

THE HUSBAND-WIFE PRIVILEGES IN FEDERAL CRIMINAL PROCEDURE

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I. THE COMMON-LAW INCOMPETENCY

Until 1933 a spouse could not testify in favor of the other spouse in federal criminal cases.¹ Earlier decisions rested on a theory of public policy alone.² In 1887 a district court stated: "There can be no doubt that at common law a wife is not a competent witness for or against her husband. And this is so not on account of interest, but on the ground of public policy. . . . There exists no statute of the United States removing the disability."³ But the court refused to grant a new trial where the Government called the defendant's wife as a witness and her testimony was all favorable to the defendant. A later lower court decision held that the wife cannot testify for the husband chiefly because of the "presumed identity of interest."⁴ In 1920 the Supreme Court followed the latter view.⁵ But the theory of interest does not adequately explain the law.⁶ And the reasons for disqualification by interest in general have by this time been universally repudiated. As to public policy, it seems strange to hold that where the wife was the only witness who could show the innocence of her husband when he is charged with a serious offense, she cannot testify.⁷

Various acts of Congress did not change the rule. The federal statute⁸ adopting existing state law in determining the competency of witnesses applied only to civil actions, so that the early state law applied in criminal cases.⁹ The Supreme Court so held in a case involving testimony by a wife for her husband in 1920.¹⁰

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¹ This was on the theory that the rules of evidence in 1789 or at the date of admission of the state applied to rules of evidence including competency of a spouse. At those dates the wife was incompetent in virtually all states.

² *Lucas v. Brooks*, 85 U.S. (18 Wall.) 436, 452 (1873).

³ *United States v. Jones*, 32 Fed. 569, 570 (D.S.C. 1887).

⁴ *Knoell v. United States*, 239 Fed. 16, 23 (3d Cir. 1917), *error dismissed*, 246 U.S. 648 (1918).

⁵ *Jin Fuey Moy v. United States*, 254 U.S. 189, 195 (1920).

⁶ 2 Wigmore, *Evidence* § 601 (3d ed. 1940) [hereinafter cited as Wigmore with the exception of references to volume 8 which are to the McNaughton Revision of 1961].

⁷ *Tinsley v. United States*, 43 F.2d 890, 896 (8th Cir. 1930).

⁸ Rev. Stat. § 858 (1875); 12 Stat. 588 (1862).

⁹ *Logan v. United States*, 144 U.S. 263, 299 (1891). The 1906 amendment was similarly interpreted in *Maxey v. United States*, 207 Fed. 327, 329 (8th Cir. 1913).

¹⁰ *Jin Fuey Moy v. United States*, *supra* note 5, at 195.

In 1873 the Supreme Court held that the Act of Congress of July 2, 1864,¹¹ providing that there shall be no exclusion of a witness in civil actions because he is a party to or interested in the issues tried, does not give capacity to a wife to testify in favor of her husband. The Court stated: "That it is a rule of the common law, a wife cannot be received as a witness for or against her husband, except in a suit between them, or in criminal cases where he is prosecuted for a wrong done to her, is not controverted."¹² The statute of 1878¹³ permitting the defendant to testify did not permit the wife to testify. "In the absence of a statute expressly allowing the wife to testify for her husband in a criminal action, she is not a competent witness for him. Neither the removal of the disability of interest nor the allowing of a defendant to testify in his own behalf in a criminal action makes the wife a competent witness."¹⁴

In the decade from 1890 to 1900, the Supreme Court commenced to deal extensively with testimony by spouses for and against each other. Two of the earlier cases involved testimony against the spouse. In 1890 the Supreme Court referred favorably to the common-law rule that a wife may not testify against her husband.¹⁵ In 1892 the Supreme Court assumed that the wife was not a competent witness in the absence of waiver.¹⁶ The next year the Court held in a murder prosecution that "the wife was not a competent witness either in behalf of, or against her husband."¹⁷ It was reversible error for the United States Attorney to comment on her absence, over objection. She cannot be placed on the stand. One judge, dissenting, thought that the wife should be present so that clearer identification of her husband could be made.¹⁸

Lower federal courts followed this view in several decisions.¹⁹ In 1911 the Supreme Court repeated its view that a wife cannot testify for her husband in a murder case.²⁰ There was no reasoning offered

¹¹ 13 Stat. 351 (1864).

