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The Adverse Testimony Privilege: Time to Dispose of a "Sentimental Relic"

Since 1580, the common law has recognized a privilege not to testify against one's spouse. Known as the adverse testimony privilege, it has been referred to as a "sentimental relic," largely because it is grounded on precepts that have long since been rejected. Originally based on the incapacity of one spouse to testify for or against the other spouse, the privilege is now viewed as necessary to preserve marital harmony and to avoid the repugnant prospect of one spouse's testimony being used to convict the other spouse. Courts and legislatures have created numerous exceptions to the privilege over the course of its history. In 1980, the Supreme Court significantly narrowed the privilege in federal cases so that only the spouse who is a witness, not the spouse who is a party, can

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1 See Bent v. Allot, 21 Eng. Rep. 50 (Ch. 1580).
2 It has also been referred to as the antimarital facts privilege, 8 J. Wigmore, Evidence §§ 2227-2245 (McNaughton ed. 1961), and spousal immunity, Lempert, A Right to Every Woman's Evidence, 66 Iowa L. Rev. 725, 726 (1981).
5 8 J. Wigmore, supra note 2, § 2228, at 216-17.
invoke it.\textsuperscript{6}

This Article examines the application of and the policy rationales underlying the adverse testimony privilege. Part I of the Article clarifies the distinction between the adverse testimony privilege and the confidential marital communications privilege which protects against disclosure of private conversations and acts between husband and wife. This part also reviews the origins and development of the adverse testimony privilege. Part II discusses the exceptions to the adverse testimony privilege and demonstrates how these exceptions undercut the policies allegedly underlying the privilege. Part III considers the policy and legal theory currently underlying the privilege. Finally, Part IV concludes that the privilege no longer serves its function sufficiently to outweigh society's competing interest in obtaining truth, and consequently, proposes its abolition.

I

BACKGROUND

A. Distinguishing the Two Marital Privileges

There are two privileges which are sometimes referred to interchangeably as the marital privilege: the privilege protecting confidential marital communications ("confidential communications privilege")\textsuperscript{7} and the privilege preventing testimony by one spouse against the other ("adverse testimony privilege").

The adverse testimony privilege traditionally gave the defendant in a criminal case the right to prevent adverse testimony by his or her spouse.\textsuperscript{8} It covers both confidential and nonconfidential infor-

\textsuperscript{6} Trammel v. United States, 445 U.S. at 53 ("[T]he existing rule should be modified so that the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying.")

\textsuperscript{7} This privilege is recognized in about 40 American jurisdictions including the federal courts. Comment, Questioning the Marital Privilege: A Medieval Philosophy in a Modern World, 7 CUMB. L. REV. 307, 311 n.28 (1976).

\textsuperscript{8} In the federal courts and most state courts, the adverse testimony privilege is only available in criminal cases. The Supreme Court in Hawkins v. United States stated:

The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well. 358 U.S. at 77 (emphasis added); see Ryan v. Commissioner, 568 F.2d 531 (7th Cir. 1977), cert. denied, 439 U.S. 820 (1978) (concluding that Supreme Court in Hawkins was referring to criminal cases). Proposed Rule of Evidence 505(a), although rejected by Congress, would have limited the privilege to criminal cases. See United States v.
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mation or communication.9

By contrast, the confidential communications privilege prevents disclosure of confidential communications made between spouses during their marriage.10 Although marital communications are presumptively confidential,11 the presence of third parties destroys the confidentiality.12 The privilege survives the marriage,13 and either spouse may invoke it.14

Although the two privileges sometimes overlap, many instances are governed by only one. For example, if a spouse is called to testify about confidential communications which occurred during the parties' marriage, and the parties are still married at the time of trial, both privileges apply. If the testimony concerns statements made in the presence of a third party, however, the confidential communications privilege does not apply because the communications are not confidential. Nevertheless, the adverse testimony privilege would apply because one spouse would be called upon to testify against the other. On the other hand, if there were a truly confidential communication between spouses who were subsequently divorced, the communication would not be protected by the

Van Drunen, 501 F.2d 1393 (7th Cir.) (application of the privilege where it made the most sense, namely where a spouse who is neither a victim nor a participant observes evidence of the other spouse's crime), cert. denied, 419 U.S. 1091 (1974); Developments in the Law—Privileged Communications, 98 HARV. L. REV. 1450, 1571 (1985); Hutchins & Slesinger, Some Observations on the Law of Evidence: Family Relations, 13 MINN. L. REV. 675 (1929); see also In re Martenson, 779 F.2d 461, 463 (8th Cir. 1985) (court declined to decide question whether privilege is limited to criminal cases).

The privilege has generally been found applicable in grand jury proceedings. See In re Malfitano, 633 F.2d 276, 277-80 (3d Cir. 1980); In re Snoonian, 502 F.2d 110 (1st Cir. 1974). The applicability of the privilege to administrative tax investigations is an open question. Rosenblatt, Marital Privileges in Tax Fraud Cases: The Government's Nonacquiescence in Wedded Bliss, 65 TAXES 10 (1987).

The confidential communications privilege, on the other hand, does apply to some civil proceedings. See 8 J. WIGMORE, supra note 2, § 2338, at 666 (applies to civil actions for family nonsupport).

9 United States v. Lilley, 581 F.2d 182, 189 (8th Cir. 1978).
10 8 J. WIGMORE, supra note 2, § 2335, at 647.
12 Pereira v. United States, 347 U.S. 1, 6 (1954); Wolfe v. United States, 291 U.S. 7, 14, 16 (1934) (presence of personal stenographer destroys privilege); Hutchins & Slesinger, supra note 8, at 681.
14 United States v. Mitchell, 137 F.2d 1006, 1008 (2d Cir.), aff'd on rehearing, 138 F.2d 831 (2d Cir. 1943), cert. denied, 321 U.S. 794 (1944); Comment, supra note 7, at 311.
adverse testimony privilege because at the time of trial the parties would no longer be married. The communication would, however, be protected by the confidential communications privilege. A criminal defendant who marries a witness to prevent testimony about nonconfidential communications might be covered by the adverse testimony privilege but would not be covered by the confidential communications privilege.

While a central rationale underlying both privileges is preservation of the family, they do have different purposes:

The [adverse testimony] privilege looks forward with reference to the particular marriage at hand; the privilege is meant to protect against the impact of the testimony on the marriage. The [confidential communications] privilege in a sense, is broader and more abstract: it exists to insure [sic] that spouses generally, prior to any involvement in criminal activity or a trial, feel free to communicate their deepest feelings to each other without fear of eventual exposure in a court of law.

B. Origins and Development of the Adverse Testimony Privilege

The origins of the adverse testimony privilege are immersed in “tantalizing obscurity.” There are numerous accounts of how the privilege came to exist, and different accounts identify different rationales for the existence of the privilege. The question courts and legislatures must examine is whether sufficiently compelling policy grounds have replaced the original rationales.

In Trammel v. United States, the Supreme Court gave one account of the history of the adverse testimony privilege. The Court quoted Lord Coke who wrote in 1628 that “it hath beene resolved by the Justices that a wife cannot be produced either against or for her husband.” According to the Court, the privilege sprang from two canons of medieval jurisprudence: first, an accused was not permitted to testify in his own behalf because of his interest in the

15 The distinction between the privileges is also exemplified in a case where one spouse is called upon to testify about confidential communications which are not adverse to the party-witness. While protected by the confidential communications privilege, the testimony would not be protected by the adverse testimony privilege because it is not “adverse” to the other spouse. See 8 J. WIGMORE, supra note 2, § 2334, at 646.
17 United States v. Byrd, 750 F.2d 585, 590 (7th Cir. 1984).
18 8 J. WIGMORE, supra note 2, § 2227, at 211.
20 Id. at 43-44 (citing 1 E. COKE, A COMMENTARIE UPON LITTLETON 6b (1628)).
proceeding; second, husband and wife were regarded as one, and since the woman had no recognized separate legal existence, the husband was that one. Therefore, if the husband could not testify, neither could his wife.

Differing with the Supreme Court, Dean Wigmore suggested that the adverse testimony privilege arose about the same time as spousal incompetence, the disqualification of a husband or wife from testifying for the other. Evidence that the adverse testimony privilege arose prior to spousal incompetence is found in the earliest reported case endorsing the privilege, Bent v. Allot, in 1580. In that case, a defendant examined his wife as a witness. No question was raised about the wife's capacity to testify, but the court upheld the husband's privilege to keep her from testifying against him. By contrast, there was no reported ruling on the disqualification of a wife due to incompetency for some time thereafter.

American courts adopted the rule of spousal disqualification, and the Supreme Court first applied it in an 1839 case. By the early twentieth century, the rule was well established. In Funk v. United States, the Supreme Court finally eliminated spousal disqualification in federal courts, permitting a defendant's spouse to testify on the defendant's behalf. The rule that one spouse could prevent the other from giving adverse testimony remained.

21 Trammel, 445 U.S. at 44.
22 The use of the terms "husband" and "wife" are not entirely inappropriate in this context. A review of hundreds of cases dating from the mid-seventeenth century to the present has revealed that only a handful of cases have involved husbands testifying against wives. Whether this will change as women become increasingly involved in criminal activity is yet to be seen. Lempert, supra note 2, at 727; Developments in the Law, supra note 8, at 1586-87 & n.170 (estimate that over 90% of the cases in which privilege is invoked involve wives testifying against husbands).
23 8 J. WIGMORE, supra note 2, § 2227, at 211.
24 21 Eng. Rep. 50 (Ch. 1580).
25 It is no surprise that courts would immunize a husband from his wife's testimony. At this time the offense of petit treason existed to protect the head of household from violence by a wife or servant. Testimony of a wife at trial which caused her husband's death would effectively violate or at least be inconsistent with the concept of protecting the husband from his wife. 8 J. WIGMORE, supra note 2, § 2227, at 212; Developments in the Law, supra note 8, at 1565; Comment, supra note 7, at 310.
26 Disqualification was mentioned by Coke in 1628, but there were no rulings on it until Charles II's reign. 8 J. WIGMORE, supra note 2, § 2227, at 211 n.3.
29 290 U.S. 371 (1933).
30 "[A] refusal to permit the wife upon the ground of interest to testify in behalf of
By comparison, the privilege protecting confidential communications between spouses was not recognized until the mid-1800s. Prior to that time, the disqualification of spouses protected against testimony regarding confidential communications. Only in the rare case where neither spouse was a party could confidential marital communications be introduced. After the spousal disqualification was abolished, the confidential communications privilege began to emerge.

Protection of marital harmony was the rationale behind spousal disqualification, and when disqualification fell, the courts ruled that the same rationale called for a confidential communications privilege.

In 1946, Congress enacted Rule 26 of the Federal Rules of Criminal Procedure, which left the interpretation of privilege to the courts. The next major development in privilege law occurred in 1973, when the Supreme Court submitted proposed rules of evidence to Congress. The proposed rules drew intense criticism.

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31 There is one instance of its application found in 1684. See 8 J. WIGMORE, supra note 2, § 2333, at 644 & n.1 (citing Lady Ivy's Trial, 10 How. St. Tr. 555, 628 (1684) (involved a husband's oath to the wife's request that he commit forgery not admitted against her as witness)).

32 8 J. WIGMORE, supra note 2, § 2333, at 644-45; Developments in the Law, supra note 8, at 1565.

33 See Stapleton v. Crofts, 18 Q.B. 367, 118 Eng. Rep. 137 (1852); Comment, supra note 7, at 308.

34 Williams v. Betts, 11 Del. Ch. 128, 98 A. 371 (1916); Mercer v. State, 40 Fla. 216, 24 So. 154 (1898); McCormick v. State, 135 Tenn. 218, 186 S.W. 95 (1916); Comment, supra note 7, at 308.

