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WITNESS-SPOUSE ALONE MAY EXERCISE SPOUSAL TESTIMONIAL  
PRIVILEGE IN FEDERAL CRIMINAL CASES

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

In *Trammel v. United States*<sup>1</sup> the Supreme Court modified the traditional common-law privilege<sup>2</sup> permitting the accused to render his spouse completely incompetent to testify in federal criminal cases.

Police indicted Otis Trammel and two others<sup>3</sup> for importation and conspiracy to import heroin.<sup>4</sup> The Government named defendant's wife as an unindicted co-conspirator<sup>5</sup> and granted her use immunity in exchange for her testimony at trial.<sup>6</sup> Asserting the testimonial privilege, Trammel moved to disqualify his wife from testifying against him.<sup>7</sup> The trial court denied the motion<sup>8</sup> and permitted defendant's wife to testify to any act she observed during the marriage and to any communication made in the presence of third parties.<sup>9</sup> The trial court convicted Trammel on both counts. On appeal, the Tenth Circuit affirmed.<sup>10</sup> The Supreme Court granted certiorari<sup>11</sup> and *held*: A witness-spouse alone may refuse to testify adversely and may neither be com-

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1. 445 U.S. 40 (1980).

2. At issue in *Trammel* is the testimonial privilege, rather than other evidentiary privileges such as the marital communications privilege or the attorney-client privilege. The testimonial privilege is a competency doctrine that permits the holder of the privilege to prevent a witness from taking the stand. This complete disqualification has a markedly greater effect than other evidentiary privileges, which may bar specific testimony, but do not completely prevent the witness from testifying. See notes 7, 9, 32 *infra* and accompanying text.

3. 445 U.S. 40, 42 (1980).

4. Defendants were indicted under 21 U.S.C. §§ 952(a), 962(a), 963 (1976).

5. 445 U.S. at 42.

6. *Id.* The Government advised Mrs. Trammel that if she cooperated it might charge her with a misdemeanor. In fact, the Government did not prosecute her. Brief for Respondent at 4 n.2, *Trammel v. United States*, 445 U.S. 40 (1980).

7. 445 U.S. at 42. In *Funk v. United States*, 290 U.S. 371 (1933), the Supreme Court permitted the spouse of a defendant to testify in his behalf. *Funk* thereby abolished absolute testimonial disqualification in the federal courts, changing the rule into a privilege of disqualification. Although *Funk* allowed favorable spousal testimony, it did not affect the rule preventing one spouse from testifying adversely against the other.

8. See 445 U.S. at 43.

9. The holding in *Trammel* applies only to the testimonial privilege. The confidential marital communications privilege, recognized in *Wolfe v. United States*, 291 U.S. 7 (1934), and *Blau v. United States*, 340 U.S. 332 (1951), was not at issue. See 445 U.S. at 45 n.5.

10. 583 F.2d 1166 (10th Cir. 1978). The Tenth Circuit relied on the fact that the witness-wife was an unindicted co-conspirator who had been granted immunity and held that the grant overcame the testimonial privilege as well as the privilege against self-incrimination.

11. 440 U.S. 934 (1979).

pelled nor foreclosed from testifying.<sup>12</sup>

The testimonial privilege<sup>13</sup> is a common-law doctrine<sup>14</sup> that enables a criminal defendant to disqualify his spouse from testifying.<sup>15</sup> A defendant could invoke the privilege<sup>16</sup> regardless of the nature or content of the testimony if the spouses were validly married at the time of the criminal proceeding.<sup>17</sup> Courts justified the testimonial privilege as necessary to protect marital harmony and family peace.<sup>18</sup>

The testimonial privilege is an evidentiary rule founded in policy; it is not a constitutional right.<sup>19</sup> Rule 501 of the Federal Rules of Evidence<sup>20</sup> provides that federal courts must develop common-law rules of

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12. 445 U.S. at 53.

13. The testimonial privilege is also referred to as the privilege against anti-marital facts or the marital privilege.

14. See generally Comment, *Questioning The Marital Privilege: A Medieval Philosophy In a Modern World*, 7 CUM. L. REV. 307 (1976). Four marital privileges developed from the common law: (1) The incompetency of one spouse to be a witness against the other; (2) the privilege of one spouse not to testify against the other; (3) the privilege of one spouse to prevent incriminating testimony from the other; and (4) the general privilege against disclosure of confidential communications between husband and wife. *Id.* at 307.