¹² *Lucas v. Brooks*, *supra* note 2, at 452-453. See 2 Wigmore §§ 608, 619.

¹³ 20 Stat. 30 (1878).

¹⁴ *United States v. Crow Dog*, 3 Dak. 106, 14 N.W. 437, 438 (1882). See 2 Wigmore §§ 608, 619. See also *United States v. Liddy*, 2 F.2d 60 (E.D. Pa. 1924); *Talbott v. United States*, 208 Fed. 144 (5th Cir. 1913) as to co-defendants.

¹⁵ *Bassett v. United States*, 137 U.S. 496, 505 (1890).

¹⁶ *Benson v. United States*, 146 U.S. 325, 331 (1892).

¹⁷ *Graves v. United States*, 150 U.S. 118, 121 (1893).

¹⁸ *Id.* at 122.

¹⁹ *United States v. Sims*, 161 Fed. 1008, 1010 (N.D. Ala. 1907); *Wesoky v. United States*, 175 Fed. 333, 335 (3d Cir. 1910).

²⁰ *Hendrix v. United States*, 219 U.S. 79, 91 (1911).

and the Court cited a case not involving spouses, holding that state law applies to the admission of testimony.²¹

Occasionally a court excluded a wife's testimony for her husband even though state law at the date of admission allowed her to testify.²² The common-law rule, without reference to any particular state, excluding the wife's testimony was applied in some cases.²³ Occasionally the court excluded by looking at current decisions of the state.²⁴

In 1919 a court pointed out that the Supreme Court had recently concluded that the "dead hand of the common-law rule of 1789 should no longer be applied" to exclude the testimony of convicted felons. The lower court also stated: "It may perhaps be said with equal reason that 'the same dead hand' should no longer disqualify husband and wife except as respects confidential communications."²⁵ If the trial court had admitted the testimony of a wife for a defendant, the Court of Appeals would not have readily reversed. But since it had not, the common-law rule would be followed. But in 1920 the Supreme Court held that the law of 1789 applied to a criminal prosecution in Pennsylvania; and the defendant's wife was not competent to testify for her husband generally or even by contradicting testimony that certain matters occurred in her presence.²⁶

In 1927 the Court of Appeals for the Ninth Circuit held that a wife could testify for her husband in a narcotics prosecution.²⁷ The Supreme Court had held that a person convicted of a felony may testify irrespective of state law, and the modern trend is to remove disability of witnesses. The same was held in a liquor prosecution, but

²¹ Logan v. United States, *supra* note 9.

²² Adams v. United States, 259 Fed. 214 (8th Cir. 1919); Liberato v. United States, 13 F.2d 564, 566 (9th Cir. 1926), corrected in Rendleman v. United States, 18 F.2d 27, 29 (9th Cir. 1927). See Leach, "State Law of Evidence in the Federal Courts," 43 Harv. L. Rev. 554, 565-566 (1930).

²³ Adams v. United States, *supra* note 22. The state was Oklahoma.

²⁴ Slick v. United States, 1 F.2d 897, 899 (7th Cir. 1924). The state was Illinois.

²⁵ Fitter v. United States, 258 Fed. 567, 577 (2d Cir. 1919).

²⁶ Jin Fuey Moy v. United States, *supra* note 5, at 195. The case is criticized in Leach, *supra* note 22, at 563-564.

The case was followed in Fisher v. United States, 32 F.2d 602, 604 (4th Cir. 1929); Barton v. United States, 25 F.2d 967 (4th Cir. 1928); United States v. Swierzbenski, 18 F.2d 685 (W.D.N.Y. 1927); Liberato v. United States, *supra* note 22; Fasulo v. United States, 7 F.2d 961 (9th Cir. 1925); Allen v. United States, 4 F.2d 688, 693 (7th Cir. 1925), *cert. denied sub nom.* Mullen v. United States, 267 U.S. 598 (1925); Slick v. United States, *supra* note 24; Krashowitz v. United States, 282 Fed. 599, 601 (4th Cir. 1922); Lowe v. United States, 282 Fed. 597, 599 (9th Cir. 1922).

