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Federal Marital Privileges In A Criminal Context: The Need For Further Modification Since Trammel The

FEDERAL MARITAL PRIVILEGES IN A CRIMINAL CONTEXT: THE NEED FOR FURTHER MODIFICATION SINCE *TRAMMEL*

The defendant's privilege to prevent admission of his or her spouse's testimony at trial has existed in one form or another for roughly 400 years.[1] Not until the twentieth century, however, have the marital privileges undergone major modifications and faced the possibility of abolition.[2] The adverse spousal testimony privilege and the confidential communications privilege constitute the marital privileges. The adverse spousal testimony privilege prevents the admission into evidence of a spouse's testimony that tends to incriminate a defendant spouse.[3] The confidential communications privilege excludes from evidence private marital communications between spouses.[4] Exceptions to the privileges have developed begrudgingly and reluctantly.[5]

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1. Trammel v. United States, 445 U.S. 40, 43-44 (1980); Lempert, *"Mason Ladd Lecture": A Right to Every Woman's Evidence,* 66 IOWA L. REV. 725, 726 (1981); Comment, *The Spousal Testimonial Privilege After* Trammel v. United States, 58 DEN. L. J. 357, 369 (1981) [hereinafter cited as *Privilege After* Trammel].

2. *Trammel,* 445 U.S. at 44-45.

3. Comment, *Questioning the Marital Privilege: A Medieval Philosophy in a Modern World,* 7 CUM. L. REV. 307, 309 (1976) [hereinafter cited as *Medieval Philosophy].* Courts sometimes referred to the adverse spousal testimony privilege as the antimarital facts privilege. *See* United States v. Lilley, 581 F.2d 182, 189 (8th Cir. 1978) (antimarital facts terminology is another name for adverse spousal testimony privilege); Graham, *Evidence and Trial Advocacy Workshop: Privileges—Husband and Wife; Identity of Informer,* 20 CRIM. L. BULL. 34, 36 (1984) (antimarital facts equals adverse spousal testimony).

4. Trammel v. United States, 445 U.S. 40, 51 (1980); Wolfle v. United States, 291 U.S. 7, 14 (1934); *see* United States v. Ammar, 714 F.2d 238, 258 (3d Cir.) (confidential marital communications pertained to post arrest communications concerning conspiracy), *cert. denied,* 104 S. Ct. 344 (1983); *see also* United States v. Archer, 733 F.2d 354, 359 (5th Cir.) (marital communications made in confidence protected by confidential communications privilege), *cert. denied,* 105 S. Ct. 196 (1984); United States v. McCown, 711 F.2d 1441, 1452 (9th Cir. 1983) (confidential communications privilege applies to communication intended to be confidential); United States v. Lefkowitz, 618 F.2d 1313, 1318 (9th Cir.) (confidential communications privilege applies only to conversations intended to be confidential), *cert. denied,* 449 U.S. 824 (1980).

5. *Medieval Philosophy, supra* note 3, at 312-13. At common law, the only exception to the marital privileges was extreme necessity. *Id.* Common-law courts invoked the necessity exception to admit a victim spouse's testimony and to avoid an injustice to the victim spouse. 8 WIGMORE, EVIDENCE § 2239 at 242 (1961) [hereinafter cited as WIGMORE]; Stein v. Bowman, 13 Pet. 209, 221 (1829). The justification for preventing the admission of a spouse's testimony was to protect a marriage. WIGMORE, *supra,* at 243; United States v. Trammel, 583 F.2d 1166, 1169 (10th Cir. 1978), *aff'd on other grounds,* 445 U.S. 40 (1980). If a spouse committed a crime against his or her spouse, however, courts presumed the marriage unworthy of protection. WIGMORE, *supra,* at 243.

At present, courts invoke an exception to the marital privileges when a spouse commits a crime against the other spouse. *See* WIGMORE, *supra,* at 243-50 (crimes against spouses triggering exception to marital privileges include assault, attempt to kill, rape, incest, and bigamy); *see*

Federal courts created the joint participation exception to the marital privileges as one way to admit spousal testimony into evidence.[6] The joint participation exception prevents the silencing of a spouse's testimony through invocation of the marital privileges if the testifying spouse participated in a joint criminal venture with the defendant spouse.[7]

In *Trammel v. United States,*[8] the United States Supreme Court significantly modified the marital privileges.[9] *Trammel,* marking the Court's latest alteration of the privileges, clarified the application of the marital privileges and the joint participation exception.[10] Prior to *Trammel,* both the defendant

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also United States v. Allery, 526 F.2d 1362, 1365 (8th Cir. 1975) (offense against child of either spouse is detrimental to familial harmony and warrants exception to marital privileges).

Appellate courts unanimously apply an exception to the marital privileges in a Mann Act prosecution in which the defendant is accused of prostituting his wife. *See Wyatt,* 362 U.S. at 525-26 (Court rejected privilege to hush testimony of wife where she was victim of crime); Mann Act, 18 U.S.C. § 2141 (1982) (prohibits interstate transportation of female for purpose of prostitution or some other immoral purpose). Federal courts also allow an exception to the confidential communications privilege when a third party overhears the marital communications since the communications are not then confidential as between the spouses. *See* United States v. Archer, 733 F.2d 354, 359 (5th Cir.) (out of court statements by one spouse and testified to by third party against other spouse not protected by marital privileges), *cert. denied,* 105 S. Ct. 196 (1984); United States v. Klayer, 707 F.2d 892, 894 (6th Cir.) (phone conversation between both spouses and third party admitted into evidence), *cert. denied,* 104 S. Ct. 180 (1983); *Medieval Philosophy, supra* note 3, at 311 (confidential communications privilege does not apply when third party is known to be present during marital conversation). The marital communications must be out of the hearing of third parties and must remain undisclosed in order to be privileged. *Medieval Philosophy, supra* note 3, at 313-14; *see also* United States v. Neal, 532 F. Supp. 942, 947 (D. Colo. 1982) (presence of third party during marital communication is not exception to confidential communications privilege when one spouse was unaware of presence of third party), *rev'd on other grounds,* 743 F.2d 1441 (10th Cir. 1984), *cert. denied,* 105 S. Ct. 1848 (1985).

6. Comment, *The Deconstruction of the Marital Privilege,* 12 PEPPERDINE L. REV. 723, 751 (1985) [hereinafter cited as *Deconstruction]; see infra* text accompanying note 7 (definition of joint participation exception).

7. United States v. Byrd, 750 F.2d 585, 589 (7th Cir. 1984). *See generally,* United States v. Pugliese, 153 F.2d 497 (2d Cir. 1945); Van Riper v. United States, 13 F.2d 961 (2d Cir. 1926). Judge Learned Hand explained that where two people comprise a joint criminal venture, they form a partnership in crime. See *Van Riper,* 13 F.2d at 967. Judge Hand treated the two joint participants as one, and thus allowed the defendant's statements against the other joint venturer into evidence since, in effect, the court admitted the declarant's statements against the declarant himself. *See id.* In both *Van Riper* and *Pugliese,* Judge Hand employed the language of common-law incompetency in allowing the admission of a joint participant's statements against the copartner. *See Van Riper,* 13 F.2d at 967; *Pugliese,* 153 F.2d at 500. The common law treated husband and wife as one entity and disallowed one's testimony for or against the other. *See infra* note 24 and accompanying text (discussion of common-law incompetency). Judge Hand treated codefendants as one entity, as a partnership; but in contrast to the common-law treatment of the husband-wife entity, Judge Hand allowed one codefendant to testify adversely against the other. *Van Riper,* 13 F.2d at 967; *see infra* text accompanying notes 21-24 (discussion of common law incompetency).

8. 445 U.S. 40 (1980).

9. *Id.* at 53; *see infra* text accompanying notes 84-94 (discussing *Trammel* modification of marital privilege).

10. 445 U.S. at 53; *see Deconstruction, supra* note 6, at 752 (*Trammel* clarified marital privilege).

spouse and the witness spouse could assert the adverse spousal testimony privilege.[11] The *Trammel* Court, however, revoked the testimonial privilege from the defendant spouse, leaving the testimonial privilege vested only in the witness spouse.[12] The *Trammel* Court, however, noted that courts should not compel the witness spouse to testify.[13] The admission of adverse spousal testimony at trial, therefore, may be contingent upon the voluntariness of the testimony.[14] Since *Trammel* discouraged compelling an intransigent witness spouse to testify, the joint participation exception has a limited function as to adverse spousal testimony.[15] The witness spouse, therefore, will either voluntarily testify as provided by *Trammel* or assert the adverse spousal testimony privilege.[16] Nevertheless, when no harmony remains in a marriage, compulsion of adverse spousal testimony is justified; and courts should apply the joint participation exception to the adverse spousal testimony privilege when spouses jointly participate in a crime and the witness spouse refuses to testify. Some courts still apply the joint participation exception to the confidential communications privilege.[17] Various federal circuit courts, how-

11. *See Medieval Philosophy, supra* note 3, at 311 (*Trammel* modified earlier law). Before *Trammel,* spouses could not testify against one another. *See* Hawkins v. United States, 358 U.S. 74, 75 (1958) (husband and wife incompetent to testify for or against one another at common law).

12. 445 U.S. at 53; *see infra* text accompanying notes 84-94 (discussion of reasons for *Trammel* modification).

13. 445 U.S. at 53; WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2d § 405, 435 (1980) [hereinafter cited as WRIGHT]. *But see infra* text accompanying notes 165-68 (courts should implement joint participation exception and thus compel some involuntary testimony).

14. *See* United States v. Crouthers, 669 F.2d 635, 642 (10th Cir. 1982) (witness spouse must knowingly and intelligently waive privilege not to testify against defendant spouse); *Appeal of Malfitano,* 633 F.2d 276, 280 (3d Cir. 1980) (waiver of adverse spousal testimony privilege must be intelligent and knowing); Galban, *Evidence,* 1983 ANN. SURV. AM. L. 175, 189 (courts must determine if witness spouse's testimony is voluntary). To insure the voluntariness of a witness spouse's testimony, one commentator suggested that courts should make an independent determination whether witness spouse's testimony is voluntary, that courts should make determinations of voluntariness *in camera* at trial, and that courts should allow neither prosecution nor defendant to make statements in the presence of the jury concerning the adverse spousal testimony privilege. *See Privilege After* Trammel, *supra* note 1, at 368.

15. *See Deconstruction, supra* note 6, at 752 (post-*Trammel,* question is whether testimony is voluntary, not whether involuntary testimony is admissible). *But see infra* text accompanying note 168 (discussion of function of joint participation exception to testimonial privilege).

