections 3 and 4 will not apply in a criminal trial for one of the following:

(1) bodily injury or violence or threat to commit one of these;

(2) an offense under sections 337 or 362 of the Penal Code – 1977 (hereinafter: the Penal Code), or under article J in chapter H and under articles E or F1 in chapter J of the Penal Code, committed by a spouse against his spouse, a parent against his child or a child against his parent;

(2a) an offense under Section 287 of the Penal Code regarding a violation of a protective order issued under the Prevention of Violence in the Family Law, 1991, or regarding a violation of any other judicial order issued under any law that aims to protect the spouse, child or parent of the violator from him;

(3) an offense under sections 244 through 246, 249 and 249A of the Penal Code, which was committed in relation to one of the offenses specified in this section;

(4) an attempt to commit one of the offenses specified in this section.

b. The restrictions in Sections 3 and 4 will not apply to the testimony of a person who has filed a complaint against their spouse, child or parents, in that matter, in a criminal trial concerning the matter of the complaint, whether it is the former who filed the complaint in that matter or a complaint was already filed on that matter by another person.

c. For the purpose of sub-sections (a) and (b) it is the same if the witness is the victim of the offense or another person.

[103] Evidence Order, 5731–1971, cl. 5 (1971) (as amended) (Isr.).

[104] *Id.*

[105] *Id.*

defendant is accused of one bodily injury, violence, or threat of either of these.[106] It is important to note that the identity of the victim is not significant. The moment that the defendant is accused of a violent offense, even if it is a threat of violence directed towards any person and not necessarily towards a family member, members of the accused's family have the competence to testify against him.[107] The accepted approach in case law is that the terms "bodily injury" and "violence" should be interpreted according to their meaning in common parlance, according to their regular and conventional meaning, irrespective of their interpretation in English common law or according to their meaning in penal law.[108]

The terms "injury" and "violence" were interpreted broadly, and it was determined that the term "violence" included all uses of force, of whatever strength, and that the term "bodily injury" is not limited to physical injury and can be enlarged to include any sort of injury to the victim's body.[109] This interpretative approach enables the courts at different levels over the years to determine that "violent offenses" includes offenses of significant violence and injury such as murder,[110] attempted murder,[111] burglary[112] and additional offenses although they are not significantly violent,[113] such as unlawful imprisonment and extortion with force,[114] extortion with threats,[115] rape, [116] and also

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[106] *Id.*

[107] *Id.*

[108] *See* CrimC 4/84 State of Israel v. Balut**,** PM(1) 331–32 (1985) (Isr.); CA 78/62 Darshani v. State of Israel, D 16(3) 1814, 1817 (1962). Thus, for example, Clause 34 (24) of the Penal Code inter alia defines the terms "injury" and "severe injury."

[109] CA 7895/04 John Doe v. The State of Israel (Feb. 8, 2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.); CA 95/50 Arika v. The Attorney General 5 PD 1200, 1204 (1951) (Isr.)

[110] An offense according to Clause 300(a) of the Penal Code. *See*, *e.g.*, CA 500/77 Omri v. State of Israel 33(22) PD 681, 698–99 (1979) (Isr.).

[111] An offense according to Clause 305 of the Penal Code. *See, e.g.*, CrimC (18) 54/58 Attorney General v. Tweez, 18 PM 187, 192 (1958) (Isr.).

[112] An offense according to Clause 402 of the Penal Code. *See* CA 4454/98 Abbas v. State of Israel [Isr.]

[113] CA 7895/04 John Doe v. The State of Israel (Feb. 8, 2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

[114] CA 1620/00 Habashi v. State of Israel (2000), Takdin Legal Database (by subscription, in Hebrew) (Isr.). In this case, it was determined that the offense of unlawful imprisonment according to Clause 377 of the Penal Code and also the offense of extortion by force according to Clause 427 of the Penal Code are "violent crimes" for the purpose of Clause 5 of the Evidence Order.

