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## Trammel v. United States, 100 S. Ct. 906 (1980)

M. J. Lord

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## CASE NOTES

**Evidence—LIMITATION ON THE FEDERAL HUSBAND-WIFE EVIDENTIARY PRIVILEGE—***Trammel v. United States*, 100 S. Ct. 906 (1980).

In 1958 the United States Supreme Court in *Hawkins v. United States*<sup>1</sup> was presented with the opportunity to do away with the federal evidentiary privilege prohibiting one spouse from testifying against the other without the consent of the defendant spouse. In the federal courts before 1958, the privilege had been applicable only in criminal trials where "life or liberty is at stake."<sup>2</sup> At the time *Hawkins* was decided a number of states had modified the "anti-marital facts"<sup>3</sup> privilege or abolished it altogether.<sup>4</sup> In addition, several authorities on the law of evidence had criticized the rule extensively.<sup>5</sup> For example, in 1923 Professor Wigmore found the "privilege has no longer any good reason for retention,"<sup>6</sup> and at

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1. 358 U.S. 74 (1958).

2. *Id.* at 77. It seems to have been generally understood that the privilege was available only in criminal trials. *Ryan v. Commissioner*, 568 F.2d 531 (7th Cir. 1977), was a case upholding contempt citations against husband and wife taxpayers for their refusal, based partly on the marital testimonial privilege, to answer interrogatories propounded by the Commissioner of Internal Revenue. The Seventh Circuit, while noting it was "not necessary to fully defend the civil-criminal distinction in order to reject the marital privilege in this case," observed "that the privilege has the greatest societal value in criminal cases because it encourages the preservation of a marriage that might assist the defendant spouse in his or her rehabilitation efforts. . . . This rationale would not be applicable in a civil case." 568 F.2d at 544 (citations omitted).

3. In *United States v. Lustig*, 555 F.2d 737, 747 (9th Cir. 1977), the court noted that this marital testimonial privilege is often referred to as the anti-marital facts privilege.

4. See *Trammel v. United States*, 100 S. Ct. 906, 910 (1980).

5. See, e.g., 4 J. WIGMORE, *WIGMORE ON EVIDENCE* § 2228 (2d ed. 1923); C. McCORMICK, *LAW OF EVIDENCE* § 83 (1st ed. 1954). McCormick argued: "All extensions [of the marital privilege] beyond communications seem unjustified. The acts thus protected are frequently acts done in furtherance of a crime or fraud, and thus under the principle developed for the cognate privilege for attorney client communications, should not be protected from disclosure even by direct communication." *Id.* at 171 (footnotes omitted).

6. 4 J. WIGMORE, *supra* note 5, § 2228 at 761. Wigmore also noted:

The record of judicial ratiocination defining the grounds and policy of this privilege forms one of the most curious and entertaining chapters of the law of Evidence. It is curious, because the variety of ingenuity displayed, in the invention of reasons "ex post facto," for a rule so simple and so long accepted, could hardly have been believed, but for the recorded utterances. It is entertaining (if any error in the law can ever be entertaining), because of its exhibition of the subtle power of cant over reason, and of the solemn absurdity of explanations which do not explain and of justifications which do not justify, and because of the fantastic spectacle of a fundamental rule of Evidence, which never had a good reason for existence, surviving none the less through two centuries upon the strength of certain artificial dogmas—pronouncements wholly irreconcilable with each other, with the facts of life, and with the rule itself, and yet repeatedly invoked, with

least as early as 1954, Professor McCormick pointed out that the "real source of the privilege" was "emotion and sentiment" and "this motive . . . while worthy and desirable, will not stand in the balance with the need for disclosure in court of the facts upon which a man's life, liberty, or estate may depend."<sup>7</sup>

The Court in *Hawkins* declined the opportunity to change this "exclusionary rule based on the persistent instincts of several centuries,"<sup>8</sup> expressing its concern that the privilege was still necessary for the preservation of "family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well."<sup>9</sup> The Court pointed to the "widespread success achieved by courts throughout the country in conciliating family differences" and its belief that adverse testimony given without the consent of the defendant spouse would destroy marriages that might otherwise be saved.<sup>10</sup>

The Government had urged modification of the rule so that the privilege would belong to the witness spouse rather than the defendant spouse. Under this version of the privilege, one spouse would be permitted to testify voluntarily against the other spouse without the consent of the defendant spouse, although the

smug judicial positiveness, like magic formulas, to still the spectre of forensic doubt. No one of these supposed reasons was ever logically carried out in the enforcing of the rule; no one of them represented a sound cause for its existence; and no one of them, in all probability, reproduced the motives or sentiments which actually served for the original acceptance of the rule in the 1500s.