16. *See Deconstruction, supra* note 6, at 751 (joint participation exception as applied to adverse spousal testimony privilege engulfed by *Trammel* ruling); M. LARKIN, FEDERAL TESTIMONIAL PRIVILEGES § 4.02, 4.12-4.12.1 (1985) (application of joint participation question to adverse spousal testimony privilege is moot issue after *Trammel).*

17. *See, e.g.,* United States v. Keck, 773 F.2d 759, 767 (7th Cir. 1985) (neither marital privilege applies when spouses are joint criminal participants); United States v. Sims, 755 F.2d 1239, 1243 (6th Cir.) (applying joint participation exception to communications privilege when marital conversations pertain to criminal activity); *cert. denied,* 105 S. Ct. 3533 (1985); United States v. Chagra, 754 F.2d 1181, 1182 (5th Cir.) (conversations in course of conspiracy not protected under marital privileges) *cert. denied,* 106 S. Ct. 255 (1985); United States v. Harrelson, 754 F.2d 1153, 1167-68 (5th Cir.) (joint participation exception allowed admission of statements concerning crimes overheard through wiretap); *cert. denied,* 106 S. Ct. 599 (1985); United States v. Kapnison, 743 F.2d 1450, 1455 (10th Cir.) (used Judge Hand's phrase "partnership in crime"

ever, have examined the joint participation exception regarding the confidential communications privilege and have come to differing conclusions as to the continued validity of the exception.[18]

The marital privileges originated in the late sixteenth century,[19] and by the end of the seventeenth century most courts recognized the privileges in both civil and criminal cases.[20] By the 1600's, the marital privileges appeared in the forms of incompetency and marital disqualification.[21] Courts often confused incompetency and marital disqualification in application, but the two forms were separate and distinct.[22] Marital disqualification was similar

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to describe spouses engaged in criminal conspiracy and applied crime fraud exception to confidential communications privilege), *cert. denied*, 105 S. Ct. 2017 (1985); United States v. Broome 732 F.2d 363, 365 (4th Cir.) (marital communications concerning illegal activity do not fall within protection of confidential communications privilege), *cert. denied*, 105 S. Ct. 181 (1984); United States v. Ammar, 714 F.2d 238, 258 (3d Cir.) (joint participation exception applied against confidential communications privilege in allowing into admission voluntary testimony of witness spouse), *cert. denied sub nom.* Stillman v. United States 464 U.S. 936 (1983); United States v. Price, 577 F.2d 1356, 1365 (9th Cir. 1978) (statements concerning conspiracy by joint participant spouses not protected by marital privileges), *cert. denied*, 439 U.S. 1068 (1979); United States v. Petty, 602 F. Supp. 996, 998 (D. Wyo. 1984) (joint participation exception applicable to confidential communications privilege when married couple engaged in criminal activity together); United States v. Shipp, 578 F. Supp. 980, 991 (S.D.N.Y. 1984) (marital conversation concerning conspiracy intercepted by wiretap not protected by marital privileges), *aff'd*, 754 F.2d 1427 (2d Cir.), *cert. denied*, 105 S. Ct. 3482 (1985).

18. *See supra* note 17 and accompanying text (courts applying joint participation exception to confidential communications privilege). *But see In re* Grand Jury Subpoena United States, 755 F.2d 1022, 1027 (2d Cir.) (refused to grant joint participation exception to either marital privilege), *vacated as moot*, United States v. Koecher, 54 U.S.L.W. 4185 (U.S. Feb. 25, 1986) (No. 84-1922); *Appeal of Malfitano*, 633 F.2d 276, 278 (3d Cir. 1980) (disallowing joint participation exception to adverse spousal testimony privilege); United States v. Geller, 560 F. Supp. 1309, 1326-27 (E.D. Pa. 1983) (court disallowed admission of tapes of spouse's conversations, reasoning confidential communications privilege protects recordings of private marital conversations), *aff'd mem.*, 745 F.2d 49 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 786 (1985); *see infra* text accompanying notes 107-17 and 136-43 (discussion and analysis of *Grand Jury Subpoena* and *Malfitano*). Only the United States Court of Appeals for the Second Circuit fails to invoke the joint participation exception against the confidential communications privilege. *See Grand Jury Subpoena*, 755 F.2d at 1027 (finding no compelling reason to create joint participation exception to marital privileges). Both the Second and Third Circuits have refused to apply the joint participation exception to the adverse spousal testimony privilege. *See id.; Malfitano*, 633 F.2d at 278 (finding that criminal marriages not necessarily beyond salvation). The Second Circuit stated that courts allowing the joint participation exception still do not force the witness spouse to testify. *Grand Jury Subpoena*, 755 F.2d at 1027.

19. Lempert, *supra* note 1, at 726.

20. WIGMORE, *supra* note 5, at § 2227, 213. The marital privilege first appeared in the English case of *Bent v. Allot* in which an accused husband prevented his wife from testifying against him. *See* Bent v. Allot, 21 Eng. Rep. 50 (Ch. 1580); WIGMORE, *supra* § 2227 at 211 n.1; 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, 1362-63 (1973); *Privilege After* Trammel, *supra* note 1, at 358.

21. Reutlinger, *supra* note 20, at 1362-63; *see infra* text accompanying notes 22-28 (discussion of incompetency and disqualification).

22. *Medieval Philosophy, supra* note 3, at 309.

to the common-law precept that disallowed a party from testifying in any fashion in a case in which the party had an interest.[23] The common-law rationale for spousal incompetency was that husband and wife were one entity and that no one should testify for himself owing to the temptation to lie in favor of one's interest.[24]

The adverse spousal testimony privilege is related closely to common-law disqualification,[25] while the confidential communications privilege is related to common-law incompetency. In the early stages of the evolution of the marital privileges, the adverse spousal testimony privilege pertained to all testimony that a spouse might present for or against the spouse's mate.[26] Like common-law disqualification, the justification for the adverse spousal testimony privilege was that courts disqualified a party's testimony in a case in which the party had an interest.[27] Similarly, since the common law treated husband and wife as one entity, courts considered the spouses incompetent to testify for or against one another.[28]

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23. Haney, *The Evolutionary Development of Marital Privileges in Federal Criminal Trials: Constricting the Invocation and Growth of Spousal Privileges in Federal Criminal Cases by Interpreting the Common Law in the "Light of Reason and Experience,"* 6 NAT. J. CRIM. DEF. 99, 122 (1980) [hereinafter cited as *Development of Marital Privileges]*. The common law prevented a litigant from testifying in a case in which the litigant held a pecuniary interest since that interest might make the litigant's testimony unduly prejudiced in favor of the litigant's case. *See* Trammel v. United States, 445 U.S. 40, 44 (1980) (accused not allowed to testify at common law in case in which accused's self-interest may result in perjury).

24. *See* Trammel v. United States, 445 U.S. 40, 44 (1980) (common-law fiction did not recognize legal existence of women); Hawkins v. United States, 358 U.S. 74, 75 (1958) (common law considered husband and wife as one unit and disallowed spousal testimony since self-interest might persuade spouse to lie); *see also* Galban, *supra* note 14, at 187 n.77 (married couples considered one entity at common law); Lempert, *supra* note 1, at 726 n.8 (husband and wife were one at common law); Note, *The Husband-Wife Testimonial Privilege in the Federal Courts,* 59 B.U.L. REV. 894, 896 (1979) (rule of incompetency founded on common-law fiction of husband and wife as one flesh) [hereinafter cited as *Testimonial Privilege];* Note, *Interspousal Immunity: What Price Marital Harmony?,* 19 FORUM 500 (1984) (husband and wife were one at common law and no one should testify on his own behalf, and courts cannot force one to testify against himself) [hereinafter cited as *Interspousal Immunity]; Medieval Philosophy, supra* note 3, at 108 (incompetency initially founded on Lord Coke's metaphysical assumption that husband and wife were one); *Privilege After* Trammel, *supra* note 1 at 358 (husband and wife considered one person and thus spousal testimony not considered trustworthy since no one is likely to testify against himself). Women achieved a separate legal existence only in the late nineteenth century. *Interspousal Immunity, supra* at 500-01. Furthermore, Congress passed legislation in 1878 that abolished disqualification and permitted criminal defendants to testify on their own behalf. *Development of Marital Privileges, supra* note 23, at 108.

25. *But see Deconstruction, supra* note 6, at 729 (adverse spousal testimony privilege based on common-law incompetency until *Trammel* left adverse spousal testimony privilege vested only in witness spouse); Trammel v. United States, 445 U.S. 40, 53 (1980) (Supreme Court vested testimonial privilege in witness spouse).

26. *See* Funk v. United States, 290 U.S. 371, 373 (1933) (in early development of marital privileges, spouses could not testify for or against one another).

27. *Trammel,* 445 U.S. at 44; *Medieval Philosophy, supra* note 3 at 309.

28. *Trammel,* 445 U.S. at 44; *see supra* note 24 and accompanying text (discussion of common-law treatment of husband and wife as one entity).

In the common-law development of the privileges, the communications privilege at first was not distinct from the adverse spousal testimony privilege.[29] Currently, however, the adverse spousal testimony privilege is available to the witness spouse as long as he or she remains married to the defendant, while the confidential communications privilege is continuously available to both spouses even after divorce or separation of the spouses so long as the spouses engaged in the conversation during the marriage.[30] Only the spouse making the confidential communication may invoke the confidential communications privilege,[31] whereas only the witness spouse may elect to assert the adverse spousal testimony privilege.[32] In fact, a witness spouse may now offer adverse testimony at trial over the objection of the defendant spouse.[33] In contrast, a defendant spouse may prevent the admission of the voluntary testimony of his or her spouse if the testimony pertains to the defendant's confidential marital communications.[34] Courts generally have applied the confidential communications privilege to spoken words or written exchanges,[35] but some courts extend the privilege to acts performed privately by a spouse in the presence of the other spouse.[36] Courts presume the private communications between spouses to be confidential and thus within the ambit of the communications privilege unless contrarily proved.[37]

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29. WIGMORE, *supra* note 5, at § 2333, 644.

30. United States v. Lilley, 581 F.2d 182, 189 (8th Cir. 1978); WRIGHT, *supra* note 13, § 406, 438. The marital relationship at the time to which the adverse testimony relates is of no consequence. WRIGHT, *supra* note 13, at § 406, 438. *But see* MCCORMICK, EVIDENCE § 86 at 202-03 (3d ed. 1984) (courts should not allow communications privilege after death of one spouse or divorce since revelation of communication no longer affects marriage).

31. WIGMORE, *supra* note 5, at § 2340, 670; *see* MCCORMICK, *supra* note 30, at § 83, 198 (communicator holds confidential communications privilege but often, conversations entail confidences disclosed by both spouses, making privilege available to both spouses); C. TORCIA, WHARTON'S CRIMINAL EVIDENCE § 567, 99 (13th ed. 1973) (confidential communications privilege only available to spouse against whom communications offered as testimony); LARKIN, *supra* note 16 at § 4.03, 4.27 (usually, only spouse making confidential communication entitled to assert privilege); Krattenmaker, *Interspousal Testimonial Privileges Under the Federal Rules of Evidence,* 64 GEO. L. J. 613, 664 (1976) (communications privilege should be vested only in one who utters confidential statement). *But see Medieval Philosophy, supra* note 3, at 30 (either spouse may assert confidential communications privilege).

32. Trammel v. United States, 445 U.S. 40, 53 (1980); *see supra* text accompanying note 12 (*Trammel* Court vested adverse spousal testimony privilege in witness spouse only).

