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THE SPOUSAL TESTIMONIAL PRIVILEGE AFTER *TRAMMEL V. UNITED STATES*

INTRODUCTION

On March 10, 1976, Otis Trammel, Jr., was indicted, along with two others, in the Federal District Court for the District of Colorado for importing heroin into the United States from Thailand and the Philippine Islands,[1] and for conspiracy to import heroin.[2] The indictment also named six persons as unindicted coconspirators, including the defendant's wife, Elizabeth Ann Trammel. When Elizabeth Trammel was granted "use" immunity in exchange for her testimony,[3] Otis Trammel moved to sever his case from the other two defendants.[4] He claimed that he would be prejudiced in a joint trial as the government was planning to call his wife as a witness. Otis Trammel asserted that he had not waived his privilege to bar adverse spousal testimony.[5] The trial court denied Trammel's motion to sever, stating that since the wife's testimony did not concern confidential communications, the spousal testimonial privilege was not available.[6]

Elizabeth Trammel testified extensively at the trial and, based exclusively on this testimony, Otis Trammel was convicted as charged.[7] The Tenth Circuit Court of Appeals, in a split decision, upheld the ruling of the trial court, concluding that the spousal testimonial privilege did not preclude "the voluntary testimony of a spouse who appears as an unindicted coconspirator under a grant of immunity from the Government."[8]

The Supreme Court granted certiorari[9] to reconsider *Hawkins v. United States*,[10] a case in which the High Court's pronouncement on the spousal testimonial privilege conflicted with the Tenth Circuit's holding in *Trammel*. The Court affirmed Trammel's conviction, not on the grounds espoused by the court of appeals, but on the same rationale that it had rejected twenty-two years earlier in *Hawkins*. The Court in *Trammel* modified the spousal testimonial privilege so that today the witness spouse alone has the privilege

1. 21 U.S.C. § 952(a) (1976) and 18 U.S.C. § 2 (1976).
2. 18 U.S.C. § 371 (1976).
3. 18 U.S.C. § 6002 (1976). Use immunity precludes the *use* of testimony or other compelled information, or the use of any information derived from such testimony or other compelled information, in a criminal prosecution of the witness. Kastigar v. United States, 406 U.S. 441, 453 (1972). Transactional immunity, in contrast, accords full immunity to the witness from *prosecution* for the offense to which the compelled testimony relates. *Id.*
4. Trammel v. United States, 445 U.S. 40 (1980).
5. *Id.*
6. Petition for Writ of Certiorari at 28, Trammel v. United States, 445 U.S. 40 (1980) (Hearing on Motion to Sever).
7. Trammel v. United States, 445 U.S. 40, 43 (1980).
8. United States v. Trammel, 583 F.2d 1166, 1168 (10th Cir. 1978).
9. Trammel v. United States, 440 U.S. 934 (1979).
10. 358 U.S. 74 (1958).

to refuse to give adverse testimony.[11] In so doing, the Court completed a 400-year evolution of the privilege. It brought the privilege into conformance with other testimonial privileges and struck a better balance between the social value of preserving marital harmony and the public's right to every person's evidence.

This comment will examine the evolution of the spousal testimonial privilege and its modification by the Court in *Trammel*. An analysis and critique of the factors relied upon by the Court in striking the new balance between the competing interests will follow. The comment will conclude with an examination of a major problem the courts will encounter in attempting to apply the *Trammel* version of the spousal testimonial privilege.

I. EVOLUTION OF THE MARITAL PRIVILEGE

A. *Origins of the Privilege*

The history of the spousal testimonial privilege is shrouded in "tantalizing obscurity."[12] There is no certain record as to the precise time of its origin or as to the thought process by which it evolved.[13] The earliest reported case in which the privilege was explicitly stated is *Bent v. Allot*,[14] an 1580 decision wherein the accused was allowed to prevent his spouse from testifying against him. The court, however, held that this privilege would be waived if the defendant permitted his spouse to take the stand to testify favorably.[15]

By the time of Coke's *Commentarie Upon Littleton*,[16] in 1628, the testimonial privilege had evolved into two complementary rules. The English courts were holding that a witness was both incompetent to testify in favor of a spouse and was privileged not to testify adversely.[17] The spousal incompetency rule was based upon the rationale that favorable spousal testimony was not trustworthy due to the common interests of a husband and wife who were considered but "two souls in one flesh."[18]

During the mid-1800's,[19] the spousal incompetency rule was statutorily abolished in most states when common interest was no longer considered a basis for disqualification.[20] These statutes, however, either expressly, or by judicial interpretation, retained a privilege for confidential communications.[21] Unlike the broad spousal testimonial privilege, this testimonial privilege extends only to confidential *communications* between husband and wife

11. 445 U.S. at 53.

12. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2227, at 211 (McNaughton rev. 1961).

13. *Id.*

14. 21 Eng. Rep. 50 (Ch. 1580).