*Id.* at 753.

7. C. McCORMICK, *supra* note 5, § 90 at 179-80. McCormick's complete statement was: All of us have a feeling of indelicacy and want of decorum in prying into the secrets of husband and wife. It is important to recognize that this is the real source of the privilege. When we do, we realize at once that this motive of delicacy, while worthy and desirable, will not stand in the balance with the need for disclosure in court of the facts upon which a man's life, liberty, or estate may depend.

*Id.* Dealing in terms of both the testimonial and confidential communications privileges, McCormick offered a solution to the problem which has in a sense been adopted by the federal courts since *Hawkins*:

This solution is to recognize, by statute, rule of court or decision, that the privilege is not an absolute but a qualified one, which must yield if the trial judge finds that the evidence of the communication is required in the due administration of justice. The judge could then protect the marital confidence when it should be protected, namely, when the material fact sought to be established by the communication is not substantially controverted and may be proven with reasonable convenience by other evidence.

*Id.* at 180 (footnote omitted).

8. 358 U.S. at 79.

9. *Id.* at 77.

10. *Id.* at 77-78.

nondefendant could not be compelled to testify. The Court noted the absence of case authority to support "such a distinction between compelled and voluntary testimony,"<sup>11</sup> however, and based its rejection of the recommended rule on contemporary reason and experience, given the underlying goal of preserving domestic harmony.<sup>12</sup> Lastly, the Court assigned further consideration of the rule and any desirable changes to Congress or future decisional law, leaving an avenue open for "whatever changes in the rule may eventually be dictated by 'reason and experience.'"<sup>13</sup>

Twenty-two years later, accompanied by considerable press attention,<sup>14</sup> the Court decided *Trammel v. United States*.<sup>15</sup> The *Trammel* Court unanimously affirmed the Tenth Circuit's refusal to follow *Hawkins* and thereby rejected the anti-marital facts privilege.<sup>16</sup> The ruling was based on a reconsideration of essentially the same arguments presented by the Government in *Hawkins*, a cir-

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11. *Id.* at 77.

12. *Id.* In rebutting the Government's argument, the Court noted:

The widespread success achieved by courts throughout the country in conciliating family differences is a real indication that some apparently broken homes can be saved provided no unforgivable act is done by either party. Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage.

*Id.* at 77-78.

13. *Id.* at 78-79. The Court cited the then limited nature of statutory and case law exceptions to the rule in support of its contention that "there is still a widespread belief, grounded on present conditions, that the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences." *Id.* at 79. The only statutory exceptions available were in prosecutions for bigamy, polygamy or unlawful cohabitation, and for the importation of aliens for immoral purposes. *Id.* at 78 (citing *Miles v. United States*, 103 U.S. 304 (1880); *Immigration and Nationality Act*, ch. 477, § 278, 66 Stat. 230 (1952) (current version at 8 U.S.C. § 1328 (1976)); *Act of March 3, 1887*, ch. 397, § 1, 24 Stat. 635 (1887) (repealed 1948)). Case law had evolved to the point where a witness spouse could testify against a defendant spouse when the witness spouse had been the victim of the offense against the person of his wife. *Stein v. Bowman*, 38 U.S. 209, 221 (1839). Although the rule in its original form prohibited a spouse from testifying for as well as against the other spouse regardless of consent, with *Funk v. United States*, 290 U.S. 371 (1933), spouses were able to testify favorably for one another; the incompetency rationale founded in the theory that husband and wife were one, was flatly rejected. *Id.* at 381. The ability to offer adverse testimony would seem to follow from the recognition of spouses as competent witnesses, but this was qualified to require consent of the spouse to be testified against. *See Hawkins*, 358 U.S. at 78.

14. Regional newspapers carried stories on the decision. *See, e.g.*, *Atlanta Constitution*, Feb. 28, 1980, § A at 1, col. 4; *Miami Herald*, Feb. 28, 1980, § A at 1, col. 3; *Wermiel, Supreme Court Decides That One Spouse Can Testify Voluntarily Against Other*, *Wall St. J.*, Feb. 28, 1980, at 19, col. 2.