²⁷ Rendleman v. United States, *supra* note 22, noted in 22 Ill. L. Rev. 545 (1928); Bronough, "Competency of Husband or Wife in Criminal Case in Federal Court," 31 Law Notes 108 (1927).

no reversible error was found in excluding the wife's testimony.²⁸ But the same court upheld a trial judge in refusing to let the wife testify where the defendant failed to state what he expected to prove by her testimony.²⁹ In 1930 the Eighth Circuit by Judge Kenyon sharply criticized the rule preventing the wife from testifying for her husband as "an absurdity and a relic of legal barbarism which should no longer be recognized."³⁰ However, the case involved testimony of a wife for a co-defendant. The court referred to an article³¹ of Professor W. Barton Leach concluding that in some states statutes existed at the time of admission qualifying the wife as a witness and that in such states the wife should be able to testify in a federal criminal case. In 1931 the Fourth Circuit adhered to the rule of incompetency.³²

Occasionally some assistance was given to the defendant spouse. In some cases the wife of the defendant testified for him apparently without objection by the Government.³³ The jury should be instructed on request that the wife cannot testify for her husband where the facts are such that the jury might otherwise draw unfavorable inferences from her failure to testify.³⁴

Suppose several defendants are jointly indicted and jointly tried. May the spouse of one defendant testify in favor of another defendant? An early case held that she could not testify.³⁵ Since the husband could not be a witness, his wife could not be.³⁶ Even after the law permitted a defendant to be a witness, it was held in several cases

²⁸ *Green v. United States*, 19 F.2d 850, 853 (9th Cir. 1927), *aff'd*, 277 U.S. 438 (1928).

²⁹ *Romeo v. United States*, 23 F.2d 551, 552 (9th Cir. 1928), on rehearing, 24 F.2d 527 (9th Cir. 1928); *Hass v. United States*, 31 F.2d 13, 14 (9th Cir. 1929).

³⁰ *Tinsley v. United States*, *supra* note 7, at 895. The court cited 1 Wigmore §§ 600-601.

³¹ Leach, *supra* note 22. (The article was inserted in the Congressional Record of June 9, 1930.)

³² *Dowdy v. United States*, 46 F.2d 417, 421 (4th Cir. 1931), noted 79 U. Pa. L. Rev. 1146 (1931).

³³ *Lasco v. United States*, 287 Fed. 69 (2d Cir. 1923) (drug prosecution); *United States v. Lindsly*, 7 F.2d 247, 255 (E.D. La. 1925), *rev'd on other grounds*, 12 F.2d 771 (5th Cir. 1926).

The defendant could waive testimony against him by his spouse. *Benson v. United States*, *supra* note 16, at 331. So it would seem the Government could waive testimony for the defendant by his spouse.

³⁴ *Fisher v. United States*, *supra* note 26, at 604.

³⁵ *United States v. Wade*, 28 Fed. Cas. 306 (No. 16629) (C.C.D.C. 1826). The court cited only *Rex v. Frederick and Tracy*, 2 Strange 1095, 93 Eng. Rep. 1054 (1795). See 2 Wigmore § 609.

³⁶ *United States v. Wade*, *supra* note 35.

that the wife was not a competent witness for or against co-defendant at a joint trial.³⁷ She could not even be a witness *for* a co-defendant³⁸ although there were several cases *contra*.³⁹ Some cases left the question open where the wife's testimony could not affect the husband.⁴⁰

Suppose that several defendants are jointly indicted, but tried separately. May the wife of one defendant testify for a co-defendant at his separate trial? Several cases left this question open without deciding it.⁴¹ Some cases allowed her to testify.⁴²

Finally, in 1933, the Supreme Court held by Justice Sutherland that the disqualification of the wife to testify for her husband was no longer a part of the common law administered in the federal courts.⁴³ This was the trend of state legislation.⁴⁴ The reasons given by the common law for its rule were not convincing. The Court expressly left open the question of competency of one spouse to testify against the other. The common-law reason as to interest was not convincing because, since 1878, the defendant could testify even though his interest was much greater. Public policy favoring the maintenance of harmonious marital relations is fanciful in the light of present day conditions.

While under the *Funk* case a wife could testify for her husband, where the trial court refused to allow her to testify, the Court of

³⁷ Talbott v. United States, *supra* note 14; United States v. Liddy, *supra* note 14.

³⁸ Dowdy v. United States, *supra* note 32, at 420, noted 79 U. Pa. L. Rev. 746 (1931) (where wife's testimony would inure to the benefit of her husband); Israel v. United States, 3 F.2d 743, 745 (6th Cir. 1925) (where wife's testimony would affect the husband's defense); Haddad v. United States, 294 Fed. 536 (6th Cir. 1923); Fitter v. United States, *supra* note 25, at 576; United States v. Liddy, *supra* note 14; United States v. Davidson, 285 Fed. 661, 662 (E.D. Pa. 1922).