35 Fed. R. Crim. P. 26, as approved in 1946, provided:

The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.


(a) General Rule of Privilege. A person has a privilege to prevent any testimony of his spouse from being admitted in evidence in a criminal proceeding against him.

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

(c) Exceptions. There is no privilege under this rule (1) in proceedings in which one spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other, or (2) as to matters occurring prior to the marriage, or (3) in proceedings in
in part because they only provided for an adverse testimony privilege and not a privilege for confidential marital communications.

In response to the uproar over the proposed rules on privilege, Congress abandoned the approach of specifying the contours of the various privileges. Instead, Congress enacted Federal Rule of Evidence 501, which allows the federal courts to interpret the common law "in the light of reason and experience," except in cases governed by state substantive law in which state law privileges apply. The Supreme Court, in *Trammel*, interpreted this development of the federal rules of privilege:

In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose was to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis," and to leave

which a spouse is charged with importing an alien for prostitution or other immoral purpose in violation of 8 U.S.C. § 1328, or with transporting a female in interstate commerce for immoral purposes or other offense in violation of 18 U.S.C. §§ 2421-2424.


38 Federal Rule of Evidence 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.

39 Even before the adoption of the Federal Rules of Evidence in 1975, the Supreme Court asserted in *Funk v. United States*, 290 U.S. at 381-86, that it had the authority to repeal or modify the rules of evidence in the federal courts in the absence of applicable legislation. The Court's rationale was that the common law is not static but adapts itself to changing circumstances. In abolishing the spousal incompetence rule, the Court noted that the underlying policy no longer made sense given the changes in society. The standard by which the Court evaluated the common law was one of reason and experience. *Funk*, 290 U.S. at 381-85; *Wolfe v. United States*, 291 U.S. 7 (1934) (reaffirming the authority of the federal courts to interpret common-law evidentiary principles in the "light of reason and experience"); Note, *Federal Marital Privileges in a Criminal Context: The Need for Further Modification Since Trammel*, 43 Wash. & Lee L. Rev. 197, 205 (1986).

40 This follows the rule in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).
the door open to change. 41

Under the Federal Rules of Evidence, the terms and continued existence of the adverse testimony privilege are in the hands of the courts of the United States, guided only by "reason and experience."

II

BROAD EXCEPTIONS TO THE PRIVILEGE

Over its long history, the adverse testimony privilege has not remained absolute. Courts have carved out a number of significant exceptions allowing valuable testimony where the policies underlying the privilege are not being advanced. These exceptions, which are generally unworkable, have dramatically reduced the scope of the privilege.

A. Crimes Against a Spouse

A number of exceptions to the privilege developed at common law to prevent certain injustices. Crimes against a wife or child were of particular concern. If the adverse testimony privilege were strictly applied, it would be difficult to prosecute a husband for domestic crimes of violence. Therefore, in many crimes against a spouse, including assault and battery, attempted murder, and rape, the courts have held the adverse testimony privilege inapplicable. 42 While some courts have based their decision on necessity, 43 others have concluded that the privilege should not apply in cases of interspousal violence because the interests of promoting marital harmony and peace are not served. 44

This reasoning has also led to an exception for Mann Act 45 prosecutions where the defendant has prostituted his wife. Because prostitution is considered an offense against the wife and the marital


42 Stein v. Bowman, 38 U.S. 209, 221 (1839) (rule that spouses are incompetent as witnesses is not applicable to husband's offenses against wife); C. MCCORMICK, MCCORMICK ON EVIDENCE § 66, at 162 (3d ed. 1984); 8 J. WIGMORE, supra note 2, § 2239, at 243-47.

43 See Trammel, 445 U.S. at 46 n.7; Lord Audley's Case, 123 Eng. Rep. 1140 (1631); 8 J. WIGMORE, supra note 2, § 2239.

44 8 J. WIGMORE, supra note 2, § 2239, at 243.

relationship, the privilege has been held inapplicable. Other exceptions in the federal courts include crimes against the spouse's property and crimes against the children of either spouse.

B. Marriages Not Worth Protecting

One of the policy grounds supporting the adverse testimony privilege is preservation of marital harmony. That policy is not served where marital relations are already poor or nonexistent. As a result, many courts have admitted adverse testimony over a claim of privilege where it appears that marital harmony does not need protection.

1. Limiting the Adverse Testimony Privilege to the Witness-Spouse

A question which arises with any privilege is who may invoke it. State courts and legislatures have responded in a variety of ways to the question of whether the witness-spouse and/or the party-spouse may invoke the adverse testimony privilege. The Supreme Court first addressed the question in *Hawkins v. United States*, a Mann Act prosecution in which the district court and court of appeals found no error in allowing the government, over the defendant's objections, to use the defendant's wife as a witness against him. On appeal to the Supreme Court, the government argued that while a husband or wife should not be compelled to testify against the

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46 Wyatt v. United States, 362 U.S. 525, 529-31 (1960). *Contra id.* at 534 (Warren, C.J., dissenting) (wife's refusal to testify demonstrates there is still a marital relationship to be protected).


48 United States v. Cameron, 556 F.2d 752, 755 (5th Cir. 1977); United States v. Allery, 526 F.2d 1362, 1367 (8th Cir. 1975) (privilege inapplicable to testimony by defendant's wife where defendant charged with attempting to rape his twelve-year-old daughter); 8 J. Wigmore, *supra* note 2, § 2239, at 248 (on the theory that an injury to a spouse's child is a wrong to the spouse).

49 Some states allow a party to prevent his or her spouse from giving adverse testimony. While the majority of these states grant the privilege only to the party-spouse, some allow the witness-spouse to testify even if the party-spouse waives the privilege. *Developments in the Law, supra* note 8, at 1567. In other states, the witness-spouse may refuse to give adverse testimony, but the party-spouse may not prevent voluntary testimony by the witness-spouse. *Id.* Finally, some states avoid the question of who may raise the privilege by simply rendering a spouse incompetent to testify against his or her marital partner. Note, *Circling the Wagons: Informational Privacy and Family Testimonial Privileges*, 20 GA. L. REV. 173, 181 n.26 (1985).

50 358 U.S. 74 (1958).
other, they should be free to do so voluntarily.\textsuperscript{51} The Court rejected that argument on the grounds that the privilege is designed to foster family peace for the benefit of the spouses, their children, and the public.\textsuperscript{52} The Court reasoned that adverse testimony, whether voluntary or compelled, will almost certainly disturb that harmony.\textsuperscript{53}

The government argued that voluntary adverse testimony may be proof that a particular marital relationship is not worth preserving.\textsuperscript{54} The Court rejected the argument, noting that even if problems with the marriage led one spouse to testify voluntarily, not all marital difficulties are irreparable. The Court reasoned that adverse testimony would cause lasting harm to any chance of reconciliation between spouses.\textsuperscript{55}

In \textit{Trammel v. United States},\textsuperscript{56} the Supreme Court's most recent decision concerning the adverse testimony privilege, the Court modified its holding in \textit{Hawkins} and held that only the witness-spouse can invoke the adverse testimony privilege.\textsuperscript{57} The case involved prosecution of Otis Trammel and others for conspiracy to import heroin. Trammel's wife, who had acted as a courier, was named as an unindicted co-conspirator. She agreed to testify against her husband based on the assurance she would receive lenient treatment. Mr. Trammel attempted to assert the adverse testimony privilege to prevent her testimony.

The Court concluded that the policy supporting the privilege, encouraging marital harmony, was not served by allowing the defendant-spouse to prevent voluntary testimony by the witness-spouse.\textsuperscript{58} Repudiating its earlier reasoning, the Court adopted the government's position in \textit{Hawkins}, and concluded that there is little left to protect in a marital relationship after one spouse agrees to voluntarily testify against the other.\textsuperscript{59}

There has been considerable criticism of the Court's unquestioning acceptance of the voluntariness of a witness-spouse's testimony.\textsuperscript{60} There are a number of ways in which the government can

\textsuperscript{51} Id. at 77.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id. at 77-78.
\textsuperscript{56} 445 U.S. 40 (1980).
\textsuperscript{57} Id. at 53.
\textsuperscript{58} Id. at 52-53.
\textsuperscript{59} Id. at 62.
\textsuperscript{60} See, e.g., Lempert, \textit{supra} note 2, at 733-38; \textit{Developments in the Law, supra} note 8, at 1568 & n.41.
induce a witness-spouse to "voluntarily" testify. In Hawkins, the witness-spouse was imprisoned as a material witness and released only after posting a substantial bond conditioned upon her appearing in court as a witness for the government. In Trammel, it is not clear that the wife's testimony was truly voluntary since in return for her testimony she was granted immunity from prosecution as a co-conspirator.

Commentators have argued that the government should not be allowed to turn one spouse against the other by striking a deal for the witness-spouse's testimony. In Hawkins, Chief Justice Warren, a former prosecutor, considered various ways in which the prosecution can secure apparently voluntary testimony from an unwilling witness. In Trammel, Chief Justice Burger responded that, even with the privilege, the government can enlist the aid of one spouse against the other outside the courtroom, producing the same interference in the marital relationship.

2. Exceptions Based on the Status of the Marriage

 Courts have examined the nature of the particular marriage at hand to determine whether the adverse testimony privilege should be available. Generally, the privilege applies only if the party and witness are married at the time the testimony is given. The marriage requirement restricts application of the privilege in the same fashion as an exception would. For instance, the privilege has been held inapplicable where the party and spouse were permanently sep-

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61 Lempert, supra note 2, at 735-38; Developments in the Law, supra note 8, at 1568 & n.41 (proposing that the party-spouse be entitled to prove that the testimony is not being given voluntarily). However, in states that have vested the privilege in the witness-spouse, there is little indication that coercion has taken place. Lempert, supra note 2, at 737.

62 Lempert, supra note 2, at 733.

63 Trammel, 445 U.S. at 52 & n.12.

64 8 J. Wigmore, supra note 2, § 2230, at 223; see C. McCormick, supra note 42, § 66, at 162. A natural corollary is that the privilege is inapplicable after a divorce, see, e.g., United States v. Smith, 533 F.2d 1077, 1079 (8th Cir. 1976); United States v. Termini, 267 F.2d 18, 19-20 (2d Cir.), cert. denied, 361 U.S. 822 (1959), or death of one spouse, 8 J. Wigmore, supra note 2, § 2237, at 239-40; see also United States v. Lustig, 555 F.2d 737, 747-48 (9th Cir.) (no privilege for couple living together but not legally married, where common-law marriages not valid in Alaska), cert. denied, 434 U.S. 926 (1977) and 434 U.S. 1045 (1978); United States v. White, 545 F.2d 1129, 1130 (8th Cir. 1976) (privilege not available to defendant and alleged common-law wife, where state did not recognize common-law marriages); State v. Watkins, 126 Ariz. 293, 298, 614 P.2d 835, 840 (1980) (no privilege where couple living together in a "de facto" marriage).
arated at the time of trial. Similar logic has led to rejection of the privilege where the marriage was entered into fraudulently or where the marriage is beyond preservation. Legislatures and courts have consistently refused to grant the privilege to unmarried couples, regardless of the "marital" characteristics of their relationship. On the other hand, in an unusual twist, one court concluded that a witness-spouse and party-spouse who had been married for forty years had such a strong relationship that adverse testimony would not significantly affect the marriage.

3. Exceptions for Prior Acts, Hearsay, and Immunity

Although inconsistent with protecting the ongoing marital relationship, the privilege has been found inapplicable where the witness-spouse's testimony concerns acts occurring before the marriage. Courts applying this exception reason that it is necessary to avoid promoting collusive marriages. This exception applies to all marriages, not just to those in which there is evidence of collusion, to avoid minitrials on the parties' sincerity in getting married.

