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since injury to person or property is essential to a cause of action for strict liability, venue may lie in the county where that injury occurs.

*Mark T. Josephs*

### Modification of the Privilege Against Adverse Spousal Testimony: Trammel v. United States

Otis Trammel was indicted for importing heroin into the United States and for conspiracy to import heroin.<sup>1</sup> Trammel's wife, Elizabeth, one of six unindicted co-conspirators, agreed to testify against her husband under a grant of immunity.<sup>2</sup> The government's case against Trammel depended primarily on her testimony. Prior to trial, Trammel moved to sever his case from that of his two co-defendants, claiming the privilege of preventing his wife from testifying against him.<sup>3</sup> Denying the motion, the district court ruled that Elizabeth Trammel could testify to any act she had observed and to any communications made during the marriage in the presence of a third person, and that only confidential marital communications with the defendant were privileged and thus inadmissible.<sup>4</sup> Based on the admission of his wife's adverse testimony, Trammel was found guilty. On appeal, the Court of Appeals for the Tenth Circuit affirmed the conviction, holding that the admission of the wife's adverse testimony was not error because the privilege against adverse spousal testimony did not apply to the voluntary testimony of a co-conspirator spouse who testified under a grant of immunity from the government.<sup>5</sup> The United States Supreme

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1. Trammel and two co-defendants were charged with violating 21 U.S.C. §§ 952(a), 962(a), 963 (1976) (providing for penalties for importing controlled substances).

2. In August 1975, Elizabeth Trammel flew to Thailand, obtained a quantity of heroin, and returned to the Philippines. She and her husband then flew to the United States to distribute the heroin. After a subsequent trip to Thailand to purchase additional heroin, Elizabeth Trammel was arrested when the heroin was discovered during a routine customs search. Based on the government's assurance of lenient treatment, she agreed to cooperate with Drug Enforcement Administration agents. Brief for the United States at 3-4, *reprinted in* 11 LAW REPRINTS, CRIMINAL LAW SERIES no. 7, at 29-30 (1979-1980).

3. Trammel's claim was based on the privilege recognized in *Hawkins v. United States*, 358 U.S. 74 (1958), which prevented a spouse from giving adverse testimony without the consent of the defendant spouse. For a discussion of *Hawkins*, see notes 28-39 *infra* and accompanying text.

4. *Trammel v. United States*, 100 S. Ct. 906, 908, 63 L. Ed. 2d 186, 190 (1980).

5. *United States v. Trammel*, 583 F.2d 1166, 1169 (10th Cir. 1978). The circuit court reasoned that the governmental right to obtain testimony through the immunity statutes must be weighed against the competing policy of the privilege of preventing adverse spousal testimony. Noting that the Supreme Court had announced at least one exception to the privilege in *Wyatt v. United States*, 362 U.S. 525 (1960) (privilege invalid when one spouse commits a crime against the other), the court determined that, in cases involving grants of immunity to a spouse who is a co-conspirator of the party spouse, reason and experience dictate that the policy behind the testimonial privilege is outweighed by the more compelling need behind the immunity statutes. 583 F.2d at 1168-70.

Court granted certiorari. *Held, affirmed*: The privilege against adverse spousal testimony is modified so that the witness spouse alone has a privilege to refuse to testify adversely; the witness spouse may be neither compelled to testify nor foreclosed from testifying. *Trammel v. United States*, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980).

## I. HISTORICAL DEVELOPMENT OF THE SPOUSAL TESTIMONIAL PRIVILEGE

The precise origins of the privilege against adverse spousal testimony are obscure.<sup>6</sup> In *Bent v. Allot*,<sup>7</sup> a case decided in the sixteenth century, a wife had testified on her defendant husband's behalf, but when the plaintiff sought to examine the wife, the court gave the defendant spouse the option of suppressing the wife's previous testimony, thus allowing him the privilege of preventing any adverse testimony.<sup>8</sup> By the 1600s an absolute rule of disqualification had developed, and the wife was considered incompetent to testify either for or against her husband.<sup>9</sup> The common law rule of spousal disqualification arose from the combined operation of two doctrines.<sup>10</sup> First, an accused was thought to be incompetent to testify on his own behalf because he had an interest in the outcome and might be tempted to perjure himself.<sup>11</sup> Secondly, husband and wife were recognized

6. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2227, at 211 (J. McNaughton rev. ed. 1961). At common law the privilege against adverse spousal testimony was only one of three husband-wife evidentiary privileges. In addition to the adverse testimony privilege, a spouse was incompetent to testify on behalf of the other spouse, and a spouse could not testify as to confidential marital communications of the other. See *United States v. Allery*, 526 F.2d 1362, 1365 (8th Cir. 1975); 1 S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 493-94 (16th ed. 1899). See also Comment, *The Husband-Wife Evidentiary Privileges: Is Marriage Really Necessary*, 1977 ARIZ. ST. L.J. 411, 413 [hereinafter cited as Comment, *Husband-Wife Evidentiary Privileges*]. The rule prohibiting a spouse from giving advantageous testimony was discarded in *Funk v. United States*, 290 U.S. 371 (1933). See text accompanying note 15 *infra*. In *Trammel* the privilege as to confidential marital communications was not at issue. 100 S. Ct. at 909 n.5, 63 L. Ed. 2d at 191 n.5. Accordingly, the scope of this Note encompasses only the husband-wife privilege against adverse testimony by a spouse. For a discussion of the marital confidential communications privilege that prohibits testimony concerning confidential communications made during marriage, see *Blau v. United States*, 340 U.S. 332 (1951) (husband refused to reveal to a federal district grand jury the location of his wife, and such information was deemed privileged as a presumptively confidential communication); *Wolfe v. United States*, 291 U.S. 7 (1934) (privilege not recognized when communication made in presence of third party or in other situations when communication obviously not intended to be privileged). See generally C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 82-90 (1954); Comment, *Questioning the Marital Privilege: A Medieval Philosophy in a Modern World*, 7 CUM. L. REV. 307, 311-14 (1976) [hereinafter cited as Comment, *Questioning the Marital Privilege*]; Comment, *The Husband-Wife Privileges of Testimonial Non-Disclosure*, 56 NW. U.L. REV. 208, 216-30 (1961).

7. 21 Eng. Rep. 50 (Ch. 1580).

8. *Id.*

9. See J. WIGMORE, *supra* note 6, at 212 (quoting E. COKE, A COMMENTARIE UPON LITTLETON 6b (1628)).

10. See 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 217, at 618-19 (1978).

11. Distrust of the intelligence of jurors fostered the doctrine of interest disqualification. See *Benson v. United States*, 146 U.S. 325, 335-36 (1892); 1 S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 425-28 (14th ed. 1883).

as one person, the husband being that one, and therefore, the interest disqualification of the husband likewise applied to the wife.<sup>12</sup>

The United States Supreme Court recognized the common law rule in *Stein v. Bowman*,<sup>13</sup> stating that neither a husband nor a wife could be a witness for or against the other. The doctrine of interest disqualification gradually disappeared,<sup>14</sup> however, and in *Funk v. United States*<sup>15</sup> the Court removed the barrier restricting a spouse from giving advantageous testimony on behalf of a defendant spouse. Although the rule against adverse spousal testimony remained intact, after *Funk* it was no longer viewed as a rule of absolute disqualification. Rather, it became a privilege to assert the right to refrain from testifying.<sup>16</sup> Both the defendant spouse and the witness spouse held the privilege,<sup>17</sup> and accordingly, a defendant could prevent his spouse from giving adverse testimony of any kind.<sup>18</sup> Even testimony concerning occurrences that took place prior to the marriage could be barred, provided a valid marriage existed at the time of trial.<sup>19</sup> The privilege, however, was subject to exceptions.<sup>20</sup> In the federal

12. See J. MCKELVEY, HANDBOOK OF THE LAW OF EVIDENCE 443 (3d ed. 1924). *But see* *Funk v. United States*, 290 U.S. 371 (1933) (abandoning common law rule).

13. 38 U.S. (13 Pet.) 209, 220-23 (1839); *accord*, *Jin Fuey Moy v. United States*, 254 U.S. 189 (1920) (wife incompetent to testify for the purpose of contradicting particular witnesses); *Hendrix v. United States*, 219 U.S. 79 (1911) (not error to prevent wife from testifying on husband's behalf in murder trial); *Graves v. United States*, 150 U.S. 118 (1893) (wife incompetent witness and spouse had no obligation to produce her at trial for identification purposes).