[115] An offense according to Clause 428 of the Penal Code. *See* CA 7895/04 John Doe v. The State of Israel (Feb. 8, 2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

[116] CA 95/50 Arika v. The Attorney General 5 PD 1200, 1204 (1951) (Isr.). In this case, in which a father was accused of raping his daughter, it was decided that the daughter had the competence to testify against her father. Justice Landoi, with the agreement of Justice Witkin, determined that the term "bodily injury" in the words of Clause 5 of the Evidence Order is not limited specifically to a physical injury, but that it is possible to extend it to

arson.[117] On the other hand, offenses of kidnapping from custody,[118] trespass and break-in to a building that is not a place of residence or prayer,[119] and even weapons offenses,[120] were not recognized as violent offenses. It was also determined that "violent offenses" includes violence towards property and not necessarily against people.[121]

In Section 5(A)(2) the legislator lists certain offenses that were committed within the nuclear family unit. In order for the said restriction to apply, two cumulative conditions must exist. According to the first condition, the defendant must be accused of one or more of the following offenses: breaching the duties of a parent or guardian;[122] neglect of children and other supervised persons;[123] prostitution and obscenity offenses;[124] sex offenses;[125] and also offenses of injury to minors and those who are helpless.[126] According to the second condition, the defendant must have committed these offenses towards their spouse, parent, or child. According to the sub-section (c), it is irrelevant if the witness that testifies is the victim of the offense or is another person.[127] As an example, if a father committed a sex offense against his oldest daughter, then all his children, including also his spouse, will have the competence to testify against him in court for that same offense.[128]

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include any injury to the complainant's body. *See also* C.A. 396/84 Fiacka v. The State of Israel, PD 39(1) 533, 540–541 (1985) (Isr.).

[117] CA 103/80 Carni v. The State of Israel (unpublished); *see* Jer 4/84 State of Israel v. Balut, PM (1) 324, 333 (1993) (Isr.) (referencing and discussing Carni v. State of Israel). Moreover, in Sader v. The State of Israel, the Supreme Court repeated the determination that the offense of arson is a violent offense for the purpose of Clause 5 of the Evidence Order. VCM 3725/90 Sader v. The State of Israel (Mar. 3, 1990), Nevo Legal Database (by subscription, in Hebrew) (Isr.)

[118] Penal Law, 5737–1977 § 373, Special Volume; *see also* Jer 4/84 State of Israel v. Balut, PM (1) 324, 334–36 (1993) (Isr.).

[119] Penal Law, 5737–1977 § 407(b), Special Volume; *see also* CA (Hi) 2814/07 Abu Kamir v. The State of Israel, (2008), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

[120] Penal Law, 5737–1977 § 144, Special Volume; *see also* CrimC (Nz) 1095/00 State of Israel v. John Doe, (2001), Takdin Legal Database (by subscription, in Hebrew) (Isr.).

[121] *See, e.g.*, CrimC (Jer) 3835/05 State of Israel v. Palto (Dec. 19, 2006) Nevo Legal Database (by subscription, in Hebrew)(Isr.). In this matter it was determined that an offense of wanton damage to property according to Clause 452 of the Penal Code constitutes a "violent offense" for the purpose of Clause 5 of the Evidence Order. In CA 49/88 *Rokach v. State of Israel*, PD42(1) 605, 613 (1998) (Isr.), the Supreme Court reiterated the decision in the case of Carni.

[122] Penal Law, 5737–1977, §337 (Isr.).

[123] *Id.* at § 362.

[124] *Id.* at §§ 199–214.

[125] *Id.* at §§ 345–55.

[126] *Id.* at §§ 361–88.

[127] Evidence Order, 5731–1971 §5(c) (Isr.).

[128] It is noted that in contradiction to the rule in Clause 5(A)(1) which applies in any case in which a spouse, parent, or child committed a "violent offense" towards someone, the

The rule in Section 5(A)(2a) determines that the exceptions detailed in Sections 3 and 4 of the Evidence Ordinance will not apply to an offense of breach of a lawful order[129] in which the accused breached a protection order according to the Law for the Prevention of Violence in the Family (1991),[130] or any another judicial order according to any law, that was intended to protect a spouse, child or parent of the person breaching the order, from the accused.[131] Section 2(A) of the Law for the Prevention of Violence in the Family grants the court the authority to give a "protection order", in which the person is forbidden inter alia to enter an apartment in which their family member is living or to be within a certain radius from that apartment,[132] to harass the family member in any way and in any place[133] and also to act in any way to prevent or make difficult the use of the property that legally serve their family member.[134] In a case where a person breaches such a "protection order" and because of this act a bill of indictment is presented against them for an offense of breach of a legal order, then according to Section 5(2a) of the Evidence Ordinance, the nuclear family members of the accused have the competence to testify against them regarding that same matter.[135]

