EVIDENCE—MARITAL PRIVILEGES—COMMON LAW PRIVILEGE PREVENTING ADVERSE SPOUSAL TESTIMONY VESTED SOLELY IN WITNESS SPOUSE IN FEDERAL CRIMINAL PROCEEDING—*Trammel v. United States*, 100 S. Ct. 906 (1980).

Born of a desire to avoid the condemnation of one spouse by the other, the common law privilege preventing adverse spousal testimony[1] remains as viable today as the institution which it was created to protect. In an age of diminishing expectations regarding traditional institutions, courts have become increasingly inclined to challenge the much revered doctrines of the past as they relate to those institutions.[2] What often remains is the essence of a once hallowed tradition, updated, by way of selective modification, for continued existence in contemporary society. Such is the case of the privilege against adverse spousal testimony and its relation to the institution of marriage. In *Trammel v. United States*[3] the Supreme Court of the United States constricted the scope of the marital privileges by removing the privilege against adverse spousal testimony from the defendant spouse, thereby allowing it to remain in the witness spouse alone.[4] The decision marks a discernable departure from the traditional approach in which both spouses were held competent to invoke the privilege,[5] although it does not otherwise alter the nature of the privilege or its application.

The marriage ceremony of Elizabeth Ann and Otis Trammel, Jr., formalized the union of a young couple who later became engaged in a conspiracy to transport heroin from Thailand into the United States.[6] The importation scheme was devised at Clark Air Force Base in the Philippines[7] by Otis Trammel and two of his neighbors, co-defendants Joseph Freeman and Edwin Lee Roberts.[8] Ms. Trammel participated in transporting the heroin and she served as an operative along with Janice Keenan, a friend of Roberts.[9]

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[1] 8 J. WIGMORE, EVIDENCE § 2227 (McNaughton rev. 1961) [hereinafter cited as 8 J. WIGMORE].

[2] Trammel v. United States, 100 S. Ct. 906, 911 (1980).

[3] 100 S. Ct. 906 (1980).

[4] *Id.* at 914.

[5] *Id.* at 910. *See* notes 38-44 *infra* and accompanying text.

[6] United States v. Trammel, 583 F.2d 1166, 1170 (10th Cir. 1978), *aff'd*, 100 S. Ct. 906 (1980).

[7] Brief for Respondent at 2, Trammel v. United States, 100 S. Ct. 906 (1980) [hereinafter cited as Brief for Respondent].

[8] *Id.* at 2-3.

[9] United States v. Trammel, 583 F.2d 1166, 1167, 1170 (10th Cir. 1978), *aff'd*, 100 S. Ct. 906 (1980).

In August 1975, Ms. Trammel smuggled an unspecified quantity of heroin into California from Thailand, via the Philippines, for distribution by her husband in the Los Angeles area.[10] On a subsequent trip from the Philippines, with four ounces of heroin secreted on her person, she was searched during a routine customs inspection and promptly arrested in Hawaii.[11] Ms. Trammel thereafter chose to cooperate with the authorities and served as a decoy, luring Roberts to a previously arranged location where he was also arrested.[12]

Otis Trammel was indicted, along with co-defendants Roberts and Freeman, on charges of "importation and conspiracy to import heroin."[13] Ms. Trammel, named as an unindicted co-conspirator,[14] was not prosecuted for her activities in furtherance of the conspiracy.[15] In order to secure her cooperation, the government assured her of lenient treatment and she thereupon agreed to testify against her husband pursuant to a grant of use immunity.[16]

In order to avoid the pernicious effect of his wife's testimony, Trammel moved to sever his case from that of his co-defendants and attempted to invoke the common law privilege of a defendant spouse to prevent adverse testimony by a witness spouse.[17] After a hearing to determine the merits of Trammel's motion, the district court permitted Ms. Trammel to testify to "any act she observed during the marriage and to any communication 'made in the presence of a third person.' "[18] The court's ruling, although allowing the introduction of adverse spousal testimony, preserved the separate and distinct testimonial privilege against the disclosure of confidential communications between spouses.[19] Trammel's objections to this testimony were rejected by the district court,[20] thereby sealing the government's case against him.[21] The court of appeals affirmed Trammel's conviction for importation of heroin and conspiracy to import heroin,

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[10] Brief for Respondent, *supra* note 7, at 3.

[11] 100 S. Ct. at 908.

[12] Brief for Respondent, *supra* note 7, at 4.

[13] United States v. Trammel, 583 F.2d 1166, 1167 (10th Cir. 1978), *aff'd*, 100 S. Ct. 906 (1980).