33. Purdy, *The Marital Privilege: A Prosecutor's Perspective,* 18 CRIM. L. BULL. 309, 310-11 (1982).

34. *See supra* note 4 and accompanying text (private marital communications protected from revelation at trial by communications privilege).

35. *See* Pereira v. United States, 347 U.S. 1, 6 (1953) (confidential communications privilege applies to utterances, not acts); United States v. McCown, 711 F.2d 1441, 1452 (9th Cir. 1983) (confidential communications privilege applies to "utterances or expressions); United States v. Lefkowitz, 618 F.2d at 1318 (same); United States v. Klayer, 707 F.2d 892, 894 (6th Cir. (same), *cert. denied,* 104 S. Ct. 180 (1983).

36. MCCORMICK, *supra* note 30, at § 79, 164; WHARTON'S, *supra* note 31, at § 568, 101; *see* United States v. Brown, 605 F.2d 389, 396 n.6 (8th Cir.) (spousal communications not restricted to speech and writings), *cert. denied,* 444 U.S. 972 (1979).

37. Wolfle v. United States, 291 U.S. 7, 14 (1934); *see In re* Grand Jury Investigation, 603 F.2d 786, 788 (9th Cir. 1979) (government must overcome presumption of confidentiality

The rationale for the adverse spousal testimony privilege existed in two forms—avoidance of marital dissension and the fostering of family harmony, and a natural repugnance for the idea of possibly condemning a person with the testimony of his spouse.[38] The prevailing rationale supporting the confidential communications privilege was preserving the intimacy of marital privacy.[39] Implicit in the underlying policy supporting the confidential communications privilege was the importance of successful marriages to public welfare.[40]

Despite the popularity of the confidential communications privilege in federal courts, the United States Supreme Court approved Proposed Rule of Evidence 505, which omitted the confidential communications privilege altogether.[41] Congress, however,enacted Federal Rule of Evidence

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in order to admit marital communications into evidence); WRIGHT, *supra* note 19, at § 406, 438-39 (marital communication presumed confidential until shown otherwise); Galban, *supra* note 18, at 192 (confidential communications privilege not applied if there is no expectation of privacy in marital communication).

38. *Testimonial Privilege, supra* note 24, at 896-97; *see* J. MAGUIRE EVIDENCE: COMMON SENSE AND COMMON LAW 91 (1947) (rationale for adverse spousal testimony is family harmony); *Development of Marital Privileges, supra* note 23, at 104, 122-23 (domestic or family harmony rationale for adverse spousal testimony privilege is most popular, but less often cited policy is natural repugnance); Haney, *Spousal Testimonial Privilege in Federal Criminal Trials: Constricting the Growth of Marital Privileges by Interpretation in the "Light of Reason and Experience"*, 8 AM. J. CRIM. L. 231, 270 (1980) (policy of adverse spousal testimony privilege is to inculcate family harmony to benefit of spouses, children and public in general) [hereinafter cited as *Spousal Testimonial Privileges]; Medieval Philosophy, supra* note 3, at 310 (policy of adverse spousal testimony privilege based on natural repugnance of condemning man through testimony of wife). *Privilege After* Trammel, *supra* note 1, at 359 (adverse spousal testimony rationale is natural repugnance and Coke's idea of fostering family harmony and preventing marital dissension); *see also* United States v. Trammel, 445 U.S. 40, 44 (1980) (modern justification of adverse spousal testimony privilege is promoting family harmony); Untied States v. Byrd, 750 F.2d 585, 590 (7th Cir. 1984) (adverse spousal testimony privilege protects marriage from impact of testimony); Appeal of Malfitano, 633 F.2d 276, 277 (3d Cir. 1980) (principal modern justification of adverse spousal testimony privilege is prevention of marital dissension). Wigmore coined the phrase "natural repugnance." WIGMORE, *supra* note 5, at § 227, 212. Wigmore described the familial structure at the time of the emergence of the marital privileges as hierarchical. *Id.* The head of the household wielded absolute authority over his dwelling, and those living under his domain usually depended upon him for sustenance. *Id.* The law eschewed the idea of an underling condemning his revered master. *Id.* Furthermore, in a time when all felonies were punishable by death, the law would not sanction a wife's testimony against her husband, possibly condemning him to death. *Id. See* Lempert, *supra* note 1, at 729 (in seventeenth century, all felonies punishable by death).

39. *See* MAGUIRE, *supra* note 38, at 85 (cannot have successful marriages if spouses do not trust one another); *Spousal Testimonial Privileges, supra* note 38, at 235-36 (confidential communications privilege not only preserves marital harmony as does adverse spousal testimony privilege, but also preserves marital trust); *Privilege After* Trammel, *supra* note 1, at 358-59 (policy underlying confidential communications privilege is promotion of trust and confidence between spouses). The confidential communications privilege did not appear until the abolition of incompetency which originally sufficed as the communications privilege. *Privilege After* Trammel, *supra* note 1, 358-59.

40. *See infra* note 157 and accompanying text (marital harmony benefits public).

41. *Testimonial Privilege, supra* note 24, at 901 n.58; Comment, *Evidence—The Privilege Against Adverse Spousal Testimony Extended to Include Indirect Implications,* 13 MEM. ST. U.

501,[42] which does not recognize a marital privilege rule per se.[43] While Rule 501 does not codify the marital privileges, Rule 501 does allow federal courts to apply the privileges as the privileges exist at common law and to develop the evidentiary privileges as changing circumstances warrant.[44]

In addition to attempting to mold the marital privileges through legislative work, the United States Supreme Court continued to develop and modify the marital privileges in a number of cases. In *Funk v. United States,*[45] the United States Supreme Court reversed the lower court's ruling that considered an individual incompetent to testify on the behalf of the individual's spouse.[46] The *Funk* Court, therefore, abolished the longstanding common-law doctrine

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L. REV. 123, 127 (1982) [hereinafter cited as *Adverse Spousal Testimony]; see* Proposed FED. R. EVID. 505 advisory committee note (marital conduct not affected by confidential privilege because couple probably unaware of existence of privilege. Proposed Rule 505 vested the adverse spousal privilege in both spouses, but omitted the confidential communications privilege. Proposed FED. R. EVID. 505. The Supreme Court in *Trammel* effectively abrogated Rule 505 by vesting the adverse spousal testimony privilege in the witness spouse only. *Trammel,* 445 U.S. at 53.

42. FED. R. EVID. 501; *see* H.R. 5463, 93d Cong., 2d Sess., 120 CONG. REC. 40, 891 (1974) (Congress enacted Rule 501); *see also* WRIGHT, *supra* note 30, at § 406, 438 n.12 (criticism of omission of confidential communications privilege from Proposed Rule 505); *Spousal Testimonial Privilege, supra* note 38, at 295 (Congress quieted the furor over Supreme Court's proposed rules by enacting Rule 501). The Proposed Rules of Evidence sanctioned by the United States Supreme Court caused a controversy among commentators. *Privilege After* Trammel, *supra* note 1, at 361 (proposed rules caused a "tremendous furor" among commentators since courts widely accepted confidential communications privilege). In 1940, Congress enacted legislation that permitted the Supreme Court to submit proposed evidentiary rules for criminal cases to Congress for approval. *See* 18 U.S.C. § 3771 (1982) (legislation allowing Court to promulgate evidentiary rule); *Development of Marital Privileges, supra* note 23, at 113. Congress also authorized Chief Justice Warren to form an advisory committee to study the use of uniform rules of evidence in federal courts. *Id.* at 113-14; S. REP. No. 1277 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7058.

43. FED. R. EVID. 501 advisory committee note; United States v. Trammel, 583 F.2d 1166, 1172 (10th Cir. 1978), *aff'd,* 445 U.S. 50 (1980).

44. FED. R. EVID. 501 advisory committee note; *Trammel,* 445 U.S. at 47 n.8; see S. REP. No. 1277, 93d Cong. 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7058 (federal courts to apply testimonial privileges using reason and experience); H.R. 5463, 93d Cong., 2d Sess., 120 CONG. REC. 40, 891 (1974) (federal courts to develop law of privilege on a case-by-case basis according to reason and experience); *see also infra* text accompanying notes 67-74 (Supreme Court based common law development of marital privileges on "reason and experience"). Congress also fashioned Rule 26 of the Federal Rules of Criminal Procedure according to the Supreme Court's language in *Funk v. United States* and *Wolfle v. United States. Funk,* 290 U.S. 371 (1933); *Wolfle,* 291 U.S. 7 (1934). *Development of Marital Privileges, supra* note 23, at 898. Rule 26 reads:

> In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the federal Rules of Evidence, or other rules adopted by the Supreme Court.

FED. R. CRIM. P. 26. Rule 501 adopted the "reason and experience" standard from Rule 26. FED. R. EVID. 501 advisory committee note.

45. 290 U.S. 371 (1933).

46. *Id.* at 387.

that prevented a witness spouse from testifying for his spouse.[47] In *Funk*, the defendant sought to admit on his behalf the testimony of defendant's wife in an effort to reverse the defendant's conviction for conspiring to violate a prohibition law.[48] The Supreme Court in *Funk* asserted that even if Congress passed no applicable legislation, the Court could repeal any common-law rule by using the criteria of "reason and experience."[49] The Court reasoned that the function of all rules of evidence is the ascertainment of the truth and that the common law is not static, but molds itself to changing circumstances.[50] Courts, therefore, should make continual determinations as to whether an evidentiary privilege still serves the policy which underlies the privilege.[51] The *Funk* Court noted that justifications for the marital privileges change with time and with society's changing needs.[52] The *Funk* Court stated that the law of the marital privileges, therefore, must change if the rationale underlying the privileges changes.[53] Furthermore, the Court in *Funk* explained that changes in evidentiary law should be premised on reason and on the continually enlightening educational device of experience.[54] *Funk* thus commenced an ongoing analysis to test the viability of the marital privileges.

The United States Supreme Court in *Wolfle v. United States*,[55] reaffirmed the *Funk* ruling, holding that federal courts should interpret common-law evidentiary principles in the "light of reason and experience."[56] The *Wolfle* Court dealt solely with the confidential communications privilege.[57] The principal issue before the Supreme Court in *Wolfle* was the admissibility of a statement in a letter from a husband to his wife.[58] The accused husband asserted the confidential communications privilege in order to prevent admission of the incriminating statement into court.[59] The Supreme Court noted that courts presume that spouses intend private marital communications to be confidential.[60] The Court, however, did not honor the communications

47. *Id.; see supra* notes 23-24 and accompanying text (discussion of common-law disqualification and incompetency).

48. *Funk*, 290 U.S. at 373.

49. *Id.* at 381-83. The United States Supreme Court in *Funk v. United States* held that unless Congress acts otherwise, the common law governs the rules of evidence in criminal cases and that the Supreme Court may interpret the common law. *Id.* at 379.

50. *Id.* at 381-83; *see Development of Marital Privileges, supra* note 23, at 162 (Federal Rules of Evidence not immutable or concrete, but are flexible).

51. *Development of Marital Privileges, supra* note 23, at 162.