³⁹ Tinsley v. United States, *supra* note 7, at 895; Romeo v. United States, *supra* note 29, at 552; Green v. United States, *supra* note 28, at 852 (not reversible error to exclude, however). See Wigmore, 15 Ill. L. Rev. 453 (1921).

⁴⁰ Israel v. United States, *supra* note 38, at 745.

⁴¹ Dowdy v. United States, *supra* note 32, at 421, noted 79 U. Pa. L. Rev. 1146 (1931); Israel v. United States, *supra* note 38, at 745; United States v. Wade, *supra* note 35.

⁴² O'Brien v. United States, 299 Fed. 568, 569 (8th Cir. 1924), citing 4 Wigmore §§ 2234-2237 (2d ed. 1923); United States v. Addatte, 24 Fed. Cas. 763 (No. 14422) (C.C.E.D.N.Y. 1868).

⁴³ Funk v. United States, 290 U.S. 371 (1933), noted 14 B.U.L. Rev. 175 (1934), 19 Cornell L.Q. 480 (1934), 22 Geo. L.J. 626 (1934), 19 Iowa L. Rev. 488 (1934), 23 Ky. L.J. 190 (1934), 33 Mich. L. Rev. 306 (1934), 18 Minn. L. Rev. 893 (1934), 13 Ore. L. Rev. 259 (1934), 19 St. Louis L. Rev. 157 (1934), 8 St. John's L. Rev. 375 (1934), 82 U. Pa. L. Rev. 406 (1934).

⁴⁴ At the present time only twelve states have statutes purporting to make spouses incompetent to testify for one another. But even in such states the rule is much less rigid than at common law. See Note, 56 Nw. U.L. Rev. 208, 209 (1961).

Appeals would not reverse in the absence of an offer of proof in the record showing the nature of the testimony.⁴⁵ Following the *Funk* case, the courts repeatedly stated in dictum that a wife could testify for her husband. There was no problem where she was willing to testify. But suppose she was not willing. A single case has presented the problem. Husband and wife had both been convicted of robbery. The husband moved for a new trial. When called by the husband to testify on the motion, she stated that she did not want to testify "against my husband or for him," and assigned as her ground, "On the wife's privilege." The wife had not yet been sentenced, and the period allowed for appeal had not expired. It was held that the wife need not testify, chiefly on the ground of self-incrimination.⁴⁶

The federal law on competency of a spouse to testify for the other spouse is now much improved. But the lead was taken by the states, and the federal courts were slow to follow.

II. THE PRIVILEGE FOR ANTI-MARITAL FACTS

1. *History*

In 1839 Justice McLean, speaking for the Supreme Court, stated: "It is, however, admitted in all the cases that the wife is not competent except in cases of violence upon her person, directly to criminate her husband, or to disclose that which she has learned from him in their confidential intercourse."⁴⁷ In 1893, in a murder prosecution, the Supreme Court held that a wife was "not a competent witness . . . against her husband."⁴⁸ Thus the earlier federal cases are correctly said to have treated adverse testimony as a matter of competency.⁴⁹ In 1914 a court stated the rule as follows: "At common law the husband and wife were each under total disability to testify for the

⁴⁵ *Price v. United States*, 68 F.2d 133, 134 (5th Cir. 1934).

⁴⁶ *Mills v. United States*, 281 F.2d 736, 739 (4th Cir. 1960); *accord*, *Bisno v. United States*, 299 F.2d 711, 721 (9th Cir. 1961). *But. cf.* *Wyatt v. United States*, 362 U.S. 525, 529 (1960), compelling a wife to testify in a Mann Act prosecution where she is the victim.

For the federal case law on compelling of a spouse to testify for another spouse, see Annot., 97 L. Ed. 607, 608-610 (1953). See also 2 Wigmore §§ 488, 600-620; McCormick, Evidence § 66 (1954) [hereinafter cited as McCormick].

In England the spouse may give evidence on the application of the defendant, but may not be compelled to give evidence. Kenny, *Outlines of Criminal Law* § 632 (17th ed. 1958).

⁴⁷ *Stein v. Bowman*, 38 U.S. (13 Pet.) 209, 222 (1839). This was repeated in *Bassett v. United States*, *supra* note 15, at 505. See also *United States v. Jones*, *supra* note 3, at 570.