[14] *Id.*

[15] 100 S. Ct. at 908 n.2.

[16] *Id.* at 908.

[17] *Id.*

[18] 100 S. Ct. at 908.

[19] *Id.*

[20] United States v. Trammel, 583 F.2d 1166 (10th Cir. 1978), *aff'd*, 100 S. Ct. 906 (1980). The court of appeals held that since the defendant husband was a joint participant in a criminal conspiracy with his wife he was precluded from invoking the privilege. *Id.* at 1169.

[21] 100 S. Ct. at 908.

with one judge dissenting.[22] The United States Supreme Court granted certiorari and affirmed the decision of the court of appeals in *Trammel v. United States*.[23]

Confusion as to the precise origin of the privilege against *adverse* spousal testimony stems from the historically proximate appearance of the disqualification or incompetency of one spouse to testify on *behalf* of the other.[24] The policy considerations advanced for the testimonial disqualification by marital relationship were similar to those traditionally supporting all testimonial disqualifications based on interest. An especially significant fear was that bias on the part of one whose affection for the defendant would all but preclude impartiality.[25]

The *raison d'être* of the privilege against adverse spousal testimony, first mentioned in 1580,[26] was couched most often in terms of a repugnance to allowing a man to be condemned by his wife[27] or for the law to " '[compel] one [spouse] to come and betray the other.' "[28] This aversion to allowing adverse spousal testimony derived in part from the same latent distaste for spousal condemnation as did the antiquated notion of petit treason, which consisted of violence against the head of a household.[29] Although the privilege applies equally to husbands and wives, the model situation in all of the earlier cases featured a wife bearing witness to the criminal acts of her husband.[30] For analytical purposes this note will hereafter assume the traditional model.

In the midst of several common law pronouncements, many of which obfuscated the distinction between the privilege and the disqualification,[31] appeared Lord Coke's admonition in 1628 that "it hath beene resolved by the Justices that a wife cannot be produced either against or for her husband."[32] The prevailing rationale was that such

[22] Trammel was ultimately sentenced under the Federal Youth Corrections Act to an indeterminate term of years. 100 S. Ct. at 908.

[23] 100 S. Ct. 906 (1980).

[24] 8. J. WIGMORE §§ 2227, 2228. Some early cases treated the privilege and the disqualification as if they were supported by the same policy considerations, causing much confusion in later years. *Id. See* notes 31-35 *infra* and accompanying text.

[25] 2 J. WIGMORE § 601 (Chadbourn rev. 1940). *See* Funk v. United States, 290 U.S. 371 (1933).

[26] Bent v. Allot, 21 Eng. Rep. 50 (Ch. 1580).

[27] 8 J. WIGMORE § 2227.

[28] 8 J. WIGMORE § 2228 (quoting Abbott, 2 The Trial of Henry Ward Beecher [Tilton v. Beecher, City Ct. of Brooklyn, N.Y.] 49-50 (1875)).

[29] 8 J. WIGMORE § 2227.

[30] *Id.*

[31] *Id.*

[32] E. COKE, COMMENTARY UPON LITTLETON 6b (1628). The quote continued, "*quia funt due anime in carne una*" ("for they are two souls in one flesh"). *Id.*

testimony was likely to cause disharmony between spouses. Thus, Coke combined the privilege (not to testify *against* one's spouse) with the disqualification (to testify on *behalf* of one's spouse) in the same sentence, leading some to mistakenly conclude that the policy considerations underlying both were the same. Despite the misleading nature of his pronouncement,[33] Coke was nevertheless among the first to articulate[34] what has survived as the most widely accepted policy consideration advanced in support of the privilege: the preservation of "the peace of families."[35]

The much anticipated demise of the disqualification came in 1933 when the United States Supreme Court held in *Funk v. United States*[36] that spouses were no longer prohibited from testifying on behalf of one another.[37] The vitality of the privilege against adverse spousal testimony was hardly as precarious, however, and when it was examined fifteen years later in *Hawkins v. United States*[38] the Supreme Court upheld the privilege as necessary for the continued preservation of marital harmony.[39] The decision in *Hawkins* was grounded in the belief that the law should not foster marital discord by encouraging spouses to openly betray one another in court.[40] In addition, *Hawkins* reaffirmed the vesting of the privilege in both witness and defendant.[41] The impact of the decision was tempered, however, by the Court's admonition that "this decision does not foreclose whatever changes in the rule may eventually be dictated by 'reason and experience.'"[42] Thus, pursuant to the law of testimonial marital privileges which existed in the federal courts prior to the *Trammel* decision, spouses could testify on behalf of one another[43] and either could invoke the privilege against adverse spousal testimony.[44]

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[33] *See generally* 8 J. WIGMORE § 2228.