The rules of Section 5(A)(3) of the Evidence Ordinance determine that the exceptions set out in Sections 3 and 4 will not apply to offenses detailed in this subsection, on condition that they were committed in connection with one of the offenses listed in Sections 5(A)(1)-5(A)(2a) of the Order (source offenses) and under the conditions determined therein.[136] The offenses listed in Section 5(A)(3) are the offenses of disruption and incitement (disruptive offenses), including the following offenses: disruption of court proceedings,[137] misleading an interrogation,[138] including misleading an investigation in

rule in Clause 5(A)(2) applies only in cases in which the offense was committed against the spouse of the accused, the parent of the accused, or the child of the accused. In a case in which the offense was committed towards another person, there is no application of the restriction determined in that clause. This means that the exceptions set out in Clauses 3 and 4 of the Evidence Order will apply. Evidence Order, 5731–1971, § 5 (Isr.).

[129] Penal Law, 5731–1977, § 287 (Isr.).

[130] Prevention of Family Violence Law, 5751–1991 (1991) (amendment 5756, 5758) (Isr.).

[131] Evidence Ordinance, 5731–1971, § 5, (1971) (Isr.).

[132] Prevention of Family Violence Law, 5751–1991 § 2(A)(1) (1991) (as amended) (amendment 5756, 5758) (Isr.).

[133] *Id.* at § 2(A)(2).

[134] *Id.* at § 2(A)(3).

[135] Evidence Ordinance, 5731–1971, § 5(A)(2), (1971) (Isr.).

[136] It is noted that there is no obligation that a legal proceeding should take place for the source offence, and it is sufficient that the father's testimony is demanded in order to prove the offense of disruption, on condition that the offense was committed in connection with one of the source offenses. Evidence Ordinance, 5731–1971, § 5(A)(3), (1971) (Isr.).

[137] Penal Law, 5731–1977, § 244 (Isr.).

[138] *Id.* at § 245.

aggravated circumstances; [139] misleading testimony[140] including misleading testimony in aggravated circumstances,[141] and also harassing a witness[142] including harassment of a witness under aggravated circumstances.[143]

### *2. The Complainant's Testimony (Section 5(B) of the Evidence Ordinance)*

The rule in Section 5(B) was added as part of Amendment 16 to the Evidence Ordinance. The legislation of sub-section (B) amended the historical injustice that before its legislation had especially affected the victims of an offense, who had no competence to testify against a family member that had harmed them, even in a case in which they complained about the offender's acts at the police station. In this manner, the evidence laws had prevented victims from having the opportunity to realize proceedings against the person who had transgressed against them. Section 5(B) was added as part of the Amendment, determining that when a person complains against their family member, there will be no application of exceptions set out in Sections 3 and 4, and they will have the competence and will even be obliged to testify against that family member. Beyond providing an opportunity for family members to exhaust all proceedings against the family member that harmed them, there is an assumption that when someone chooses to complain about their family member, they reveal their opinion that the family unit has been disrupted, and so there is less justification to prevent their testimony in order to maintain the integrity of the family unit.[144]

According to extant law, the decisive factor for the application of this restriction is the presentation of a complaint regarding the same matter.[145] When the witness presents a claim against their family member, then, on their own initiative, they move the system to conduct a criminal process against their family member, and as such, they are not entitled to refuse to testify during that process.[146] This means that it is possible to avoid the situation in which a writ of indictment is presented relying on a person's complaint and then later that person decides not to testify in court, and thus the necessary certainty is attained for the prosecution.[147] If giving the testimony was subject to their

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[139] *Id.* at § 249A.

[140] *Id.* at § 246.

[141] *Id.* at § 249A.

[142] *Id.* at § 249.

[143] *Id.* at § 249A.

[144] *See* Memorandum to the Law of 2013, *supra* note 6, at 2; *see also* Proposed Bill to Amend the Evidence Order (no. 16) (Family Members' Testimony), 2013, Book of Laws 44 (hereinafter Proposed Law from 2013).

[145] *Id.*; *see also* the Memorandum to the Law of 2013, *supra* note 6, at 2.

