

10/30/69

Memorandum 69-122

Subject: Study 63.20-50 • Evidence Code (Marital Testimonial Privilege)

You will recall that the Commission is recommending that the privilege not to be called in a civil case be abolished. Our recommendation includes the following footnote concerning the privilege not to be called in criminal cases:

Under former Penal Code Section 1322 (repealed Cal. Stats. 1965, Ch. 299, p. 1369, § 145), neither a husband nor a wife was competent to testify against the other in a criminal action except with the consent of both. However, this section was construed by the courts to confer a waivable privilege rather than to impose an absolute bar; the witness spouse was often forced to take the stand before asserting the privilege. See *People v. Carmelo*, 94 Cal. App.2d 301, 210 P.2d 538 (1949); *People v. Moore*, 111 Cal. App. 632, 295 P. 1039 (1931). Although it was said to be improper for a district attorney to call a defendant's wife in order to force the defendant to invoke the testimonial privilege in front of the jury, such conduct was normally held to be harmless error. See *People v. Ward*, 50 Cal.2d 702, 328 P.2d 777 (1958). Thus, the privilege not to be called is necessary in criminal cases to avoid the prejudicial effect of the prosecution's calling the spouse as a witness and thereby forcing him to assert the privilege in the presence of the jury.

Attached as Exhibit I is an extract from the recent case of People v. Coleman, 71 Adv. Cal. 1201, 1209-1210 (Oct. 1969). The Supreme Court holds that the prosecuting attorney may comment on the failure of the defendant to call his wife to testify on his behalf. This substantially eliminates the privilege not to be called and the privilege not to testify against a spouse in a criminal case. The staff brings this case to your attention. However, because we see no particular justification for the marital testimonial privilege (which protects testimony concerning observed facts as distinguished from confidential marital communications), we do not recommend that any revision be made in the Evidence Code to change the result in the Coleman

case. We have, however, added the following sentence to the portion of the recommendation quoted above: "But see People v. Coleman, 71 Adv. Cal. 1201, 1209, Cal. Rptr. , (1969)(not misconduct for prosecution to comment on defendant's failure to call his spouse as witness on his behalf).

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT I

EXTRACT FROM PEOPLE V. COLEMAN,
71 A.C. 1201, 1209-1210 (Oct. 1969)

[3] Defendant contends that the prosecuting attorney committed misconduct by commenting on the failure of defendant's wife to testify on his behalf. We do not agree with this contention.

Before the enactment of the Evidence Code it was misconduct for the prosecuting attorney to comment on the failure of a defendant's spouse to testify for the defendant. (*People v. Wilkes* (1955) 44 Cal.2d 679, 687 [284 P.2d 481], and cases cited.) At that time, however, neither spouse could testify for or against the other without the consent of both. (Code Civ. Proc., § 1881, subd. 1; Pen. Code, § 1322; both repealed effective Jan. 1, 1967.) Accordingly, it was improper to comment on the defendant's spouse's failure to testify, for the defendant could not compel his spouse to testify either for or against him. Under the provisions of the Evidence Code, however, a defendant's spouse has no privilege not to testify for the defendant, and the defendant has no privilege to prevent his spouse from testifying for or against him. (Evid. Code, §§ 911, 970, 971.) Comment on a wife's failure to testify for her defendant husband does not, therefore, constitute comment on the exercise of a privilege that defendant has (see Evid. Code, § 913) or on his failure to call a witness that he cannot compel to testify on his behalf. Since defendant's failure to call his wife was a failure to call a material and important witness, his not doing so could be considered by the jury and commented upon by the prosecuting attorney. (See Evid. Code, § 412; *People v. Carter* (1953) 116 Cal. App.2d 533, 539 [253 P.2d 1016].)