15. 100 S. Ct. 906, 914 (1980).

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

cumstance the Court seemed to acknowledge in its analysis.<sup>17</sup> Despite Justice Stewart's criticism in his concurring opinion of the manner in which the decision was explained,<sup>18</sup> few would argue with the result reached by the Court. The Court used this opportunity to rid the federal judicial system of an outdated and increasingly cumbersome rule. Apparently the instincts of the Court in 1980 finally eclipsed the "persistent instincts of several centuries."<sup>19</sup>

The evidentiary privilege question was presented in slightly differing factual contexts in *Hawkins* and *Trammel*, although each situation involved a degree of participation by the witness spouse in the criminal activity of the defendant spouse.

*Hawkins* was a prosecution under the Mann Act.<sup>20</sup> The defendant was charged with transportation of a seventeen-year-old girl from Arkansas to Oklahoma for immoral purposes.<sup>21</sup> The defendant's prostitute wife, whose testimony the court viewed as "a strong suggestion to the jury that petitioner was probably the kind of man to whom such a purpose would have been perfectly natural,"<sup>22</sup> participated in the acts culminating in criminal charges against her husband to the extent of giving the illegally transported girl advice on trade practices. She also travelled with the girl in an automobile owned by the defendant's wife from Oklahoma back to Arkansas where they rejoined the defendant.<sup>23</sup> Testimony given by the defendant's wife against her husband constituted the grounds for reversal.<sup>24</sup>

17. See *Trammel*, 100 S. Ct. at 909-12.

18. Mr. Justice Stewart stated:

Although agreeing with much of what the Court has to say, I cannot join an opinion that implies that "reason and experience" have worked a vast change since the *Hawkins* case was decided in 1958. . . .

The fact of the matter is that the Court in this case simply accepts the very same arguments that the Court rejected when the Government first made them in the *Hawkins* case in 1958.

100 S. Ct. at 914 (Stewart, J., concurring).

19. 358 U.S. at 79.

20. 18 U.S.C. § 2421 (1976). This act provides punishment for those who transport or aid in the transportation of a female in interstate or foreign commerce or in the District of Columbia or in any territory or possession of the United States for the purpose of prostitution, debauchery, or for any immoral purpose, or to induce the female to partake in these activities.

21. *Hawkins v. United States*, 249 F.2d 735, 736 (10th Cir. 1957), *rev'd*, 358 U.S. 74 (1958). The complete facts are set forth in 249 F.2d at 737.

22. 358 U.S. at 81.

23. 249 F.2d at 737.

24. 358 U.S. at 74.

In *Trammel*, Otis Trammel was one of three defendants charged with conspiracy to import heroin.<sup>25</sup> Elizabeth Trammel, Otis's wife, was an unindicted co-conspirator who agreed to testify against the charged defendants in return for an assurance that her testimony would not be used against her and for a guarantee of lenient treatment. The indictment alleged Mr. and Mrs. Trammel had flown to the Philippines with some heroin. From there, Mrs. Trammel proceeded to Thailand and bought more heroin, which was discovered in her possession upon her arrival in Hawaii. Mrs. Trammel subsequently agreed to cooperate with government officials.

The *Trammel* Court acknowledged the sensitive nature of the issue, but suggested that visible changes had taken place since 1958 which justified the abandonment of the anti-marital facts privilege when it said:

Although Rule 501 [of the Federal Rules of Evidence] confirms the authority of the federal courts to reconsider the continued validity of the *Hawkins* rule, the long history of the privilege suggests that it ought not to be casually cast aside. That the privilege is one affecting marriage, home, and family relationships—already subject to much erosion in our day—also counsels caution. At the same time we cannot escape the reality that the law on occasion adheres to doctrinal concepts long after the reasons which gave them birth have disappeared and after experience suggests the need for change.<sup>26</sup>

Eventually the Court concluded that “‘reason and experience’ no longer justify so sweeping a rule as that found acceptable by the Court in *Hawkins*.”<sup>27</sup> If the Court could have further explicated the experience to which it alluded rather than merely reiterating the arguments made in *Hawkins*, perhaps the Court's decision would be more informative. The erosion of policy-based rules, however, seems to be a process insusceptible to precise documentation. Given the myriad exceptions to *Hawkins* promulgated over the last twenty-two years, the Court has responded, if instinctively, to the clear demonstration of “the fallacy or unwisdom of the old rule.”<sup>28</sup>

Two separate marital privileges have long been recognized in the federal courts: (1) the marital privilege protecting confidential communications, similar in scope to other special relationship evi-

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25. The facts are set forth in *Trammel*, 100 S. Ct. at 908-09.