14. See D. LOUISELL & C. MUELLER, *supra* note 10, at 619-20.

15. 290 U.S. 371 (1933). *Funk* sought to have his wife testify on his behalf during his trial for conspiracy to violate the prohibition law. Recognizing that the disqualification rule had outlived the reasons for its existence, the Court stated that interest was no longer a basis of disqualification for either a party or a witness, and modern reason did not support the policy of disqualifying a wife as a witness on behalf of her husband. *Id.* at 380-81.

16. The federal privilege against adverse spousal testimony applies to federal criminal litigation. See generally D. LOUISELL & C. MUELLER, *supra* note 10, at 632, suggesting that no federal decision recognizes the privilege in a civil context. For a discussion of choice of law considerations relating to marital privileges, see Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 117-21 (1956); Reese & Leiwant, *Testimonial Privileges and Conflict of Laws*, 41 L. & CONTEMP. PROBS. 85 (1977); Seildson, *The Federal Rules of Evidence: Rule 501, Klaxon and the Constitution*, 5 HOFSTRA L. REV. 21 (1976); Comment, *The Constitutional and Erie Implications for Federal Diversity Cases of the Privilege Provisions of the Proposed Federal Rules of Evidence*, 8 LINCOLN L. REV. 151 (1973).

17. See *Wyatt v. United States*, 362 U.S. 525, 527-29 (1960); *Hawkins v. United States*, 358 U.S. 74 (1958). *But see* 3 S. GARD, JONES ON EVIDENCE § 20:47, at 700 (6th ed. 1972) (privilege is in defendant spouse and witness spouse may claim privilege only on behalf of defendant spouse). See also D. LOUISELL & C. MUELLER, *supra* note 10, at 623; J. WIGMORE, *supra* note 6, at 254-56.

18. See D. LOUISELL & C. MUELLER, *supra* note 10, at 624.

19. *Accord*, *Lutwak v. United States*, 344 U.S. 604 (1953) (no privilege because of sham marriage); *United States v. Lustig*, 555 F.2d 737 (9th Cir. 1977) (no privilege because common law marriage not valid under Alaska law); *United States v. White*, 545 F.2d 1129 (8th Cir. 1976) (no privilege because Arkansas does not recognize common law marriage); *United States v. Smith*, 533 F.2d 1077 (8th Cir. 1976) (privilege does not survive divorce); see G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 327 (1978); J. WIGMORE, *supra* note 6, at 223.

20. See D. LOUISELL & C. MUELLER, *supra* note 10, at 633-34. Interspousal suits such as divorce cases are prime examples of instances in which the privilege is not applicable. *Id.*

courts the privilege could not be claimed in a criminal trial for a crime against the spouse.<sup>21</sup> In addition, the privilege did not apply to adverse spousal testimony pertaining to crimes against children of either spouse.<sup>22</sup>

Fostering domestic peace became the primary rationale for the privilege.<sup>23</sup> A second factor was a "natural repugnance" against forcing either spouse to condemn the other.<sup>24</sup> Despite these justifications, the privilege was criticized severely.<sup>25</sup> Critics claimed that the rule prevented the presentation of relevant evidence and therefore hindered justice,<sup>26</sup> and that marriage, no longer as important in society as it once had been, did not deserve the protection.<sup>27</sup>

In 1958 in *Hawkins v. United States*,<sup>28</sup> the Supreme Court reevaluated the status of the privilege against adverse spousal testimony. In *Hawkins* the Court considered whether the privilege should be vested in the witness spouse alone, thereby enabling the witness spouse to testify voluntarily<sup>29</sup> without the consent of the defendant spouse.<sup>30</sup> Noting that modification of the privilege could not be based on precedent,<sup>31</sup> but would have to depend on reason and experience,<sup>32</sup> the Court decided not to abandon the common law rule that prevented a spouse from testifying against the other

The privilege also has been disallowed when the defendant spouse has been granted immunity. See *In re Lochiatio*, 497 F.2d 803, 805 n.3 (1st Cir. 1974).