⁴⁸ *Graves v. United States*, *supra* note 17, at 121.

⁴⁹ Note, 98 U. Pa. L. Rev. 719, 724 (1950); Note, 33 Tul. L. Rev. 884, 888 (1959).

other, but the disability did not extend to the testimony of one against the other. Such testimony of the one against the other was excluded, however, unless both the husband and wife waived the privilege and consented to its admission."⁵⁰

Following Wigmore,⁵¹ several modern cases have held that it is not correct to speak of competency to testify against a spouse, but rather one should speak of a privilege not to testify.⁵² In 1949 the Supreme Court stated: "The federal courts have held that one spouse cannot testify against the other unless the defendant waives the privilege."⁵³ But several cases continued to treat it as a question of competency.⁵⁴ Federal statutes adopting existing state laws as to competency of witnesses applied only to civil actions.⁵⁵ The federal statute⁵⁶ providing that there shall be no exclusion of a witness in civil actions because he is a party to or interested in the issues tried, did not apply to criminal cases.⁵⁷ The statute of 1878⁵⁸ providing that a defendant may testify and that no witness shall be excluded on account of color, or because he is a party or interested in the issue tried, did not affect the competency of one spouse against the other in a federal criminal case.⁵⁹

One might have thought that following the *Funk* case,⁶⁰ the federal courts would be willing to take the next step and permit a spouse to testify against a spouse. But most of the cases have declined to do so.⁶¹ The Third Circuit declined to let a husband testify against his wife and even against a co-defendant.⁶² No doctrine of marital har-

⁵⁰ *Cohen v. United States*, 214 Fed. 23, 29 (9th Cir. 1914). The court cited 8 Wigmore § 2239.

⁵¹ 8 Wigmore § 2242.

⁵² *Olender v. United States*, 210 F.2d 795, 800 (9th Cir. 1954); *Shores v. United States*, 174 F.2d 838, 839 (8th Cir. 1949); *United States v. Mitchell*, 137 F.2d 1006, 1008 (2d Cir. 1943), *cert. denied*, 321 U.S. 794 (1944).

⁵³ *Griffin v. United States*, 336 U.S. 704, 714 (1949). See also *Wyatt v. United States*, *supra* note 46, at 528; *Hawkins v. United States*, 358 U.S. 74, 78 (1958).

⁵⁴ *Lutwak v. United States*, 344 U.S. 604, 615 (1953); *Funk v. United States*, *supra* note 43, at 373; *Brunner v. United States*, 168 F.2d 281 (6th Cir. 1948).

⁵⁵ *Jin Fuey Moy v. United States*, 254 U.S. 189, 195 (1920).

⁵⁶ 13 Stat. 351 (1864).

⁵⁷ *Lucas v. Brooks*, 85 U.S. (18 Wall.) 436, 452 (1873).

⁵⁸ 20 Stat. 30 (1878).

⁵⁹ *Johnson v. United States*, 221 Fed. 250 (8th Cir. 1915). See also *Hendrix v. United States*, *supra* note 20, at 85; *Jin Fuey Moy v. United States*, *supra* note 55, at 195; *United States v. Crow Dog*, 3 Dak. 106, 14 N.W. 437, 438 (1882).

⁶⁰ *Funk v. United States*, *supra* note 43.

⁶¹ McCormick § 66.

⁶² *Paul v. United States*, 79 F.2d 561, 563 (3d Cir. 1935). See also *United States v. Gonella*, 103 F.2d 123 (3d Cir. 1939).

mony could be applied, as the spouses had lived apart for several years. The Sixth Circuit refused to let a wife testify against her husband in a prosecution for obtaining a registered letter from a letter carrier by fraud.⁶³ The court felt itself bound by a decision of the Supreme Court.⁶⁴ The Second Circuit refused to allow a wife to testify in a prosecution for transporting money in interstate commerce which had been taken feloniously by fraud.⁶⁵ The opinion was rendered by Learned Hand, but Judge Charles E. Clark dissented. Judge Hand stated: "We conclude therefore that we should await the choice of Congress between the conflicting interests involved, or such an overwhelming general acceptance by the states of abolition of the privilege as induced the Supreme Court to action in *Funk v. United States*."⁶⁶ The Fifth Circuit⁶⁷ and the Ninth Circuit⁶⁸ adhered to the earlier law. In 1949 Justice Frankfurter speaking for the Court stated: "The federal courts have held that one spouse cannot testify against the other unless the defendant spouse waives the privilege. Since this Court in the *Funk* case left open the question whether this rule should be changed, . . . it presumably is still the 'federal rule' for the lower courts."⁶⁹