52. *Funk*, 290 U.S. at 385.

53. *Id.*

54. *See id.* at 381 (experience is the best teacher).

55. 291 U.S. 7 (1934).

56. *Id.* at 12; *Funk*, 240 U.S. at 381; *see supra* text accompanying note 54 (discussion of "reason and experience").

57. *Wolfle*, 291 U.S. at 14.

58. *Id.* at 12.

59. *Id.*

60. *Id.* at 14.

privilege since the prosecution offered the statement through the testimony of the accused's stenographer who dictated the letter.[61] The *Wolfle* Court observed that the confidential communications privilege protected marital confidences essential to the preservation of the marriage.[62] Nevertheless, the Court in *Wolfle* explained that marital communications made in the presence of third parties are not privileged since the communications are not considered confidential.[63] Since the communication transpired in the presence of the stenographer, the communication was not confidential, and the Court allowed the admission of the stenographer's testimony.[64]

The United States Supreme Court again dealt with the confidential communications privilege in *Blau v. United States.*[65] In *Blau,* the accused husband asserted the communications privilege in declining to testify as to the whereabouts of his wife whom the lower court wanted for questioning before a grand jury investigating the husband's activities in the Communist Party of Colorado.[66] The *Blau* Court reasoned that the husband obtained knowledge of his wife's location through marital communications.[67] Furthermore, the Supreme Court noted that courts presume the confidentiality of private marital communications.[68] Since the government failed to rebut the presumption of confidentiality, the *Blau* Court honored the confidential communications privilege by refusing to compel the witness husband to testify.[69]

In *Hawkins v. United States,*[70] the United States Supreme Court slowed the development of the marital privileges by upholding the imposition of the adverse spousal testimony privilege in a Mann Act prosecution in which the prosecution charged defendant with prostituting his wife.[71] The *Hawkins* decision reiterated the *Funk* and *Wolfle* holdings which held that the criteria

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61. *Id.* at 16-17.

62. *Id.* at 14.

63. *See id.* at 17 (marital communications made in presence of mature children or other members of nuclear family are not privileged); *see also supra* note 5 and accompanying text (discussion of third party exception).

64. *Wolfle,* 291 U.S. at 17. The United States Supreme Court in *Wolfle v. United States,* however, did not rule on whether the wife's testimony would have been privileged. *Id.*

65. 340 U.S. 332 (1951).

66. *Id.* at 333.

67. *Id.*

68. *Id.; see supra* note 37 and accompanying text (courts presume confidentiality of spousal communications).

69. *Blau,* 340 U.S. at 333-34; *see* Note, *Partners in Crime: An Examination of the Privilege Against Adverse Spousal Testimony,* 22 J. FAM. L. 713, 723 (1983-84) (*Trammel* did not affect law in *Blau* since marital communications are still presumed confidential) [hereinafter cited as *Partners in Crime].*

70. 358 U.S. 74 (1958).

71. *Id.* at 81; *see supra* note 5 and accompanying text (while *Hawkins* prevented victim spouse from testifying against defendant's spouse, all appellate courts now apply an exception to adverse spousal testimony rule in Mann Act case); Mann Act, 18 U.S.C. § 2421 (1982) (prohibits interstate transportation of females for prostitution).

of "reason and experience" controlled the evolution of the marital privileges.[72] The *Hawkins* Court found that the common-law justification for the adverse spousal testimony privilege of fostering family harmony was still viable.[73] The Court in *Hawkins* refused to abolish or modify the adverse spousal testimony privilege.[74] While the *Hawkins* Court did not advance the development of the marital privileges, the Court did not stifle the evolution of the marital privileges but left the privileges susceptible to change should the Court decide to abolish or modify the adverse spousal testimony privilege in the future.[75]

The United States Supreme Court modified the adverse spousal testimony privilege according to "reason and experience" in *Trammel v. United States.*[76] In *Trammel,* the Government indicted defendant Otis Trammel for importing heroin and for conspiring to import heroin.[77] The Government agreed not to prosecute Trammel's wife if she testified against Trammel.[78] Mrs. Trammel testified,[79] and defendant Trammel asserted the adverse spousal testimony

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72. *See Hawkins,* 358 U.S. at 79 (changes in evidentiary rules premised on "reason and experience"); *supra* text accompanying notes 54 and 56 (Supreme Court mandates that "reason and experience" are guiding criteria for development of marital privileges).

73. *Hawkins,* 358 U.S. at 77.

74. *Id.* at 79.

75. *See id.* (privileges left open to change); *see also Development of Marital Privileges. supra* note 23, at 111-12 (*Hawkins* stated ongoing evolution of marital privileges subject to "reason and experience").

76. 445 U.S. 40, 53 (1980). In Justice Stewart's concurring opinion in *Trammel v. United States,* Stewart agreed with the majority's modification of the adverse spousal testimony privilege, but Stewart claimed that "reason and experience" was not the basis of the Court's holding. *Id.* at 53 (Stewart, J., concurring). Stewart believed circumstances had not changed that dramatically since the *Hawkins* decision in 1958. *Id.* at 54. Justice Stewart argued that the Court in *Trammel* simply accepted the government's arguments from 1958. *Id.* In 1958, the government asked the Court to construe the adverse spousal testimony privilege to allow a witness spouse to testify voluntarily. *Hawkins,* 358 U.S. at 77; *see Privilege After* Trammel, *supra* note 1, at 377 (Stewart stated correctly that Court should not base justification of *Trammel* on "reason and experience" or changing circumstances since circumstances did not substantially change in short time from 1958 to 1980). Stewart believed that *Hawkins* did not provide a factual setting conducive to the evolutionary development of the adverse spousal privilege. *Hawkins,* 358 U.S. at 82 (1958) (Stewart, J., concurring).

77. *Trammel,* 445 U.S. at 42.

78. *See id.* at 42-43 (Mrs. Trammel was unindicted coconspirator).

79. *See id.* at 53 (fact that Trammel's wife opted to testify against Trammel after being immunized from prosecution does not mean Court compelled Trammel's wife to testify); *see also* United States v. Neal, 743 F.2d 1441, 1444-45 (10th Cir. 1984) (grant of immunity to witness spouse did not render spouse's testimony involuntary nor inadmissible regarding confidential marital communications); *cert. denied,* 105 S. Ct. 1848 (1985); Reutlinger, *supra* note 20, at 1384 (witness spouse is only spouse able to determine worth of spouse's marriage since accused probably will not be able to overcome personal bias owing to accused's interest in case); *Privilege After* Trammel, *supra* note 1, at 367 (witness spouse in better position to determine worth of spouse's marriage because of defendant spouse's bias). *But see* Lempert, *supra* note 1, at 734 (*Trammel* decided wrongly because Court gave government incentive to turn spouses against one another); United States v. Trammel, 583 F.2d 1166, 1171-72 (10th Cir. 1978) (McKay, J., dissenting) (law should not give incentive to witness spouse to testify against

privilege.[80] The district court denied Trammel's claim to the adverse spousal testimony privilege, but did not allow into admission testimony concerning confidential communications between Trammel and his wife.[81] The United States Court of Appeals for the Tenth Circuit invoked the joint participation exception against the adverse spousal testimony privilege to admit Mrs. Trammel's testimony.[82] The United States Supreme Court, however, concluded that "reason and experience" no longer justified a defendant's privilege to bar the voluntary adverse testimony of the defendant's spouse.[83] The *Trammel* Court, therefore, limited the application of the joint participation exception to the adverse spousal testimony privilege by vesting the right to claim the adverse spousal testimony privilege in the witness spouse only.[84]

In addressing the adverse spousal testimony privilege, the *Trammel* Court examined the *Hawkins* decision and noted that *Hawkins* set no absolute doctrine governing the marital privilege, but rather left open the possibility of change.[85] In *Hawkins,* the Court refused to abrogate or modify the adverse spousal testimony privilege because the privilege culminated centuries of common-law evolution.[86] The Supreme Court in *Trammel,* however, discerned a trend in state law to revoke from the accused the privilege to

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defendant spouse and thus rupture marital harmony) (citing *Hawkins v. United States,* 445 U.S. 74, 77 (1958)), *aff'd on other grounds,* 445 U.S. 40 (1980); *supra* note 14 and accompanying text (discussion of voluntariness of witness spouse's testimony). The Supreme Court in *Trammel* stated that allowing the accused the privilege to bar the adverse testimony of the accused's spouse might undermine the marital relationship. *Trammel,* 445 U.S. at 52. The *Trammel* Court explained that the Goverment might not offer immunity to a spouse if the Government knows that the accused will exercise the privilege to prevent the spouse from testifying. *Id.* This twist in logic, if not specious, is irrelevant. The accused's indirect eradication of his spouse's initial acquittal through immunity will not likely further damage a marriage if, as the *Trammel* Court itself stated, the accused's spouse is willing to help put the accused in jail to begin with. *Id.* The *Trammel* Court, however, effectively pointed out that *Hawkins* does not prevent the Government from soliciting a spouse for inculpating evidence. *Trammel,* 45 U.S. at 52 n.12; *see* United States v. Burton, 631 F.2d 280, 281 (4th Cir. 1980) (marital privileges do not preclude government from obtaining information from one spouse in order to apprehend other spouse). The *Trammel* Court reasoned that only the testimony at trial is important. *Trammel,* 445 U.S. at 52 n. 12.

80. *Trammel,* 445 U.S. at 43.

81. *Id.;* United States v. Trammel, 583 F.2d 1166, 1167 (10th Cir. 1978), *aff'd on other grounds,* 445 U.S. 40 (1980).

82. United States v. Trammel, 583 F.2d at 1169.

83. *Trammel,* 445 U.S. at 53.

84. *Id.; see Development of Marital Privileges, supra* note 23, at 143 (*Trammel* left adverse spousal testimony privileges with witness spouse only). *Trammel* conceded the efficacy of the adverse spousal testimony privilege rationale as set forth in *Hawkins. Id.* The *Trammel* Court acknowledged that the testimonial privilege preserved marital harmony. *Id.* Nevertheless, the Court modified the privilege and concluded that vesting the adverse spousal testimony privilege in the witness spouse alone still helped foster marital tranquility without making a spouse's testimony unobtainable. *Trammel,* 445 U.S. at 53.

85. *Trammel,* 445 U.S. at 46.