15. See, e.g., *United States v. Bolzer*, 556 F.2d 948, 951 (9th Cir. 1977); *United States v. Cameron*, 556 F.2d 752, 755 (5th Cir. 1977); *United States v. Allery*, 526 F.2d 1362, 1365 (8th Cir. 1975); *United States v. Fisher*, 518 F.2d 836, 839 (2d Cir.), *cert. denied*, 423 U.S. 1033 (1975); *In re Snoonian*, 502 F.2d 110, 112 (1st Cir. 1974); *United States v. Harper*, 450 F.2d 1032, 1045 (5th Cir. 1971); *United States v. Moorman*, 358 F.2d 31, 33 (7th Cir.), *cert. denied*, 385 U.S. 866 (1966); *Wilkerson v. United States*, 342 F.2d 807, 809 (8th Cir. 1965).

16. Privileges are evidentiary laws created to foster or effect desirable social policies and allow exclusion of evidence from judicial proceedings. A court may exclude privileged testimony regardless of its probative value. See Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CALIF. L. REV. 1353, 1358 (1973).

17. See, e.g., *United States v. Saniti*, 604 F.2d 603, 604 (9th Cir.), *cert. denied*, 444 U.S. 969 (1979); *United States v. Lustig*, 555 F.2d 737, 747 (9th Cir. 1977), *cert. denied*, 434 U.S. 1045 (1978); *United States v. White*, 545 F.2d 1129, 1130 (8th Cir. 1976); *United States v. McElrath*, 377 F.2d 508, 510 (6th Cir. 1967); *United States v. Owens*, 424 F. Supp. 421, 423 (E.D. Tenn. 1976). Death or divorce terminates the privilege. See, e.g., *Pereira v. United States*, 347 U.S. 1, 6 (1954); *United States v. Bolzer*, 556 F.2d 948, 951 (9th Cir. 1977); *United States v. Smith*, 533 F.2d 1077, 1079 (8th Cir. 1976); *United States v. Fisher*, 518 F.2d 836, 838 (2d Cir.), *cert. denied*, 423 U.S. 1033 (1975).

18. Courts point out that admission of adverse spousal testimony may disrupt marital harmony or family peace. See, e.g., *Hawkins v. United States*, 358 U.S. 74, 77-79 (1958); *United States v. Cameron*, 556 F.2d 752, 755 (5th Cir. 1977); *United States v. Allery*, 526 F.2d 1362, 1365 (8th Cir. 1975); *United States v. Armstrong*, 476 F.2d 313, 315 (5th Cir. 1973). See generally 8 J. WIGMORE, EVIDENCE §§ 2227-2228 (J. McNaughton ed. 1961).

19. E.g., *United States v. Benford*, 457 F. Supp. 589, 597 (E.D. Mich. 1978); *In re September*, 435 F. Supp. 538, 545 (N.D. Ind. 1977); *Young v. Oklahoma*, 428 F. Supp. 288, 294 (W.D. Okla. 1976); *United States v. Hicks*, 420 F. Supp. 533, 536 (N.D. Tex. 1976).

20. FED. R. EVID. 501 provides in pertinent part:

privilege on a case-by-case basis<sup>21</sup> "in light of reason and experience."<sup>22</sup>

In *Hawkins v. United States*<sup>23</sup> the Supreme Court first considered the validity of a criminal defendant's testimonial privilege. The Court held the spouse's testimony inadmissible, choosing to preserve the common-law rule that "bars the testimony of one spouse against the other unless both consent."<sup>24</sup> The Court rejected the Government's argument that

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

By enacting Rule 501 of the Federal Rules of Evidence, Congress rejected Proposed Rule 505, 56 F.R.D. 183, 244-45 (1972), promulgated by the Supreme Court. Proposed Rule 505 would have codified the right of an accused in a criminal trial to prevent his spouse from testifying against him. Proposed Fed. R. Evid. 505 provided:

(a) General rule of privilege. An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him.

(b) Who may claim the privilege. The privilege may be claimed by the accused or by the spouse on his behalf. The authority of the spouse to do so is presumed in the absence of evidence to the contrary.

(c) Exceptions. There is no privilege under this rule (1) in proceedings in which one spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other, or (2) as to matters occurring prior to the marriage or (3) in proceedings in which a spouse is charged with importing an alien for prostitution or other immoral purpose in violation of 8 U.S.C. § 1328, with transporting a female in interstate commerce for immoral purposes or other offense in violation of 18 U.S.C. §§ 2421-2424, or with violation of other similar statutes.