15. *Id.*

16. L. COKE, A COMMENTARIE UPON LITTLETON 6b (1628).

17. Note, *Marital Testimony and Communication Privileges: Improvements and Uncertainties in the Courts*, 9 U. CAL. D. L. REV. 569, 570 (1976).

18. L. COKE, *supra* note 16, *quoted in* J. WIGMORE, *supra* note 12, § 2227, at 212.

19. This abolition did not occur in the federal courts until Funk v. United States, 290 U.S. 371 (1933).

20. J. WIGMORE, *supra* note 12, § 2333, at 645.

21. *Id.*

during the marriage and can be invoked even after death[22] or divorce.[23] The policy behind the confidential communications privilege is to promote the free interchange of confidences necessary for mutual understanding and trust.[24] There had been no need for a separate confidential communications privilege until this time because such information had been adequately protected by the all-encompassing spousal incompetency or testimonial privilege rules.[25]

There are two major justifications proffered for the spousal testimonial privilege.[26] The first justification is that the privilege fosters family harmony and avoids the marital dissension which would allegedly result from the admission of adverse testimony.[27] This rationale was originated by Lord Coke in 1628 and has become the leading modern day justification for the privilege.[28] The second reason advanced is that there is a natural repugnancy in compelling a husband or wife to be the means of the other's condemnation.[29] These justifications have been criticized on the premise that the privilege extends to marriages beyond salvation,[30] while at the same time, it does not extend to other family members whose testimony will be equally repugnant.[31]

Although the spousal testimonial privilege has been severely criticized,[32] it has survived, virtually intact, throughout the years.[33] It has been

22. Merlin v. Aetna Life Ins. Co., 180 F. Supp. 90, 91 (S.D.N.Y. 1960).

23. Pereira v. United States, 347 U.S. 1, 6 (1954).

24. *See* Wolfle v. United States, 291 U.S. 7, 14 (1934).

25. *Id.* See discussion in Note, *The Husband-Wife Testimonial Privilege in the Federal Courts*, 59 B.U.L. REV. 894, 896 (1979) [hereinafter cited as *Testimonial Privilege*].

26. Every current argument for the privilege had appeared in England by the early 1800's. Unfortunately, these reasons usually confused the spousal testimonial privilege with the confidential communications privilege or the spousal incompetency rule. Only the two reasons discussed in the text have any arguable merit. J. WIGMORE, *supra* note 12, § 2228, at 214-16.

27. *Id.*

28. In Hawkins v. United States, 358 U.S. 74, 77 (1958), the Court stated that "such a policy was necessary to foster family peace . . . ." This rationale was also the basis for Judge McKay's dissent in United States v. Trammel, 583 F.2d 1166, 1173 (10th Cir. 1978).

29. Wyatt v. United States, 362 U.S. 525, 535 (1960) (Warren, C.J., dissenting); J. WIGMORE, *supra* note 12, § 2228, at 217; Brief for Respondent at 15 n.10, Trammel v. United States, 445 U.S. 40 (1980).

30. *See, e.g.*, United States v. Walker, 176 F.2d 564 (2d Cir.), *cert. denied*, 338 U.S. 891 (1949).

31. J. WIGMORE, *supra* note 12, § 2228, at 217 n.2. Forcing a child to testify against his parents would be equally undesirable, yet the common law privilege does not extend, and never has extended to any family members other than the spouse. *Id.*

32. Professor McCormick claims that the privilege is "an archaic survival of mystical religious dogma." C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 66, at 145 (2d ed. 1972). Dean Wigmore claimed that the privilege was "the merest anachronism in legal theory and an indefensible obstruction to truth." J. WIGMORE, *supra* note 12, § 2228, at 221.

> One of the earliest critics of the privilege was Jeremy Bentham who stated:
>
> Let us . . . grant to every man a license to commit all sorts of wickedness, in the presence and with the assistance of his wife: let us secure to every man in the bosom of his family . . . a safe accomplice: let us make every man's house his castle; and . . . let us convert that castle into a den of thieves.

5 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 332, 340 (1827), *quoted in* J. WIGMORE, *supra* note 12, § 2228, at 218.

33. The spousal testimonial privilege is not absolute and has long been subject to exceptions. The privilege will not apply when the witness spouse is the victim of the crime, Wyatt v. United States, 362 U.S. 525 (1960); or if the crime is against the spouse's property, Herman v. United States, 220 F.2d 219, 226 (4th Cir. 1955); or if the crime is committed against the child

retained in some form by a majority of the jurisdictions in the United States today.[34] The first indication that the privilege was not inviolable appeared in the Federal Rules of Criminal Procedure, which declared that the application of all privileges should be governed by common law principles "in light of reason and experience."[35] Some federal courts began to question the continuing viability of the privilege and used the "reason and experience" guideline as a basis for its modification.[36] Other courts felt inclined to await explicit guidance from the Supreme Court,[37] or Congress.[38]