86. Hawkins v. United States, 358 U.S. 74, 79 (1958).

prevent the accused's spouse from testifying against the accused.[87] Furthermore, the Court in *Trammel* noted that Congress did not intend to stifle the development of the marital privileges in passing Rule 501 of the Federal Rules of Evidence.[88] The Court stated that Congress' purpose was to provide a flexible set of evidentiary rules.[89] In addition, the *Trammel* Court explained that the goal of the adversarial system is the ascertainment of truth and that ordinarily a court has the right to hear all evidence.[90] The Court stated that courts should construe the testimonial privileges narrowly and strictly since testimonial privileges prevent the admission of evidence and consequently burden the quest for truth.[91] Furthermore, the Court in *Trammel* reasoned

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87. *See Trammel,* 445 U.S. at 49-50 (law of domestic relations reserved for states); Galban, *supra* note 14, at 187 (*Trammel* recognized movement in state law to revoke adverse spousal testimony privilege from accused); *see also Development of Marital Privileges, supra* note 23, at 146 (*Trammel* decision influenced heavily by ambivalence of federal courts towards adverse spousal testimony privilege). In the Fourth Circuit, the State of Maryland provides a confidential communications privilege. *See* MD. CTS. & JUD. PROC. § 9-105 (1974). Maryland's adverse spousal testimony privilege models the *Trammel* rule. *Id.* § 9-106. North Carolina allows spousal testimony for, but not against, the defendant spouse except for crimes by one spouse against the other spouse, and no confidential communications are compellable. *See* N.C. GEN. STAT. § 8-57 (1977). South Carolina provides no adverse spousal testimony privilege, but no spouse may testify as to confidential marital communications. *See* S.C. CODE ANN. § 19-11-30 (Law Co-op. 1976). In Virginia, courts may compel a spouse to testify for, but not against, the defendant spouse, but courts allow adverse spousal testimony when a spouse commits a crime against the other spouse or the couple's child. *See* VA. CODE § 8.01-398 (1950). West Virginia provides a confidential communications privilege. *See* W. VA. CODE § 57-3-4 (1966). In addition, West Virginia provides an adverse spousal testimony privilege except in cases of crimes against a spouse or the couple's child. *Id.* § 57-3-3.

88. *Trammel,* 445 U.S. at 47; *see supra* note 44 and accompanying text (federal courts accorded flexibility in developing rules of evidence on case-by-case basis in light of reason and experience); *supra* text accompanying note 75 (*Hawkins* Court allowed for future development of marital privileges); *Development of Marital Privileges, supra* note 23, at 143 (*Trammel* Court's decision predicated upon *Hawkins* and rule 501 of the Federal Rules of Evidence which extend to federal courts authority to develop the marital privileges in "light of reason and experience").

89. *Trammel,* 445 U.S. at 47; *see* Graham, *Evidence and Trial Advocacy Workshop: Privileges—Their Nature and Operation,* 19 CRIM. L. BULL. 442, 444 (1983) (intent of Congress in enacting Rule 501 was to provide flexible rules of evidence).

90. *Trammel,* 445 U.S. at 50; *see* Graham, *supra* note 3, at 34 (ascertainment of truth is goal of evidentiary rules).

91. *Id.; see* United States v. Nixon, 418 U.S. 683, 710 (1974) (all testimonial privileges block road to truth); *see also* United States v. Byrd, 750 F.2d 585, 589 (7th Cir. 1984) (Supreme Court in *Nixon* held that courts must construe privileges narrowly); United States v. Neal, 743 F.2d 1441, 1447 (10th Cir. 1984); (*Nixon* Court warned that privileges should be held suspect, *cert. denied,* 105 S. Ct. 1848 (1985); United States v. Mendoza, 574 F.2d 1373, 1381 (5th Cir.) (*Nixon* cautioned that courts must narrowly construe privileges), *cert. denied,* 439 U.S. 988 (1978); Matter of Grand Jury Subpoena of Clay, 603 F. Supp. 197, 198 (S.D.N.Y. 1985) (federal courts narrowly apply adverse spousal privilege); Matter of Grand Jury Subpoena of Jean Ford, no. M 11-188, slip op. at ____(S.D.N.Y. Jan. 9, 1985) (available Feb. 8, 1986, on LEXIS, Genfed library, Dist. file) (adverse spousal testimony privilege is disfavored and narrowly construed in federal courts), *aff'd* 756 F.2d 249 (2d Cir. 1985).

that precedent alone did not justify the absolute testimonial privilege.[92] The Court, however, stopped short of abolishing the testimonial privilege and reaffirmed the privilege's modern justification of preserving marital harmony.[93]

The marital privileges should not be abolished.[94] The privileges are judicial constructs evolving over centuries,[95] and federal courts have the authority and the responsibility to continue the development of the marital privileges.[96] The post-*Trammel* adverse spousal testimony privilege still serves the common-law rationale of preventing marital dissension and fostering marital harmony only when the marriage encourages solace and affection between the spouses.[97] Similarly, the current confidential communications

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92. *Trammel*, 445 U.S. at 49 (when precedent is only support for legal theory, that theory must be eliminated) (quoting *Francis v. Southern Pac. Co.*, 333 U.S. 445, 471 (1948) (Black, J., dissenting)); *see id.* at 52 (basis for allowing defendant spouse to hush testimony of his wife is outmoded because courts no longer deny women separate legal identity); *see also supra* note 24 and accompanying text (women gain separate legal existence).

93. *Trammel*, 445 U.S. at 53.

94. *See* McCORMICK, EVIDENCE § 86 at 173 (2d ed. 1972) (Supreme Court erred in omitting communications privilege from Rule 505) [hereinafter cited as McCORMICK]; *Testimonial Privilege, supra* note 24, at 915 (Supreme Court should modify marital privileges but leave abolition to the Congress); Note, *Pillow Talk, Grimgribbers and Connubial Bliss: The Marital Communications Privilege*, 56 IND. L. J. 121, 139 (1980) (marital privileges should not be eradicated) [hereinafter cited as *Pillow Talk]; Privilege After* Trammel, *supra* note 1, at 357 (abolition of privilege should be left to legislature).

95. Port v. Heard, 764 F.2d 423, 430 (5th Cir. 1985); *see* United States v. Lefkowitz, 618 F.2d 1313, 1319 (9th Cir.) (marital privileges have no constitutional underpinnings), *cert. denied*, 449 U.S. 824 (1980); *Development of Marital Privileges, supra* note 23, at 122 (marital privileges not found in United States Constitution); Purdy, *supra* note 33, at 310 (marital privileges founded in common law and have no constitutional justification). *But see* Krattenmaker, *supra* note 31, at 647-48 (penumbra of right to privacy include protection of marital privileges); Reutlinger, *supra* note 20, at 1370-71 (freedom to engage in private marital communications guaranteed by constitutional right to privacy); *Pillow Talk, supra* note 94, at 141 (United States Constitution does not specifically delineate marital privileges, but privileges related to right to privacy under Fourth Amendment); *Deconstruction, supra* note 6, at 729-30 (some courts hold confidential communications guaranteed by Fourth Amendment as right to personal privacy).

96. *See* United States v. Trammel, 583 F.2d 1166, 1168 (10th Cir. 1978) (federal courts have responsibility to reexamine common law justifications of marital privileges and to modify privileges according to "reason and experience"), *aff'd on other grounds*, 445 U.S. 40 (1980); United States v. Cameron, 556 F.2d 752, 756 (5th Cir. 1977) (federal courts have responsibility to examine underlying rationale of common-law privileges); United States v. Allery, 526 F.2d 1362, 1366 (8th Cir. 1975) (federal courts possess the right and should exercise responsibility to modify common-law privileges according to "reason and experience"). The Supreme Court in *Trammel* explained that Congress intended to allow and encourage federal courts to continue the development of the marital privileges in enacting Federal Rule of evidence 501. *Trammel*, 445 U.S. at 47 n.8. *But see* 583 F.2d at 1172 (McKay, J., dissenting) (appellate courts have modified marital privileges, but changes should be made by Supreme Court or Congress).

97. *See* Appeal of Malfitano, 633 F.2d 276, 277 (3d Cir. 1980) (*Trammel* held that adverse spousal testimony privilege still supported by common-law principle of preventing marital dissension). In allowing into evidence the voluntary adverse spousal testimony, the United States Supreme Court in *Trammel* vitiated the common-law justification of "natural repugnance." *See supra* note 39 and accompanying text (discussion of common-law justification of adverse

privilege achieves the common-law justification of preserving confidence and intimacy in marital communications only when a trusting bond between the spouses exists.[98] Courts, therefore, should apply the joint participation exception when applicable to either marital privilege, even if the court must compel a witness spouse's testimony, if implementation of the marital privileges would not serve the common-law rationales.[99] Appellate courts, however, disagree as to the continued validity of the joint participation exception to the marital privileges.[100]

The United States Court of Appeals for the Seventh Circuit, in *United States v. Van Drunen,*[101] defined an occasion in which the kind of trust in a marriage worth preserving exists.[102] In *Van Drunen*, the government indicted the defendant for knowingly transporting an alien into the United States.[103] The defendant subsequently married the alien and asserted the adverse spousal testimony privilege to prevent the defendant's wife from testifying against the defendant.[104] The Seventh Circuit denied defendant the adverse spousal testimony privilege stating that "collusive marriages" do not warrant the protection of the privilege.[105] The *Van Drunen* court explained that

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spousal testimony privilege). Since *Trammel* stated that courts should not compel involuntary spousal testimony, the Court in *Trammel* eradicated the offensiveness of compulsion. Reutlinger, *supra* note 20, at 1384-85 (society less likely to be offended if testimony is voluntary); *Privilege After* Trammel, *supra* note 1, at 367 (same). Unlike the rationale for preserving marital harmony, the common-law rationale of "natural repugnance" had no foundation in logic or policy. McCORMICK, *supra* note 94 at § 86, 176; WIGMORE, *supra* note 5, at § 2228, 216. On the contrary, the "natural repugnance" felt in digging into marital privacy by exposing marital conversations rested on sentiment. McCORMICK, *supra* note 94, at § 86, 173; WIGMORE, *supra* note 5, at § 2228, 217. *But see In re* Grand Jury Subpoena United States, 755 F.2d 1022, 1025, 1028 (2d. Cir.) (present rationale for adverse spousal testimony privilege is promotion of marital harmony and natural repugnance for compelling witness spouse to testify), *vacated as moot*, United States v. Koecher, 54 U.S.L.W. 4185 (U.S. Feb. 25, 1986) (No. 84-1922); United States v. Venuti, no. 84 CR 1002, slip op. at ____(S.D.N.Y. Sept. 20, 1985) (available Feb. 8, 1986, on LEXIS, Genfed library, Dist file) (natural repugnancy for condemning defendant spouse with testimony of witness spouse still viable rationale for adverse spousal testimony privilege).

98. *See supra* text accompanying notes 39-40 (discussion of confidential communications privilege rationale).

99. *See infra* text accompanying notes 157-63 (courts should use marital privileges only in support of privileges' rationales).

100. *See supra* note 18 and accompanying text (discussion of appellate treatment of joint participation exception).

101. 501 F.2d 1393 (7th Cir. 1974), *cert. denied*, 419 U.S. 1091 (1974).

102. *Id.* at 1397; *see infra* note 106 and accompanying text.

103. *Van Drunen*, 501 F.2d at 1394.

104. *Id.* at 1394, 1397. Since *United States v. Van Drunen* occurred before *Trammel*, the analysis would be different if the case were tried today, but the holding would be the same. *See In re* Grand Jury Subpoena United States, 755 F.2d 1022, 1025-26 n.5 (2d Cir.) (*Trammel* obviated need for joint participation exception as to adverse spousal testimony privilege), *vacated as moot*, United States v. Koecher, 54 U.S.L.W. 4185 (U.S. Feb. 25, 1986) (No. 84-1922).