In 1935 the Court of Appeals for the Tenth Circuit indicated by Judge McDermott that it was ready to accept the view that a spouse may testify against another spouse.⁷⁰ The court took this position although the case could have gone off on the point that the wife testifying was a divorced wife. In 1952 the Seventh Circuit followed this case,⁷¹ but it was reversed by the Supreme Court.⁷² In 1957 the Tenth Circuit adhered to its view,⁷³ but was also reversed by the Supreme Court.⁷⁴

⁶³ *Brunner v. United States*, *supra* note 54, at 283.

⁶⁴ *Graves v. United States*, 150 U.S. 118, 121 (1893).

⁶⁵ *United States v. Walker*, 176 F.2d 564, 567 (2d Cir. 1949), *cert. denied*, 338 U.S. 891 (1949), noted 30 B.U.L. Rev. 135 (1950), 38 Geo. L.J. 316 (1950), 25 Notre Dame Law. 382 (1950), 23 So. Cal. L. Rev. 405 (1950), 17 U. Chi. L. Rev. 525 (1950).

⁶⁶ *United States v. Walker*, *supra* note 65, at 568.

⁶⁷ *Jackson v. United States*, 250 F.2d 897, 900 (5th Cir. 1958); *Ford v. United States*, 210 F.2d 313, 317 (5th Cir. 1954).

⁶⁸ *Olender v. United States*, *supra* note 52, at 800.

⁶⁹ *Griffin v. United States*, *supra* note 53, at 714-715.

⁷⁰ *Yoder v. United States*, 80 F.2d 665, 667 (10th Cir. 1935), noted 24 Calif. L. Rev. 472 (1936), 4 Duke B.A.J. 107 (1936), 35 Mich. L. Rev. 329 (1936), 20 Minn. L. Rev. 693 (1936), 10 So. Cal. L. Rev. 94 (1936). The case was followed in *Thouvenell v. Zerbst*, 83 F.2d 1003 (10th Cir. 1936).

⁷¹ *United States v. Lutwak*, 195 F.2d 748, 761 (7th Cir. 1952). The court also had another basis, invalidity of the marriage.

⁷² *Lutwak v. United States*, *supra* note 54.

⁷³ *Hawkins v. United States*, 249 F.2d 735, 736 (10th Cir. 1957).

⁷⁴ *Hawkins v. United States*, *supra* note 53.

In 1943 Judge Charles E. Clark pointed out that New York law permitted a spouse to testify against a spouse, and that the Model Code of Evidence of the American Law Institute omitted any privilege, although the privilege for confidential communications was retained.⁷⁵ In 1949 Judge Clark restated his view in a dissenting opinion.⁷⁶ The same year a district court permitted a spouse who was the victim of an offense against property to testify.⁷⁷

In 1953 the Supreme Court stated that: "It is open to us to say whether we shall go further and abrogate the common law rule disqualifying one spouse from testifying in criminal cases against the other spouse."⁷⁸ In 1959 the Court stated its decision in the pending case "does not foreclose whatever changes in the rule may eventually be dictated by 'reason and experience.'"⁷⁹

A defendant may not attack testimony of a spouse against him as being a violation of due process of law.⁸⁰ Habeas corpus will not lie.⁸¹ It should be noted that in 1961, in a case involving a state statute making the defendant incompetent to give sworn testimony in his own behalf, two Justices of the Supreme Court suggested that such a statute violated due process.⁸² But obviously the latter problem is quite different from the present one. Excluding witnesses otherwise competent is surely not the same as permitting witnesses otherwise competent to testify.

2. Policy of the Privilege

What is the rationale as to testimony against a spouse? In 1953 Justice Minton, speaking for the Supreme Court, stated: "The reason for the rule at common law disqualifying the wife is to protect the

⁷⁵ *United States v. Mitchell*, *supra* note 52, at 1008.

⁷⁶ *United States v. Walker*, *supra* note 65, at 569.