Rule 505 was eliminated by a congressional committee when it became apparent that no agreement was likely to be possible as to the content of specific privilege rules. Because the inability to agree threatened to forestall or prevent passage of an entire rules package, the determination was made that the specific privilege rules proposed by the Court should be eliminated and a single rule (rule 501) substituted. Thus, Congress left the law in its current condition, allowing the courts to develop it by utilizing the principles of the common law. S. REP. NO. 1277, H. R. REP. NO. 650, 93d Cong., 2d Sess. 6, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7051, 7053.

21. Congress intended testimonial privileges to develop through adjudication of particular cases. Congressman Hungate, principal sponsor of the Rules of Evidence in the House, addressed this point during floor debate:

Rule 501 is not intended to freeze the law of privilege as it now exists. The phrase "governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience," is intended to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis.

120 CONG. REC. 40891 (1974).

22. *Wolfe v. United States*, 291 U.S. 7 (1934) (expression first used by Supreme Court). FED. R. CRIM. P. 26 codified the language in *Wolfe* and governed the admissibility of evidence in federal courts, including the application of common-law privileges, until Congress enacted FED. R. EVID. 501. See note 20 *supra*.

23. 358 U.S. 74 (1958).

24. *Id.* at 78. See also *Wyatt v. United States*, 362 U.S. 525 (1960); *Funk v. United States*,

the witness-spouse should have the privilege to testify independent of the defendant's control.<sup>25</sup> Justice Black<sup>26</sup> made no attempt to balance the possible consequences of adverse testimony against the loss to society caused by excluding relevant evidence.<sup>27</sup> Instead he emphasized a strong concern for the preservation of marital harmony.<sup>28</sup> The Court did not preclude future modification based on "reason and experience,"<sup>29</sup> but suggested little room for change.<sup>30</sup>

Courts, legislators, and commentators have criticized the *Hawkins* rule as an impediment to the performance of justice.<sup>31</sup> There is disa-

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290 U.S. 371 (1933); *Benson v. United States*, 146 U.S. 325 (1892); *United States v. Mitchell*, 137 F.2d 1006 (2d Cir. 1943).

25. 358 U.S. at 77-79. The Court believed that "the law should not force or encourage testimony which might alienate husband and wife or further inflame existing domestic differences." *Id.* at 79.

26. Justice Black wrote on behalf of a majority of eight. In his first opinion as a member of the Court, Justice Stewart concurred, asserting that "reason and experience" require "that we do more than indulge in mere assumptions, perhaps naive assumptions, as to the importance of this ancient rule to the interests of domestic tranquility." *Id.* at 81-82 (Stewart, J., concurring).

27. The Court only casually acknowledged this problem, stating that "[o]f course, cases can be pointed out in which this exclusionary rule has worked apparent injustice." *Id.* at 78. *See Note, The Husband-Wife Testimonial Privilege in the Federal Courts*, 59 B.U.L. REV. 894, 900 & nn.51-53 (1979).

28. 358 U.S. at 77. The Court stated:

The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy is necessary to foster family peace, not only for the benefit of husband, wife, and children, but for the benefit of the public as well. Such a belief has never been unreasonable and is not now.

*Id.*

29. *See* notes 20-22 *supra* and accompanying text.

30. 358 U.S. at 78. *See United States v. White*, 545 F.2d 1129 (8th Cir. 1976); *United States v. Allery*, 526 F.2d 1362 (8th Cir. 1975). *See also* Note, *supra* note 27, at 900; Note, *Evidence-Competency of Wife to Give Adverse Testimony Against Husband*, 32 TEMP. L.Q. 351, 355 (1959); Note, *Evidence-Witnesses-Ability of One Spouse to Testify Against the Other in Federal Criminal Proceedings*, 12 VAND. L. REV. 947, 949 (1959).

31. *See United States v. Tsinnijinnie*, 601 F.2d 1035 (9th Cir. 1979), *cert. denied*, 445 U.S. 966 (1980); *United States v. Van Drunen*, 501 F.2d 1393 (7th Cir.), *cert. denied*, 419 U.S. 1091 (1974); C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 66 at 145-46 (2d ed. 1972); 8 J. WIGMORE, *supra* note 18, § 2228 at 217-22; Hines, *Privileged Testimony of Husband and Wife in California*, 19 CALIF. L. REV. 390, 408 (1931); Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675 (1929); notes 33-35 *infra* and accompanying text.

Justice Stewart is also an outspoken critic. Although concurring in the judgment on the ground that the present case did not present an appropriate opportunity to modify the privilege, he stated:

Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice. When such a rule is the product of a conceptualism long ago discarded, is universally criticized by scholars, and has been qualified or abandoned in many jurisdictions, it should receive the most careful scrutiny.