[146] *Id.*

[147] *Id.*

discretion, there would be a fear that the accused might exert improper pressure during the proceedings to persuade the witness to retract and choose not to testify against them.[148] Thus, giving evidence is considered obligatory and is not subject to the witness's discretion. In this case, Israeli law deviates from the two recognized generic models. If the competence model, at one extreme, cancels the family member's competence to testify, and the privilege model, at the other extreme, grants the witness privilege, then this existing arrangement is between these two poles. This, in my opinion, is its clear advantage. On the one hand, it enables the claimant to testify against their family member, and thus constitutes a deviation from the competence model. While in contrast to the privilege model, it does not allow the witness to choose whether to testify or not. Such an arrangement does not only contribute clearly to the clarification of the truth and promote legal certainty, but it even gives a response (not provided by the privilege model) to the fear concerning the exertion of pressure on the witness and use of improper measures aimed at preventing the witness from testifying.

Sub-section (C) also determines that it is not necessary for the family member to be the first one to turn to the police or another investigative body on the same matter, for them to be considered as the "complainant" for the purpose of the said section.[149] Even in a case in which another person presented the complaint, and it was only afterwards that the spouse, parent or child, according to the matter involved, of their own initiative also complained to the police on the same matter, the section will apply, and the family member will have the competence to testify and will even be obliged to testify.[150] To remove any doubt, in sub-section (C) the legislature clarifies that the restrictions listed in Section 5(A) and (B) applies whether the witness is the victim of the offense or if the witness is another person.[151] Thus, for example, in a case where a person commits a financial offense against their elderly parents, and the person who presents the complaint is the son of the accused. The son is competent and even obliged to testify against his father in the trial that ensues against the father in this matter, and it is irrelevant that the witness's grandmother and grandfather were the victims of the offense and not him.

### *F. Canada and New Zealand*

In contrast to the legal systems discussed above, there are some states that do not determine specific arrangements for the testimony of family members. In these systems the family unit is not a protected value, and family members have the competence and are compelled to testify like any other witness. For

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148 *Id.*

149 Evidence Ordinance, 5731–1971, § 5(C), (1971) (Isr.).

150 *Id.*

151 *Id.*

example, in Canada, until 2015, a rule rooted in common law forbade spouses from testifying one against the other, but only for specific offenses such as sex offenses, prostitution and obscenity, or offenses towards minors and the helpless.[152] In 2015, the Canada Evidence Act (1985) was amended so that spouses have the competence to give evidence against each other.[153] In New Zealand in 2006, New Zealand amended its Evidence Act so that anyone has the competence to testify in any legal proceedings, either criminal or civil, including spouses.[154]

## IV. PART THREE: WHAT IS THE OPTIMAL MODEL FOR THE REGULATION OF FAMILY MEMBERS' TESTIMONY?

From the discussion above in Part Two, each legal system determines the normative tension between the search for the truth and the integrity of the family unit in a different way and sets the point of balance along the normative spectrum in a different position. While in Canada and New Zealand the legal systems prefer revelation of the truth and doing justice above the integrity of the family unit, other states regulate family members' testimony along the spectrum between these two values.

In contrast to English law (that does not annul the competence of parents and children to testify one against the other)[155] or American law (that does not grant any privilege to parents and children),[156] the prohibitions in Israeli law against providing evidence apply to both parents and children.[157] In Australian law, parents and children are granted privilege similar to that given to spouses.[158] According to my approach, the application of the prohibition to bring parents and children to testify, and not only to spouses, provides complete and beneficial protection to the family unit and realizes its purpose. The harm to the family unit may not only be when the prosecution is entitled to bring the spouse to give evidence against his spouse, but may also occur when it is entitled to compel parents to testify against their children and vice-versa. The fact that in some of the states the respective prohibitions or privilege apply for spouses but do not apply to parents and children engenders difficulty. When evidentiary laws aim to protect the family unit, the arrangement should

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[152] See Canada Evidence Act 1985, R.S.C. 1985, c. C-5.

[153] Sanjay Vashishtha, *'Honey Let's Keep The Doors Open': A Critical Study on the Abrogation of Spousal Privileged Communication in Canada and Its Implications in Criminology*, 10 INT'L J. CRIM. & SOC. THEORY 1, 1 (2017).

[154] Evidence Act 2006, pt 3, s 71 (N.Z.) (stating that "any person" can, and can be compelled to, testify).

[155] *See supra* Part One, at Sec. A.