65 United States v. Fulk, 816 F.2d 1202, 1205 (7th Cir. 1987). But cf. Jackson v. United States, 250 F.2d 897, 899-900 (5th Cir. 1958) (privilege applied even though spouses had been separated).

66 United States v. Mathis, 559 F.2d 294, 298 (5th Cir. 1977) (remarriage of ex-wife less than two months prior to trial based on promise of money and conceding custody of their child); United States v. Apodaca, 522 F.2d 568, 571 (10th Cir. 1975) (marriage three days before trial).

67 United States v. Fisher, 518 F.2d 836, 840 (2d Cir.) (parties had not cohabited for eleven years; husband lives with and had two children by another woman; wife's appeal from divorce decree pending), cert. denied, 423 U.S. 1033 (1975).

68 Developments in the Law, supra note 8, at 1566 & n.23.


70 United States v. Clark, 712 F.2d 299, 302 (7th Cir. 1983) (in order to avoid inquiry into whether marriage is a sham, privilege does not cover premarital acts and events). But see United States v. Owens, 424 F. Supp. 421, 423 (E.D. Tenn. 1976) (refusing to accept this rationale as the basis for an exception to the privilege). Other courts have concluded that so long as the marriage exists at the time the testimony is to be given, the events with which the testimony is concerned may have taken place before or during the marriage. Developments in the Law, supra note 8, at 1567; see State v. Williams, 133 Ariz. 220, 231-32, 650 P.2d 1202, 1213-14 (1982); Brinig & Schwartzstein, Spousal Privileges, in TESTIMONIAL PRIVILEGES 332, 336 (S. Stone & R. Liebman eds. 1983); Comment, The Deconstruction of the Marital Privilege, 12 PEPPERDINE L. REV. 723, 762-63 (1985).


In addition, marital harmony has not been a significant concern to courts considering whether to admit hearsay statements by spouses. Despite the possible repugnance of a spouse's out-of-court statements serving as the basis for convicting a spouse, and the potential harm to marital harmony, courts have consistently admitted such statements over claims of privilege. These courts reason that because out-of-court statements have already been made at the time of trial, "[m]arital harmony would be enhanced minimally if at all . . . by excluding the statement when offered after the fact through a third-party witness at trial, and 'the normally predominant principle of utilizing all rational means for ascertaining truth' would be . . . frustrated." A spouse's out-of-court statements can also be used to impeach the defendant. Thus, ironically, despite the policy behind the adverse testimony privilege, a spouse's out-of-court statement which incriminates a defendant-spouse is not so repugnant as to prevent its admission. The privilege has been found inapplicable where the government has immunized both spouses against use of the testimony. Courts seem to ignore the possibility that the act of testifying in court may cause harm to the marital relationship even if the spouse cannot be convicted on the basis of the adverse testimony. The witness-spouse has nonetheless publicly revealed damaging evidence, which may place the defendant-spouse in a bad light or incriminate friends.

4. The Difficulty of Determining Whether a Marriage is Worth Protecting

In an effort to serve the policy interest of preserving marital harmony, some courts have tried to determine whether particular mar-

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74 United States v. Archer, 733 F.2d at 359 (quoting Trammel v. United States, 445 U.S. 40, 50 (1980)).
riages are moribund, damaged beyond repair, or otherwise not worthy of protection. In such cases, spouses are not permitted to invoke the adverse testimony privilege because there is ostensibly no marital harmony left to preserve. Unfortunately, for many reasons, courts are not well suited to make judgments during the course of criminal proceedings about the stability and quality of marital relationships.

One reason is that courts lack expertise to determine whether relations between spouses have so deteriorated that the marriage no longer merits protection. Any attempt to develop this expertise and to gather the information necessary to make such a determination would be unduly time-consuming. Assessing whether marriages merit protection would force courts to hold minitrials during criminal cases to determine the viability of marriages. Therefore, criminal proceedings are not appropriate forums for evaluating the condition of particular marriages. In light of the wide range of marital relations, the difficult task of determining which marriages merit protection, if handled by any court, is better handled by family courts, which do not exist in the federal system.

The Second Circuit, in a pre-Trammel decision, cautioned against making case-by-case determinations of whether a marriage deserves protection:

[It is neither] practicable [nor] desirable to make the decision dependent upon the judge’s conclusion that in the instance before

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78 See, e.g., United States v. Brown, 605 F.2d 389, 396 (8th Cir.) (husband left wife after two weeks of marriage), cert. denied, 444 U.S. 972 (1979); United States v. Cameron, 556 F.2d 752, 756 (5th Cir. 1977) (marriage effectively, though not legally, had expired). Some commentators have encouraged courts to conduct a detailed examination of the particular marital relation between the witness-spouse and the party-spouse as a way of limiting the application of the privilege to cases in which marital harmony will be served. See Rothstein, A Re-Evaluation of the Privilege Against Adverse Spousal Testimony in the Light of its Purpose, 12 INT’L & COMP. L.Q. 1189, 1194 (1963); Note, supra note 39, at 220.

79 Cf. United States v. Byrd, 750 F.2d 585, 592 (7th Cir. 1984). In the context of the confidential communications privilege, the court concluded that “the making of the determinations of when a marriage has deteriorated to the point when its communications are no longer confidential would involve courts in difficult factual inquiries in which we are reluctant to require trial courts to become involved.” Id.

80 United States v. Sims, 755 F.2d 1239, 1243 n.3 (6th Cir.), cert. denied, 473 U.S. 907 (1985); In re Malfitano, 633 F.2d 276, 279 (3d Cir. 1980) ("[G]iven the theoretical and empirical difficulties of assessing the social utility of such marriages, either in general or in each case, we do not think that courts should 'condition the privilege . . . on a judicial determination that the marriage is a happy or successful one.'") (quoting United States v. Lilley, 581 F.2d 182, 189 (8th Cir. 1978)).

him the marriage has already been so far wrecked that there is nothing to save. . . . The question will always arise in the progress of the trial; it must be decided at once; and its answer will introduce a collateral inquiry likely to complicate the trial seriously.\(^{82}\)

Courts have been unwilling to fashion applicable rules or criteria, leaving the issue of the viability of the marriage to individual judges with little guidance or standard of review.\(^{83}\) This lack of standards creates the danger that judges' individual prejudices regarding how spouses should relate to each other will serve as the basis for decisions. One alternative is simply to disallow the privilege if the couple is divorced or legally separated.\(^{84}\) However, spouses who are legally separated are technically married and presumably have a chance to reconcile their marriage.

Because of the difficulty of determining a marriage's viability, some courts have chosen to apply the privilege whenever the spouses are married, regardless of the state of the marriage.\(^{85}\) Such a broad application prohibits valuable testimony from being admitted when no actual harm would have resulted due to the poor condition of the marriage. Ironically, these same courts would not apply the privilege in a case where a couple was merely engaged to be married, despite the fact that adverse testimony might cause significant harm to the relationship.

Difficulty also arises in determining whether a marriage is a sham, entered into solely for the purpose of exercising the privilege. If the marriage occurs after the relevant events but before or during trial, courts have focused on whether the marriage was based on legitimate, prior relations between the parties rather than on the timing of the marriage.\(^{86}\) If the court determines the parties may


\(^{83}\) See, e.g., United States v. Cameron, 556 F.2d at 756 ("We fashion no broad rule with our holding today as to when the marital privilege should be allowed.").

\(^{84}\) See United States v. Witness Before Grand Jury, 791 F.2d at 241 (Oakes, J., concurring) (otherwise "too amorphous a task to determine the degree of viability of a marriage"); United States v. Byrd, 750 F.2d at 592 (deterioration of marriage irrelevant unless spouses permanently separated); United States v. Walker, 176 F.2d at 568 (issue of the status of the marriage "must be decided at once; and its answer will introduce a collateral inquiry likely to complicate the trial seriously").

\(^{85}\) See, e.g., United States v. Lilley, 581 F.2d at 182.

\(^{86}\) Compare United States v. Apodaca, 522 F.2d 568, 571 (10th Cir. 1975) (privilege not upheld where marriage occurred three days before trial and there was evidence marriage was a result of coercion) with Emo v. United States, 777 F.2d 508, 508-09 (9th Cir. 1985) (privilege upheld, despite marriage which occurred between service of subpoena and scheduled grand jury testimony, based on prior relationship between the
have married anyway, based on the length and nature of their relationship, a claim of privilege will be upheld. Even assuming the court has the requisite expertise for such a determination, the decision necessitates a time-consuming minitrial.

Courts have also considered the rehabilitative worth of a marriage in determining whether the privilege ought to apply. In *United States v. Van Drunen*, the Seventh Circuit refused to allow the privilege where the defendant was indicted for knowingly transporting an alien into the United States. The defendant subsequently married the alien, but the court found the marriage to be "collusive" and lacking in the rehabilitative aspects that worthwhile marriages possess. In *In re Grand Jury Subpoena United States*, the Second Circuit criticized the Seventh Circuit's approach because the rehabilitative effect of a marriage was not a facet of the traditional common-law justification for the adverse testimony privilege.

On its face, the privilege is overinclusive in protecting marriages which have effectively ended or are in such disrepair that adverse testimony will not harm them. At the same time, courts are ill-equipped to draw lines between healthy and troubled marriages. It is, therefore, no solution to suggest that the privilege only cover marriages deserving of protection.

C. Joint Participant Exception

Recently, considerable debate has arisen over the "joint participant" exception to the adverse testimony privilege. Where both
spouses have participated in the crime ("partners in crime"), it has been argued that the adverse testimony privilege should not be available. The circuits have split on this question, with the Seventh and Tenth Circuits endorsing the exception and the Second and Third rejecting it.

The Supreme Court was confronted with this exception in *Trammel*, yet it chose not to address the issue. Courts and commentators speculated on whether the Court implicitly rejected the exception or simply left the question open. Some commentators have suggested that the exception apply to the involuntary witness-spouse only when the court determines the marriage is not worth preserving.

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92 United States v. Pugliese, 153 F.2d 497, 500 (2d Cir. 1945) ("partnership in crime").
93 Of course, after *Trammel*, this exception would arise only when the jointly participating witness-spouse refused to testify based on the adverse testimony privilege.
94 See, e.g., United States v. Keck, 773 F.2d 759, 767 (7th Cir. 1985); United States v. Clark, 712 F.2d 299, 300-01 (7th Cir. 1983); United States v. Trammel, 583 F.2d 1166, 1169-70 (10th Cir. 1978), aff'd on other grounds, 445 U.S. 40 (1980).

97 See *In re Grand Jury Subpoena United States*, 755 F.2d at 1026 (*Trammel* has "some negative implications" concerning joint participant exception); Note, *Partners in Crime, supra* note 91, at 1027-32; Note, *An Examination of the Privilege, supra* note 91.
98 See United States v. Clark, 712 F.2d at 301 n.1 (*Trammel* did not consider joint participant exception, and its criticism of the adverse testimony privilege makes it unlikely it was implicitly rejecting an exception to the privilege); cf. *In re Malfitano*, 633 F.2d at 279 (no exception will encourage government to charge both spouses in hopes that one will incriminate the other to exculpate him or herself; irony that allegation will be easier to prove the closer the marriage).
99 See, e.g., Note, *supra* note 39, at 220. The author suggests that courts, in order to avoid collusive marriages, should consider when the spouses were married, whether the spouses cohabitated for an insubstantial time since the marriage, whether the spouses have lived with someone else since the marriage, and whether one spouse has threatened
If it is accepted that the adverse testimony privilege balances the benefit of protecting marital harmony and the cost of losing valuable evidence at trial, the privilege should fail where both spouses are involved in the criminal activity. By their nature, conspiracies are difficult to prove. Therefore, the law compensates by easing the proof burden required to show participation in a conspiracy and allowing statements of one conspirator to be used against another. Application of the privilege may serve to silence the best, and perhaps only, witness to the crime, providing an extensive shield to criminal activity.