105. *See Van Drunen*, 501 F.2d at 1397 (collusive marriage is marriage procured only to prevent spouse from testifying); United States v. Clark, 712 F.2d 299, 302 (7th Cir. 1983) (testimony concerning joint criminal acts of spouses not privileged in order to avoid criminal acts of spouses not privileged in order to avoid collusive marriages); *see also* Lutwak v. United

defendant's marriage did not contain the rehabilitative aspect that worthwhile marriages possess.[106] The rehabilitative aspect that the Seventh Circuit mentioned in *Van Drunen* is indicative of a situation in which the marriage rocked by the criminal activity of one's spouse is still worth preserving, since the marriage still provides comfort, solace, and tranquility for the spouses.[107]

The United States Court of Appeals for the Second Circuit, in *In re Grand Jury Subpoena United States,*[108] claimed that the Seventh Circuit's rehabilitative argument in *Van Drunen* was invalid since the rehabilitative aspect of the marriage upon the spouses was not a facet of the common-law justification of adverse spousal testimony privilege.[109] The Second Circuit, therefore, reasoned that a marriage's retaining no rehabilitative aspect does not warrant the imposition of the joint participation exception to the adverse spousal testimony privilege.[110] In *Grand Jury Subpoena,* the defendant spouses were involved in an alleged conspiracy to leak national defense secrets to a foreign government.[111] The wife refused to testify before the grand jury investigation concerning the defendant husband's indictment.[112] The wife asserted the adverse spousal testimony privilege, believing that her testimony might implicate the husband.[113] The lower court jailed the wife for contempt of court.[114] The Second Circuit stated that the Supreme Court in *Trammel* undermined the Seventh's Circuit's argument in *Van Drunen* that preservation of family harmony does not justify the recruitment of a spouse for criminal activity.[115] The Second Circuit explained that after *Trammel,* a person seeking the help of one's spouse in criminal activity could

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States, 344 U.S. 604, 607, 614-15 (1953) (Supreme Court ruled that spouses entering sham marriages not privileged to withhold testimony against ostensible spouse). In *Lutwak,* the spouses entered the marriage for the sole purpose of gaining illegal entry into the United States. *Id.* The spouses were not to live together, but were to break the marriage bonds upon entry into the United States. *Id.* at 607.

106. *See Van Drunen,* 501 F.2d at 1397 (marriage may have rehabilitative effect on defendant spouse); *see also* Appeal of Malfitano, 633 F.2d 276, 278 (3d Cir. 1980) (marriage might have rehabilitative, "restraining" effect and might facilitate defendant's re-entry into society).

107. *See infra* text accompanying notes 161-63 (discussion of *Van Drunen's* rehabilitative aspect).

108. 755 F.2d 1022 (2d Cir.), *vacated as moot,* United States v. Koecher, 54 U.S.L.W. 4185 (U.S. Feb. 25, 1986) (No. 84-1922).

109. *Id.* at 1026.

110. *Id.* The Second Circuit in *In re Grand Jury Subpoena United States* also argued that if the Supreme Court approved the joint participation exception, the Court would have stated so in *Trammel. Id.*

111. *Id.* at 1022-23.

112. *Id.* at 1023.

113. *See id.* at 1023, 1025 (confidential marital communications not at issue in *Grand Jury Subpoena).*

114. The United States released defendant husband Karl and wife Hana Koecher with others in exchange for Russian dissident Anatoly Scharansky on February 12, 1986. *Scharansky Is Released In Berlin,* Wash. Post, Feb. 12, 1986, at 1, col. 1. The United States Supreme Court initially had granted certiorari to hear the Second Circuit case. United States v. Koecher, 106 S. Ct. 56 (1985). Upon the Koecher's release, the Supreme Court vacated the case as moot. United States v. Koecher, 54 U.S.L.W. 4185 (Feb. 25, 1986). *Id.* at 1023.

115. *Id.* at 1026.

not be sure that the spouse would not testify voluntarily against that person.[116] Furthermore, the Second Circuit refused to implement the joint participation exception to the adverse spousal testimony privilege and thus compel the witness spouse to testify.[117]

The Second Circuit in *Grand Jury Subpoena* correctly applied the adverse spousal testimony privilege since the wife demonstrated an unflinching devotion and loyalty to the husband.[118] When no rehabilitative aspects remain in a marriage, however, the marriage is not worth protecting since the marriage offers no harmony, tranquility, or sanctity to the spouses. For example, in *United States v. Neal,* [119] the United States Court of Appeals for the Tenth Circuit held that the confidential communications privilege did not protect the conversations by which the witness spouse learned of the defendant spouse's crime.[120] In *Neal,* defendant appealed an earlier conviction of felony murder.[121] The defendant's wife did not participate in the robbery, but the wife was an accessory after the fact to the robbery and subject to prosecution.[122] The defendant's wife implicated defendant through testimony revealing marital communications.[123] The Tenth Circuit affirmed the district court's ruling, which admitted the wife's voluntary testimony through invocation of the joint participation exception to the confidential communications privilege.[124] The Tenth Circuit explained that marital communications in furtherance of a joint participation crime did not warrant protection by the confidential communications privilege and the subsequent withholding of relevant testimony because the communications privilege would not serve the common-law rationale of encouraging marital privacy and confidence.[125] Implicit in the *Neal* court's reasoning is that criminal conversations contribute nothing to a marriage.[126] The Tenth Circuit, however, stated that when the witness spouse learns of defendant spouse's criminal activity only through

116. *Id.*

117. *Id.* at 1028.

118. *See id.* at 1025 (wife stated she would rather die in jail than offer adverse testimony against husband); *infra* text accompanying note 162 (Second Circuit mistaken in that rehabilitative aspect has no common-law roots, but Second Circuit achieved common-law rationale by applying adverse spousal privilege to protect worthy marriage).

119. 743 F.2d 1441 (10th Cir. 1984), *cert. denied,* 105 S. Ct. 1848 (1985).

120. *Id.* at 1446.

121. *Id.* at 1442.

122. *Id.* at 1444.

123. *Id.* at 1442.

124. *Id.* at 1444-45.

125. *See id.* at 1446 (while witness spouse did not participate in commission of crime, she actively and knowingly enjoyed fruits of robbery); *cf.* United States v. Mendoza, 574 F.2d 1373, 1381 (5th Cir.) (marital conversations pertaining to joint criminal venture not protected by confidential communications privilege), *cert. denied,* 439 U.S. 988 (1978); Graham, *supra* note 3, at 38 (confidential communications privilege did not protect marital conversations pertaining to joint criminal venture); *Deconstruction, supra* note 6, at 753 (confidential communications between spouses during criminal activity are not marital communications).

126. *Neal,* 743 F.2d at 1445; *see supra* text accompanying note 7 (discussion of "partnership in crime"). The *Neal* court echoed Judge Hand's reasoning in stating that when husband and wife commit a joint venture crime, the spouses form a "partnership in crime." *Neal,* 743 F.2d at 1446.

private marital communications and the witness spouse neither participates in the fruits of the crime nor acts to cover-up the crime, the communications privilege would prevent the admission of confidential marital communications.[127] The *Neal* court, therefore, silently endorsed the *Van Drunen* rehabilitative argument in encouraging spouses to be frank and open with one another.[128]

Criticism of the joint participation exception manifests itself primarily in an unwillingness to pass on an issue not ratified by Congress or the United States Supreme Court.[129] The Supreme Court has not considered the application of the joint participation exception to the confidential communications privilege.[130] Additionally, courts refusing to grant the joint participation exception to the marital privileges fail to find that the ascertainment of truth outweighs marital privacy and the withholding of marital communications from admission into evidence.[131] For example, a concurring opinion in *Neal* claimed that the joint participation exception should not apply to the confidential communications privilege.[132] In *Neal,* the concurring opinion reasoned that appellate courts are not free to abolish or modify what the

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127. *Neal,* 743 F.2d at 1446.

128. *See Id.* at 1446; United States v. Sims, 755 F.2d 1239, 1243 (6th Cir.) (common-law rationale for confidential communications privilege encourages spouses to be frank and open with one another), *cert denied,* 105 S. Ct. 3533 (1985).

129. *See* Appeal of Malfitano, 633 F.2d 276, 278 (3d Cir. 1980) (as long as no federal or state law calls for use of joint participation exception to adverse spousal testimony privilege, courts should not use rules of evidence to impose exception).

130. *See Partners in Crime, supra* note 69, at 724-25 (no Supreme Court precedent exists concerning joint participation exception as applied to confidential communications); *see also In re* Grand Jury Subpoena United States, 755 F.2d 1022, 1028 (2d Cir.) (preferring to allow Congress or Supreme Court to countenance joint participation exception), *vacated as moot,* United States v. Koecher, 54 U.S.L.W. 4185 (U.S. Feb. 25, 1986) (No. 84-1922).

131. *See* Trammel v. United States, 445 U.S. 40, 50-51 (1980) (public has right to hear all evidence, but marital privileges allowed only when public welfare of maintaining privilege outweighs admission of evidence); Wolfle v. United States, 291 U.S. 7, 17 (1934) (courts should only allow invocation of marital privileges when courts cannot preserve common law rationales of privileges in another manner); WIGMORE, *supra* note 5, at § 2332, 642 (courts must find that harm to marriage resulting from revelation of spousal communications at trial exceeds benefit of communications as testimony in ascertainment of truth in order to allow marital privileges). Courts wisely utilize a balancing test to avoid preserving a tenuous marriage at the expense of justice. *See, e.g., In re* Grand Jury Matter, 673 F.2d 688, 698 (3d Cir.) (when negative effect on familial harmony insignificant, balancing test mandates admission of testimony), *cert. denied,* 459 U.S. 1015 (1982); *In re* Grand Jury Proceedings, 664 F.2d 423, 429 (5th Cir. 1981) (courts must balance public's right to hear evidence against effect of spousal testimony on marriage), *cert. denied,* 455 U.S. 1000 (1982); United States v. Trammel, 583 F.2d 1166, 1168 (10th Cir. 1978) (allowing joint participation exception against adverse spousal testimony privilege because evidentiary needs outweighed policy of fostering family harmony through implementation of testimonial privilege), *aff'd on other grounds,* 445 U.S. 40 (1980); United States v. Mendoza, 574 F.2d 1373, 1381 (5th Cir.) (courts must balance countervailing forces of preservation of familial sanctity against ascertainment of truth and realization of justice), *cert. denied,* 439 U.S. 988 (1978).

132. *Neal,* 743 F.2d 1441, 1447-48 (10th Cir. 1984) (Logan, J., concurring), *cert. denied,* 105 S. Ct. 1848 (1985).