[156] Hillary B. Farber, *Do You Swear to Tell the Truth, the Whole Truth, and Nothing but the Truth Against Your Child?*, 43 LOY. L. A. L. REV. 551, 551 (2010).

[157] Evidence Ordinance, 5731–1971, § 7 (as amended) (Isr.).

[158] Evidence Act 1995 (Cth) s 18 (Austl.).

apply (whether it annuls the family members' competence to testify or grants them privilege) for spouses and also for parents and children. While in the case where the evidential laws do not aim to protect the family unit at the cost of hindering the search for the truth, then the prosecution should compel the family member to testify.

English law and Israeli law regulate spouses' testimony under the competence model. Both annul spouses' competence to testify, one against the other. However, a list of restrictions to exceptions in Israeli law encompasses more than its English parallel, and in this manner Israeli law enables spouses to be compelled to testify in many more cases than in English law.[159]

In contrast to English and Israeli law, U.S. federal law and also the law of most of the constituent states of the United States determines that spouses have the competence to testify against their partners.[160] However, they cannot be compelled to do so.[161] U.S. law, like English law, does not cancel the competence of parents and children but also does not grant them privilege.[162] In a rather crude and inclusive manner it could be said that the point of balance in U.S. law is closer to the factual truth, both in relation to English law, that annuls spouses' competence and prevents them from testifying against each other, and also in relation to Israeli law, that annuls the competence of both parents and children and also that of spouses.

Apart from the normative tension discussed above, it should be noted that the granting of privilege to a witness makes the management of criminal proceedings in court more difficult, contributing to a lack of certainty and hindering the process of justice by enabling the exertion of pressures on witnesses to prevent them from testifying in court. These disadvantages, discussed in the first paragraph of this Article, are significantly expressed in American law; however, they do not characterize the arrangement that exists in Israel.

Like U.S. law, Australian law regulates family members' testimony under the privilege model.[163] However, in contrast to U.S. law, Australian law grants privilege not only to spouses but also to parents and children.[164] Thus, the protection that Australian law provides for the family unit is more comprehensive than its parallel in the United States. This resembles Israeli law in that it includes spouses, parents and children in the group of family members.[165] Yet, Australian law is unique among the other discussed systems, since it includes a mechanism of judicial criticism for family members' testimony that

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159 *See supra* Part Two, at Sec. E.ii.c.

160 Trammel v. United States, 445 U.S. 40, 53 (1980).

161 *Id.*

162 *See supra* Part two, at Sec. B.

163 Australian Evidence Act 1995 (Act. No. 3) § 18(2) (Cth.)

164 *Id.*

165 Evidence Ordinance, 5731–1971, § 5 (as amended) (Isr.).

balances the arrangement concerning the duty to testify.[166] Although the legislation provides family members with the right to make use of privilege and avoid incriminating their relatives, it also grants the court the authority to intervene and remove this privilege, if necessary, according to the circumstances of each case.[167] In a case in which the witness does not use the privilege, they can deliver testimony and their choice will help the court to clarify the truth.[168] In a case where the witness chooses to use privilege, the court can remove the privilege after weighing the competing values and determining that, in the case before the court, the investigation of the truth necessitates removing the privilege, even at the cost of harm to the family unit.[169]

The fact that the use of privilege is performed under the court's supervision enables the judge to consider the conflicting values and to form an ad hoc balance between them, in any case according to its circumstances. When a witness uses the privilege, they may take foreign considerations into account, motivated by personal motives and subject to improper influences and pressures. When this choice is critiqued by the court, the court will take broader considerations into account relating to the search for truth and the public interest that is liable to be harmed as a result of the use of this privilege. It is argued that the judicial critique that exists in Australian law, sets the point of balance closer to the value of the search for factual truth, but this is if transpires that the number of cases in which witnesses testified against their family members is high, whether the witness waived their privilege or used it but the court ordered the removal of privilege.

In contrast, Israeli law includes a special rule that relates to the filing of a complaint at the police station by a family member. According to the existing rule, from the moment that this complaint is filed, the family member has the competence to testify and is even compelled to do so in the trial that takes place against their family member.[170] In contrast, according to the privilege model, the witness who complained against their family member is granted privilege. If the witness uses this privilege, the state's ability to bring the accused who harmed protected values to trial and to convict them is hindered. In this way, the purposes of penal law are not only harmed, but the administration of justice is thwarted. Insofar as the number of witnesses that choose to use privilege is larger, then a harsher blow is dealt to the search for the truth. Consequently, Israeli law that requires family members who filed a complaint at the police station to testify in court, thereby oiling the wheels of

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[166] *Fact Check: Can You Criticise the Conduct of the Courts or of a Judge?*, AUSTL. BROAD. NEWS (Jul. 9, 2017), https://www.abc.net.au/news/2017-06-29/fact-check-can-you-criticiseconduct-courts-turnbull/8646494.