21. See D. LOUISELL & C. MUELLER, *supra* note 10, at 633. A victim could even be compelled to testify. See *Wyatt v. United States*, 362 U.S. 525, 527-30 (1960) (privilege deemed inapplicable in Mann Act prosecution of husband even though both spouses sought to invoke it). See also *Yoder v. United States*, 80 F.2d 665 (10th Cir. 1935) (wife competent witness against husband in Mann Act prosecution even though she was not the victim).

22. See *United States v. Allery*, 526 F.2d 1362, 1367 (8th Cir. 1975) (wife allowed to testify about husband's sexual misconduct with her children).

23. See *id.* at 1365; *United States v. Redstone*, 488 F.2d 300, 305 (8th Cir. 1973); *United States v. Armstrong*, 476 F.2d 313, 315 (5th Cir. 1973).

24. See S. GARD, *supra* note 17, § 20.47, at 698; J. WIGMORE, *supra* note 6, at 216-17. But see Comment, *Husband-Wife Evidentiary Privileges*, *supra* note 6, at 427 (the "inherently repugnant" rationale may be the product of the courts because no factual studies have been found that indicate that such a belief is widely held).

25. See generally G. LILLY, *supra* note 19, at 327; Comment, *Questioning the Marital Privilege*, *supra* note 6, at 318-21; 20 MINN. L. REV. 693 (1936).

26. See, e.g., S. GARD, *supra* note 17, § 21:1, at 745-46, stating that "ordinarily the sanctity of confidence must yield to the necessity of getting all the facts, and it is only in a few rare relationships that the public policy of protecting the relationship overrides the public policy of unrestricted inquiry."

27. See generally Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675 (1929).

28. 358 U.S. 74 (1958). Hawkins had been charged with transporting a girl from Arkansas to Oklahoma for immoral purposes in violation of the Mann Act. Over his objection, the district court allowed Hawkins's wife to testify against him. *Id.* at 74-75.

29. *Id.* at 77.

30. At the time of *Hawkins*, the witness spouse could testify only if the defendant spouse did not invoke the privilege to prevent the adverse testimony. See notes 16-18 *supra* and accompanying text.

31. 358 U.S. at 76-77. The Court noted that the individual states and foreign jurisdictions had provided limited exceptions and modifications to the rule. *Id.* at 78.

32. The Court found the authority to use reason and experience in interpreting the common law from *Funk v. United States*, 290 U.S. 371 (1933), and decided that FED. R. CRIM. P. 26 confirmed that authority. 358 U.S. at 76-77.

without the accused spouse's consent.<sup>33</sup> Addressing the issue of voluntary spousal testimony against the other spouse, the Court reasoned that not all marital rifts are permanent and that family peace would be no less disrupted by voluntary testimony than by compelled testimony.<sup>34</sup> The Court also considered whether the underlying reason for the privilege, that of fostering family peace, had been undermined by changing times, and decided that although criticism had been leveled at the rule<sup>35</sup> and its exclusionary effect had at times worked an injustice,<sup>36</sup> the privilege and the policy behind it were still viable.<sup>37</sup> The Court recognized that it possessed the authority to change or modify the privilege, but it nevertheless found that reason and experience dictated that the privilege remain unchanged.<sup>38</sup> The Court, however, carefully left the rule open to modifications that might become necessary because of a change of circumstances in the future.<sup>39</sup>

The privilege was considered again during the promulgation of the Federal Rules of Evidence.<sup>40</sup> Proposed rule 505<sup>41</sup> would have entitled an ac-

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33. 358 U.S. at 79.

34. *Id.* at 77-78. The Court stated "it is difficult to see how family harmony is less disturbed by a wife's voluntary testimony against her husband than by her compelled testimony." *Id.* at 77.

35. *Id.* at 76 & n.4.

36. *Id.* at 78.

37. *Id.* at 79.

38. *Id.* at 77-79.

39. *Id.* at 78-79.