26. *Id.* at 911.

27. *Id.* at 914.

28. *Funk v. United States*, 290 U.S. 371, 381 (1933).

dentiary privileges, and (2) the ban on adverse testimony without the consent of defendant spouse, labelled the "anti-marital facts" privilege.<sup>29</sup> The first privilege, regarding confidential communications, allows one spouse to prevent the other from testifying as to "intra-spousal, confidential expressions arising from the marital relationship."<sup>30</sup> Either the testifying spouse or the defendant spouse may assert this privilege. In this respect it is unlike the anti-marital facts privilege.<sup>31</sup> After *Trammel* the confidential communications privilege remains fully intact, but certain requirements must be met in order to claim it. Most obviously, common sense and the cases indicate that in order to claim the privilege, a valid marriage must have existed when the communication was made.<sup>32</sup> To be privileged, moreover, the communications must have been "utterances or expressions intended by one spouse to convey a message to the other."<sup>33</sup> An expression or communication does not become privileged solely because one spouse made the expression in the presence of the other.<sup>34</sup> The husband and wife must have intended the communication to be confidential. Therefore, it must not have occurred in the presence of third persons.<sup>35</sup> Those claiming the privilege must have been communicating in their roles as spouses<sup>36</sup> and not, for example, as business partners. The communicating spouse alone, however, may consent to the revelation of the communications.<sup>37</sup> Courts have held that to prevent waiver the communicating spouse must continuously assert the privilege,<sup>38</sup> and that the privilege is not applicable to intraspousal communications made in the process of joint commission of a crime.<sup>39</sup> The privilege

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29. See *United States v. Cameron*, 556 F.2d 752, 755 (5th Cir. 1977); *United States v. Lustig*, 555 F.2d 737, 747 (9th Cir. 1977); *United States v. Allery*, 526 F.2d 1362, 1365 (8th Cir. 1975). See also Annot., 46 A.L.R. Fed. 735, 739 (1980).

30. *United States v. Lustig*, 555 F.2d 737, 747 (9th Cir. 1977).

31. See *McCORMICK ON EVIDENCE* 169-70 (2d ed. 1972).

32. *Id.* For cases on the marital privilege regarding confidential communications see Annot., 46 A.L.R. Fed. 735, 756-59 (1980).

33. *United States v. Lustig*, 555 F.2d 737, 748 (9th Cir. 1977) (citing *Pereira v. United States*, 347 U.S. 1, 6 (1954)).

34. *United States v. Lustig*, 555 F.2d 737, 748 n.13 (9th Cir. 1977).

35. *Id.* at 748; *Wolfe v. United States*, 291 U.S. 7, 14 (1934).

36. *United States v. Kahn*, 471 F.2d 191, 194 (7th Cir. 1972) (citing Annot., 4 A.L.R.2d 835 (1949)).

37. *Fraser v. United States*, 145 F.2d 139, 144 (6th Cir. 1944), *cert. denied*, 324 U.S. 849 (1945).

38. *United States v. Figueroa-Paz*, 468 F.2d 1055, 1057 (9th Cir. 1972).

39. *United States v. Mendoza*, 574 F.2d 1373, 1380 (5th Cir.), *cert. denied*, 439 U.S. 988 (1978).

only applies to communications occurring during the marriage,<sup>40</sup> but unlike the anti-marital facts privilege, the protection afforded confidential communications continues to apply even after the termination of the marriage.<sup>41</sup>

The early common law justification for the anti-marital facts privilege, which barred spouses from testifying in favor of or against one another in civil or criminal proceedings, was the theory that husband and wife constituted one unit and thus, were precluded by self-interest from testifying concerning each other.<sup>42</sup> For this reason, a spouse was viewed as incompetent to testify either for or against the other spouse. In *Funk v. United States*,<sup>43</sup> the Court abandoned the self-interest theory and qualified the absolute bar on spousal testimony by making spouses competent to testify in favor of one another. The *Trammel* Court further modified the privilege so that a willing spouse is now competent to testify against as well as in favor of the other spouse.