A less forceful argument in favor of the exception is that marriages in which the spouses are jointly participating in crime are unstable and likely to disintegrate because of the joint participation. The argument suggests that such marriages are beyond hope and therefore not in need of protection. However, there is no empirical evidence which indicates that marital partners in crime are not happily married. Also, the fact that only the witness-spouse can invoke the privilege serves as a check. Presumably, if the marriage is in trouble, the witness-spouse will not invoke the privilege.

An additional argument in favor of the joint participant exception is that the other spouse not to testify. Finding one or more of these circumstances to exist, the court should compel involuntary spousal testimony. Finding one or more of these circumstances to exist, the court should compel involuntary spousal testimony. Id; see also Note, The Joint Participation Exception, supra note 91, at 662-63, in which the author suggests that, in evaluating whether to overcome the privilege, the court should initially determine whether the marriage is worth protecting and, if so, should consider the nature and magnitude of the crime involved, whether the testimony is expected to be material, and whether the same information could be obtained from another source. Lastly, the court should consider the extent of harm to the marriage if the spouse were ordered to testify. Id. For a discussion of the difficulties associated with judicial determination of whether the marriage is worth protecting, see supra Part II.B.4.


Of course, after Trammel, criminal defendants may not be sure their spouses will not voluntarily choose to testify against them. In re Grand Jury Subpoena United States, 755 F.2d at 1026.

Bentham noted this danger:

Let us, therefore, grant to every man a license to commit all sorts of wickedness, in the presence and with the assistance of his wife: let us secure to every man in the bosom of his family, and in his own bosom, a safe accomplice: let us make every man's house his castle; and, as far as depends upon us, let us convert that castle into a den of thieves.

J. BENTHAM, 5 RATIONALE OF JUDICIAL EVIDENCE 340 (1827) (footnote omitted).

In re Malfitano, 633 F.2d 276, 278 (3d Cir. 1980) (nothing in the record or otherwise to indicate that marriages with criminal overtones disintegrate and dissolve).

See id.
tion is that a marriage used merely as a cover for criminal activity does not deserve protection. However, proponents of this argument cannot point to any public policy against marital partners in crime remaining married. In addition, it is inappropriate for the rules of evidence to be the source of punishment above the penalties prescribed by criminal law.

Another argument is that any rehabilitative effect of the marriage on criminals is diminished where both spouses are joint participants in crime. This position has been criticized on the ground that the common-law rationale for the adverse testimony privilege never included marriage's rehabilitative effect and that marriage may in fact restrain future antisocial acts. As in conspiracy proceedings, the strongest and most convincing argument in favor of the joint participant exception is the difficulty of obtaining evidence rather than any argument based on social judgments about marriages between criminals.

Determining whether both spouses are joint participants for purposes of the joint participant exception is difficult to establish without invading the privilege. To determine whether both spouses were involved in criminal activity, the prosecution may have to elicit testimony from each spouse regarding the other's activities. Forcing this testimony results in the harm the privilege was designed to prevent: the disruption in the marital relationship which occurs when one spouse testifies against the other. To avoid this dilemma, courts could require independent evidence of joint participation before finding the exception applicable, thus avoiding a disruptive effect on the marriage.

106 Id.
107 Id.
108 United States v. Van Drunen, 501 F.2d 1393, 1396-97 (7th Cir.), cert. denied, 419 U.S. 1091 (1974). However, the Second Circuit, in In Re Grand Jury Subpoena United States, 755 F.2d at 1025 n.5, noted that the witness-spouse in Van Drunen apparently testified voluntarily. If the case had been decided after Trammel, there would have been no need to invoke the joint participation exception because of the Supreme Court's holding in Trammel that only the witness-spouse in Van Drunen apparently testified voluntarily. The case had been decided after Trammel, there would have been no need to invoke the joint participation exception because of the Supreme Court's holding in Trammel that only the witness-spouse can claim the privilege. This attack does not go to the reasoning of the Seventh Circuit. The Second Circuit observed that an alternative ground to the holding in Van Drunen was that the testimony concerned events which occurred when one spouse testifies against the other. To avoid this dilemma, courts could require independent evidence of joint participation before finding the exception applicable, thus avoiding a disruptive effect on the marriage. Id.

109 In re Grand Jury Subpoena United States, 755 F.2d at 1026.
110 In re Malftano, 633 F.2d at 278.
111 In re Grand Jury Subpoena United States, 755 F.2d at 1028.
Codefendant spouses have argued that severance should be granted so that each could take the stand in their own trials to present exculpatory evidence, but invoke the adverse testimony privilege in their spouse’s trial to avoid providing damaging testimony.112 Surely, it would be a farce to, on one hand, allow each spouse to divert criminal liability to the other through their own testimony, and on the other hand, protect the other spouse from that negative testimony by invoking the privilege.113 To do so would confirm Jeremy Bentham’s concern that the adverse testimony privilege fosters, and perhaps creates, partners in crime.114

D. Testimony Not Adverse

Inherent in its name, the adverse testimony privilege can be interpreted as applying only to testimony by one spouse which is adverse to the other spouse’s legal interests.115 It appears from the large number of reported decisions dealing with the issue that courts have given real meaning to the adversity requirement. In some instances, this is based on the general policy of construing privileges narrowly.116 In other cases, it is possible to infer that courts are unsympathetic to the adverse testimony privilege and construe it to

112 If there are multiple defendants, the government may be forced to grant immunity for use of the witness-spouse’s testimony against the party-spouse. In re Grand Jury Proceedings of Larson, 785 F.2d 629 (8th Cir. 1986) (dictum); In re Grand Jury Subpoena of Ford, 756 F.2d 249, 253-54 (2d Cir. 1985); In re Grand Jury Matter, 673 F.2d 688, 692-94 (3d Cir.), cert. denied, 459 U.S. 1015 (1982) (witness can assert privilege where promise of immunity withdrawn); In re Snoonian, 502 F.2d 110, 112-13 (5th Cir. 1974).

The government, in an extreme case, felt a need to assign separate prosecutors so that the one who heard the witness-spouse’s testimony against others was not involved in the prosecution of the party-spouse. The Second Circuit upheld this procedure. In re Grand Jury Subpoena of Ford, 756 F.2d 249 (2d Cir. 1985); see also In re Grand Jury Subpoenas of Clay and Wareham, 603 F. Supp. 197 (S.D.N.Y. 1985).

113 This very possibility arose in a case where a court suggested that severance might have been appropriate if each spouse could have offered favorable testimony for the other. United States v. Vaccaro, 816 F.2d 443, 450 (9th Cir.) (failure to sever not prejudicial where no showing that invocation of marital privilege would have prevented married codefendants from effectively defending themselves), cert. denied, 108 S. Ct. 262 (1987). The court analogized to cases in which a codefendant invoked the fifth amendment privilege not to testify and the necessity of showing the harm resulting from the failure to obtain that testimony. The application of the joint participant exception would be appropriate in this case to prevent this possible injustice. Id. (citing United States v. Little, 753 F.2d 1420, 1446 (9th Cir. 1984)).

114 J. BENTHAM, supra note 103.

115 United States v. Van Cauwenbergh, 814 F.2d 1329, 1337 (9th Cir. 1987) (not a blanket privilege, only available where testimony would be adverse), cert. denied, 108 S. Ct. 773 (1988); Developments in the Law, supra note 8, at 1569.

restrict its application. As a result, the adversity requirement restricts application of the privilege in the same fashion as do exceptions to the privilege.

1. Substantive Versus Contextual Adversity

The privilege clearly covers testimony by a witness-spouse which is substantively harmful to the party-spouse's position. It might make sense, given the goal of protecting marital relationships, to conclude that any testimony by a spouse which the prosecutor chooses to elicit in establishing a case against a party-spouse ought to be protected as well.\textsuperscript{117} Courts have rejected this contextual adversity standard in favor of one of both contextual and substantive adversity, where the in-court testimony is actually adverse to the party's interests.\textsuperscript{118} Following this standard, courts have concluded that testimony regarding neutral, objective facts is unprotected,\textsuperscript{119} and statements of a spouse made outside the courtroom are not subject to the privilege when offered for impeachment\textsuperscript{120} because they

\textsuperscript{117} Party admissions are not hearsay, whether or not they are adverse to the party's legal interests. \textit{Fed. R. Evid.} 801(d)(2); see United States v. Clark, 712 F.2d 299, 303 (7th Cir. 1983) (court, in dictum, noted that it was not sure even exculpatory information used by prosecution would not be a threat to marital harmony).

\textsuperscript{118} United States v. Smith, 742 F.2d 398, 401 (8th Cir. 1984).

\textsuperscript{119} United States v. Brown, 605 F.2d 389, 396 (8th Cir.) (check cashing scheme: testimony by spouse relating to otherwise legal origins of scheme and fact that signature on forged checks was not hers held not adverse), \textit{cert. denied}, 444 U.S. 972 (1979); \textit{Developments in the Law, supra} note 8, at 1569; see also \textit{In re} Martenson, 779 F.2d 461, 464 (8th Cir. 1986) (questions directed at objective facts; speculative harm to spouse's pecuniary interest but no discernible impact on penal interests sufficient to invoke privilege); United States v. Smith, 742 F.2d at 401; \textit{In re} Grand Jury Proceedings, 664 F.2d 423, 430 (5th Cir. 1981) (witness-spouse answered objective questions containing no reference to her husband), \textit{cert. denied}, 455 U.S. 1000 (1982).


lack contextual adversity.

Appellate courts also use the adversity requirement to reject claims that privileged testimony was improperly admitted at trial. In a recent case where the trial court had allowed the witness-spouse to testify under circumstances suggesting involuntary testimony, in violation of the *Trammel* requirement, the court of appeals found no reversible error. It held that the testimony was not adverse to the party-spouse's interests and thus the privilege was inapplicable.\textsuperscript{121}

\section*{2. A Broad Reading of Adversity}

In two instances, courts have taken an expansive position on what constitutes adversity, extending the privilege to situations where most courts would find an exception to the privilege.\textsuperscript{122} These examples do not follow the contextual versus substantive distinction. The first case concerned testimony by a spouse in a proceeding in which the other spouse was not a party. The court held that a wife's testimony was adverse and therefore privileged if it could implicate a third party who, in turn, could implicate the husband.\textsuperscript{123} This expansive view of adversity presents a danger that valuable testimony against third parties will be lost on the mere contingency that those third parties will implicate the witness' spouse. Since the threat to marital harmony is tenuous, and the threat to the information-gathering process is substantial, the privilege is inappropriate. The absence of direct confrontation between spouses reduces the likelihood of negative consequences to the marriage.