40. In 1965 an advisory committee was assigned to develop a uniform code of evidence. A final draft of the proposed rules was submitted to the Supreme Court in October 1971. The Federal Rules of Evidence then were promulgated by the Supreme Court in November 1972, and were transmitted to Congress, which enacted Public Law 93-12 to ensure adequate time for review of the proposals. Act of Mar. 30, 1973, Pub. L. No. 93-12, 73 Stat. 9. Prior to enactment of the rules, which became effective July 1, 1975, substantial changes were made in some sections. Notably, the 13 proposed rules covering the privilege area were eliminated in favor of rule 501. Disagreements had arisen as to whether the privilege rules should redefine privileges or merely codify existing law. Questions were also raised as to whether the Enabling Act, 18 U.S.C. §§ 3402, 3771, 3772 (1976); 28 U.S.C. §§ 2072, 2075 (1976), should be utilized in codifying rules of privilege or whether the legislature was the appropriate body to promulgate such rules. Because no agreement could be reached on the 13 specific rules proposed, Congress chose to enact rule 501. *See* S. REP. NO. 1277, 93d Cong., 2d Sess. 6-7, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7051, 7052-53. For the text of FED. R. EVID. 501, see note 43 *infra*.

41. PROP. FED. R. EVID. 505 would have 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.

cused in a criminal proceeding the privilege of preventing his spouse from testifying adversely to him. Incorporating the *Hawkins* rule, the proposed privilege could have been claimed either by the accused or by the spouse on his behalf.<sup>42</sup> Congress edited rule 505 from the final draft of the rules and, instead, substituted rule 501<sup>43</sup> that allows the courts to interpret common law privileges "in the light of reason and experience."<sup>44</sup> By enacting rule 501, Congress thus indicated that it intended to leave the law of privilege unchanged<sup>45</sup> and to allow for its continued development by the courts.<sup>46</sup> Accordingly, the privilege against adverse spousal testimony re-

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42. *Id.* The proposal made no mention of the privilege against the disclosure of confidential marital communications. Therefore, once a party spouse gave his consent to permit the other spouse to testify, he could not later assert the confidential marital communication privilege to prevent testimony of that nature.

43. FED. R. EVID. 501 provides:

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. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

44. *Id.* The Federal Rules of Evidence were designed to promote uniformity of decisions. See S. REP. NO. 1277, 93d Cong., 2d Sess. 8, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7051, 7054-55. The "reason and experience" language of rule 501 in fact promoted a lack of uniformity. See *Ryan v. Commissioner*, 568 F.2d 531 (7th Cir. 1977), cert. denied, 439 U.S. 820 (1978); *United States v. Cameron*, 556 F.2d 752 (5th Cir. 1977); *United States v. King*, 73 F.R.D. 103 (E.D.N.Y. 1976), *aff'd*, 563 F.2d 559 (2d Cir. 1977), cert. denied, 435 U.S. 918 (1978).

45. The proposed privilege section of the Federal Rules of Evidence had drawn a great deal of criticism. See Note, *The Proposed Federal Rules of Evidence: Of Privileges and the Division of Rule-Making Power*, 76 MICH. L. REV. 1177 (1978). See also S. REP. NO. 1277, 93d Cong., 2d Sess. 6, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7051, 7053 (suggesting that rule 501 was substituted when no agreement could be reached as to specific privileges and passage of the entire rules package was threatened). In Schwartz, *Privileges Under the Federal Rules of Evidence—A Step Forward?*, 38 U. PITT. L. REV. 79, 80 (1976), the author noted that the House Judiciary Committee thought that the Supreme Court had intruded too far into state interests. The committee report stated:

The rationale underlying the proviso is that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason. The Committee believes that in civil cases in the federal courts where an element of a claim or defense is not grounded upon a federal question, there is no federal interest strong enough to justify departure from State policy. In addition, the Committee considered that the Court's proposed Article V would have promoted forum shopping in some civil actions, depending upon differences in the privilege law applied as among the State and federal courts. The Committee's proviso, on the other hand, under which the federal courts are bound to apply the State's privilege law in actions founded upon a State-created right or defense, removes the incentive to "shop".

H.R. REP. NO. 650, 93d Cong., 1st Sess. 8, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7075, 7082.

46. H.R. REP. NO. 650, 93d Cong., 1st Sess. 8, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7075, 7082; 2 J. MOORE, MOORE'S FEDERAL PRACTICE: FEDERAL RULES OF EVIDENCE 1532 (1975). See also *Michelson v. United States*, 335 U.S. 469, 486 (1948) (suggesting that rules will emerge slowly when developed on a case by case basis).

mained subject to the consent of the defendant spouse as it had been after *Hawkins*.