*Hawkins v. United States*, 358 U.S. at 81.

greement as a policy matter, however, whether the rule strikes the proper balance between the competing societal interests of preserving family harmony and the need for presentation of relevant evidence.<sup>32</sup>

Many state legislatures have failed to follow the Supreme Court's lead in *Hawkins*, vesting the privilege in the witness-spouse<sup>33</sup> or abolishing the privilege altogether.<sup>34</sup> The trend in state law since the 1958 *Hawkins* decision deprives the accused of the ability to bar adverse spousal testimony.<sup>35</sup>

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32. Privileges such as priest-penitent, attorney-client, and physician-patient limit protection to communications made in trust. The testimonial privilege, on the other hand, permits the accused to exclude all adverse testimony. For *Trammel's* discussion of this issue, see 445 U.S. at 51.

33. *Id.* at 48 n.9. Nine states entitle the witness-spouse alone to assert a privilege against adverse spousal testimony. See ALA. CODE § 21-227 (1977); CAL. EVID. CODE §§ 970-973 (Deering 1966 & Supp. 1981); CONN. GEN. STAT. ANN. § 54-84 (West. Cum. Supp. 1979); GA. CODE ANN. § 38-1604 (1974); KY. REV. STAT. § 421.210 (Cum. Supp. 1978); LA. REV. STAT. ANN. § 15:461 (West 1967); MD. CTS. & JUD. PROC. CODE ANN. §§ 9-101, -106 (1974); MASS. ANN. LAWS ch. 233, § 20 (Michie/Law. Co-op 1974); R.I. GEN. LAWS § 12-17-10 (1970).

In 1901 Congress enacted a rule of evidence for the District of Columbia that made husband and wife "competent but not compellable to testify for or against each other," except as to confidential communications. This provision, which vests the privilege against adverse spousal testimony in the witness-spouse, remains in effect. D.C. CODE ANN. § 14-306 (1973).

In 1965 California took the privilege from the defendant-spouse and vested it in the witness-spouse, accepting a study commission recommendation that the "latter [was] more likely than the former to determine whether or not to claim the privilege on the basis of the probable effect on the marital relationship." See CAL. EVID. CODE §§ 970-973 (Deering 1966 & Supp. 1981); 1 CALIF. L. REVISION COMM'N, RECOMMENDATION AND STUDY RELATING TO THE MARITAL "FOR OR AGAINST" TESTIMONIAL PRIVILEGE F-5 (1956). See also 6 CALIF. L. REVISION COMM'N, TENTATIVE PRIVILEGES RECOMMENDATIONS—RULE 27.5 at 243-44 (1964).

34. 445 U.S. at 48 n.9. Seventeen states have abolished the privilege in criminal cases. See ARIZ. REV. STAT. ANN. § 12-2231 (Supp. 1980); ARK. STAT. ANN. § 28-1001, Rules 501, 504 (Cum. Supp. 1977); DEL. CODE ANN. tit. 11, § 3502 (1979); FLA. STAT. ANN. §§ 90.501, .504 (West. 1979); ILL. ANN. STAT. ch. 38, § 155-1 (Smith-Hurd Cum. Supp. 1980); IND. CODE ANN. § 34-1-14-5 (Burns Cum. Supp. 1980); KAN. STAT. ANN. §§ 60-407, -428 (1976); ME. REV. STAT. ANN. tit. 16, § 53 (1965); N.H. REV. STAT. ANN. § 516.27 (1974); N.Y. CRIM. PROC. LAW § 60.10 (McKinney 1971); N.Y. CIV. PRAC. LAW §§ 4502, 4512 (McKinney 1963); N.D. CENT. CODE, N.D. R. EVID., 501, 504 (Supp. 1977); OKLA. STAT. ANN. tit. 12, §§ 2103, 2501, 2504 (West 1980); S.C. CODE § 19-11-30 (1977); S.D. COMP. LAWS ANN. §§ 19-13-1, -12 to -15 (1979); TENN. CODE ANN. § 40-24-4 (1975); VT. STAT. ANN. tit. 12, § 1605 (1973); WIS. STAT. ANN. §§ 905.01, .05 (West 1975).

35. When the Court decided *Hawkins* in 1958, 31 jurisdictions allowed an accused to prevent adverse spousal testimony. 358 U.S. at 81. The number dropped to 24 in 1980. 445 U.S. at 48.