In the second case where a court applied an expansive interpretation of adversity, a wife's testimony favorable to codefendants arguably created a negative inference that her husband was guilty because she provided no exculpatory testimony for him. Although the harm was speculative, the court granted a severance resulting in inefficient prosecution of the case.\textsuperscript{124}

\begin{footnotes}
\item[121] See United States v. Smith, 742 F.2d at 401.
\item[123] In re Grand Jury Matter, 673 F.2d at 692; see also United States v. Doe, 478 F.2d 194, 195 (1st Cir. 1973); Comment, supra note 70, at 754-56. One method of protecting a spouse from third-party implication is to immunize the spouse against the government's use of the testimony.
\item[124] See United States v. Fields, 458 F.2d at 1199.
\end{footnotes}
III
LEGAL AND POLICY RATIONALES FOR THE PRIVILEGE

The adverse testimony privilege remains largely due to inertia.\(^{125}\)

\(^{125}\) The Supreme Court's mandate under Federal Rule of Evidence 501 is to interpret the common-law privileges in light of "reason and experience." In addition to federal court decisions, the actions of state courts and legislatures provide relevant "experience" upon which to base changes in the adverse testimony privilege. The Trammel Court noted that actions by the states had special relevance to this marital privilege because laws relating to marriage and domestic relations are traditionally state concerns. Trammel v. United States, 445 U.S. 40, 49-50 (1980). Actions by the states with regard to interspousal immunity are also illustrative. The adverse testimony privilege and interspousal immunity share a common origin, the legal concept of the unity of husband and wife. The abandonment of that concept has led to a growing rejection of interspousal immunity. The policy behind interspousal immunity, preserving marital harmony, has been found to be poorly served by immunizing spouses from tort actions against each other. As a result, a number of states have completely abrogated their interspousal immunity doctrines. See, e.g., Flagg v. Loy, 241 Kan. 216, 224-25, 734 P.2d 1183, 1189-90 (1987); Price v. Price, 732 S.W.2d 316, 319 (Tex. 1987).

In Trammel, the Supreme Court examined the actions of state legislatures, advisory committees, and even the English judicial system in reconsidering the adverse testimony privilege. Trammel v. United States, 445 U.S. at 44-45. After noting an unmistakable trend in the states and in England to restrict or abolish the privilege, the Court decided nonetheless to retain it in modified form. A 1972 study group in England, the Criminal Law Revision Committee, proposed giving only the witness-spouse the right to invoke the adverse testimony privilege, the approach ultimately taken in Trammel. Id. at 49 n.10. These recommendations were enacted by Parliament in section 80 of the Police and Criminal Evidence Act of 1984. See Zander, The Police and Criminal Evidence Act of 1984, 117-19 (1985).

When Trammel was decided, 17 states had abolished the adverse testimony privilege. Since then, the state trend of abandoning the privilege has continued. Four additional states have eliminated the privilege (although in one case the legislature reenacted the privilege after it had been abolished through judicial action). The following jurisdictions have abolished the adverse testimony privilege in criminal cases since the Supreme Court's decision in Trammel: Iowa, 1983 Iowa Acts ch. 37, § 7 (amending IOWA CODE ANN. § 726.4 (1979)); Nebraska, 1984 Neb. Laws L.B. 696, § 1 (amending Neb. REV. STAT. § 27-505 (1943) to exclude from privilege enumerated crimes including crimes of violence); New Mexico, N.M. STAT. ANN. § 11-505 (1983); North Carolina, abolished by judicial action in State v. Freeman, 302 N.C. 591, 276 S.E.2d 450 (1981), but subsequently reinstated by legislative action. N.C. GEN. STAT. § 8-57 (1985) (witness-spouse controls).

Jurisdictions which had abolished the privilege in criminal cases prior to Trammel are: Arizona, ARIZ. REV. STAT. ANN. § 12-2232 (Supp. 1985); Arkansas, ARK. R. EVID. 501 & 504; Delaware, DEL. CODE ANN. tit. 11, § 3502 (1970); Delaware, DEL. R. EVID. 504(d) (may testify for or against each other); Florida, FLA. STAT. §§ 90.501, 90.504(d) (1979); Illinois, ILL. REV. STAT. ch. 38, § 155-1, ch. 110, § 8-801 (1984); Indiana, IND. CODE § 34-1-14-5 (1976); Kansas, KAN. STAT. ANN. §§ 60-407 & 60-428 (1976); Maine, ME. R. EVID. 501 & 504; New Hampshire, N.H. REV. STAT. ANN. § 516:27 (1974); New York, N.Y. CRIM. PROC. LAW § 60.10 (1971); North Dakota, N.D. R. EVID. 501 & 504; Oklahoma, OKLA. STAT. ANN. tit. 12, § 2504 (West 1980); South Carolina, S.C. CODE ANN. § 19-11-30 (Law Co-op. 1985); South Dakota, S.D. CODIFIED LAWS ANN. §§ 19-13-12 to 19-13-15 (1987); Tennessee, TENN. CODE ANN.
It was originally designed to serve the rule that spouses were incom-

§§ 24-1-201, 40-17-104 (1980); Vermont, VT. STAT. ANN. tit. 12, § 1605 (1973); Wis-

consin, WIS. STAT. § 905.05 (1975).

The party-spouse still controls the privilege in Colorado, COLO. REV. STAT. § 13-90-

107 (1985 Supp.).

The witness-spouse controls the privilege in: Alabama, ALA. CODE § 12-21-227 (1975); California, CAL. EVID. CODE § 970-3 (West 1979); Connecticut, CONN. GEN. STAT. ANN. § 54-84a (West 1985); District of Columbia, D.C. CODE ANN. § 14-306 (1981); Georgia, GA. CODE ANN. § 38-1604 (1981); Hawaii, HAW. R. EVID. 505; Ken-


The privilege is controlled by either the witness or party-spouse in: Alaska, ALASKA CRIM. PROC. R. 26(b)(2), ALASKA R. EVID. 505; Idaho, IDAHO CODE § 9-203 (1979); Michigan, MICH. COMP. LAWS ANN. § 600.2162 (West 1986); Minnesota, MINN. STAT. § 595.02 (1979); Missouri, MO. ANN. STAT. § 546.260 (Vernon 1987); Montana, MONT. CODE ANN. § 46-16-212 (1979); New Jersey, N.J. STAT. ANN. § 2A-84A-17(1) & (2) (West 1976); Virginia, VA. CODE ANN. § 19.2-271.2 (1983 Cum. Supp.); Wash-

ington, WASH. REV. CODE § 5.60.060(1) (1979); West Virginia, W. VA. CODE § 57-3-3 (1966).

Spouses are incompetent to testify in: Mississippi, MISS. CODE ANN. § 13-1-5 (1979); Ohio, OHIO REV. CODE ANN. § 2945.42 (Baldwin 1979), OHIO R. EVID. 601 (B); Penn-

sylvania, 42 PA. CONS. STAT. ANN. §§ 5913, 5915 (Purdon 1979); Wyoming, WYO. STAT. § 1-12-104 (1985).

This trend demonstrates a rejection of Trammel's modified approach of placing the privilege in the hands of the witness-spouse. Instead of following the Supreme Court's lead, the privilege was rejected in toto. Even in those jurisdictions which have retained it, the applicability of the privilege has been restricted. See 8 J. WIGMORE, supra note 2, §§ 2240, 2245.

The privilege appears in neither the Model Code of Evidence nor the Uniform Rules of Evidence. The Model Code of Evidence states:

It is now generally agreed that these considerations cannot justify ... a privi-

lege either in the witness-spouse to refuse to testify or in the party-spouse to

prevent the other from testifying. They are, however, currently thought by

legislators and judges to be sufficient to require the creation or maintenance of

a privilege for confidential communications between husband and wife.

MODEL CODE OF EVIDENCE Rule 215 comment a (1942). 8 J. WIGMORE, supra note 2, 

§ 2228, at 221. Uniform Rule of Evidence 23(2) comment (1953) states: "This abol-

ishes the rule, still existing in some states, and largely a sentimental relic, of not requiring one spouse to testify against the other in a criminal action. It limits the privilege to confidential communications between the spouses ... ." 8 J. WIGMORE, supra note 2, 

§ 2228, at 221. Additionally, in 1938 an American Bar Association committee on im-

proving the law of evidence called for the abolition of the privilege. The American Bar Association Committee on the Improvements in the Law of Evidence, Report, in 63 REPORTS OF THE AMERICAN BAR ASSOCIATION 570, 594-95 (1938), stated:

Husband and wife at common law were ... privileged not to testify against the other nor to be testified against by the other. ... The privilege has been abol-

ished in only a few States; but a tendency to extend the abolition has recently
petent, a precept long since abandoned. Yet, the privilege lingered on in search of a rationale. In light of the competing interest in the truth-seeking process, unquestioning adherence to precedent does not make sense. The confidantiality of communications between husband and wife are protected by the confidential communications privilege, not the adverse testimony privilege.

The two rationales which the courts substituted for spousal incompetence are encouraging marital harmony and preventing the "natural repugnance" of compelling one spouse to testify against the other. When spousal incompetence justified the privilege, there were few reasons for creating exceptions to it. Since the time

been apparent, not only for civil litigation but in criminal prosecutions... It is recommended that the privilege protecting from being called one against the other be abolished (1) in civil cases, and (2) in criminal cases. [Vote of the Committee: in favor 25, opposed 14.]

8 J. WIGMORE, supra note 2, § 2228, at 220-21.

In 1974, the National Conference on Uniform State Laws revised its Uniform Rules of Evidence and again rejected the adverse testimony privilege in favor of a confidential communications privilege. Trammel v. United States, 445 U.S. at 48-50; see UNIF. R. EVID. 504. However, in 1986, the Revised Uniform Rules were broadened by an amendment to include an adverse testimony privilege, though with a number of exceptions. UNIF. R. EVID. 504 reads in part:

(b) Spousal privilege in criminal proceedings. The spouse of an accused in a criminal proceeding has a privilege to refuse to testify against the accused spouse.

(c) Exceptions. There is no privilege under this rule in... any criminal proceeding in which a prima facie showing is made that the spouses acted jointly in the commission of the crime charged, or in any proceeding in which one spouse is charged with a crime or tort against the person or property of (i) the other, (ii) a minor child of either, (iii) an individual residing in the household of either, or (iv) a third person if the crime... is committed in the course of committing a crime... against any of the individuals previously named in this sentence. The court may refuse to allow invocation of the privilege in any other proceeding if the interests of a minor child of either spouse may be adversely affected.

126 It has been suggested that forcing a spouse to testify will be a pointless exercise. In many cases, according to this view, witness-spouses will choose to perjure themselves rather than give damaging testimony against the party-spouses. Comment, The Husband-Wife Privileges of Testimonial Non-Disclosure, 56 NW. U.L. REV. 208, 210 (1961). This same argument could be made regarding witness-spouses who testify in favor of party-spouses. Their incentive is also to perjure themselves to support their spouse's case. Yet, the rule of spousal incompetence has long since been abandoned. The response ought not to be exclusion of spousal testimony. In both situations we are better off placing our trust in the jury to evaluate the evidence. The nature of the witness' relationship to the party will be brought to the jury's attention, and the jury will be free to evaluate the evidence accordingly. But see Hutchins & Slesinger, supra note 8, at 684.

127 See Hawkins v. United States, 358 U.S. 74, 81 (1958) (Stewart, J., concurring); Comment, supra note 7, at 321.
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spousal incompetence was abandoned, the courts have developed a fluctuating patchwork of exceptions to ensure that the policies which currently support the privilege are served. Today, these exceptions have so jaded use of the privilege that its application has become inconsistent and unprincipled. Because the privilege is prejudicial to the prosecution, and does not serve its goals of protecting marital harmony, its continued use cannot be justified.

A. The Adverse Testimony Privilege Fails to Serve the Policies Which Arguably Support It

If the adverse testimony privilege is to be justified on policy grounds, the benefits of preventing family discord\(^\text{128}\) and avoiding the “natural repugnance” of condemning a person with the testimony of a spouse\(^\text{129}\) must outweigh the social costs of losing valuable evidence at trial.\(^\text{130}\) On balance, the benefits do not support continuation of the privilege.