#### ANALYSIS OF *Trammel*

The *Trammel* Court began by noting the further erosion of the anti-marital facts privilege among the various jurisdictions.<sup>44</sup> In *Hawkins* the Court had observed "most American States retain the rule, though many provide exceptions in some classes of cases."<sup>45</sup> Apparently thirty-one of fifty states retained the rule at the time *Hawkins* was decided, whereas presently only twenty-four states allow the anti-marital facts privilege.<sup>46</sup> The steady trend of states abandoning the rule is notable as an expression of continuing dis-

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40. *United States v. Pensinger*, 549 F.2d 1150, 1151 (8th Cir. 1977).

41. *United States v. Lustig*, 555 F.2d 737, 747 (9th Cir. 1977).

42. 358 U.S. at 75. See also *United States v. Lustig*, 555 F.2d 737, 747 (9th Cir. 1977).

43. 290 U.S. 371 (1933). When *Funk* was decided, "Widespread disqualifications because of interest . . . had long since been abolished both in this country and in England in accordance with the modern trend which permitted interested witnesses to testify and left it for the jury to assess their credibility." 358 U.S. at 76. See also *United States v. Fisher*, 518 F.2d 836, 839 (2d Cir. 1975) (the Second Circuit ruled that since the defendant's marriage had little chance of survival, there was no reason to involve the anti-marital facts privilege).

44. 100 S. Ct. at 911-12.

45. 358 U.S. at 78 (footnote omitted).

46. 100 S. Ct. at 911-12 n.9. Florida is one of the states cited as having abolished the privilege in criminal cases. FLA. STAT. §§ 90.501, .504 (1979), became effective July 1, 1979, as part of the newly adopted Florida Evidence Code. It should be noted, however, that the privilege did not exist in Florida's statutes prior to the adoption of the Florida Evidence Code. See ch. 4029, 1891 Fla. Laws 56 (repealed 1978); ch. 70-339, § 100, 1970 Fla. Laws 1038 (current version at FLA. STAT. § 914.07 (1979)).



approval, even though nearly half the states retain it yet.<sup>47</sup>

Continued scholarly criticism is cited in *Trammel* as a second reason for abandoning *Hawkins*.<sup>48</sup> A number of articles criticizing the result in *Hawkins* have been written since 1958; a rash of critical comments appeared immediately after *Hawkins* and sporadic calls for abandonment of the anti-marital facts privilege have appeared since.<sup>49</sup> In 1976, a commentator advocated a case-by-case approach to adverse spousal testimony, claiming, "the marital privilege, in its modern context, serves little or no purpose in the majority of cases other than to obstruct the discovery of truth."<sup>50</sup>

In further support of *Trammel's* rejection of the common law rule, the Court in *Trammel* noted the broad sweep of the anti-marital facts privilege, which prohibited all adverse spousal testimony. Other evidentiary privileges protect only matters within a defined scope, such as confidential communications within the attorney-client privilege.<sup>51</sup> The broader marital testimonial privilege

47. 100 S. Ct. at 911-12.

48. *Id.* at 912 & n.11.

49. See, e.g., 45 CORNELL L. Q. 121, 124 (1959). More recently, see Comment, *The Husband-Wife Evidentiary Privileges: Is Marriage Really Necessary?* 1977 ARIZ. ST. L. J. 411, 429-33 (1977); Comment, *Questioning the Marital Privilege: A Medieval Philosophy in a Modern World*, 7 CUM. L. REV. 307, 318-21 (1976).

50. Comment, 7 CUM. L. REV. *supra* note 49, at 322.

51. The Court specifically noted:

The privileges between priest and penitent, attorney and client, and physician and patient limit protection to private communications. These privileges are rooted in the imperative need for confidence and trust. The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. Similarly, the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment.

The *Hawkins* rule stands in marked contrast to these three privileges. Its protection is not limited to confidential communications; rather it permits an accused to exclude all adverse spousal testimony.