B. *The* Hawkins *Precedent*

In 1958, the Supreme Court appeared to settle the controversy in *Hawkins v. United States*.[39] In *Hawkins*, the Court unequivocally reaffirmed the applicability of the spousal testimonial privilege in federal courts. The Court asserted that there was no reason why the privilege "based on the persistent instincts of several centuries should now be abandoned."[40] The Court in *Hawkins* stated that the value of the privilege in promoting marital harmony "has never been unreasonable and is not now."[41] The Court, however, made no attempt to determine if this policy would be advanced by the application of the privilege in the *Hawkins* case. Such a conclusion would have been unlikely as it was questionable whether there was any harmony in the Hawkins marriage to preserve.[42]

The government, in *Hawkins*, did not argue for the abolition of the testimonial privilege, but simply urged its modification in light of "reason and experience." The government maintained that the privilege should belong solely to the witness spouse.[43] This revision would permit the witness spouse to waive the privilege and testify if he or she should so choose. The Court explicitly rejected this argument, claiming that there was no valid distinction between "voluntary" and "compelled" testimony in this context. "The basic reason the law has refused to pit wife against husband or husband against wife in a trial . . . was a belief that such a policy was necessary to

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of either spouse, United States v. Allery, 526 F.2d 1362 (8th Cir. 1975); or if the marriage is fraudulent, Lutwak v. United States, 344 U.S. 604 (1953).

34. See listing as to how each state treats the spousal testimonial privilege in Trammel v. United States, 445 U.S. 40, 48-49 n.9 (1980).

35. FED. R. CRIM. P. 26, Pub. L. No. 76-675, ch. 445, 54 Stat. 688 (1940). This provision was deleted when the Federal Rules of Evidence became effective on July 1, 1975. *See* FED. R. CRIM. P. 26 and Amendment Notes, 18 U.S.C.A. (West 1975).

36. *See, e.g.*, United States v. Yoder, 80 F.2d 665 (10th Cir. 1935).

37. Brunner v. United States, 168 F.2d 281, 283 (6th Cir. 1948).

38. United States v. Walker, 176 F.2d 564 (2d Cir.), *cert. denied*, 338 U.S. 891 (1949). See discussion in *Testimonial Privilege*, *supra* note 25, at 898-99.

39. 358 U.S. 74 (1958).

40. *Id.* at 79. Justice Stewart, in his concurrence, was more skeptical. He stated that "[s]urely '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).

41. *Id.* at 77.

42. The defendant's wife, a prostitute, had been living apart from the accused for several years, under an assumed name. At one point in his testimony, the defendant referred to Mrs. Hawkins as his "ex-wife." *Id.* at 82 n.4 (Stewart, J., concurring).

43. Brief for Respondents, Hawkins v. United States, 358 U.S. 74 (1958).

foster family peace . . . ."[44] and family peace would be disturbed as much, if not more so, by voluntary testimony.[45] The Court conceded that if one spouse were willing to testify against the other, there was a strong indication that the marriage was in disrepair. The Court went on to state, however, that many broken homes could be salvaged "provided no unforgivable act [was] done by either party."[46] In the Court's opinion, adverse testimony, either voluntary or compelled, would constitute such an "unforgivable act." While the Court acknowledged that the rule was open to modification under the "reason and experience" guideline, that guideline, in the Court's opinion, did not justify granting the privilege solely to the testifying spouse.[47]

C. *Congressional Response*

Fifteen years after *Hawkins*, Congress attempted to legislate a compromise on the spousal testimonial privilege dispute in the proposed Federal Rules of Evidence.[48] Proposed rule 505 provided that the accused in a criminal proceeding would have a privilege to prevent his spouse from testifying against him, subject to certain exceptions.[49] The Advisory Committee rejected the suggestion from the Department of Justice and Senator McClellan that the testifying spouse be made the sole holder of the privilege. In the Committee's judgment, "[t]he willingness of the testifying spouse is not . . . complete support for the conclusion that the marriage is past saving since there may be temporary pressures brought to bear."[50]

Unaccountably, the proposed rules did not provide for a confidential communications privilege. This absence caused a tremendous furor among legal scholars because the confidential communications privilege, unlike the spousal testimonial privilege, was generally accepted. One writer, criticizing the proposed rules, claimed that Congress had "adopted the wrong form of the wrong privilege, and [gave] it to the wrong spouse."[51]

Rather than jeopardize the passage of the rest of the rules, Congress substituted the current rule 501 which simply states that all testimonial privileges are to be "governed by the principles of the common law as they may

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44. 358 U.S. at 77.

45. *Id.*

46. *Id.* at 78.

47. While Justice Stewart was more inclined to believe that "reason and experience" warranted the requested change in the privilege, he felt that *Hawkins* was not the proper case for the modification. There was a question as to the voluntariness of the wife's testimony. *Id.* at 82-83 (Stewart, J., concurring). See discussion in text accompanying notes 99-108, *infra*.