[34] Stapleton v. Crofts, 118 Eng. Rep. 137, 138 (Q.B. 1852).

[35] Barker v. Dixie, 95 Eng. Rep. 171 (K.B. 1736). Similar language was adopted in Rex v. Cliviger, 100 Eng. Rep. 143, 147 (K.B. 1788). As acknowledged in *Trammel*, the modern justification for the privilege "is its perceived role in fostering the harmony and sanctity of the marriage relationship." 100 S. Ct. at 909.

[36] 290 U.S. 371 (1933).

[37] *Id.* at 386-87.

[38] 358 U.S. 74 (1958).

[39] *Id.* at 75.

[40] *Id.* at 79. Another consideration expounded by the Court was "the unwillingness to use testimony of witnesses tempted by strong self-interest to testify falsely." *Id.*

[41] *Id.* at 77-78.

[42] *Id.* at 79.

[43] *See* notes 36-37 *supra* and accompanying text.

[44] *See* notes 38-42 *supra* and accompanying text. An exception to *Hawkins* was recognized where a crime is committed by one spouse against the other. Wyatt v. United States, 362 U.S. 525 (1960). 100 S. Ct. at 910.

A third aspect of the testimonial marital privileges prevents the disclosure of confidential communications between spouses.[45] The earliest justification for this privilege, which preserves what the Supreme Court has called "the best solace of human existence,"[46] was derived from language in *Stapleton v. Crofts*.[47] The confidential communications privilege, although regarded as the most widely accepted of the marital privileges,[48] has usually been inapplicable in those situations in which the communication was made in the presence of a third party.[49] The continued vitality of the confidential communications privilege was therefore specifically acknowleged in the *Trammel* decision.[50]

The Supreme Court in *Trammel* once again confronted the issue whether a defendant spouse may invoke the privilege against adverse spousal testimony to prevent the voluntary testimony of an adverse witness spouse in a federal criminal proceeding.[51] Rule 501 of the Federal Rules of Evidence provides that all testimonial privileges are "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."[52] The intent of Congress in enacting Rule 501 was to enable the courts to fashion an approach towards testimonial privileges on a case-by-case basis.[53] The Court was therefore free, within the broad parameters of Rule 501, to redefine the scope of the privilege by examining its validity in light of contemporary notions regarding the sanctity of the marital relation. This analysis was accomplished through an examination of these notions *vis-à-vis* society's interest in the expeditious administration of justice.[54]

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[45] Stein v. Bowman, 38 U.S. (13 Pet.) 209, 220 (1839). The Supreme Court noted that "the wife is not competent except in cases of violence upon her person, directly to criminate her husband; or to disclose that which she has learned from him in their confidential intercourse." *Id.*

[46] *Id.* at 223.

[47] 118 Eng. Rep. 137, 139 (Q.B. 1852). The Court in *Stapleton* was of the belief that "the confidence subsisting between husband and wife should be sacredly cherished." *Id.*

[48] Comment, *The Husband-Wife Privileges of Testimonial Non-Disclosure*, 56 N.W. L. REV. 208, 216 (1961).

[49] Wolfle v. United States, 291 U.S. 7, 14 (1934). The privilege is also inapplicable when the communication by its nature was not intended to be confidential. *Id.* at 14. *See also* Blau v. United States, 340 U.S. 332, 333-34 (1951).

[50] Trammel v. United States, 100 S. Ct. at 909-10 n.5.

[51] 100 S. Ct. at 908.

[52] FED. R. EVID. 501.

[53] 100 S. Ct. at 910-11. Congress rejected proposed Rule 505 which would have retained the privilege to prevent adverse spousal testimony in the defendant spouse alone. *Id.* In addition, Rule 505 would have abolished the confidential communications privilege. *Id.*

[54] *Id.* at 912.

The Court, while careful not to disturb the confidential communications privilege,[55] appreciably constricted the scope of the privilege against adverse spousal testimony by vesting it solely in the witness spouse.[56] At the time of the *Trammel* decision there were four views among the states regarding the privilege.[57] The majority view provided either for limitation of the privilege consistent with *Trammel* or for its total abolition.[58] This trend in the states, together with significant scholarly criticism of *Hawkins*,[59] must be acknowledged in analysing the *Trammel* Court's willingness to embrace the very arguments which were found to be unpersuasive in *Hawkins*.