\(^{128}\) Comment, *supra* note 7, at 318 (“delicate balance between the protection of marital harmony and confidential communications on the one hand, and the procurement of facts on the other”). The earliest statement of the concern about marital harmony appears to be in 1628 in Coke’s Commentaries Upon Littleton. Coke writes: “[A] wife cannot be produced either against or for her husband, *qua sunt duae animae in carne una* [because they are two souls in one body]; and it might be a cause of implacable discord and dissention between the husband and wife. . . .” E. COKE, COMMENTARIES UPON LITTLETON § 6b (1628), quoted in Lempert, *supra* note 2, at 728 n.10.

\(^{129}\) See Trammel v. United States, 445 U.S. 40, 51 (1980): “[W]e must decide whether the privilege against adverse spousal testimony promotes sufficiently important interests to outweigh the need for probative evidence in the administration of criminal justice.” Wigmore offers a forceful argument regarding the importance of this factor: The whole life of the community, the regularity and continuity of its relations, depends upon the coming of a witness. Whether the achievements of the past shall be preserved, the energy of the present kept alive and the ambitions of the future be realized depends upon whether the daily business of regulating rights and redressing wrongs shall continue without a moment’s abatement, or shall suffer a fatal cessation. The business of the particular cause is petty and personal, but the results that hang upon it are universal. All society, potentially, is involved in each individual case. The vital process of justice must continue unceasingly. A single cessation typifies the prostration of society. A series would involve its dissolution. The pettiness and personality of the individual trial disappear when we reflect that our duty to bear testimony runs not to the parties in that present cause, but to the community at large and forever.

\(^{130}\) See also C. MCCORMICK, *supra* note 42, § 72, at 171: “[T]he rules of privilege . . . are not designed or intended to facilitate the fact-finding process or to safeguard its integrity. Their effect instead is clearly inhibitive; rather than facilitating the illumination of truth, they shut out the light.” Cf. Krattenmaker, *supra* note 37, at 93 (“[T]rial court fact finding in this country has long
1. Harmony of Marriage

Persistent questions have been raised concerning the justifications of the privilege on the ground of protecting marital harmony.\textsuperscript{131} Wigmore has suggested that the privilege is not well tailored to meet this end.\textsuperscript{132} In many cases in which the privilege is applied, the marital relationship is already in serious trouble.\textsuperscript{133} Wigmore further questioned whether harmony between a husband and wife is closely tied to the testimony of one against the other. He argued that many circumstances contribute to creating marital dissension and that giving testimony is a casual and minor one which should not be the foundation for so important a rule of evidence.\textsuperscript{134} Wigmore's argument is supported by the fact that there is an absence of empirical evidence concerning the proposition that adverse testimony causes significant damage to a marital relationship.\textsuperscript{135}

Wigmore also found a certain irony in the balance struck between society's interest and that of the marital parties. If A has wronged B, and A's spouse's testimony is needed to establish the wrong, is it a sensible policy to protect A's marriage at the expense of B's ability

\textsuperscript{131} Marriage has been seen as the foundation of the family, Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)), and as making an important contribution to the rehabilitation of a criminal defendant spouse, United States v. Van Drunen, 501 F.2d 1393, 1397 (7th Cir.), cert. denied, 419 U.S. 1091 (1974). An extreme view is that marriage is sacred and nothing should be done to endanger the relationship. Comment, supra note 7, at 311. On the other hand, as one commentator noted:

Whether there exists any real justification for the marital testimonial privilege remains the subject of debate. That the social policy of preserving marital harmony has no relation in fact to the privilege and is "merely a sentiment" will continue to be asserted by some and denied by others. Nevertheless, the Supreme Court has indicated that the privilege is not apt to disappear soon as an evidentiary concept. It is, however, subject to further modification.

Note, The Joint Participation Exception, supra note 91, at 663.

\textsuperscript{132} 8 J. Wigmore, supra note 2, § 2228, at 216.

\textsuperscript{133} Id. It has been noted that even Judge Learned Hand refused to allow a wife to testify after her husband had deserted her and remarried. His position was that even if, as a factual matter, the marriage had failed, it was not the role of the courts to inquire as to the viability of the marriage. United States v. Walker, 176 F.2d 564, 568 (2d Cir. 1949). According to one commentator, "One can only admire a marriage that remained sufficiently harmonious despite the wife's desertion and remarriage that it was vulnerable to further discord should the first husband testify against the wife." Lempert, supra note 2, at 729.

\textsuperscript{134} 8 J. Wigmore, supra note 2, § 2228, at 216.

\textsuperscript{135} See Rosenberg, The New Looks in Law, 52 Marquette L. Rev. 539, 540-42 (1969-70); Developments in the Law, supra note 8, at 1580.
to prove the wrong? According to some commentators, the privilege protects little more than the wrongdoer who hides behind it.

The changing role of the family in modern society supports this skepticism over the effectiveness of the privilege. Significantly, the divorce rate has risen to the point where, for many, marriage is only a temporary relationship. Two commentators have taken the position that "[i]n this period of readjustment, we can see no reason for sacrificing individual justice (as it has demonstrably been sacrificed in several cases) to a mythical family unity." There is, on the other hand, a competing view of how the balance should be struck. It asserts that while compelling a spouse's testimony will not necessarily destroy the marriage, neither will it necessarily produce a just result. If the testimony is ultimately unnecessary to ensure conviction, justice will not have been served. Likewise, no one gains if the spouse refuses to testify and is held in contempt. Nor is justice advanced if the witness-spouse commits perjury.

The problem with this approach is that "justice" is defined retroactively, after the testimony has been given and its effects seen. Unfortunately, courts lack the foresight to determine how a case will be resolved and which elements will be critical to its resolution. In the absence of insight into the future, the court should strike the balance against a claim of privilege which prevents introduction of relevant testimony.

In theory, the adverse testimony privilege, when compared to the

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136 8 J. WIGMORE, supra note 2, § 2228, at 216-17. Though some might respond that in a criminal case, A is viewed as having wronged the state, not B, the state has an interest in both protecting marriage and punishing the harm caused by A.
137 See Comment, supra note 7, at 321; Hutchins & Slesinger, supra note 8, at 686 (invoking the marital privilege amounts to a sacrifice of justice).
138 Comment, supra note 7, at 321. It has been estimated that one-half of first marriages of young adults in the United States will end in divorce. Note, Parent-Child Loyalty and Testimonial Privilege, 100 HARV. L. REV. 910, 919 n.51 (1987) (citing Glick, Marriage, Divorce, and Living Arrangements: Prospective Changes, 5 J. FAM. ISSUES 7, 15 (1984)).
139 Hutchins & Slesinger, supra note 8, at 679.
140 Lempert, supra note 2, at 731.
141 Id.
142 Id. Yet another policy ground offered in support of the privilege is to rid the courts of perjured testimony. See Hawkins v. United States, 358 U.S. 74, 75 (1958); Reutlinger, supra note 37, at 1363; Note, Partners in Crime, supra note 91, at 1023.
143 Furthermore, the Trammel compromise of letting the witness-spouse decide whether to testify does not resolve these problems. Instead, it often results in pressure being put on the witness-spouse to testify "voluntarily," thus potentially creating marital disharmony.
confidential communications privilege, affects relatively few couples. The purpose of the confidential communications privilege is to encourage free and open communications between spouses, whether or not they end up in court.\textsuperscript{144} If confidential communication between spouses is motivated by the existence of the privilege, an admittedly questionable assumption,\textsuperscript{145} eliminating the privilege could affect communication between a significant number of couples.

By contrast, the adverse testimony privilege is not designed to protect interspousal relations predating invocation of the privilege.\textsuperscript{146} Rather, it is justified on the basis of its effect after one spouse is called as a witness against the other. Furthermore, although the confidential communications privilege is limited to conversations between spouses, the adverse testimony privilege is applicable to any testimony given by the witness-spouse. Thus, the adverse testimony privilege only applies in the relatively small number of cases which actually go to trial and in which a spouse is a witness. Consequently, its abolition would permit the introduction of potentially critical evidence while harming relatively few couples.

The privilege has been held inapplicable to disclosures made by the witness-spouse outside of court.\textsuperscript{147} Theoretically, a spouse could cooperate with the government\textsuperscript{148} yet refuse to testify at trial by invoking the privilege. Once the cooperation becomes known,
the potential for harm to the marital relationship is as great or perhaps even greater than in-court testimony. The harm would be greater if it became apparent that, but for the cooperation, the party-spouse might never have been apprehended or indicted.

Our legal system is concerned with determining truth and maintaining the appearance of impartiality. While these are not absolutes, they should only give way to more compelling interests. That the adverse testimony privilege applies to criminal cases is a significant factor in the balance of interests. Not only does society have a general interest in just adjudication, it also has an interest in maintaining order through its criminal laws.149 Jeremy Bentham, a leading critic of the adverse testimony privilege, considered whether domestic happiness outweighs the state’s interests:

"It disturbs domestic confidence. Whose? Those who abuse it to disturb the public security. A miscreant, then, who could be convicted of an atrocious crime by the testimony of a woman, has nothing to fear, if he has only time to go through the marriage ceremony! No asylum ought to be opened for criminals; every sort of confidence among them must be destroyed, if possible, even in the interior of their own houses. If they can neither find mercenary protectors among the lawyers, nor concealment at their own firesides, what harm is done? Why, they are compelled to obey the laws, and live like honest people!150"

Ultimately, the utilitarian approach to the privilege, that social benefits must outweigh social costs for the privilege to continue, is insufficient.151 The approach does not adequately protect marital harmony because once the need for the spouse’s testimony increases beyond the value of the particular relationship, the privilege must give way. Therefore, supporters of the privilege must look to another rationale to justify its continued existence.152

149 The Supreme Court has expressed the view that “the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.” Berger v. United States, 295 U.S. 78, 88 (1935).
150 J. BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 238 (M. Dumont ed. 1825). Bentham’s extreme position would eliminate the attorney-client privilege as well as the adverse testimony privilege.
151 Note, supra note 49, at 185-87 (the utilitarian rationale forces judges to place values on individual relationships to decide which marriages are worthy of protection); see also R. DWORKIN, TAKING RIGHTS SERIOUSLY 184-207 (1977) (arguing for the recognition of certain individual needs regardless of the social cost); C. FRIED, RIGHT AND WRONG 36-37 (1978); Levinson, Testimonial Privileges and the Preferences of Friendship, 1984 DUKE L.J. 631, 633.
152 Wigmore offered four criteria necessary for the creation of a privilege against disclosure of communications. 8 J. WIGMORE, supra note 2, § 2285, at 527. Since the adverse testimony privilege is not a privilege against communications, but instead a
Some argue that the adverse testimony privilege embodies an important statement about social attitudes toward marriage. Because the privilege may play a role in keeping some marriages together in a stressful time, or help avoid the anguish of one spouse being forced to testify against the other, it is argued that the privilege is justified. While it may be indisputable that, in theory, marriage deserves protection, the question is at what price? Marriage is no longer the only intimate relation in which two people may live. The concept of a couple “living together” has gained increasing acceptance; even having children out of wedlock by choice has become more popular. Homosexual relationships can be just as intimate as marriage. Beyond these are many other close family relationships, such as those between parent and child, which do not receive protection through an evidentiary privilege. Aside from inertia, there is no apparent reason why marriage should continue to receive this extraordinary protection.

2. Natural Repugnance

The second most commonly offered policy ground justifying the adverse testimony privilege is one based on a visceral reaction to what happens in court when there is no privilege. Some believe that there is a “natural repugnance” to the prospect of compelling one spouse to testify against the other. Once stated, little more is added by way of reasoning, logic, or history to support or elaborate on this policy ground.