Citing this opinion of Judge Clark, the Preliminary Report on Rules of Evidence for the United States District Courts of February 1962 states at p. 28:

"The reluctance of the Supreme Court to attempt to improve evidence rules by decisions, is matched by the inability of the lower courts to show progress towards a modern law of Federal criminal evidence."

⁷⁷ *United States v. Graham*, 87 F. Supp. 237 (E.D. Mich. 1949), noted 48 Mich. L. Rev. 1223 (1950).

⁷⁸ *Lutwak v. United States*, *supra* note 54, at 614.

⁷⁹ *Hawkins v. United States*, *supra* note 53, at 79.

⁸⁰ *Wilhoit v. Wyatt*, 60 F. Supp. 664, 666 (M.D. Pa. 1945); *Alford v. Territory*, 205 F.2d 616, 619 (9th Cir. 1953).

⁸¹ In general, habeas corpus does not lie to attack competency of a spouse to testify before the grand jury and at the trial. *Thouvenell v. Zerbst*, *supra* note 70.

⁸² *Ferguson v. Georgia*, 365 U.S. 570, 601-602 (1961). See Louisell, "Confidentiality, Conformity and Confusion: Privileges in Federal Court Today," 31 Tul. L. Rev. 101, 123 (1956).

sanctity and tranquility of the marital relationship."⁸³ In 1959 Justice Black, speaking for the Court 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 is necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well. Such a belief has never been unreasonable and is not now. . . . 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.

Other jurisdictions have been reluctant to do more than modify the rule. English statutes permit spouses to testify against each other in prosecutions for only certain types of crimes. And most American states retain the rule, though many provide exceptions in some classes of cases. The limited nature of these exceptions shows there is 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.⁸⁴

3. *Who Is Prohibited as Husband and Wife*

The privilege exists only where the parties are lawfully married. Where there is a sham marriage and no intention to live together as husband and wife, the Supreme Court has denied the privilege.⁸⁵ Three Justices dissented because the validity of the marriage was not decided. The lower court had held that the marriage was invalid, indulging in the improper presumption that the law of the place where the marriage was celebrated, here French law, was the same as American law.⁸⁶ The majority of the Supreme Court did not pass on the point, but the three dissenting Justices disapproved the unrealistic presumption.⁸⁷

A statute of 1887 provided that:

in any proceeding or prosecution before a grand jury, a judge,

⁸³ *Lutwak v. United States*, *supra* note 54, at 615.

⁸⁴ *Hawkins v. United States*, *supra* note 53, at 77-79. See also 8 Wigmore § 2228.

⁸⁵ *Lutwak v. United States*, *supra* note 54, noted 38 Cornell L.Q. 614 (1953), 41 Geo. L.J. 576 (1953), 37 Marq. L. Rev. 79 (1953), 28 N.Y.U.L. Rev. 1330 (1953), 31 N.C.L. Rev. 520 (1953), 26 So. Cal. L. Rev. 452 (1953), 20 U. Chi. L. Rev. 313 (1953), 20 U. Chi. L. Rev. 710 (1953), 101 U. Pa. L. Rev. 700 (1953), 15 U. Pitt. L. Rev. 318 (1954).

See also *Pereira v. United States*, 202 F.2d 830, 835 (5th Cir. 1953).

⁸⁶ *United States v. Lutwak*, *supra* note 71, at 761.

⁸⁷ See Schlesinger, *Comparative Law* 124 (2d ed. 1959); Note, 38 Cornell L.Q. 614, 619 (1953).

justice, or a United States commissioner, or a court in any prosecution for bigamy, polygamy or unlawful cohabitation, under any statute of the United States, the lawful husband or wife of the person accused shall be a competent witness, and may be called, but shall not be compelled to testify in such proceeding, examination, or prosecution without the consent of the husband or wife, as the case may be: and such witness shall not be permitted to testify as to any statement or communication made by either husband or wife to each other, during the existence of the marriage relation, deemed confidential at common law.⁸⁸

In a prosecution for bigamy, the alleged second wife was compelled to testify against the defendant over his objection. It was held that her competency depended on whether the marriage to the alleged first wife was established, and that this was a question to be settled by the judge. Since there was evidence sufficient to justify the judge in finding the first marriage valid, there was no error in his ruling.⁸⁹ In these cases the preliminary question for the judge coincided with an ultimate question for the jury.⁹⁰ In *Miles v. United States*,⁹¹ the Supreme Court said that when the first marriage was found by the judge, the second wife could testify to the second marriage, but not to the first.⁹² Neither wife could testify to the first marriage. The defendant's admissions may be used to show the first marriage. As long as the first marriage is contested, the second wife may not testify. Where the first marriage has by other evidence been duly established to the satisfaction of the court, the second wife may be admitted to prove her marriage to the defendant. If the first marriage is lawful, the first wife may not testify against the defendant.⁹³ But in 1958 the Supreme Court in a dictum seemed to imply otherwise.⁹⁴