## II. TRAMMEL V. UNITED STATES

In *Trammel v. United States* the Supreme Court again confronted the issue of whether an accused could assert the privilege to exclude the voluntary testimony of his spouse. Initially, the Court stated that because Congress had adopted rule 501 of the Federal Rules of Evidence that allows for the common law of privilege to be "interpreted . . . in the light of reason and experience"<sup>47</sup> the Court had the authority to reconsider the testimonial privilege in the light of existing conditions.<sup>48</sup> Reevaluating the *Hawkins* rule that had retained the privilege in the party spouse,<sup>49</sup> the Court then balanced the justification for the privilege against society's countervailing right to know all probative evidence that exists. Weighing the competing factors,<sup>50</sup> the Court noted that, although the testimonial privilege had ancient roots, support for the doctrine had decreased since *Hawkins*.<sup>51</sup> The Court emphasized that the number of jurisdictions recognizing the privilege had diminished<sup>52</sup> and that criticism of the rule had continued.<sup>53</sup> The Court found this erosion of state support for the privilege significant because the domestic relations area traditionally has been a state concern.<sup>54</sup> The Court then compared the spousal adverse testimonial privilege<sup>55</sup> with other such privileges<sup>56</sup> and found the spousal privilege to be much broader because it protected the accused from adverse statements

47. FED. R. EVID. 501. For the text of rule 501, see note 43 *supra*.

48. 100 S. Ct. at 910-11, 63 L. Ed. 2d at 192-93.

49. 358 U.S. at 77.

50. 100 S. Ct. at 912, 63 L. Ed. 2d at 195. In performing a balancing test, the Court followed a practice used in previous federal cases. *See Elkins v. United States*, 364 U.S. 206, 233-34 (1960) (Frankfurter, J., dissenting) (established rule should be subject to change only if new experience undermines its justification or if new insight into undesirable consequences of old rule demand change); *United States v. Bryan*, 339 U.S. 323, 331 (1950) (exceptions to giving testimony grounded on individual interest found to outweigh public interest in search for the truth).

51. 100 S. Ct. at 909-10, 63 L. Ed. 2d at 190-91.

52. *Id.* at 911-12 & n.9, 63 L. Ed. 2d at 193-94 & n.9. Thirty-one jurisdictions recognized the privilege at the time of *Hawkins*. Only 24 states still recognize it. *Id.*

53. *Id.* at 912, 63 L. Ed. 2d at 195; *accord*, Hutchins & Slesinger, *supra* note 27.

54. 100 S. Ct. at 912, 63 L. Ed. 2d at 194; *see Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (validity of durational residency requirements for divorce actions is a domestic relations area long recognized as a province of the states). *See also Simms v. Simms*, 175 U.S. 162, 167 (1899) ("the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the State, and not to the laws of the United States").

55. Before discussing the other privileges, the Court distinguished the privilege against adverse spousal testimony from the privilege against disclosure of confidential marital communications, stating "[t]hose confidences are privileged under the independent rule protecting confidential marital communications." 100 S. Ct. at 913, 63 L. Ed. 2d at 195; *see* note 6 *supra*.

56. The Court examined the privileges that exist between priest and penitent, attorney and client, and physician and patient. *See Callahan, Historical Inquiry into the Priest-Penitent Privilege*, 36 JUR. 328 (1976); Comment, *The Physician-Patient Privilege*, 56 NW. U.L. REV. 263 (1961); Comment, *The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics, and Its Possible Curtailment*, 56 NW. U.L. REV. 235 (1961).

made even in the presence of third persons and was not limited to confidential communications as were the corresponding privileges in other confidential relationships. Moreover, the Court recognized that not only had the ancient justifications for the privilege disappeared over the years,<sup>57</sup> but also the modern rationale of preserving marital harmony did not support the privilege in situations in which one spouse is willing to testify against the other.<sup>58</sup> Rather, the privilege is "more likely to frustrate justice than to foster family peace."<sup>59</sup>

Determining that the privilege against adverse spousal testimony as stated in *Hawkins* was no longer justified, the Court modified the rule and placed the privilege with the witness spouse alone.<sup>60</sup> According to the Court, the witness spouse may be neither compelled to testify nor foreclosed from testifying.<sup>61</sup> The fact that the witness spouse had testified against her husband under a grant of immunity did not make her testimony involuntary.<sup>62</sup>