In responding to a critique of the marital privilege by Jeremy

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153 Lempert, supra note 2, at 736.
154 Id. at 736-37.
155 See Wyatt v. United States, 362 U.S. 525, 535 (1960) (Warren, J., dissenting); United States v. Gonella, 103 F.2d 123 (3d Cir. 1939); 8 J. WIGMORE, supra note 2, § 2228, at 217; see also Rothstein, The Proposed Amendments to the Federal Rules of Evidence, 62 GEO. L.J. 125, 131-32 (1973) (“popular aversion to testimony by one spouse against the other”); Note, Partners in Crime, supra note 91, at 1023 (“repugnance to the conviction of an individual through the testimony of his or her spouse”).
Bentham, Wigmore commented on the "natural repugnance" policy. Wigmore provided a damning critique:

This reason, if we reflect upon it, is at least founded on a fact, and it seems after all to constitute the real and sole strength of the opposition to abolishing the privilege. Let it be confessed, then, that this feeling exists, and that it is a natural one. But does it suffice as a reason for the rule? In the first place, it is not more than a sentiment. It does not posit any direct and practical consequence of evil. It is much the same reason that anyone might give for abolishing the office of spies in a war. In the next place, it exemplifies that general spirit of sportsmanship which, as elsewhere seen, so permeates the rules of procedure inherited from our Anglo-Norman ancestors. The process of litigation (many learned judges agree) is a noble kind of sport, and certain rules of fair play should never be overstepped. One of these is to give something of a start to the victim of the chase, to follow him by certain rules only and to respect his feelings so far as may be. This complicates the sport, and adds zest for the pursuers by increasing the skill and art required by them for success. The expedient of convicting a man out of the mouth of his wife is (let us say) poor sport, and we shall not stoop to it. Such is the theory and the sentiment of sportsmanship.156

A related argument in support of the privilege is that it enhances public acceptance of the legal system. The public might perceive the system as unfair if a witness-spouse were coerced into testifying, or if the spouse's desire not to testify were ignored.157 Counterbalancing this argument, however, is the public's adverse reaction to a criminal defendant going free because the defendant's spouse, whose testimony might have led to a conviction, was excused from testifying. It is also not clear that rules of evidence should be based on public opinion.

The concern about natural repugnance is, to some extent, a shorthand and ill-founded argument that privileges ought to protect human dignity and the privacy of relationships. Viewed as a question of values, one asks: Does the state value the judicial process and the results it achieves more than the protection of personal relationships and individual feelings? This choice should not present such a distressing dilemma. There is, on the one hand, a concrete need for the information sought in the judicial system, and on the other hand, only an abstract harm to the individual or society caused by the process of obtaining the information. Moreover, even if the concern about destroying relationships is valid, it must be

156 8 J. Wigmore, supra note 2, § 2228, at 217.
157 Developments in the Law, supra note 8, at 1585-86.
measured against the strong need for evidence. Litigation inherently intrudes on privacy and human dignity and, unfortunately, there is a substantial cost to protecting those values. In the case of the adverse testimony privilege (assuming the retention of the confidential communications privilege), the cost is not justified given the speculative nature of the potential harm which would result without a privilege.  

B. Right to Privacy as Rationale for the Privilege

Given the weak policy foundation upon which the adverse testimony privilege has been built, there has been an effort to find support for the privilege in the constitutional right to privacy. If constitutionally based, both federal and state courts would have to recognize the privilege. According to this approach, the constitutional protection of the institution of marriage extends to ongoing marital relations. By compelling one spouse to testify against the other, the state forces the witness to choose between loyalty to spouse and loyalty to state. The adverse testimony privilege removes this dilemma, or at least removes the coercion of a possible contempt citation, and allows the witness-spouse to remain faithful to the relationship if that is the spouse's greater loyalty.

The constitutional justification stretches the right to privacy be-

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158 In considering the confidential communications privilege, the Seventh Circuit stated: “Protecting the truth-seeking function of a trial should not be outweighed by oversensitivity to 'embarrassing' testimony . . . .” United States v. Byrd, 750 F.2d 585, 593 (7th Cir. 1984); see C. McCormick, supra note 42, § 86.

159 Since the seminal article by Samuel Warren and Louis Brandeis on the right to privacy, Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890), the courts have expanded the right to protect matters relating to the marital relationship as well as protecting private relationships generally. Court opinions have limited government interference in decisions relating to abortion, Roe v. Wade, 410 U.S. 113 (1973), contraception, Griswold v. Connecticut, 381 U.S. 479 (1965), although, recently, not sodomy, Bowers v. Hardwick, 478 U.S. 186 (1986). The right to marry without government interference has been held to be a fundamental right. Zablocki v. Redhail, 434 U.S. 374, 383-86 (1978); Loving v. Virginia, 388 U.S. 1, 12 (1967); see also Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (“Marriage and procreation are fundamental to the very existence and survival of the [human] race.”)

160 Developments in the Law, supra note 8, at 1584-85.

161 See, e.g., Port v. Heard, 764 F.2d 423, 430 (5th Cir. 1985); United States v. Lefkowitz, 618 F.2d 1313, 1319 (9th Cir. 1980); LaRoche v. Wainwright, 599 F.2d 722, 726 (5th Cir. 1979); United States v. Doe, 478 F.2d 194, 195 (1st Cir. 1973); see also United States v. Hicks, 420 F. Supp. 533, 536 (N.D. Tex. 1976) (privilege is not constitutionally based and can be altered or even abolished at will).
yond all accepted bounds. The communications most logically protected by the right to privacy, those made in confidence between husband and wife, are already protected by the confidential communications privilege. What remains is testimony about nonconfidential matters, the knowledge of which did not necessarily arise from the marital relationship. There is no legitimate expectation that marriage immunizes one spouse from testimony by the other spouse concerning matters that are neither confidential nor private. Although several Supreme Court decisions have provided protection for the right to marry, that right is not implicated by the in-court testimony of one spouse against the other.\(^{162}\)

Some believe that the Supreme Court’s decision in *Branzburg v. Hayes*\(^{163}\) forecloses any hope of recognizing a broad constitutionally-based marital privilege.\(^{164}\) Despite empirical data, the Court failed to recognize a reporter’s privilege arguably based on first amendment rights, suggesting a hostility towards creating new privileges.\(^{165}\)

The Court’s refusal to uphold a parent-child privilege further exemplifies its reluctance to create privileges with constitutional foundations. While there is ample support from commentators,\(^{166}\) only

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\(^{162}\) By contrast, application of the right to privacy to the confidential communications privilege is more logical. Requiring that confidential conversations be recounted in court intrudes into the private aspects of the relationship, possibly violating an expectation of privacy held by the spouses when the communications were made. *Cf. Katz v. United States*, 389 U.S. 347, 353 (1967) (justifiable reliance on privacy of phone booth). Even the confidential communications privilege, however, would not be appropriate for constitutional protection. In balancing the strong state interest in just adjudication, the threat to the right to make family decisions is not “sufficiently grievous . . . to establish a constitutional [privilege].” Note, *supra* note 49, at 199 (quoting Whalen v. Roe, 429 U.S. 589, 600 (1977)).

\(^{163}\) 408 U.S. 665 (1972).

\(^{164}\) Krattenmaker, *supra* note 37, at 96-98.

\(^{165}\) *Id.* Subsequent empirical data has demonstrated that despite the Court’s refusal to create a privilege, the press continues to rely on confidential news sources. Surveyed reporters stated that they continued to use confidential sources after *Branzburg* in roughly the same percentage as they did before the decision. News coverage has not been adversely affected by the possibility that reporters would have to disclose confidential information. Osborn, *The Reporter’s Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 COLUM. HUM. RTS. L. REV. 57, 72-75 (1985).

a handful of jurisdictions have recognized such a privilege. 167 Significantly, advocates of the parent-child privilege argue that it protects only confidential communications and not adverse testimony. 168 Judicial hostility to creation of new privileges, especially those with constitutional rationales, bodes ill for the recognition of constitutional dimensions to the adverse testimony privilege.

IV
PROPOSAL TO ABOLISH THE PRIVILEGE

During the history of the adverse testimony privilege, courts have puzzled over its uncertain origins, developed numerous exceptions to avoid its application, and yet voiced an unwillingness to do away with it, 169 probably due to the inertia which accompanies a 400-year-old privilege. All the while, commentators have urged the elimination of the privilege which they have referred to as an "archaic survival," 170 "merest anachronism," 171 and "sentimental relic." 172 As Dean Wigmore concluded, "[r]eform in this area of the law is long overdue." 173

The Supreme Court has consistently been critical of evidentiary privileges, reasoning that privileges "are not lightly created nor expansively construed, for they are in derogation of the search for..."
It follows that if a privilege which has been strictly applied and subsequently modified no longer adequately serves its underlying policy rationales, it should be abolished.

Application of the adverse testimony privilege, especially since Trammel, demonstrates that the time has come to eliminate the privilege. This is not to say that marriage is no longer deserving of respect or protection. It is only an acknowledgment that the privilege, even as reformed, does a poor job of protecting marriage and deprives the judicial system of valuable testimony.

A. Reform Is Not an Adequate Solution

In criticizing the adverse testimony privilege, a number of courts and commentators have suggested modifying the privilege. None of the proposed changes provides a satisfactory response to the deficiencies of the privilege.

One commentator acknowledges that the privilege serves little or no purpose in most cases and instead obstructs the discovery of truth. Rather than abolish the privilege, however, he suggested that a party claiming the privilege bear the burden of showing the

174 United States v. Nixon, 418 U.S. 683, 710 (1974); see also Herbert v. Lando, 441 U.S. 153, 175 (1979) ("Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances.") (footnote omitted); Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting) (Limitations on the truth-seeking process should be allowed "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."); United States v. Bryan, 339 U.S. 323, 331 (1950) ("the public... has a right to every man's evidence.")

Several courts have taken these admonitions to heart in declining to create new evidentiary privileges. See Matthews v. United States, 714 F.2d 222 (2d Cir. 1983) (declining to create an in-laws privilege); United States v. Jones, 683 F.2d 817 (4th Cir. 1982) (parental privilege rejected).

175 "[W]e realize the possibility that the social benefit of the [adverse testimony] privilege may be minimal and that it could be dispensed with without serious erosion of marriages." In re Malfitano, 633 F.2d 276, 280 (3d Cir. 1980).

At the same time, the confidential communications privilege should be retained. It encourages free communication between spouses, much as the attorney-client privilege does between attorney and client. One commentator argues that the post-Trammel decisions demonstrate a unification of the adverse testimony and the confidential communications privileges in that the focus is now on protecting confidential marital communications. See Comment, supra note 70, at 765-67. What the author fails to consider is that the adverse testimony privilege is not in any way limited to preventing disclosure of confidential communications. In a general sense it arguably helps preserve the marriage so that future confidential communications may take place. There is, however, nothing in the recent court decisions that suggests it is this focus which dictates the contours of the current privilege.

176 Comment, supra note 7, at 322.
need for it based on the facts of the case. Only where it can be shown that the testimony will cause "real damage" will the privilege be sustained. This approach would supposedly strike the proper balance between the interests of society in ascertaining truth and in preserving the marital relationship. It does not explain, however, how a judge would determine whether "real damage" will result. Even a psychologist would have difficulty making accurate predictions.

The Fifth Circuit articulated, but did not actually apply, a modification of the privilege. The court suggested a balancing test: "Applicability of the marital privilege is determined on a case-by-case basis, after a careful balancing of the public's need for disclosure on the one hand against the need to protect the marital relationship on the other." The problem with this balancing test is how, as a practical matter, a trial judge can possibly balance these two competing concerns? As noted above, it is almost impossible to determine how a particular marriage will fare after one spouse adversely testifies against another. Furthermore, how is a judge to weigh the "public's" need for disclosure in any given case? If only the witness-spouse is capable of giving the particular testimony and it is relevant, will the judge always overrule the privilege? If so, the privilege will often, if not always, be rejected. If the privilege will be overridden only for "important" testimony, how is a judge to know mid-trial how much more the prosecution needs to convince the jury of the defendant's guilt?