Implicit in the Court's recent departure from the rationale of past decisions was the tacit admission that the law must maintain elasticity when confronted by doctrines of the past whose underpinnings have been eroded by the passage of time and the sharpening focus of judicial vision.[60] As Chief Justice Burger conceded in his opinion on behalf of eight members of the Court, "[t]he ancient foundations for so sweeping a privilege have long since disappeared."[61] This was in obvious reference to lingering notions of medieval paternalism which have for centuries forestalled the recognition of women as separate entities in the eyes of the law.[62] Specifically, Chief Justice Burger was referring to the antiquated notion that a wife's testimony against her husband was tantamount to self-incrimination since husband and wife were viewed by the law as one person.[63] Similarly, the Court dismissed as "unpersuasive" the previously fashionable rationale that vesting the privilege in the defendant spouse was necessary to foster family peace.[64] The intellectual dishonesty of the historical reasoning becomes apparent when applied to the instant case since its application

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[55] *See* notes 45-50 *supra* and accompanying text.

[56] 100 S. Ct. at 914.

[57] *Id.* at 911-12 n.9. In eight states one spouse cannot testify against the other in a criminal proceeding. Sixteen states allow both spouses or the defendant spouse alone to prevent adverse testimony. The *Trammel* approach is taken by nine states which vest the privilege to refuse to testify adversely in the witness spouse alone and the remaining seventeen states have abolished the privilege in criminal proceedings. *Id.*

[58] *Id.* The current breakdown among the states is twenty-six in favor of a modified approach and twenty-four against. *Id.*

[59] *Id.* at 912 & 912 n.11.

[60] *See id.* at 911.

[61] *Id.* at 913.

[62] *Id.*

[63] *Id.* at 909. The traditional view was that "husband and wife were one, and that since the woman had no recognized separate legal existence, the husband was that one." *Id.*

[64] *Id.* at 913.

could easily have the perverse effect of allowing the defendant to escape prosecution while subjecting his spouse to possible criminal charges.[65]

The *Trammel* Court was also sympathetic to the argument that there is little marital harmony to preserve when the witness spouse voluntarily agrees to give adverse testimony.[66] There are strong arguments, however, in support of the view that by vesting the privilege in the witness spouse alone, he or she becomes the focus of prosecutorial attention, vulnerable to enticing offers of immunity in exchange for valuable testimony.[67] The foregoing interpretation renders "voluntariness" a vacant concept. Arguably, the detrimental effect of *Hawkins* (allowing the defendant to escape prosecution) is less severe than the potentially detrimental effect of allowing the witness to become subject to prosecutorial pressure. In seeking to allay the fears of the skeptics, however, it must be emphasized that not all prosecutors will be inclined to exert pressure on witnesses to secure testimony.

The most penetrating indictment against the expansive nature of a *Hawkins*-type privilege remains Jeremy Bentham's warning that it "secures, to every man, one safe and unquestionable and ever ready accomplice for every imagineable crime."[68] As early as 1827, Bentham was sensitive to the danger that a privilege of such breadth could allow for the exclusion of all adverse testimony by a spouse.[69] The Supreme Court also recognized that the privilege is distinguishable from not only the confidential communications privilege, but from the traditional privileges of priest-penitent, attorney-client and physician-patient.[70] Its uniqueness stems from the fact that it allows evidence of communications made in the presence of third parties to be excluded.[71]

The *Trammel* decision, in as much as it embodies the modern trend, seeks to align itself with other recent developments in the law which have endeavored to rectify past inequities regarding the legal

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[65] *Id.*

[66] *Id.* "In these circumstances, a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace." *Id.*

[67] United States v. Trammel, 583 F.2d 1166, 1171 (10th Cir. 1978) (McKay, J., dissenting), *aff'd*, 100 S. Ct. 906 (1980). *See also* Comment, *Marital Privileges and the Right to Testify*, 34 U. CHI. L. REV. 196, 204 (1966).

[68] 5 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 332, 338 (1827).

[69] *Id.* at 338-40.

[70] 100 S. Ct. at 913.