100 S. Ct. at 913.

Even the more limited privileges are subject to attack, and it is said that evidentiary privileges in general are to be "narrowly construed because they block the judicial fact-finding function." *Ryan v. Commissioner*, 568 F.2d 531, 542 (7th Cir. 1977). See also *United States v. Nixon*, 418 U.S. 683, 709-10 (1974) (the Court noted the need for all relevant facts in rejecting Nixon's contention of an absolute executive privilege). In *United States v. Mendoza*, 574 F.2d 1373, 1380 (5th Cir. 1978), the court observed "the call for the curtailment of both aspects of the [marital] privilege has risen from many quarters," and cited MCCORMICK ON EVIDENCE § 79 at 165 (2d ed. 1972):

[A]ll privileges, in general, and this privilege for marital confidences, in particular, are inept and clumsy devices to promote the policies they profess to serve, but are

is not therefore necessary to protect confidential communications between married persons; a second distinct privilege exists to protect them and it still remains in effect.<sup>52</sup> This is an extremely important point, the significance of which was underemphasized in the press coverage of the *Trammel* decision. *Trammel* has merely modified the anti-marital facts privilege to allow the policy favoring full disclosure to dominate when truth and intimacy conflict. An unwilling spouse may still refuse to testify against the other spouse, and even a spouse who undertakes to testify adversely may not disclose communications made by the defendant spouse within the confidential marital relationship.<sup>53</sup>

The *Trammel* Court's reference to the ancient foundations of the testimonial privilege was bound to draw attention.<sup>54</sup> The observation that women are no longer viewed as chattels without separate legal identities had been made previously by the Court.<sup>55</sup> Although this observation appeals to contemporary sentiments regarding the status of women, it merely states the legally obvious and fails to disclose the reasons for the change of opinion between *Hawkins* and *Trammel*.

Finally, the *Trammel* Court refers to the "unpersuasiveness" to contemporary understanding of the reasoning traditionally used to support the anti-marital facts rule.<sup>56</sup> The best explanation for abandoning the rule would seem to rest in this transformation of values. The Court, however, did not elaborate on precisely why the rationale of preserving family peace and harmony was persuasive in 1958, but specious in 1980. This lack of discussion is due in part to earlier justification of the anti-marital facts privilege based directly upon public policy grounds and an older consensus of feelings of "natural repugnance . . . to compelling a wife or husband

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extremely effective as stumbling blocks to obstruct the attainment of justice. Accordingly the movement should be toward restriction, and not toward expansion, of these . . . relevant facts.

52. 100 S. Ct. at 912-13.

53. 100 S. Ct. at 912-14. See *Mills v. United States*, 281 F.2d 736, 740 (4th Cir. 1960) (the Fourth Circuit ruled that the trial court acted properly in refusing to compel a woman to testify either for or against her husband); *United States v. Lustig*, 555 F.2d 737, 747 (9th Cir. 1977) (the Ninth Circuit noted that the confidential communications privilege bars all testimony concerning confidential, intraspousal communications arising from the marital relationship).

54. The *Trammel* Court noted that "The ancient foundations for so sweeping a privilege have long since disappeared." 100 S. Ct. at 913.

55. See *Taylor v. Louisiana*, 419 U.S. 522, 533-37 (1975); *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975).

56. 100 S. Ct. at 913.

to be the means of the other's condemnation."<sup>57</sup> Because these concepts are matters of convention rather than exact definition, it is especially difficult to pinpoint changes in the underlying sentiment which required modification of the rule. The legal manifestation of these changes in popular attitude which led to the result in *Trammel*, however, is the proliferation of exceptions to *Hawkins* in the federal courts during the twenty-two year interim.<sup>58</sup> Prior to its reconsideration of *Hawkins*, case law had reached the point where the anti-marital facts privilege had become so complex and subject to such narrow interpretation as to leave the *Hawkins* rule virtually unavailable in some circuits. Prior to the Supreme Court's reversal of *Hawkins*, the Tenth Circuit should not have stated that it had been established that the testimonial privilege belonged to the witness spouse<sup>59</sup> because it thereby implied, contrary to *Hawkins*, that the witness spouse alone could decide to testify. The Tenth Circuit might have avoided conflict with *Hawkins* by applying an exception to the *Hawkins* rule which prevents use of the privilege when both spouses participate in the crime. Such a ruling, however, would have added a new twist to an already complex group of exceptions because then the witness spouse could have asserted her rights under the fifth amendment.<sup>60</sup> Outright abandonment of the rule was timely in 1980, in light of this mounting complexity.