Justice Stewart concurred with the majority. Having been on the Court when *Hawkins* was decided, he was in a unique position to evaluate the circumstances underlying both decisions. Basically agreeing with the majority, Justice Stewart emphasized, however, that the justifications for the privilege had already disappeared when the Court decided *Hawkins*, and that the *Trammel* majority merely accepted the same arguments that had been presented and rejected in that case.<sup>63</sup>

*Trammel* is significant because the Court considered the question of the adverse spousal testimonial privilege on the basis of present day standards and modified the rule accordingly to reflect current circumstances. Approximately twenty years before *Trammel*, Justice Stewart's concurring opinion in *Hawkins* had indicated the need for additional data before an intelligent decision could be rendered,<sup>64</sup> particularly emphasizing the need for uniform rules of evidence.<sup>65</sup> When the Federal Rules of Evidence were

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57. 100 S. Ct. at 913, 63 L. Ed. 2d at 196. The Court stated that "[n]owhere in the common-law world . . . is a woman regarded as chattel or demeaned by denial of a separate legal identity." *Id.*; cf. *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) (suggesting that women's activities have expanded in scope and are no longer limited to family related responsibilities).

58. 100 S. Ct. at 913, 63 L. Ed. 2d at 196. The Court noted that "[w]hen one spouse is willing to testify against the other . . . there is probably little in the way of marital harmony for the privilege to preserve." *Id.* But see *Hawkins v. United States*, 358 U.S. 74, 77 (1958) (suggesting that this policy is necessary to foster family peace, and that voluntary testimony would disturb such harmony no less than compelled testimony).

59. 100 S. Ct. at 913, 63 L. Ed. 2d at 196.

60. *Id.* at 914, 63 L. Ed. 2d at 196.

61. *Id.*

62. *Id.* In an analogous situation the Court in *Bordenkircher v. Hayes*, 434 U.S. 357, 363-64 (1978), suggested that the basic theory behind plea bargaining implies rejection of the notion that a plea of guilty made as a result of plea bargaining is involuntary. But see Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978); Wilson, *The Fifth Amendment and the Guilty Plea: An Incompatible Association*, 30 HASTINGS L.J. 545 (1979).

63. See text accompanying notes 28-39 *supra*.

64. 358 U.S. at 82 n.4 (Stewart, J., concurring).

65. *Id.*

enacted,<sup>66</sup> rule 501 specifically vested the courts with the authority to develop the common law rules of privilege.<sup>67</sup> Rule 501 thus encouraged a case by case consideration of the privilege doctrines and emphasized the appropriateness of the use of the courts as the mode of accomplishing re-evaluation in the light of changing circumstances.<sup>68</sup> This affirmation of the Court's authority<sup>69</sup> in the privilege area was perhaps the needed incentive that prompted the *Trammel* modification.<sup>70</sup>

Although the decision did identify and evaluate a number of competing factors relating to the adverse spousal testimonial privilege, the Court summarily treated several other factors. First, the Court determined that a relationship in which one spouse would testify voluntarily against the other had little harmony to preserve.<sup>71</sup> In so holding the Court overlooked the suggestion in *Hawkins* that such discord might be temporary.<sup>72</sup> Additionally, the Court did not address the possibility that the rule might be subject to abuse by prosecutorial authorities, thereby bringing the voluntary nature of a spouse's testimony into question.<sup>73</sup>

The threat of prosecution on a conspiracy charge,<sup>74</sup> even an unfounded one, could conceivably be utilized to persuade the witness spouse to testify. The voluntariness of testimony obtained under such duress is certainly

66. The enactment of the Federal Rules culminated 13 years of study, thereby filling the need for the additional data that Justice Stewart had noted in the concurring opinion in *Hawkins*. S. REP. NO. 1277, 93d Cong., 2d Sess. 4, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7051.

67. FED. R. EVID. 501. For the text of FED. R. EVID. 501, see note 43 *supra*. The Court's ability to modify the privileges through its rule-making power and without the approval of Congress had been foreclosed. Act of Jan. 2, 1975, Pub. L. No. 93-595, § 2(a)(1), 88 Stat. 1948 (codified at 28 U.S.C. § 2076 (1976)). Rule 501, however, enables the courts to develop modifications through case law.