Eight states provide that one spouse is incompetent to testify against the other in a criminal proceeding. HAWAII REV. STAT. § 621-18 (Supp. 1975); IOWA CODE § 622.7 (1950); MISS. CODE ANN. § 13-1-5 (Cum. Supp. 1980); N.C. GEN. STAT. § 8-57 (Cum. Supp. 1979); OHIO REV. CODE ANN. § 2945.42 (Page Cum. Supp. 1980); PA. STAT. ANN. tit. 42, §§ 5913, 5915 (Purdon Supp. 1980); TEX. CODE CRIM. PRO. ANN. art. 38.11 (Vernon 1973); WYO. STAT. § 1-12-104 (1977).

Sixteen states provide a privilege against adverse spousal testimony and vest the privilege in

Legal scholars and commentators prefer the witness-spouse rule for four reasons.<sup>36</sup> First, the willingness of the witness-spouse to testify adversely may indicate the degree to which marital harmony exists and merits protection.<sup>37</sup> Second, the witness-spouse is in a better position to know if adverse testimony will be harmful to the marriage.<sup>38</sup> Third, more witness-spouses will testify and provide relevant evidence at trial if the witness-spouse, rather than the accused, has the privilege.<sup>39</sup> Finally, recognition of the witness-spouse rule will be uniform throughout the federal judicial system.<sup>40</sup>

Following *Hawkins*, federal courts declined to consider the possibility of adopting a witness-spouse rule.<sup>41</sup> Some courts adhered to *Hawkins*,<sup>42</sup> while others limited the accused's privilege by carving out exceptions to the rule<sup>43</sup> or refusing to apply it for policy reasons.<sup>44</sup>

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both spouses or in the defendant-spouse alone. ALASKA R. CRIM. P. 26(b)(2) (Supp. 1968); COLO. REV. STAT. § 13-90-107 (1974); IDAHO CODE § 9-203 (1979); MICH. COMP. LAWS § 600.2162 (1970); MINN. STAT. ANN. § 595.02 (West Cum. Supp. 1978); MO. REV. STAT. § 546.260 (1978); MONT. REV. CODES ANN. § 46-16-212 (1979); NEB. REV. STAT. § 27-505 (1975); NEV. REV. STAT. § 49.295 (1979); N.J. STAT. ANN. § 2A:84A-17 (West 1976); N.M. STAT. ANN. § 38-6-6 (1978); OR. REV. STAT. § 44.040 (1979); UTAH CODE ANN. § 78-24-8 (1977); VA. CODE § 19.2-271.2 (Cum. Supp. 1980); WASH. REV. CODE ANN. § 5.60.060 (Supp. 1980); W. VA. CODE § 57-3-3 (1966).

36. See Reutlinger, *supra* note 16, at 1384-85; Note, *supra* note 27, at 917-19; Comment, *The Husband-Wife Evidentiary Privileges: The Power of the Federal Courts to Seek a Rational Solution*, 17 ST. LOUIS U.L.J. 107 (1972); Note, *Competency of One Spouse to Testify Against the Other in Criminal Cases Where the Testimony Does not Relate to Confidential Communications: Modern Trend*, 38 VA. L. REV. 359 (1952); 52 J. CRIM. L.C. & P.S. 74 (1961).

37. Brief for Respondent at 19, *Trammel v. United States*, 445 U.S. 40 (1980) (citing C. McCORMICK, *supra* note 31, § 66 at 145 (2d ed. 1972)); Comment, *Federal Rules of Evidence and the Law of Privileges*, 15 WAYNE L. REV. 1287, 1336 (1969).

38. Note, *supra* note 27, at 918. See Reutlinger, *supra* note 16, at 1384; Comment, *Marital Privileges and the Right to Testify*, 34 U. CHI. L. REV. 196, 199 (1966).

39. See Reutlinger, *supra* note 16, at 1304; Note, *supra* note 27, at 917-18; Comment, *supra* note 14, at 318.

40. Note, *supra* note 27, at 917-18. This assumes that federal courts will honor the privilege whenever properly claimed by the witness. If exercise of the privilege is not subject to the judge's discretion, but is instead applied uniformly and without exception, inconsistencies among the circuit courts of appeal will be avoided. See notes 42-44 *infra* and accompanying text.

41. Note, *supra* note 27, at 918.

42. *United States v. Bolzer*, 556 F.2d 948 (9th Cir. 1977); *United States v. Cameron*, 556 F.2d 752 (5th Cir. 1977); *United States v. Allery*, 526 F.2d 1362 (8th Cir. 1975); *United States v. Fisher*, 518 F.2d 836 (2d Cir.), *cert. denied*, 423 U.S. 1033 (1975); *In re Snoonian*, 502 F.2d 110 (1st Cir. 1974); *United States v. Harper*, 450 F.2d 1032 (5th Cir. 1971); *United States v. Moorman*, 358 F.2d 31 (7th Cir.), *cert. denied*, 385 U.S. 866 (1966); *Wilkerson v. United States*, 342 F.2d 807 (8th Cir. 1965).