### POST-*Hawkins* DEVELOPMENTS

In addition to the multitude of reasons recited by the Court for its decision, a study of post-*Hawkins* lower federal court cases involving the anti-marital facts privilege provides added insight to the *Trammel* decision. Since *Hawkins*, lower federal courts have recognized and created numerous exceptions to the privilege. These exceptions supplement the early statutory and judicial exceptions which allowed one spouse to testify without the consent of the other when the defendant spouse was being prosecuted for bigamy, polygamy, unlawful cohabitation, the transportation of aliens for immoral purposes, or a crime against the person of the testify-

57. J. WIGMORE, *supra* note 5, § 2228 at 756.

58. See, e.g., *United States v. Allery*, 526 F.2d 1362 (8th Cir. 1975) (privilege not applicable when spouse is victim of the crime charged; including fraud, adultery, and subjection to possible criminal prosecution); *United States v. Van Drunen*, 501 F.2d 1393 (7th Cir.), *cert. denied*, 419 U.S. 1091 (1974) (wife permitted to testify against her husband without his consent as both had participated in the crime).

59. *Trammel*, 583 F.2d at 1169.

60. See *id.*

ing spouse.<sup>61</sup> For example, the participation of both spouses in the crime charged creates a bar to the testimonial privilege.<sup>62</sup> The Eighth Circuit noted that the scope of the exception for a spouse who has been a victim of the crime was expanded by the inclusion of fraud, adultery, and subjection to possible criminal prosecution within the definition of an offense against the spouse.<sup>63</sup> The court in *United States v. Allery* further stated that many jurisdictions had passed laws creating an exception for cases in which children are abused or neglected.<sup>64</sup>

After the decision in *Hawkins*, the circuits differed as to whether third parties could testify to out-of-court statements made by one spouse against the other,<sup>65</sup> or whether tape recordings of out-of-court conversations of a spouse were admissible.<sup>66</sup> Because the privilege, which is grounded in policy and is not of constitutional dimension,<sup>67</sup> could be waived, questions also arose as to whether a spouse's consent to favorable testimony also constituted consent to adverse testimony.<sup>68</sup>

Between *Hawkins* and *Trammel* the federal courts seemed to adopt a case-by-case approach to the anti-marital facts privilege.

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61. See note 13 *supra*.

62. In *United States v. Van Drunen*, 501 F.2d 1393 (7th Cir. 1974), a wife was permitted to testify without consent against her husband, with whom she had participated in violating 8 U.S.C. § 1324(a) (1976) which prohibits the transportation of illegal aliens. The Seventh Circuit noted that *Hawkins* could be a barrier to allowing such testimony, determining that if the *Hawkins* case were "treated as involving a joint criminal venture by the spouses, then the Supreme Court has held *sub silentio* that the privilege against spousal testimony applies in such a case." *Id.* at 1397 (emphasis in original). The court went on to say, however, that due to the fact that *sub silentio* holdings are of less precedential value than treatment on the merits and due to other Supreme Court created exceptions to *Hawkins*, it did not view *Hawkins* as controlling in the case. *Id.*

63. See *United States v. Allery*, 526 F.2d 1362, 1365 (8th Cir. 1975). The court further stated: "An 'offense against the other' has been broadly interpreted to include any personal wrong done to the other, whether physically, mentally or morally injurious." *Id.*

64. *Id.* at 1367. See, e.g., LA. REV. STAT. ANN. § 14:403(F) (West 1964); NEB. REV. STAT. SUPP. § 28-1505 (1974); S.D. COMPILED LAWS ANN. § 19-2-1 (1967).

65. See *United States v. Tsinnijinnie*, 601 F.2d 1035, 1037-39 (9th Cir. 1979) (the court noted the differing views of various circuits and concluded that the marital privilege should not be extended to bar a third party witness from testifying about an excited utterance by one spouse concerning the other spouse).

66. See *United States v. Price*, 577 F.2d 1356, 1364 (9th Cir. 1978) (the court held that the tapes of extrajudicial statements by the wife, though normally precluded by the anti-marital facts privilege, could be admitted as the wife was not the testifying witness and she had been a co-conspirator).

67. *United States v. Hicks*, 420 F. Supp. 533, 536 (N.D. Tex. 1976).

68. See *United States v. Benford*, 457 F. Supp. 589, 597-98 (E.D. Mich. 1978) (the court concluded that when the defendant spouse testified he waived the privilege as to testimony by his wife on the same subject).