68. See S. REP. NO. 1277, 93d Cong., 2d Sess. 13, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7051, 7053, 7059 (stating that rule 501 should not be viewed as disapproving any of the specific privileges that had been part of the proposed privilege section, but rather that privileges should be determined on a case by case basis by the courts).

69. *Id.* Commentators suggest that the proposed rules may reappear as common law through court decisions. *E.g.*, Schwartz, *supra* note 45, at 84; see Krupp, *Problems of Privilege and Witnesses Under the New Federal Rules of Evidence*, 20 TRIAL LAW GUIDE 489, 490 (1976). *But see* Note, *The Husband-Wife Testimonial Privilege in the Federal Courts*, 59 B.U.L. REV. 894, 916 (1979) (suggesting that Congress's action weighs against judicial determination of modification of privileges).

70. 100 S. Ct. at 914, 63 L. Ed. 2d at 197. Justice Stewart's concurring suggestion that *Trammel* would be of interest to students of psychology is perhaps an indication that factors other than those stated by the Court are the true reasons for the Court's determination to modify the privilege at this time.

71. *Id.* at 913, 63 L. Ed. 2d at 196.

72. 358 U.S. at 77-78.

73. A co-conspirator spouse might be induced to testify to save himself, thus bringing into question the voluntary nature of such testimony. See generally *Hawkins v. United States*, 358 U.S. 74, 82-83 (1958) (Stewart, J., concurring); Comment, *Marital Privileges and the Right to Testify*, 34 U. CHI. L. REV. 196, 204 (1966) (suggesting that the voluntariness of a wife's testimony is questionable when a wife might be indicted whether or not she was suspected of complicity in a crime in a direct effort to obtain her testimony as to her husband's activities).

74. The Brief for the Petitioner suggests that accusing someone of participating in a conspiracy is a relatively simple matter. Brief for the Petitioner at 12, reprinted in 11 LAW REPRINTS, CRIMINAL LAW SERIES no. 7, at 12 (1979-1980).

subject to question.<sup>75</sup> The Court's statement in *Trammel* that assurances of lenient treatment and a grant of immunity did not render Trammel's wife's testimony involuntary<sup>76</sup> poses questions as to the weight that the statement is to carry in future cases involving the issue of voluntariness. Because the Court did not state that all testimony elicited under such assurances or promises of immunity would be considered voluntary, the circumstances under which such testimony will be considered voluntary will have to be defined by future decisions. Although the criteria for determining the voluntariness of spousal testimony was not adequately examined by the Court, the *Trammel* decision to modify the privilege by vesting it solely in the witness spouse reflected the changing nature of the marital relationship and served to eliminate many of the inequities that had been severely criticized throughout the years.

### III. CONCLUSION

In *Trammel v. United States* the Supreme Court modified the privilege that had enabled an accused to prevent the adverse testimony of his spouse to the extent that the witness spouse alone now has a privilege to refuse to testify adversely. The Court first recognized that rule 501 of the Federal Rules of Evidence gave it the authority to reexamine the foundations of the privilege in the light of reason and experience. Balancing the modern justification for the privilege, the fostering of family harmony, against society's right to know all relevant evidence, the Court determined that the preservation of marital harmony did not justify the privilege in situations when one spouse is willing to testify against the other. Rather, the privilege in such situations would only serve to frustrate justice. Noting the continued criticism of the privilege, the Court found that reason and experience dictated modifying the privilege and vesting it only in the witness spouse, who may be neither compelled to testify nor foreclosed from testifying. Moreover, the Court, without explanation, decided that the adverse testimony of a spouse under a grant of immunity is not involuntary.

The *Trammel* decision has the potential for making available relevant evidence that previously would have been unheard. At the same time, the marital relationship is still protected because although testimony of a spouse against a defendant spouse may be voluntarily presented, it cannot be compelled. Furthermore, the confidential marital communications privilege remains intact.

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75. See generally Brief for the Amicus Curiae Michigan Bar Association Standing Committee on Civil Procedure at 18-19, reprinted in 11 LAW REPRINTS, CRIMINAL LAW SERIES no. 7, at 94-95 (1979-1980) (suggests that in *Hawkins* the claim that Hawkins's wife testified voluntarily was questionable because she was subject to the threat of prosecution if she refused).

76. 100 S. Ct. at 914, 63 L. Ed. 2d at 196.