43. *United States v. Cameron*, 556 F.2d 752, 755 (5th Cir. 1977) (exception to testimonial privilege exists in prosecution of crimes committed by one spouse against the other or against the children of either, and in action by one of the spouses against an outsider for an intentional injury

A recognized exception to the testimonial privilege arises when spouses are jointly involved in a criminal enterprise.<sup>45</sup> This exception rests on several grounds: it is unlikely that spousal testimony will affect marital harmony when both husband and wife are parties to a crime;<sup>46</sup> the need for evidence outweighs the possibility that the policy of the privilege will be advanced;<sup>47</sup> and the goal of preserving the family does not justify guaranteeing aid to a criminal from his spouse without fear that she will later be an adverse witness.<sup>48</sup> As stated by the Seventh

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to the marital relation); *United States v. Smith*, 533 F.2d 1077, 1079 (8th Cir. 1976) (privilege unavailable when one spouse commits offense against the other). *Accord*, *United States v. Allery*, 526 F.2d 1362, 1365 (8th Cir. 1975). *See* *Grulkey v. United States*, 394 F.2d 244, 245-46 (8th Cir. 1968) (exception exists when wife is victim of alleged criminal act of husband); *Herman v. United States*, 220 F.2d 219, 226 (4th Cir. 1955), *cert. denied*, 350 U.S. 971 (1956) (privilege inapplicable when wife claims injury of physical or moral nature, or when husband's crime affects wife's property).

44. *Ryan v. Commissioner*, 568 F.2d 531, 542-43 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978) (policy of full enforcement of federal tax laws outweighed claim of privilege when marriage would not be harmed by admission of testimony); *United States v. Cameron*, 556 F.2d 752, 756 (5th Cir. 1977) (when marriage no longer viable, traditional policy reasons for privilege non-existent and privilege not applied); *United States v. Allery*, 526 F.2d 1362, 1366-67 (8th Cir. 1975) (policy of preserving family harmony cannot be served in cases involving child abuse); *United States v. Fisher*, 518 F.2d 836, 840 (2d Cir.), *cert. denied*, 423 U.S. 1033 (1975) (purpose of privilege will not be served when court believed marriage was beyond reconciliation); *In re Snoonian*, 502 F.2d 110, 112-13 (1st Cir. 1974) (privilege serves no purpose when testimony of husband poses no threat of prosecution against wife).

45. *See United States v. Price*, 577 F.2d 1356 (9th Cir.), *cert. denied*, 439 U.S. 1068 (1978) (extrajudicial statements of husband or wife made in furtherance of conspiracy admissible); *Ryan v. Commissioner*, 568 F.2d 531 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978) (spouses must answer interrogatories concerning tax evasion over claim of marital privilege); *United States v. Mackiewicz*, 401 F.2d 219 (2d Cir.), *cert. denied*, 393 U.S. 923 (1968) (extrajudicial statement of husband admissible when spouses accused of defrauding the government by falsifying income tax returns); *United States v. Owens*, 424 F. Supp. 421 (E.D. Tenn. 1976) (wife permitted to testify against husband when both involved in criminal offense).

46. *United States v. Doughty*, 460 F.2d 1360, 1364 (7th Cir. 1972) (criminal conviction of husband for aiding and abetting wife in tax evasion). *Accord*, *Ryan v. Commissioner*, 568 F.2d 531 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978); *United States v. Van Drunen*, 501 F.2d 1393 (7th Cir.), *cert. denied*, 419 U.S. 1091 (1974). *See United States v. Mackiewicz*, 401 F.2d 219 (2d Cir.), *cert. denied*, 393 U.S. 923 (1968) (Government testimony on husband's statement at trial provided sufficient "buffer" so as not to endanger domestic peace). *But see Ivey v. United States*, 344 F.2d 770 (5th Cir. 1965) (admission of wife's out-of-court statement against husband held reversible error).

47. *Ryan v. Commissioner*, 568 F.2d 531 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978) (when spouses married for 40 years, admitting testimony on failure to answer interrogatories by the Internal Revenue Commissioner held not likely to adversely affect marriage). *See also United States v. Doughty*, 460 F.2d 1360 (7th Cir. 1972); *United States v. Mackiewicz*, 401 F.2d 219 (2d Cir.), *cert. denied*, 393 U.S. 923 (1968).