[167] Australian Family Law Act 1975 (Act. No. 53) pt. 7 div. 12A subdiv. 69ZT § (1), (2) (Cth.).

[168] *Id.*

[169] *Id.*

[170] Evidence Ordinance [New Version], 5731–1971, § 5 (1972) (as amended) (Isr.).

criminal justice, also contributes to legal certainty. This allows for sides to prepare for the trial under the assumption that a family member will testify in court (since it is possible to compel them to testify), whether for the benefit of the presentation of a writ of indictment, consolidation of a plea agreement, or management of the trial.

This situation constitutes a deviation from the competence model but, at the same time, also constitutes a deviation from the privilege model, since from the moment that the witness filed the complaint at the police station, they not only have the competence to testify but can also be compelled to do so. This "hybrid" solution has the advantages of each of the models, while protecting the two conflicting values—the search for the factual truth and protection of the family unit—without the protection of one causing a cost to the other. When the state does not compel the witness to file a complaint against their family member, it does not initiate the harm against the family unit. And when the state compels the person who files the complaint to testify against family members, it enables the prosecution and the court to try accused persons and bring about their conviction or, at least, their detention to increase the probability that this will happen. When we add the restriction to the list of offenses noted in Section 5 of the Evidence Ordinance, according to which family members have the competence and are obliged to testify against their accused-relatives,[171] then the result is that despite the family members' competence being annulled under Israeli law, there are many cases in which the prosecution has the possibility of compelling family members to testify and consequently to increase the probability that guilty defendants will be convicted.

Against this background, it becomes pertinent to ask: Which model is optimal for the regulation of family members' testimony? As indicated in the discussion in Part One of this Article, each of the models has its own advantages and disadvantages. In my opinion, the optimal model is one which allows a deviation from the existing arrangement, whether the law annuls the family members' competence, or if it grants them privilege but compels family members to testify against their relatives in certain cases. The assumption is that strict, formal rules are liable to hinder the fact-finding task and to create unjust results. In order to prevent such results, a deviation from these rules should be permitted in suitable circumstances. An optimal model or regulation would allow two conflicting values to be protected simultaneously: the search for the truth and the administration of justice on the one hand and the integrity of the family unit on the other. However, such an arrangement should also include exceptions that would enable the possibility of compelling witnesses, in certain circumstances, to testify against a family member despite potential harm to the accused's family unit. The purposes of criminal procedure are to convict guilty defendants and to acquit the innocent. Since the prohibition of

[171] *Id.*

family members' testimony, whether by annulling their competence or by granting them privilege, harms the possibility of convicting guilty defendants, then the proper and just model is one that does not allow unbearable damage to these purposes.

There are two main ways avenues of deviation from the general arrangement. One way is to determine exceptions by statute, which can allow witnesses to be compelled to testify against their family members formally. The second way is to grant the court, whether in a preliminary proceeding or the main proceedings, the discretionary authority to compel a witness to testify against his or her family member in suitable cases.

Some cases that justify deviation from the general model are those where the defendant is accused of serious offenses. When the defendant has harmed important social values such as the sanctity of life, integrity of the body, or state security, the search for the truth and administration of justice necessitate that the accused should be brought to trial and punished, even at the risk of harm to the integrity of the accused's family unit. Protection of the sanctity of life and the public's bodily integrity should supersede the protection of the integrity of family unit of a defendant who is guilty of murder, assault, or rape. When a person commits a sex crime, whether the victim is a family member or a stranger, and witnesses who are family members do not have the competence to testify against them (according to the competence model) or choose not to testify against them (according to the privilege model), it may be impossible to bring the offender to trial. This deals a difficult blow to justice and the purposes of both discursive and substantive criminal law.

Another example of a case that justifies deviation from the existing arrangements is in offenses against national security. National security is one of the most important social values and its protection is consequently justified, even at the cost of harm to the family unit. For example, in a situation where a family member acted with a terrorist organization or spied for an enemy state, the protection of the value of security of the state and its members should be prioritized over the privacy of the defendant's home.