48. 56 F.R.D. 183 (1973).

49. Proposed Fed. R. Evid. 505, 56 F.R.D. 183, 244-47 (1973). The proposed privilege did not apply to (1) crimes against the spouse or the children of either spouse, (2) matters occurring prior to the marriage, or (3) proceedings in which the spouse is charged with importing aliens for prostitution purposes in violation of 8 U.S.C. § 1328 (1976), or with violation of the Mann Act, 18 U.S.C. §§ 2421-2424 (1976).

50. 2 WEINSTEIN'S EVIDENCE ¶ 505 [01], at 505-6 to 505-7 (1980). This was the principal reason, given in a memorandum by Edward W. Cleary, Reporter for the Advisory Committee of the Federal Rules of Evidence, for rejecting this suggestion. *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).

51. M. 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, 1381 (1973).

be interpreted by the courts . . . in the light of reason and experience."[52] The spousal testimonial privilege was thus left just where Congress had found it—governed by "reason and experience" as defined on a case-by-case basis.[53]

The purpose of the proposed rules was to provide uniformity among the federal courts. Rule 501, however, just as its predecessor in the federal criminal procedure rules, resulted in conflicting decisions. Courts utilized the reason and experience guideline of rule 501 to carve out exceptions to the privilege when both spouses jointly participated in a crime,[54] or when the marriage at issue appeared to be fraudulent or beyond preservation.[55] These exceptions evidenced the reluctance of the courts to impede the fact-finding process by applying a testimonial privilege of questionable validity.

II. *TRAMMEL V. UNITED STATES*

A. *Procedural History*

Trammel v. United States[56] is a prime example of the creativity employed by the courts to rationalize the admission of adverse spousal testimony over a defendant's objection. In the *Trammel* case, the district court, the Tenth Circuit Court of Appeals, and the United States Supreme Court all allowed admission of the spouse's hostile testimony. Significantly, each court found its own justification for so doing.

The district court apparently confused the spousal testimonial privilege with the confidential communications privilege. The court adjudged that the defendant Trammel could not prevent his wife from testifying about his criminal activities because the information was deemed not to be confidential.[57] The Tenth Circuit Court of Appeals affirmed the district court and held that the spouse's testimony was admissable, but for reasons other than those advanced by the district court.[58] The Tenth Circuit court held that there is an exception to the spousal testimonial privilege when the witness spouse is an unindicted coconspirator testifying under a grant of immunity.[59] The court of appeals further stated that the defendant's privilege did not "override" his spouse's grant of immunity and, therefore, *in light of reason*

52. FED. R. EVID. 501.

53. *See* S. REP. NO. 1277, 93d Cong., 2d Sess. 11, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051, 7059; H.R. REP. NO. 650, 93d Cong., 2d Sess. 8, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7082; 120 CONG. REC. 40891 (1974) (remarks of Rep. Hungate).

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

55. United States v. Cameron, 556 F.2d 752 (5th Cir. 1977); United States v. Fisher, 518 F.2d 836 (2d Cir.), *cert. denied*, 423 U.S. 1033 (1975).

56. 445 U.S. 40 (1980).

57. Petition for Writ of Certiorari at 28, Trammel v. United States, 445 U.S. 40 (1980) (transcript of hearing on defendant's motion for severence before Chief Judge Winner of the Federal District Court for the District of Colorado).

58. 583 F.2d 1166 (10th Cir. 1978). The court made it clear that the marital relationship spawns two distinct privileges—the spousal testimonial privilege and the confidential communications privilege—and that only the former was involved in the instant case. *Id.* at 1171 (McKay, J., dissenting). For a further analysis of the Tenth Circuit's reasoning, see Overview, *Criminal Law and Procedure, Sixth Annual Tenth Circuit Survey*, 57 DEN. L.J. 229, 260 (1980).

59. 583 F.2d at 1168.

and experience, her adverse testimony could properly be admitted.[60]

The Supreme Court granted certiorari[61] to reconsider its decision in *Hawkins v. United States*.[62] The differing rationales of the district court and of the court of appeals were indicative of the confusion and doubts which all of the courts were experiencing in applying the spousal testimonial privilege. Congress' attempt to legislate the privilege had failed[63] and the courts' application of the "reason and experience" guideline was producing inconsistent results.[64] The time was ripe for the Supreme Court to provide further guidance.

B. *The Government's Position*

The government advanced two arguments in support of its position. The United States urged the Court to affirm the decision of the court of appeals and hold that the spousal testimonial privilege does not apply when the husband and wife are joint participants in crime.[65] The government claimed that the rehabilitating aspect of the marriage is lost when both wife and husband are involved in a crime. The application of the privilege therefore would abuse the relationship it was designed to protect.[66] The United States asserted that an exception in this case was necessary in order to bring the spousal testimonial privilege into conformance with other testimonial privileges.[67]

The second argument espoused by the government was the bold assertion that the time had come to reconsider the *Hawkins* decision and award the testimonial privilege solely to the witness spouse.[68] This contention apparently surprised both the petitioner and the *amicus curiae*.[69] While both of these parties presented very cogent arguments as to why the exception relied upon by the court of appeals should not be upheld, neither addressed the government's second argument. This omission proved to be a crucial mistake.