48. *United States v. Van Drunen*, 501 F.2d 1393 (7th Cir.), *cert. denied*, 419 U.S. 1091 (1974)

Circuit Court of Appeals, the *Hawkins* rule “should be limited to cases where a spouse who is neither a victim nor a participant observes evidence of the other spouse’s crime.”<sup>49</sup>

In *Trammel v. United States*<sup>50</sup> the Supreme Court acknowledged the erosion of the *Hawkins* rationale<sup>51</sup> and reexamined the rule.<sup>52</sup> Writing for the majority, Chief Justice Burger considered “whether the privilege against adverse spousal testimony promotes sufficiently important interests to outweigh the need for probative evidence in the administration of criminal justice.”<sup>53</sup> He observed that the *Hawkins* privilege was broader than other testimonial privileges, permitting an accused to exclude all spousal evidence of criminal acts and communications made in the presence of third parties.<sup>54</sup> Such a rule may frustrate justice rather than promote family peace.<sup>55</sup> Additionally, vesting the privilege in the accused could jeopardize the marital relationship.<sup>56</sup>

Chief Justice Burger thus reasoned that when one spouse voluntarily testifies against the other in a criminal proceeding, little marital harmony may remain for the *Hawkins* privilege to preserve.<sup>57</sup> Finding the *Hawkins* rule inadequate, the Court declared that the witness-spouse alone should have the privilege to refuse to testify adversely.<sup>58</sup> Chief Justice Burger concluded that the witness-spouse rule furthers the pub-

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(husband indicted for illegal transportation of aliens, one of whom he subsequently married; testimony of wife against him at trial held properly admitted). See *Ryan v. Commissioner*, 568 F.2d 531, 544 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978). See also 5 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 332, 339-45 (1827) (calling the privilege a license to indulge in crime and stating that the privilege could be used to turn a man’s home into a shelter for thieves).

49. *United States v. Van Drunen*, 501 F.2d 1393 (7th Cir.), *cert. denied*, 419 U.S. 1091 (1974). *Accord*, *Ryan v. Commissioner*, 568 F.2d 531 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978).

50. 445 U.S. 40 (1980).

51. The Court made special note of the trend in state law. See notes 33-35 *supra* and accompanying text.

52. 445 U.S. at 47-53.

53. *Id.* at 51.

54. *Id.* at 51-52. See notes 2, 32 *supra*.

55. 445 U.S. at 52.

56. *Id.* The Court asserted that the Government would not offer a wife immunity and lenient treatment if her husband could prevent her from testifying. If both spouses were implicated, and the husband invoked his testimonial privilege, he could effectively escape justice at his wife’s expense.

57. *Id.*

58. *Id.* at 53. The Court apparently ignored the Government’s alternative argument that it recognize an exception to the *Hawkins* rule when the spouses are jointly involved in the criminal activity. See Brief for Respondent at 8-16, 25-29, *Trammel v. United States*, 445 U.S. 40 (1980). See notes 45-49 *supra* and accompanying text.

lic interest in marital harmony without unduly burdening law enforcement needs.<sup>59</sup>

Justice Stewart, concurring, criticized the Court for rejecting *Hawkins* based solely on a change in "reason and experience."<sup>60</sup> He found the witness-spouse rule superior, but was unwilling to join an opinion that neglected to detail the Court's sudden change in policy.<sup>61</sup>

By modifying the *Hawkins* rule, the *Trammel* Court sought to strike the appropriate balance between the competing interests of preserving marital harmony and securing accurate resolution of judicial proceedings.<sup>62</sup> The witness-spouse rule most effectively achieves this balance.<sup>63</sup> Because the Court failed to address several key issues, however, it is unclear whether *Trammel* will lead to favorable development of the testimonial privilege.

First, the Court focused on the deficiencies of *Hawkins* rather than emphasizing the virtues of the witness-spouse rule. The Court intended the new rule to promote marital harmony, increase admissibility of relevant evidence, and add uniformity to a privilege that has failed to accomplish these objectives.<sup>64</sup> Chief Justice Burger did not, however, provide guidance on the proper balance between the competing societal interests. The opinion fails to indicate whether courts will have discretion in applying the rule<sup>65</sup> or whether courts will permit exceptions to facilitate the production of evidence.<sup>66</sup> Only if the privilege applies uniformly and without exception will inconsistencies disappear.

Second, the Court failed to apply the witness-spouse rule to the *Trammel* facts. The record indicates that Mrs. Trammel testified vol-

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59. 445 U.S. at 53.

60. *Id.* at 53-54 (Stewart, J., concurring).