Another exception that justifies a deviation from the general arrangement relates to the filing of a complaint by a family member, as determined recently in Israeli law. As discussed, according to Israeli law, once a family member files a complaint at the police station against their relative for any offense, they are compelled to testify against the accused relative in the trial.[172] Granting privilege to witnesses in a case such as this may prompt defendants to exert pressure on the witnesses in order to prevent them from testifying against the offender. This situation not only makes it difficult to administer criminal proceedings, it also harms the goals of criminal procedure.

Apart from the determination of exceptions that will constitute a deviation from the general arrangement and permit the prosecution to compel witnesses

[172] *Id.* at § 5(b).

to testify against their family members, or in addition to these exceptions, it is possible to grant the courts residual jurisdiction—authority according to their discretion—to deviate from the general arrangement in suitable cases. In a specific case, the court will have to weigh the damage to the family unit caused as a result of giving testimony against the possible damage that would be caused to the fact-finding task, to public interests. The court will need to create an ad hoc balance between the potential damage in the family unit on the one hand and the benefit and damage that might be caused to the search for truth and the public interest on the other hand, both by the transmission of the evidence and by its disqualification.

In this context, it is possible to adopt the considerations that the courts in Australia are required to weigh and to add to them other considerations such as: the severity of the defendant's purported offense; the testimony's significance for the trial; the probative value of the testimony; the a priori weight of the testimony; whether there is additional evidence on the same matter and whether it can be accessed; whether the evidence needs an evidential supplement, and whether such supplement exists in the interrogation file; the type of relationship between the witness and the accused and the potential extent of harm to this relationship if the witness is required to testify; whether the accused exerted pressure on the witness to prevent them from filing a complaint with the police or testifying in court; and implications of these and other considerations.

## V. CONCLUSION

The competence and privilege models are the two general models for the arrangement of testimony of family members. The advantages and disadvantages of each of the models are reflected in the degree of normative tension between the search for the truth and the integrity of the family unit, and also in other aspects. Other aspects include the contribution of each of the models to judicial certainty, to the ability of a side to prepare appropriately for the trial, and to thwarting improper pressures and means exerted on witnesses in order to prevent them from testifying.

The regulation of family members' testimony varies in comparative law, both from a descriptive viewpoint and from a normative viewpoint. While in some states there are no special rules for the testimony of family members, other states do determine specific arrangements for spouses' testimony, and a few states regulate the testimony of parents and children. While some states regulate the testimony of family members within the competence model, others grant the witnesses privilege to choose whether to incriminate the accused family member. These legal arrangements range along a spectrum between reaching the factual truth and doing justice at one end of the scale and protection of the integrity of the family unit at the other end of the scale. Each legal system sets the point of balance between these two values at a different

position, reflecting its approach to the desirable point of balance between the two conflicting values. In light of these different arrangements in different legal systems, the question arises: Which would be the optimal model for the arrangement of family members' testimony? Since each of the models and each form of regulation has its own advantages and disadvantages, I argue that the optimal model would be one that determines specific rules for family members' testimony whether by annulling their competence or by granting them privilege, but at the same time would enable deviation from that same general arrangement in suitable cases. This is to ensure that the administration of justice would not be thwarted and that there would be no serious harm to the purposes of the criminal procedure and goals of the penal law. Such a deviation is possible either by predetermined and statutory exceptions, or by granting the courts residual jurisdiction to order the witness's testimony against the family member to be heard in exceptional circumstances.

In order to provide appropriate and complete protection for the family unit, there is room to apply such rules not only for spouses but also for parents and children, as occurs in Israeli and Australian law. The family unit may be harmed not only when the prosecution is able to compel a spouse to testify against the other spouse, but also when it compels a parent to testify against a child, and vice-versa. The enlargement of the arrangement to include parents and children would severely harm the fact-finding task and the doing of justice, since the group of witnesses with competence to testify is diminished, or alternatively the group to whom privilege is granted is enlarged. However, it is possible to minimalize the damage, if when existing arrangements are broadened to include also parents and children the exceptions are simultaneously determined. This will restrict the application of those arrangements and permit deviation from them. In this way, the protection of the integrity of the family will not be at a cost to the protection of important social values, and an optimal balance will be achieved between those two values.