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60. *Id.* (emphasis added). Judge McKay severely criticized this rationale in his dissent, stating that the immunity statutes are irrelevant and afford no basis for fashioning a new exception to the privilege. *Id.* at 1172 (McKay, J., dissenting).

61. 440 U.S. 934 (1979).

62. 358 U.S. 74 (1958).

63. *See* text accompanying notes 48-55, *supra*.

64. *Compare* United States v. Trammel, 583 F.2d 1166 (10th Cir. 1978) *with* United States v. Lilley, 581 F.2d 182 (8th Cir. 1978).

65. Brief for Respondents at 25-29, Trammel v. United States, 445 U.S. 40 (1980). The government did not argue that a grant of immunity had to be involved. The government felt that the married couple's joint participation in a crime was sufficient to justify an exception to the spousal testimonial privilege.

66. *Id.* at 26.

67. Joint participation in a crime creates an exception to the confidential communications privilege, United States v. Mendoza, 574 F.2d 1373 (5th Cir.), *cert. denied*, 439 U.S. 988 (1978); and to the attorney-client privilege, Clark v. United States, 289 U.S. 1, 15 (1933) (dictum); *In re* Doe, 551 F.2d 899, 901 (2d Cir. 1977); Hyde Constr. Co. v. Koehring Co., 455 F.2d 337, 342 (5th Cir. 1972); United States v. Friedman, 445 F.2d 1076, 1086 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971); United States v. Hoffa, 349 F.2d 20, 37 (6th Cir. 1965).

68. Brief for Respondents at 16-25, Trammel v. United States, 445 U.S. 40 (1980).

69. The Michigan Bar Association Standing Committee on Civil Procedure was granted leave to file a brief as *amicus curiae*. Trammel v. United States, 442 U.S. 939 (1979).

C. *The Holding in* Trammel

The Supreme Court recognized that the government's supplemental argument, that the spousal testimonial privilege should belong to the testifying spouse, had been expressly rejected in *Hawkins*. The Court, nevertheless, claimed that the caveat in *Hawkins*,[70] coupled with the language and the congressional intent behind rule 501 of the Federal Rules of Evidence,[71] confirmed its authority to reconsider the continued vitality of the *Hawkins* rule in light of "reason and experience."[72]

As further justification for a reconsideration of *Hawkins*, the Court pointed out that the trend in state law is toward divesting the accused of the privilege to bar adverse spousal testimony. The number of jurisdictions that recognize the privilege has decreased from thirty-one in 1958 to twenty-four in 1980.[73] A conclusion regarding the trend in state law, however, would not be accurate without an examination of the states' confidential communication statutes as well. These statutes are often broader in scope than the federal definition of "confidential communication."[74]

Having found sufficient cause to reconsider *Hawkins*, the Court went on to hold that

> "reason and experience" no longer justify so sweeping a rule as that found acceptable by the Court in *Hawkins*. Accordingly . . . the existing rule should be modified so that the witness spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying.[75]

III. ANALYSIS OF THE COURT'S RATIONALE

A. *Reason and Experience Re-examined*

The *Trammel* Court modified the spousal testimonial privilege on the pretext that it was no longer tenable in light of "reason and experience." Specifically, the Court claimed that the spousal testimonial privilege was broader in scope than the other testimonial privileges, that the ancient foundations for the privilege had long since disappeared, and that the willingness of one spouse to testify against the other was a reliable indication that the marital relationship was in disrepair. As Justice Stewart cogently pointed

70. In *Hawkins*, the Court stated that "this decision does not foreclose whatever changes in the rule [as] may eventually be dictated by 'reason and experience.'" 358 U.S. at 79.

71. Congress intended that Fed. R. Evid. 501 was to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis." 120 CONG. REC. 40891 (1974) (statement of Rep. Hungate), *quoted in* Trammel v. United States, 445 U.S. 40, 47 (1980).

72. The petitioner claimed that the Court was without authority to reconsider *Hawkins*, as 28 U.S.C. § 2076 (1976) states that no rule "creating, abolishing, or modifying a privilege shall have . . . force or effect unless . . . approved by act of Congress." The Court dismissed this contention as inconsistent with the congressional intent behind Fed. R. Evid. 501. 445 U.S. at 47 n.8.

73. 445 U.S. at 48.

74. Many of the states' statutes regarding confidential communications are broad enough in scope to allow the accused to exclude adverse spousal testimony which would not fall within the federal definition of "confidential communication." See discussion in *Testimonial Privilege*, *supra* note 25, at 914-15.