Supreme Court has recognized since *Trammel.*[133] In addition, the concurrence explained that no persuasive evidence warranting modification of the confidential communications privilege exists[134] and that the joint participation exception will tempt the prosecution to threaten the witness spouse[135] or will tempt a vindictive spouse to lie or exaggerate.[136]

The United States Court of Appeals for the Third Circuit in *Appeal of Malfitano*[137] criticized the invocation of the joint participation exception to the marital privileges by examining the privileges' foundation.[138] The *Malfitano* court refused to honor the joint participation exception to the adverse spousal testimony privilege and to compel the witness spouse to testify against the defendant spouse.[139] In *Malfitano,* a married couple engaged in a conspiracy involving bribery and collusion.[140] The district court disallowed the implementation of the adverse spousal testimony privilege.[141] The Third Circuit overruled the district court's decision and granted defendant the privilege against adverse spousal testimony, reasoning that criminal marriages are not necessarily beyond salvation.[142] The *Malfitano* court explained that the adverse spousal testimony privilege is designed to preserve marriages, not to disturb already unstable marriages, and that courts should not evaluate the social utility of marriages.[143] Furthermore, the Third Circuit noted that the testimonial privilege is designed to protect marriages from the debilitating impact of adverse spousal testimony.[144] Since the joint participation exception would render a marriage vulnerable to the detrimental impact of adverse testimony, the *Malfitano* court concluded that the exception would vitiate the very principles the testimonial privilege is supposed to protect.[145]

The Third Circuit again addressed the joint participation exception to

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133. *Id.* at 1448. *But see supra* text accompanying note 96 (federal courts have right and responsibility to modify common-law testimonial privileges).

134. *Neal,* 743 F.2d at 1448. *But see infra* text accompanying notes 155-58 (communications privilege should protect only those marriages worth preserving).

135. *Neal,* 743 F.2d at 1448; *see* Lempert, *supra* note 1, at 734 (courts should not use joint participation exception because exception gives prosecution incentive to splinter marriages); *see also supra* note 79 and accompanying text (discussion of witness spouse's voluntariness to testify).

136. *Neal,* 743 F.2d at 1448; *see* Krattenmaker, *supra* note 31, at 655 (revelation of private marital conversations might induce witness spouse to lie owing to natural inclination to protect loved ones).

137. 633 F.2d 276 (3d Cir. 1980).

138. *Id.* at 277-78.

139. *Id.* at 278.

140. *Id.* at 276.

141. *Id.* at 277.

142. *Id.* at 278; *see infra* note 154 and accompanying text (courts evaluate social worth of criminal marriages).

143. *Malfitano,* 633 F.2d at 278-79.

144. *Id.* at 279 n.5.

145. *Id.* at 279; *In re* Grand Jury Subpoena United States, 755 F.2d 1022, 1028 (2d Cir.), *vacated as moot,* United States v. Koecher, 54 U.S.L.W. 4185 (U.S. Feb. 25, 1986) (No. 84-1922).

the marital privileges in *United States v. Ammar.*[146] In *Ammar,* the Third Circuit heard an appeal from the defendant's conviction for conspiring to import and distribute heroin.[147] The district court allowed the defendant's wife to testify against the defendant, revealing private marital communications.[148] The Third Circuit affirmed the district's court's holding by invoking the joint participation exception to the confidential communications privilege.[149] In examining the joint participation exception, the *Ammar* court distinguished the two marital privileges.[150] The *Ammar* court reaffirmed the decision in *Appeal of Malfitano,* stating that the adverse spousal testimony privilege protected the actual marriage on a broad front and emphasizing that the joint participation exception belies the underlying rationale of the testimonial privilege.[151] In contrast, however, the *Ammar* court noted that the confidential communications privilege specifically protects marital communications only.[152] The Third Circuit, therefore, concluded that while the marriage of joint criminal venturers might deserve protection from the adverse spousal testimony privilege, the marital communications made during the commission of a crime do not warrant protection from the confidential communications privilege.[153] Underlying the Third Circuit's analysis is the premise that the admission into evidence of voluntary testimony revealing marital conversations pertaining to criminal activity does not have a negative impact upon a marriage.[154] Furthermore, the Third Circuit implicitly held that the willingness of a spouse to testify against his or her spouse was indicative of a marriage not worth preserving.[155]

Marriages worth preserving through invocation of the marital privileges and thus deserving protection from deleterious spousal testimony possess a polarizing and centrifugal quality that binds the spouses and benefits social

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146. 714 F.2d 238 (3d Cir.), *cert. denied,* 464 U.S. 936 (1983).

147. *Id.* at 243.

148. *Id.* at 251.

149. *Id.* at 258.

150. *Id.*

151. *Id.; see supra* text accompanying note 145 (failure to apply testimonial privilege would destroy underlying premise of privilege).

152. *Ammar,* 714 F.2d at 258; *see In re* Grand Jury Subpoena United States, 755 F.2d 1022, 1027 (2d Cir.) (communications privilege designed to protect only conversations), *cert. vacated as moot,* United States v. Koecher, 54 U.S.L.W. 4185 (U.S. Feb. 25, 1986) (No. 84-1922).

153. *Ammar,* 714 F.2d at 258. *But see In re* Grand Jury Subpoena Koecher, 601 F. Supp. 385, 392 (S.D.N.Y. 1984) (court applied joint participation exception against adverse spousal testimony privilege and ordered witness spouse to testify), *vacated, In re* Grand Jury Subpoena United States, 755 F.2d 1022 (2d Cir.), *vacated as moot,* 54 U.S.L.W. 4185 (U.S. Feb. 25, 1986) (No. 84-1922). In *In re Grand Jury Subpoena Koecher,* the United States District Court for the Southern District of New York stated that to allow the application of the joint participation exception to the confidential communications privilege and not to the adverse spousal testimony privilege was illogical. *Id.*

154. *See supra* text accompanying notes 125-26 (criminal conversations not essential to welfare of marriage).

155. *Ammar,* 714 F.2d at 258; *see infra* text accompanying note 163 (no marriage is worth preserving if witness spouse is willing to help place defendant spouse in jail).

welfare.[156] In determining whether a marriage contains some measure of comfort and trust, several courts have evaluated the social worth of marriages.[157] Courts must make some evaluation as to the worth of a marriage

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156. McCormick, *supra* note 94, at § 86, 216; *see* Hawkins v. United States, 358 U.S. 74, 77 (1958) (underlying justification for adverse spousal testimonial privilege of fostering familial tranquility benefits not only spouses and children but society in general); *Medieval Philosophy, supra* note 3, at 319 (marital tranquility is crucial to modern society).

157. *See, e.g.,* United States v. Clark, 712 F.2d 299, 301 (7th Cir. 1983) (deterring recruitment of spouses as accomplices outweighs protection of marriage); United States v. Brown, 605 F.2d 389, 396 (8th Cir.) (possible preservation of defendant's marriage through exclusion of wife's testimony would not have outweighed search for truth at trial), *cert. denied,* 444 U.S. 972 (1979); United States v. Trammel, 583 F.2d 1166, 1170 (10th Cir. 1978) (no family harmony existed worth preserving nor outweighing need for evidence), *aff'd on other grounds,* 445 U.S. 40 (1980); United States v. Cameron, 556 F.2d 752, 756 (5th Cir. 1977) (even though spouses legally married, marriage had deteriorated beyond point at which marital privilege could offer protection); *In re* Ms. X, 562 F. Supp. 486, 488 (N.D. Cal. 1983) (evidentiary concerns greater than possible preservation of tenuous marriage). *But see* United States v. Byrd, 750 F.2d 585, 592 (7th Cir. 1984) (refusing to require trial courts to determine worth of marriage before attempting to preserve marriage through implementation of confidential communications privilege); Appeal of Malfitano, 633 F.2d 276, 279 (3d Cir. 1980) (courts cannot evaluate social utility of marriages); *Trammel,* 483 F.2d at 1173 (McKay, J., dissenting) (majority's ruling is unjust in that prosecutor may make independent judgment whether marriage is worth preserving); United States v. Lilley, 581 F.2d 182, 189 (8th Cir. 1978) (court declined to make value judgment whether defendant's marriage was worth preserving); United States v. Venuti, No. 84 CR 1002, slip op. at ____(S.D.N.Y. Sept. 20, 1985) (available Feb. 8, 1986, on LEXIS, Genfed library, Dist file) (rejected inference that marriage destroyed because divorce proceedings initiated since reconciliation still possible); Galban, *supra* note 14, at 188 (*Trammel* mistakenly assumed that voluntary adverse testimony indicates deteriorated marriage); *Testimonial Privilege, supra* note 24, at 912 (federal judges ought not evaluate worth of marriage); *Privilege After-*, Trammel, *supra* note 1, at 367 (courts should avoid inquiries into worth of marriages). Federal courts require that those wishing to invoke the marital privilege must have a valid marriage. Graham, *supra* note 3, at 38; *Development of Marital Privileges, supra* note 23, at 123. Courts construe invalid marriages as those marriages entered into for the sole purpose of reaping the benefits of the marital privileges at trial. *Id.* at 124-25; *see* United States v. Apodaca, 522 F.2d 568, 571 (10th Cir. 1975) (defendant could not avail himself of adverse spousal testimony privileges because defendant's marriage not procured in good faith); *supra* note 105 and accompanying text (collusive marriage is not marriage based on love or trust, but rather an attempt to defraud courts and reap benefits of marital privileges). The United States Court of Appeals for the Third Circuit in *Appeal of Malfitano* disfavored a court's assessing the value of a particular marriage, but the *Malfitano* court conceded that courts must determine the validity of the marriage. *Malfitano,* 633 F.2d at 278. In *United States v. Byrd,* the United States Court of Appeals for the Seventh Circuit suggested that courts determine only whether spouses are separated, not whether the spouses' marriage contains any social worth. United States v. Byrd, 750 F.2d 585, 594 (7th Cir. 1984). The *Byrd* court reasoned that the ascertainment of truth at trial outweighed the interest in preserving the confidentiality of separated couples. *Id.* at 593. In *United States v. Fisher,* the United States Court of Appeals for the Second Circuit held the adverse spousal testimony privilege inapplicable when evidence overwhelmingly showed a marriage beyond salvation. United States v. Fisher, 518 F.2d 836, 841 (2d Cir.), *cert. denied,* 423 U.S. 1033 (1975). The Second Circuit, therefore, did not endorse a judicial evaluation of a marriage, deeming it inappropriate to delve into private marital concerns. *Id.* The *Fisher* holding restricted the denial of the testimonial privilege to a situation in which no additional inquiry was necessary beyond the threshold determination that the marriage was wrecked. *Id.*

in order to determine whether protection of the spouse from adverse testimony legitimizes preventing the admission of the evidence.[158] The ascertainment of truth at trial is more important than a judicial attempt to reconcile a marriage already torn asunder by the spouses themselves.[159] The presence of a rehabilitative aspect in a marriage reflects a marriage which common-law courts designed the marital privileges to protect.[160] The Second Circuit in *In re Grand Judy Subpoena United States* mistakenly construed the rehabilitative feature of a particular marriage in claiming the effect had no basis in the common-law rationale underlying the marital privileges.[161] The rehabilitative aspect discussed in *Van Drunen* is imbedded firmly in the common-law justification of fostering family tranquility and preventing marital dissension. When a couple invests trust and confidence in a marriage, the marriage exudes harmony and tranquility. Through the common-law evolution of the marital privileges, courts designed the privileges to foster trust, honesty, openness, and peace of mind.[162]

The *Trammel* rule achieves the purpose of the adverse spousal testimony privilege by preserving those marriages worth saving by admitting voluntary adverse spousal testimony and withholding involuntary adverse spousal testimony when some family harmony, mutual spousal trust, and marital tranquility exists.[163] The Court in *Trammel* stated that courts should not compel an unwilling witness spouse to testify.[164] The *Trammel* Court, however, did not envisualize a scenario in which the witness spouse refused to testify and the marriage lacked the qualities the adverse spousal testimony privilege purports to protect. The *Trammel* Court stated that the purpose of the modern adverse spousal testimony privilege was to encourage marital harmony and tranquility.[165] Courts should compel a witness spouse's testimony only when no marital harmony worth preserving exists.[166] Not compelling involuntary testimony when the marriage possesses no redeeming rehabilitative aspects would not utilize the adverse spousal testimony privilege

158. WIGMORE, *supra* note 5, at § 2228, 216.

159. MCCORMICK, *supra* note 94, at § 86, 173; WIGMORE, *supra* note 5, at § 2228, 216.

160. *See supra* note 106 and accompanying text (discussion of rehabilitative aspect).