Another approach suggests expanding the privilege to nonmarital, intimate relationships. Traditionally, the law's protection focused on the marital relationship because marriage was considered part of the foundation of Western society. In recent years, relationships outside of marriage have become more common and accepted. If the privilege is to survive and be applied in a principled manner, it would have to be extended to other kinds of intimate relations and perhaps simultaneously be restricted in the case of marriages where the intimacy has been lost or never existed. The intimate relations privilege, like the adverse testimony privi-

177 Id.
178 Id.
179 Id.
181 Developments in the Law, supra note 8, at 1589-90.
182 See id. at 1582; Levinson, supra note 151, at 651-53. In response, it has been
lege, would only be available to the witness, not the party. "Intimate relationships" would include parent-child, unmarried cohabitants, homosexual lovers, and "intimate" friends.\textsuperscript{183} Proponents of an intimate relations privilege argue that the law should respect the individual's choice of an intimate relationship.\textsuperscript{184}

A problem with this approach is that it fails to offer a logical or even ascertainable point at which protection can be considered unnecessary. Once some intimate relations are recognized, how can others be excluded? Who is to say best friends, in-laws, and roommates should not receive protection?

\textbf{B. Abolition is the Only Alternative}

This Article suggests that the adverse testimony privilege be abandoned completely and that only confidential marital commun-

argued that the marital relationship is unique in that it is easily destroyed through estrangement and divorce.

If the privilege were, for example, extended to those having a general family relationship, it would be impossible to draw the line. Children, brothers, sisters, and even those only related by marriage would be included within the privilege. See Port v. Heard, 594 F. Supp. 1212, 1219-20 (S.D. Tex. 1984), aff'd, 764 F.2d 423 (5th Cir. 1985).

\textsuperscript{183} The law would recognize a rebuttable presumption for certain accepted relationships such as marriage, parent-child, and couples who have lived together for more than two years. A member of any other relationship would have the burden of convincing the court that their particular relationship had the requisite degree of intimacy. \textit{Developments in the Law}, supra note 8, at 1591-92; see also Krattenmaker, \textit{Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach}, 64 GEO. L.J. 613, 664 (1976) (communications should be presumptively privileged if made "between individuals intimately related or in a position of close personal trust"). No specific guidance is given as to how the court is to determine how much intimacy there must be before the privilege will apply. At least the marital privilege has the virtue of making identification of protected witnesses easier. See Levinson, supra note 151, at 648.

\textsuperscript{184} See Levinson, supra note 151, at 645 (questioning why intimate and family relations outside of marriage are not protected). A commentator promoting this expanded privilege argues that marriage is a "male-dominated institution" and that limiting the privilege to marriage is thus harmful to women. \textit{Developments in the Law}, supra note 8, at 1590-91. According to the author:

One explanation of family privilege law suggests that the male-dominated structure of our society accounts for the limitation of family privileges to marital relationships. This explanation argues from the premise that the legal institution of traditional marriage supports husbands' dominion over wives. . . . Although marital privileges do not directly promote male domination, they help to maintain male power by promoting the institution of marriage. . . .

The feminist power theory provides a particularly persuasive explanation of the historical development of marital privileges. \textit{Id.} at 1586.

The adverse testimony privilege has traditionally protected men from their wives' testimony. To this extent the privilege itself is discriminatory.
ocations be protected by a privilege. In *Trammel*, the Supreme Court chose to modify rather than abolish the privilege despite Dean Wigmore’s arguments against it. While acknowledging the criticism of the privilege, the Court deferred to inertia, noting "the long history of the privilege suggests that it ought not to be casually cast aside."

Marital harmony would not be significantly harmed by elimination of the privilege in the few situations where it applies. The adverse testimony privilege only applies if the following facts are present: the witness-spouse does not want to testify voluntarily; the testimony does not concern confidential communications; the spouse is legally and happily married; the spouse was not jointly participating in criminal activity with the defendant; and the spouse is not called upon to testify about a crime against him or herself or his or her children. By definition, the privilege protects only involuntary testimony by a witness-spouse. How harmful is it to a relationship when a witness-spouse is forced to testify and face contempt sanctions? Perhaps in extreme cases, the party-spouse would expect the witness-spouse to refuse to testify and face contempt sanctions. In many, if not most, other instances, where the testimony is not very damaging or the potential punishment is not great, the party-spouse can hardly expect the witness-spouse to do anything but testify. The blame in such instances, if rationally placed, would be on the prosecution and not on the spouse. This fact, coupled with the strong need for the spouse’s evidence, which will often be highly credible, makes clear that any resultant harm is

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This privilege has no longer any good reason for retention. In an age which has so far rationalized, depolarized, and de-chivalrized the marital relation and the spirit of Femininity as to be willing to enact complete legal and political equality and independence of man and woman, this marital privilege is the merest anachronism, in legal theory, and an indefensible obstruction to truth, in practice.

8 J. WIGMORE, supra note 2, § 2228, at 221; see also *Wyatt v. United States*, 362 U.S. 525, 536 n.5 (1960); *In re Grand Jury Subpoena*, 755 F.2d 1022, 1026-27 (2d Cir. 1985); C. McCORMICK, supra note 42, § 66, at 162-63.


187 As one judge noted:

If I were free to do so I would hold that the rule of *Hawkins v. United States*, recognizing a privilege of one spouse not to testify against the interest of the other, should be overruled, because it is based upon a supposititious impact of such testimony upon that interspousal relationship in the future, which impact has no support in any behavioral science evidence.

*In re Malfitano*, 633 F.2d 276, 281 (3d Cir. 1980) (Gibbons, J., concurring) (citation omitted).
insufficient to justify continuation of the adverse testimony privilege.

The concern about the natural repugnance of one spouse implicating the other spouse also fails to justify continuation of the privilege. In *Trammel*, the Supreme Court stated:

> It is argued that abolishing the privilege will permit the Government to come between husband and wife, pitting one against the other. That, too, misses the mark. Neither *Hawkins*, nor any other privilege, prevents the Government from enlisting one spouse to give information concerning the other or to aid in the other's apprehension. It is only the spouse's testimony in the courtroom that is prohibited.¹⁸⁸

As the Court's comment implies, "natural repugnance" is not a compelling rationale for upholding the privilege. By limiting the privilege to testimony in the courtroom, the Court allows the witness-spouse to potentially harm the party-spouse and, presumably, the marriage, by implicating the party-spouse in statements made outside the courtroom. Little concern is demonstrated about the effect of such out-of-court statements on the marriage.

Though many decisions since *Trammel* have found ways to circumvent the adverse testimony privilege,¹⁸⁹ many have upheld it.¹⁹⁰ Those cases which have upheld the privilege provide little support for its continuation. In *In re Grand Jury Proceedings*,¹⁹¹ the court upheld the privilege despite the fact that the marriage at issue took place between grand jury appearances by the witness-spouse. It is hard to see the need to protect marital harmony when the witness' earlier testimony did not interfere with her marrying the target of the investigation. The privilege was also upheld for testimony concerning events prior to the marriage, which included all the testimony sought. Admittedly, other courts have refused to apply the privilege in such instances to avoid the necessity of minitrials on the possibility of a sham marriage.¹⁹²

Another court surprisingly upheld the privilege in a situation involving a former Assistant United States Attorney facing criminal charges in another case.¹⁹³ The defendants in the instant case

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¹⁸⁸ Trammel v. United States, 445 U.S. at 52 n.12 (emphasis added).
¹⁸⁹ See discussion of exceptions to the privilege, supra Part II.
¹⁹⁰ See, e.g., *In re Grand Jury Proceedings*, 664 F.2d 423, 430 (5th Cir. 1982) (in a prosecution for contempt, the spousal privilege was upheld regarding questions that might reflect negatively on the defendant spouse's innocence).
¹⁹² See, e.g., United States v. Clark, 712 F.2d 299, 302 (7th Cir. 1983).
¹⁹³ United States v. Venuti, No. 84 CR 1002, slip op. (S.D.N.Y. Sept. 20, 1985)
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sought testimony to establish that the United States Attorney had failed to seal surveillance tapes as required by law because of his cocaine habit. The government attributed his lack of compliance to overwork. The United States Attorney's wife, who was called to testify about his activity, invoked the adverse testimony privilege. Despite the fact that the couple had filed for divorce, the court upheld the privilege due to the possibility of reconciliation.\textsuperscript{194} Without facts supporting the marital harmony rationale, the court placed special reliance on the natural repugnance rationale, rarely an explicit ground for decision.\textsuperscript{195}

In another extreme example, a federal court upheld an injunction against a couple getting married, despite the woman's pregnancy, in order to prevent the use of the adverse testimony privilege.\textsuperscript{196} To this court, obtaining trial testimony was more important than any highly speculative harm to the marriage. Ironically, the privilege, which was designed to protect and preserve marriages, in this case prevented one.

Even if there were some vitality to the privilege in those cases to which it still applies, the fact that the exceptions have almost replaced the rule undermines the privilege's social benefit. Application of the numerous exceptions diverts the attention of the court from the determination of guilt to tangential issues such as the vitality of the marriage. The large number of exceptions also provides fertile ground for appeal, thus delaying resolution of cases and consuming judicial and prosecutorial resources.

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Few of the exceptions which have been carved out serve the underlying policies of the privilege. For example, courts often admit out-of-court statements made by a spouse which lead to a conviction of the other spouse. The joint participant exception also allows testimony by one spouse to lead to the other's conviction, albeit justified by the spouses' cooperative criminal efforts. Likewise, the unusual holding in \textit{Ryan v. Commissioner},\textsuperscript{197} where the court found a marriage so strong that it needed no protection from the privilege ignores the policies behind the privilege. Adverse testimony could

\begin{footnotes}
\textsuperscript{194} See \textit{Id.} This appears to be an empathetic reaction to a former prosecutor being the object of scrutiny in a criminal case. It also demonstrates the danger of providing the judge with too much discretion in applying the privilege.


\textsuperscript{197} 568 F.2d 531 (7th Cir. 1977), \textit{cert. denied}, 439 U.S. 820 (1978).
\end{footnotes}
harm even a strong marriage, and the fact that a marriage is strong and long-lasting makes it no less repugnant when one spouse is the tool by which the other is convicted.

Moreover, the privilege as it stands today does not correspond to contemporary social realities about the institution of marriage. It is illogical to limit the privilege to married couples when there are many other relationships that deserve protection. However, expanding the privilege to cover these relationships is no more logical.¹⁹⁸

The Supreme Court has demonstrated its hostility to claims of privilege, especially in the criminal context.¹⁹⁹ On balance, the interests of the judicial system outweigh the interests protected by the privilege, even assuming they have constitutional underpinnings. In the case of the adverse testimony privilege, the constitutional arguments are weak, while the interest in credible, relevant evidence is compelling, given society’s interest in protecting the public welfare through enforcement of the law. The time has come to question the worth of the adverse testimony privilege. The answer is that the privilege is no longer worth the price.

¹⁹⁸ To demonstrate the difficulty of expanding the privilege, one commentator proposed a “fantasy” in which each citizen received privilege tickets to distribute to people he or she interacted with in order to protect their relationships. Levinson, supra note 151, at 654-62. Aside from the insurmountable administrative problems, there would be a tremendous burden on the individual in choosing to whom tickets should be given. The current privilege at least has the virtue of not, albeit paternalistically, placing the decision of which relationships are most valuable in the hands of the individual.