75. 445 U.S. at 53.

out in his concurrence, reason and experience had not changed since *Hawkins*. The Court simply accepted the argument it had rejected in 1958.[76] An examination of the majority's reasoning demonstrates the accuracy of Justice Stewart's perception.

The Court claimed that the spousal testimonial privilege is in marked contrast to all other testimonial privileges as it is not limited to confidential communications. Instead, the spousal testimonial privilege permits the accused to exclude *all* adverse testimony.[77] While true, this distinction had not developed since *Hawkins* was decided.[78] Furthermore, it is invalid to compare the spousal testimonial privilege with testimonial privileges designed to promote confidence and trust between the parties. The cultivation of confidence and trust is not the primary purpose of the spousal testimonial privilege, nor was it ever purported to be. The principal purpose of the spousal testimonial privilege is to foster family harmony and to avoid the marital dissension which would result from "pitting" one spouse against the other in a trial.[79] To limit the spousal privilege to confidential communications would not further the goal of family harmony, and would moreover render the spousal privilege superfluous since confidential communications are independently privileged.[80] Apparently, the Court was aware of the infirmity of this comparison for, even after the *Trammel* modification, the privilege extends to *all* adverse spousal testimony. The post-*Trammel* spousal testimonial privilege encompasses adverse testimony relating to both actions and confidential communications. The significant difference after *Trammel* is *who* may invoke or waive the privilege.

The Court stated that the "ancient foundations for so sweeping a privilege have long since disappeared."[81] As Justice Stewart pointed out in his concurrence, however, these foundations disappeared long before 1958 and "this disappearance certainly did not occur in the few years that have elapsed between the *Hawkins* decision and this one."[82] It is also questionable whether the "ancient foundations" referred to by the Court ever pertained to this particular privilege.[83]

The Court's final basis for modifying *Hawkins* was its conclusion that, if one spouse is willing to testify against the other, there is a clear indication that the relationship is in disrepair. The Court reasoned that there is thus

76. *Id.* (Stewart, J., concurring).

77. *Id.* at 51.

78. This distinction has existed since the privilege was created some 400 years ago. To state that this distinction makes a difference in light of "reason and experience" in 1980, but not in 1958, overestimates the credulousness of the American public.

79. Hawkins v. United States, 358 U.S. 74, 77 (1958). See discussion in text accompanying notes 26-31, *supra*.

80. The confidential communications privilege already excludes this information. The Court made it clear that the confidential communications privilege was not at issue in the instant case. 445 U.S. at 45 n.5.

81. *Id.* at 52.

82. *Id.* at 54 (Stewart, J., concurring).

83. The Court was referring to Lord Coke's statement that the husband and wife were but "two souls in one flesh." See text accompanying notes 16-18, *supra*. This early rationale, however, supported the spousal disqualification for incompetency rule, not the privilege of the accused to prevent adverse spousal testimony.

very little marital harmony to be preserved by the privilege.[84] In *Hawkins v. United States*, the Court had stated that:

> the Government argues that the fact a husband or wife testifies against the other voluntarily is strong indication that the marriage is already gone. Doubtless this is often true. But not all marital flareups . . . are permanent. . . . [S]ome apparently broken homes can be saved provided no unforgivable act is done by either party. Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage.[85]

It is noteworthy that the *Trammel* Court repudiated this reasoning without citation to the *Hawkins* decision.

A proper analysis of *Trammel* cannot be based upon the changing circumstances between 1958 and 1980. Any attempt to justify the *Trammel* decision on the ground that "reason and experience" has evolved since the *Hawkins* opinion was handed down will falter. The *Trammel* opinion is a de novo analysis by the Supreme Court and the Court's rationale must be examined independently of *Hawkins*. As Justice Stewart stated, any attempt to reconcile the *Hawkins* and *Trammel* opinions would be of "greater interest to students of human psychology than to students of law."[86]

B. *Balancing of Interests*

The Court in *Trammel* re-examined the balance between society's interest in preserving marital harmony and the public's right to every man's evidence. The Court prefaced this discussion by stating that every privilege impedes the pursuit of justice and will be recognized only to the extent that it promotes "a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth."[87]

The importance of preserving marital harmony is generally accepted.[88] The criticism of the rule has usually centered on whether the spousal testimonial privilege, as it existed prior to *Trammel*, sufficiently promoted that goal.[89] Permitting the accused to invoke the privilege fostered abuse because the privilege was often claimed when there was, in fact, no marital harmony to preserve. Too often the privilege was claimed to protect the defendant rather than the marriage.[90] Ironically, a prime example of this abuse was demonstrated in *Hawkins v. United States*.[91] In *Hawkins*, the Court upheld the right of the accused to invoke the privilege even though the defendant's wife, a prostitute, had been living apart from him for several years under an as-

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84. 445 U.S. at 52.

85. 358 U.S. at 77-78.

86. 445 U.S. at 54 (Stewart, J., concurring). Justice Stewart was paraphrasing a similar sentiment of Justice Jackson, as stated in Zorach v. Clauson, 343 U.S. 306, 325 (1951).