161. *See supra* note 118 and accompanying text (discussion of *Grand Jury Subpoena* holding and rehabilitative aspect).

162. MCCORMICK, *supra* note 94, at § 86, 173; WIGMORE, *supra* note 5, at § 2332, 642; United States v. Byrd, 750 F.2d 585, 593 (7th Cir. 1984).

163. *See* Trammel v. United States, 445 U.S. 40, 53 (1980); MCCORMICK, *supra* note 94, at § 86, 173; WIGMORE, *supra* note 5, at § 2228, 216; *see supra* note 79 and accompanying text (*Trammel* rule does not invite prosecution to splinter marriage, but better serves common law rationale of preserving marital harmony).

164. *Trammel*, 445 U.S. at 53.

165. *Id.* at 44.

166. *See* Krattenmaker, *supra* note 31, at 655 (compulsion of spousal testimony not inconsistent with common law rationales of marital privileges if evidentiary needs predominant, but court should restrict scope of disclosure); *Testimonial Privileges, supra* note 24, at 911 n.138 (stricter standards of admission of evidence into court could protect spouses from unnecessary disclosure of private marital matters if court employs joint participation exception).

in the manner the common-law courts intended, or for the purpose the *Trammel* Court acknowledged.[167] Courts, therefore, should implement the joint participation exception to the adverse spousal testimony privilege when a married couple commits a crime together and the couple's marriage is not worth preserving. In a situation in which an accused confides in his spouse the nature of the accused's criminal activity, however, courts should protect and encourage the trust manifested in the accused's turning to his spouse for comfort and understanding. The common-law justification of fostering marital privacy through invocation of the confidential communications privilege encourages spouses to be frank and open with one another.[168] Courts, therefore, should not penalize a defendant for seeking solace in defendant's marriage partner by revealing his conscience. When the witness spouse offers voluntary testimony against the defendant spouse, however, the marriage is not worth preserving.[169] Furthermore, in a joint participation crime, courts should not invoke the confidential communications privilege and thus encourage or sanction a defendant's recruitment of the defendant's spouse as an accomplice unable to testify as to the criminal activity.[170] The kind of trust or comaraderie between partners in crime is different than the trust or confidence between spouses.[171] The communications privilege intends to protect the affection and confidence in marriages.[172] The communications privilege should not encourage the recruitment of a spouse as a criminal accomplice.[173] Thus, when a marriage possesses no characteristics such as confidence, trust, openness, or frankness, courts should not invoke the communications privilege and prevent ostensibly damaging statements from admission into evidence at trial.[174] Courts should also apply the joint partici-

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167. *See supra* text accompanying note 39 (discussion of adverse spousal testimony privilege rationale).

168. United States v. Sims, 755 F.2d 1239, 1243 (6th Cir.), *cert. denied*, 105 S. Ct. 3533 (1985).

169. Trammel v. United States, 445 U.S. 40, 52 (1980); *see* Wyatt v. United States, 362 U.S. 525, 534 (1960) (Warren, C. J., dissenting) (when spouse refuses to testify against other spouse, courts probably should protect marriage); MCCORMICK, *supra* note 94, at § 66, 145 (same); United States v. Venuti, No. 84 CR 1002, slip op. at ____(S.D.N.Y. Sept. 20, 1985) (available Feb. 8, 1986, on LEXIS, Genfed library, Dist file) (witness spouse's unwillingness to testify against defendant spouse reflects marital harmony worth protecting). *But see* United States v. Byrd, 750 F.2d 585, 592 (7th Cir. 1984) (confidential communications privilege applies even when witness spouse's testimony is voluntary). In *Byrd*, the United States Court of Appeals for the Seventh Circuit rejected the contention that the confidential communications privilege does not apply to a disintegrated marriage. *Byrd*, 750 F.2d at 592.

170. WIGMORE, *supra* note 5, at § 2228, 216.

171. *See supra* note 7 and accompanying text (discussion of Judge Learned Hand's phrase "partnership in crime").

172. *See* text accompanying note 40 (discussion of communications privilege rationale).

173. *See supra* text accompanying notes 40-41 (discussion of rationale of confidential communications privilege).

174. MCCORMICK, *supra* note 94, at § 86, 173; WIGMORE, *supra* note 5, at § 2332, 642. *But see* WHARTON'S, *supra* note 31, at § 562, 99 (courts cannot compel or allow spouse to testify if defendant spouse asserts confidential communications privilege); *In re* Grand Jury

pation exception to the confidential communications privilege because the rationale of the communications privilege does not protect the confidences of criminals. In the absence of some marital trust, the evidentiary needs in the ascertainment of truth warrant the compulsion of spousal testimony regarding confidential marital communications.[175]

In deciding whether to compel involuntary spousal testimony, courts must determine whether the marriage deserves the protection of the marital privileges.[176] In evaluating whether a marriage is worth preserving, courts should consider when the couple married,[177] whether the spouses have cohabited for an insubstantial period of time since the marriage,[178] whether the spouses have lived with another person since marriage,[179] and whether one spouse has threatened the other spouse not to testify.[180] If one or more of the circumstances exist, courts should consider compelling involuntary spousal testimony, since the existence of one of the circumstances would indicate that the marriage does not possess the rehabilitative aspects that the common-law courts designed the privileges to foster.

Before the commencement of the modern evolution of the marital privileges,[181] courts disqualified or declared incompetent a spouse's testimony

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Investigation, 603 F.2d 786, 789 (courts should not compel witness spouse to choose whether to claim communications privilege and risk contempt of court or forego privilege and testify, possibly breaching loyalty to defendant spouse).

175. *See supra* note 131 and accompanying text (balancing test for admission of testimony requires substantial showing of harm to marriage before marital privileges allowed to hamper ascertainment of truth). *But see Testimonial Privilege, supra* note 24, at 917 (harm to marriage difficult to prove whereas probative value of evidence easier to show).

176. *See supra* text accompanying note 162 (marriages worth preserving possess rehabilitative aspects).

177. *See* United States v. Apodaca, 552 F.2d 568, 521 (10th Cir. 1975) (defendant spouse not accorded adverse spousal testimony privilege because spouses' marrying three days before trial indicated collusive marriage); *supra* note 105 and accompanying text (discussion and definition of collusive marriage).

178. *See, e.g.*, United States v. Byrd, 750 F.2d 585, 593 (7th Cir. 1984) (confidential communications privilege does not protect communications between separated spouses even if communications intended to be confidential); United States v. Brown, 605 F.2d 389, 396 (8th Cir.) (defendant husband left wife after two weeks of marriage and spouses did not see one another between husband's leaving and trial), *cert. denied,* 444 U.S. 972 (1979); United States v. Cameron, 556 F.2d 752, 756 (5th Cir. 1977) (marital privileges inapplicable because spouses did not cohabitate and saw each other very infrequently); United States v. Fisher, 518 F.2d 836, 840 (2d Cir.) (adverse spousal testimony privilege not allowed since spouses had not lived together for ten years), *cert. denied,* 423 U.S. 1033 (1975); United States v. Venuti, No. 84 CR 1002, slip. op. at ____(S.D.N.Y. Sept. 20, 1985) (available Feb. 8, 1986, on LEXIS Genfed library, Dist file) (adverse spousal testimony privilege upheld on grounds that spouses still married and cohabitated for one year prior to trial).

179. *Cameron,* 556 F.2d at 756 (husband lived with another woman and fathered child by that woman); *Fisher,* 518 F.2d at 840 (defendant husband had two children by another woman).

180. United States v. Apodaca, 522 F.2d 568, 571 (10th Cir. 1975) (husband threatened wife not to testify, thus indicating that wife's testimony was voluntary).

181. *See supra* text accompanying notes 52-54 (discussion of evolution of marital privileges).

for or against a defendant spouse.[182] The United States Supreme Court, however, eliminated common-law disqualification[183] and changed the rationale of the confidential communications privilege from incompetency to the modern justification of preserving marital intimacy and encouraging frank and open marital relationships.[184] The Supreme Court finally vested the adverse spousal testimony privilege in the witness spouse alone.[185] While the *Trammel* Court improved and clarified the application of the adverse spousal testimony privilege, the Court did not consider the possibility that the privilege might be used for a purpose for which the privilege was not intended.[186] Federal courts have the right and the responsibility to modify and thus continue the evolutionary development of the marital privileges.[187] If a marriage is not worth preserving, courts should compel the involuntary testimony of a witness spouse since the attempted preservation of a moribund marriage does not outweigh the public's right to hear all evidence in the ascertainment of truth at trial.[188] Similarly, courts should not protect private marital communications through invocation of the confidential communications privilege when a marriage offers no intimacy or comfort to the spouses and confidentiality would not benefit the deteriorated marriage.[189] Courts, therefore, should invoke the joint participation exception against either marital privilege when the spouses engage in a joint criminal venture and the privileges would not help preserve a worthwhile marriage.[190]

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182. *See supra* text accompanying notes 21-24 (discussion of incompetency and disqualification).

183. *See supra* text accompanying note 53 (*Funk* abrogated common-law disqualification).

184. *See supra* text accompanying notes 39-40 (discussion of communications privileges rationale).

185. *See supra* text accompanying note 12 (*Trammel* modified the adverse spousal testimony privilege).

186. *See supra* text accompanying note 167 (discussion of rehabilitative aspect).

187. *See supra* text accompanying note 96 (courts have power and duty to modify marital privileges).

188. WIGMORE, *supra* note 5, at § 2228, 216 (courts should not risk acquitting defendant spouse by attempting to save moribund marriage).

189. *See supra* text accompanying notes 168-175 (discussion of confidential communications privilege and privilege's underlying rationale).

190. *See Hawkins*, 358 U.S. at 77 (if witness spouse compelled to testify, marriage suffers less damage than if witness spouse voluntarily testified).