[71] *Id.*

status of women.[72] Depending upon one's predelictions concerning the prospective effect of the court's ruling, the extent of its progressiveness becomes subject to interpretation. Although vesting the privilege in the witness spouse precludes the possibility that a defendant spouse might escape prosecution by claiming the privilege, it places a correspondingly onerous burden upon the witness spouse. Therefore, the witness (most often the wife) now assumes an appreciably greater control over her own destiny and that of her family. She must weigh the myriad of possible consequences which could arise should she decide to testify against her spouse. Knowing her husband to be guilty, she would be torn between condemning him to a possible prison term or preserving what vestiges of their marriage remain.[73] The potential for prosecutorial abuse exists where a witness like Ms. Trammel, who is less culpable than her defendant spouse, could be coaxed into testifying for fear that she might be prosecuted if she refuses to testify.[74]

The all pervasive tension which envelops the area of testimonial marital privileges is the balancing of marital harmony with the need to administer justice.[75] The *Hawkins* approach represents a desire to preserve the marital relation at the expense of allowing some to flout the very rules which were enacted for their protection.[76] Although the *Trammel* approach creates additional concerns for the witness, it removes the possibility that a defendant might use the privilege designed to preserve the peace of his family to prevent his criminal conviction.[77] A third approach, removing the privilege entirely except for confidential communications,[78] reflects the greatest emphasis upon the need to apprehend criminals. Advocates of the privilege's abolition could cite the transient nature of contemporary cohabitive relationships as well as language characterizing the privilege as "an archaic survival of a mystical religious dogma."[79] This approach tends to evidence a cynical view toward marriage, finding little worth preserving in the traditional nuclear family when its vitality no longer comports with the expeditious administration of justice.

The court of appeals in *Trammel* fashioned a novel approach toward the privilege by embracing arguments forwarded in several of

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[72] The Court cited to Stanton v. Stanton, 421 U.S. 7 (1975).

[73] *See* Comment, *supra* note 67, at 204.

[74] *See* note 67 *supra* and accompanying text.

[75] 100 S. Ct. at 912.

[76] *See* notes 38-41 *supra* and accompanying text & notes 64-65 and accompanying text.

[77] 100 S. Ct. at 913-14.

[78] 8 J. WIGMORE § 2337.

[79] C. MCCORMICK, EVIDENCE § 66, at 145-46 (2d ed. 1972) (footnote omitted).

the circuits[80] regarding the consequences of joint participation by a husband and wife in a criminal conspiracy.[81] The court adopted the cogent reasoning advanced in *United States v. Van Drunen*[82] that to allow a defendant to invoke the privilege tacitly encourages the recruitment of his or her spouse as an accomplice.[83]

An accomplice spouse is especially valuable since he or she may be conveniently silenced to accomplish the ends of crime.[84] Although the consequences of joint participation are implicit in its holding, the Supreme Court made no mention of the trend in the circuits in reaching its decision. The Court chose instead to bypass any consideration of the trend in favor of modifying the privilege in more expansive langauge.[85] Therefore, joint participation in a criminal conspiracy need not be established to remove the privilege from the defendant spouse.

A shift in societal values during the period since *Hawkins* provided the impetus for the Supreme Court to re-examine the privilege at this time. The *Trammel* decision, although constricting the scope of the privilege against adverse spousal testimony to insure against its misapplication, nevertheless affirmed its viability as a dynamic concept. An additional motivation for the Court to clarify the law of testimonial marital privileges was that *Trammel* was factually suited to its purposes. It enabled the court to artfully remove a painful obstruction to the continued vitality of the privilege against adverse spousal testimony while avoiding a thorough examination of the law of marital privileges. A more comprehensive analysis of the area must therefore await a factual setting in which such broad review is required.

As Mr. Justice Black cautioned in an earlier dissent, "[w]hen precedent and precedent alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule's creator to

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[80] *See* United States v. Apodaca, 522 F.2d, 568 (10th Cir. 1975); United States v. Smith, 520 F.2d 1245 (8th Cir. 1975).

[81] United States v. Trammel, 583 F.2d 1166, 1169-70 (10th Cir. 1978), *aff'd*, 100 S. Ct. 906 (1980).

[82] 501 F.2d 1393 (7th Cir. 1974), *cert. denied*, 419 U.S. 1091 (1974).

[83] *Id.* at 1396.

[84] *Id.*

[85] 100 S. Ct. at 914.

destroy it."[86] Since any prospective disintegration of the institution of marriage would result in an increased scrutiny of the privilege by those who would seek to hasten its demise, the privilege must by its nature be continually tailored to comport with contemporary mores.

Thomas J. Pryor

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[86] *Id.* at 911 (quoting Francis v. Southern Pac. Co., 333 U.S. 445, 471 (1948) (Black, J., dissenting)).