87. 445 U.S. at 50 (quoting Elkins v. United States, 364 U.S. 206, 234 (1960)).

88. Wigmore, however, claimed that the defendant's marital harmony should not be placed above society's need for the truth. J. WIGMORE, *supra* note 12, § 2228, at 216-18.

89. *See, e.g.*, *Testimonial Privilege*, *supra* note 25, at 912-15.

90. When Elizabeth Trammel was questioned whether divorce was contemplated, she testified that her husband had said that "I would go my way and he would go his." 445 U.S. at 42 n.1. This does not comport with the theory that Otis Trammel was concerned with his marital harmony.

91. 358 U.S. 74 (1958).

sumed name. At one point in his testimony, the defendant had referred to her as his "ex-wife."[92]

Aware of the privilege's abuses, the Supreme Court concluded that the privilege, in its present form, did not sufficiently promote the goal of preserving marital harmony so as to justify its burden on society's need for probative evidence.[93] Concluding that the spousal testimonial privilege was inappropriate, the Court was presented with the problem of modifying the privilege so as to allow more testimony into evidence while, at the same time, still fostering family peace. There were three alternatives. The Court could have: 1) abolished the privilege; 2) requested the courts to balance, in each case, the need for the evidence against the possible adverse impact on the marriage; or 3) awarded the privilege to the witness spouse alone.[94]

Abolition of the privilege would involve the type of policy decision that is properly left to the legislature. This approach was the one taken by all the states which have modified or abolished the privilege.[95] The individual balancing approach would be too difficult to apply and conducive to the generation of conflicting results.[96] In addition, this approach would put the defendant in the objectionable position of having to establish the "worth" of his marriage before the privilege could be invoked.

The most viable alternative was to grant the testimonial privilege to the witness spouse alone. This modification will enhance the opportunity for the introduction of probative evidence into testimony, will avoid the onerous judicial inquiry into the "worth" of a marriage, and will promote a uniform application of the spousal testimonial privilege throughout the federal judicial system. The advantages of this rule are substantial. Moreover, there is no reason to suspect that family peace will be jeopardized by the Court's empowering the witness spouse to decide whether he or she will testify. As one commentator has stated,

> if the rationale for the privilege is one of avoiding marital dissension, then the only spouse able to make a decision to testify on the basis of whether the marriage is worth saving is the *witness* spouse; the accused is understandably unlikely to be able to put aside his or her strong personal interest in suppressing adverse testimony, and would be likely to invoke the privilege regardless of marital considerations.[97]

The witness spouse is in a better position than either the accused or the court to decide whether the marriage is worth saving and what effect, if any, adverse testimony will have on the relationship. The *Trammel* modification also minimizes society's "natural repugnancy" in witnessing the condemnation of one spouse by the other. Society is less likely to be offended if the witness

92. *Id.* at 82 n.4 (Stewart, J., concurring).

93. 445 U.S. at 53.

94. *See Testimonial Privilege*, *supra* note 25, at 913-19, for a further discussion of the possible alternatives.

95. *Id.* at 915.

96. *Id.* at 917. "Because the harm that might be caused to the marriage would be difficult to show, while the need for evidence easy to show, any balancing would be illusory at best." *Id.*

97. M. Reutlinger, *supra* note 51, at 1384 (emphasis in original).

spouse has voluntarily chosen to testify.[98] A trial court should respect, therefore, any decision by the witness spouse to voluntarily testify. The key determination, however, is whether the testimony is indeed voluntary.

C. *Determining Voluntariness*

The Court's reasoning in *Trammel* is based upon the assumption that the witness spouse's testimony will be voluntary. If this is indeed the situation in every case, the grant of the privilege solely to the witness spouse will result in an ideal balance of the competing interests. If, however, a witness spouse is pressured into testifying, the privilege will become an absurdity, as the marital relationship will be subject to the whim of the prosecutor. This possibility was recognized by Justice Stewart in *Hawkins*, wherein he stated that

> such a rule [the witness spouse privilege] would be difficult to administer and easy to abuse. Seldom would it be a simple matter to determine whether the spouse's testimony were really voluntary, since there would often be ways to compel such testimony more subtle than the simple issuance of a subpoena, but just as cogent.[99]

In *Hawkins*, the witness spouse had been imprisoned and was released under a three thousand dollar bond. The bond, however, was conditioned upon her appearance in court as a witness for the government. As Justice Stewart observed, "these circumstances are hardly consistent with the theory that [the witness'] testimony was voluntary."[100]

The situation in the *Trammel* case was strikingly similar. Elizabeth Trammel was given immunity on the condition that she testify against her husband.[101] The government conceded that she would be in danger of losing her freedom if she refused to testify.[102] When the witness spouse is placed in a position where he or she must choose between the marriage and freedom, it would be difficult for any trial court to conclude that the testimony is voluntary.[103] The Court in *Trammel* summarily dismissed the voluntariness issue with the conclusory statement that the witness spouse's testimony was not rendered involuntary by the fact that she chose to testify only after a grant of immunity and assurances of lenient treatment.[104] In light of the circumstances, the voluntariness of Elizabeth Trammel's testimony is highly suspect. The voluntariness issue certainly deserved a more thorough analysis by the Court.