The various courts examined each case carefully to discover whether the purpose of preserving family peace could be served in particular cases by precluding spousal testimony without consent of the other spouse. If a court decided a marriage was incapable of benefiting from the privilege, it generally refused to allow the privilege.<sup>69</sup> In *United States v. Cameron*,<sup>70</sup> for example, the Fifth Circuit noted that "in spite of the legal existence of the marriage, as a social fact it had expired."<sup>71</sup>

Perhaps another unspoken factor in the Court's decision in *Trammel* was that although the Court at one time could piously wish that the lower courts were significantly successful at reconstructing faltering marriages, an escalated divorce rate has encouraged it to abandon that pretense.<sup>72</sup> Commentators have noted that in cases in which the anti-marital facts privilege usually arose, the marital relationship was not often a happy one and was not likely to survive.<sup>73</sup> This factor together with the experience of the federal courts in recent years provide a firm, socio-logical basis for understanding the result in *Trammel*.

Finally, with the exception of spouses who are victims of Mann Act violations, after *Trammel* unwilling spouses clearly cannot be compelled to give adverse testimony.<sup>74</sup> In *Mills v. United States*,<sup>75</sup> it was held that the wife could not be compelled to testify in favor of her husband even though he had consented and wanted her to do so. These early cases continue to be authoritative since the *Trammel* Court has said that spouses may not be compelled to

69. See, e.g., *United States v. Cameron*, 556 F.2d 752 (5th Cir. 1977); *United States v. Fisher*, 518 F.2d 836 (2d Cir. 1975). Both courts decided that the marriage would not benefit from the privilege and therefore refused to let the defendants invoke the privilege.

70. 556 F.2d 752, 756 (5th Cir. 1977).

71. The case-by-case approach had once been condemned by the Second Circuit in *United States v. Walker*, 176 F.2d 564, 568 (2d Cir. 1949), however, because the answer to the question as to whether the particular marriage is capable of being saved would "arise in the progress of the trial; it [would have to] be decided at once; and its answer [would] introduce a collateral inquiry likely to complicate the trial seriously."

72. See generally Comment, 7 CUM. L. REV., *supra* note 49, at 319.

73. See 33 TUL. L. REV., 884 (1959). This commentator went on to say, "[T]he mere possibility that the use of this rule will promote domestic harmony does not justify exclusion of spousal testimony when it is certain that useful and sometimes crucial information is thereby excluded." *Id.* at 891.

74. See *Eisenberg v. United States*, 273 F.2d 127, 128 & n.2 (5th Cir. 1959), where the husband, who was being prosecuted under the Mann Act, did not object to testimony by his wife, but the wife's attorney did object. The court ordered the wife, who had also been a victim of her husband's crime, to testify. See also *Mills v. United States*, 281 F.2d 736, 740 (4th Cir. 1960).

75. 281 F.2d 736, 740 (4th Cir. 1960).

testify.<sup>76</sup>

As a result of *Trammel*, the marital evidentiary privilege stands as follows: the option to testify against the defendant spouse rests with the witness spouse alone, although the witness spouse cannot be compelled to testify. The privilege protecting confidential marital communications remains fully intact, but the *Trammel* rationale would seemingly indicate its future erosion as well.<sup>77</sup> The marital evidentiary privilege has been limited to the point that it is now similar in scope to the attorney-client or physician-patient privilege and therefore less likely to obstruct full disclosure of all relevant evidence. The only key difference is that testifying spouses have the option not to testify whereas attorneys and physicians do not have this option if the defendant wants them to testify. The unique and often volatile nature of marital situations may present special problems in determining the reliability of witness spouses. Voluntariness of the testimony may also be a difficult issue to determine; pressure from prosecutors or from the defendant spouse may cast doubt on the witness spouse's free will in exercising the option to testify. At any rate, it will be interesting to note whether, when, and for what specific reasons the twenty-four states which retain the consent rule will follow the example of the federal courts in abolishing the anti-marital facts privilege.

M.J. LORD

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76. 100 S. Ct. at 914.

77. The rationale of *Trammel*, that if a spouse is willing to testify adversely about the defendant spouse the relationship is beyond repair, could be applied as well to the confidential communications privilege. Few criminal cases would benefit from such an exception, however, given the exceptions to this privilege currently in existence. See text accompanying note 38 *supra*.