61. Justice Stewart indicated that he had found the witness-spouse rule acceptable when the Government first urged its acceptance in *Hawkins*. He found the Court's sudden turnabout puzzling. "[T]here is reason to believe that today's opinion of the Court will be of greater interest to students of human psychology than to students of law." *Id.* at 54 (Stewart, J., concurring) (citation omitted).

62. *Id.* at 47-53.

63. See notes 36-40 *supra* and accompanying text.

64. *Id.* See Reutlinger, *supra* note 16, at 1384-85; Note, *Competency of One Spouse to Testify Against the Other in Criminal Cases Where the Testimony Does Not Relate to Confidential Communications: Modern Trend*, *supra* note 36, at 375.

65. See note 40 *supra* and accompanying text.

66. If courts allow exceptions to the witness-spouse rule, further questions arise. Will courts be permitted to inquire into the state of the marriage to determine if there is, in fact, a valid marriage to protect? If so, what standards will be utilized to conduct this inquiry?

untarily,<sup>67</sup> implying three possibilities: (1) The marital relationship was not worth preserving; (2) the marriage would ultimately benefit from truthful testimony; and (3) the fear of prosecution and promises of leniency prompted her appearance.<sup>68</sup>

If the witness-spouse does not participate in the criminal activity, the decision to testify must rest on the first or second rationale. The court may then assume that the spouse's testimony will not upset marital harmony.<sup>69</sup> When the witness-spouse is implicated but not named a defendant,<sup>70</sup> however, the prosecution may strain the marital relationship by promising leniency in return for the spouse's testimony.<sup>71</sup> The spouse may testify in an attempt to save herself at the accused's expense.<sup>72</sup> Under these circumstances, it would be impossible to determine whether marital harmony exists or whether the policy of the testimonial privilege is being subverted.<sup>73</sup>

The witness-spouse rule will adequately protect the marital relationship in a majority of cases.<sup>74</sup> The *Trammel* decision is nevertheless difficult to administer when both spouses are involved.<sup>75</sup> Precedent exists

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67. 445 U.S. at 53. The Court stated that "[h]ere, petitioner's spouse chose to testify against him. That she did so after a grant of immunity and assurances of lenient treatment does not render her testimony involuntary." *Id.* The Court referred to Mrs. Trammel's so-called voluntary testimony to vitiate any criticism similar to Justice Stewart's concurrence in *Hawkins*. See 358 U.S. at 82-83 (Stewart, J., concurring).

68. See generally Reutlinger, *supra* note 16, at 1384-85.

69. See notes 37-38 *supra* and accompanying text.

70. Competency of spouses to testify against each other as co-defendants is not at issue. See *United States v. Hicks*, 420 F. Supp. 533 (N.D. Tex. 1976). Competency of a husband or wife as a witness for or against a co-offender or a spouse is also distinguishable. See generally Annot., 90 A.L.R.2d 648 (1963).

71. N.Y.L.J., April 18, 1980, at 28, col. 1.

72. 358 U.S. at 83 (Stewart, J., concurring); 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 505[04] at 505-15 (1979).

73. This was the principal reason given in a memorandum by Edward W. Cleary, Reporter for the Advisory Committee on the Federal Rules of Evidence, for rejecting the suggestion by the Department of Justice that the witness-spouse be the sole holder of the privilege. *Rules of Evidence: Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 57-58 (1973). The decision to testify could still be voluntary, however, even if a witness weighed an interest in securing lenient treatment in return for testimony against any concern for the marriage. See Brief for Respondent at 21-22 & n.21, *Trammel v. United States*, 445 U.S. 40 (1980).

74. See notes 37-40 *supra* and accompanying text.

75. This suggests that *Trammel* was an inappropriate case to modify the common-law testimonial privilege. For similar reasons, Justice Stewart expressed the same view in *Hawkins*. See 358 U.S. at 82-83 (Stewart, J., concurring).

for establishing a co-conspirator exception to resolve this problem;<sup>76</sup> whether the Court will recognize any exception to the witness-spouse rule remains a matter of conjecture.<sup>77</sup>

The decision to modify the outdated *Hawkins* rule by vesting the testimonial privilege in the witness-spouse is commendable. The *Trammel* opinion unfortunately fails to provide needed insight into the difficult task of balancing the public interest in marital harmony without burdening law enforcement needs.

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76. See notes 45-49 *supra* and accompanying text. Co-conspirator exceptions imply that marriages between criminals are unworthy of protection. If the Court had chosen to adopt the witness-spouse rule, and at the same time adopted a co-conspirator exception, Mrs. Trammel would not have had the privilege to refuse to testify against her husband.

77. See *Wyatt v. United States*, 362 U.S. 525 (1960) (Court first recognizes exception to *Hawkins* rule).