Notwithstanding this imperfection, the Court's *Trammel* decision is to be commended. It is imperative, however, that the federal district courts adopt precautions to ensure that the witness spouse's testimony is, in fact, volunta-

98. *Id.* at 1385.

99. 358 U.S. at 83 (Stewart, J., concurring).

100. *Id.*

101. 445 U.S. at 42.

102. The government, in its brief, stated that the invocation of the privilege by the accused could place the witness in danger of losing her freedom. Brief for Respondent at 20-21, Trammel v. United States, 445 U.S. 40 (1980).

103. This was the principle reason why the Advisory Committee on the Federal Rules of Evidence rejected the suggestion that the witness spouse be the sole holder of the privilege. *See*, note 50 *supra* and accompanying text.

104. 445 U.S. at 53.

rily given. An examination of the jurisdictions which have adopted the witness spouse privilege indicates that the states have been able to effectively deal with this problem.[105] The precautions generally followed by these jurisdictions include the requirement that the trial judge make an independent determination that the witness spouse is aware of the privilege not to testify, and that the witness spouse has knowingly and voluntarily waived that privilege.[106] This bench determination should be made outside of the presence of the jury,[107] and neither party should be permitted to comment to the jury regarding the invocation of the privilege.[108]

Undoubtably, many occasions will arise where the witness spouse will feel pressured to testify, for a variety of reasons. If the federal district courts adopt precautions to ensure the voluntariness of testimony, both the marital relationship and the rights of the accused should be adequately protected. While the voluntariness of spousal testimony is a serious question, and deserves consideration more thorough than that afforded it by the Court in *Trammel*, the voluntariness determination requirement is not a fatal flaw in the *Trammel* modification of the spousal testimonial privilege.

CONCLUSION

The Court, in its *Trammel* decision, has completed a 400-year evolution of the spousal testimonial privilege. By granting the privilege solely to the witness spouse, the Court has struck a more equitable balance between society's interest in preserving marital harmony, on the one hand, and the public's right to every person's evidence, on the other. In addition, the Court has silenced the major critics of the testimonial privilege who had argued that a marriage in which one spouse is willing to testify against the other is beyond salvation,[109] and that the accused should not be "consulted in determining whether justice shall have its course against him."[110]

As with most solutions, however, the Court has raised new problems. Unless it can adequately be shown that the witness spouse's testimony is indeed voluntary, the spousal testimonial privilege will become a mere charade. The prosecutor, with his abilities to pressure a witness spouse, will be in the position of deciding whether a particular marriage is "worthy" of the privilege. The prosecutor's dominance is compounded when the husband and wife have jointly participated in a crime. Through the use of prosecutorial discretion and immunity, the government can put great pres-

105. *See, e.g.*, Postom v. United States, 322 F.2d 432 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 917 (1964); Taylor v. State, 25 Ala. App. 408, 147 So. 647 (1933); People v. Lankford, 55 Cal. App. 3d 203, 127 Cal. Rptr. 408 (1976); People v. Marsh, 270 Cal. App. 2d 365, 75 Cal. Rptr. 814 (1969); Carroll v. State, 147 Ga. App. 332, 248 S.E.2d 702 (1978); Broome v. State, 141 Ga. App. 538, 233 S.E.2d 883 (1977); Commonwealth v. Stokes, 374 N.E.2d 87 (Mass. 1978).

106. *See, e.g.*, People v. Lankford, 55 Cal. App. 3d 203, 210, 127 Cal. Rptr. 408, 412 (1976); Commonwealth v. Stokes, 374 N.E.2d 87, 96 n.9 (Mass. 1978).

107. Postom v. United States, 322 F.2d 432 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 917 (1964); Broome v. State, 141 Ga. App. 538, 233 S.E.2d 883 (1977); Commonwealth v. Stokes, 374 N.E.2d 87 (Mass. 1978).

108. Holyfield v. State, 365 So. 2d 108 (Ala. App.), *cert. denied*, 365 So. 2d 112 (Ala. 1978).

109. C. MCCORMICK, *supra* note 32, § 66, at 145.

110. J. WIGMORE, *supra* note 12, § 2228, at 216-17.

sure on one spouse to testify against the other. Although this problem raises serious complications for trial courts, it can effectively be dealt with if the courts take precautionary measures to ensure the voluntariness of testimony. The courts have successfully dealt with the voluntariness determination in other areas.[111] There is no reason to believe that the courts will have any more difficulty in determining the voluntariness of spousal testimony.

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111. Voluntariness requires an "intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).