4. Hearsay Statements of Spouse

A spouse is protected not only as to oral testimony by his spouse, but also as to her documentary utterances. In an income tax evasion prosecution, documents filed by the wife with local welfare authorities

⁸⁸ 24 Stat. 635 (1887).

⁸⁹ *Matz v. United States*, 158 F.2d 190 (D.C. Cir. 1946). The court cited *Miles v. United States*, 103 U.S. 304 (1880).

⁹⁰ See Note, 38 Cornell L.Q. 614, 619 n.34 (1953); Note, 20 U. Chi. L. Rev. 313 (1953).

⁹¹ 103 U.S. 304, 313 (1880).

⁹² Dean Wigmore has pointed out that the cases involving the competency of spouses in plural marriages are confusing both in reasoning and result. 8 Wigmore § 2231.

⁹³ *Bassett v. United States*, 137 U.S. 496 (1890); *United States v. Walker*, *supra* note 65.

⁹⁴ *Hawkins v. United States*, *supra* note 53, at 78. See 8 Wigmore § 2239.

introduced to impeach the husband were held to be within the privilege, but as no objection was made at the trial, they were admitted on a theory of waiver.⁹⁵ There can be no claim of privilege where the defendant's records were turned over by his estranged wife to the Internal Revenue Service.⁹⁶ In an income tax evasion prosecution, Government agents were permitted to testify as to information received from the defendant's wife, but not her declarations concerning his guilt. A motion to suppress was denied.⁹⁷

When statements are made by the wife in the presence of her husband under such circumstances that his silence would in effect admit their truth, the statements may be received in evidence if third persons are present. In a conspiracy prosecution of a wife, her failure to deny a statement made by her husband in her presence was admissible.⁹⁸

5. *Co-defendants*

The wife of one defendant charged with conspiracy, who has pleaded guilty, can testify against the other defendants over their objection, where neither she nor her husband claim any privilege. However, if he had not pleaded guilty, her testimony would be incompetent. The reason for the rule, which is to prevent the violation of confidences between spouses and the incrimination of one by the other, no longer applies after a plea of guilty.⁹⁹ The court applied the law of the state in 1789.

When, in 1933, the Supreme Court changed the rule so that a wife could testify for her husband, it followed logically that she could

⁹⁵ *Olender v. United States*, *supra* note 52, at 799. See 8 Wigmore § 2232.

⁹⁶ *United States v. Ashby*, 245 F.2d 684, 686 (5th Cir. 1957). A motion to suppress was denied.

⁹⁷ *United States v. Winfree*, 170 F. Supp. 659, 660 (E.D. Pa. 1959).

⁹⁸ *United States v. Anthony*, 145 F. Supp. 323, 335 (M.D. Pa. 1956).

The cases are collected in 80 A.L.R. 1229, 1246 (1932); 115 A.L.R. 1514 (1938); 8 Wigmore § 2232 n.4.

A wife's declarations to a police officer are competent against her husband if what she said was a step in a venture to which both were parties, but are incompetent if not made in such a venture regardless of whether a conspiracy was charged. It makes no difference that the jury later acquitted the wife. *United States v. Pugliese*, 153 F.2d 497, 500 (2d Cir. 1945).

⁹⁹ *Knoell v. United States*, 239 Fed. 16, 22 (3d Cir. 1917), *error dismissed*, 246 U.S. 648 (1918). The court cited 4 Wigmore § 2236.

See also *Astwood v. United States*, 1 F.2d 639, 642 (8th Cir. 1924).

In England, where the spouse of a defendant is not competent to give evidence for the prosecution, the exclusion applies also to the spouse of a co-defendant unless the co-defendant would himself be competent. The co-defendant would be competent at a separate trial. Kenny, *Outlines of Criminal Law* § 634 (17th ed. 1958).

testify for a co-defendant.¹⁰⁰ But it has been held that a spouse cannot testify against a co-defendant.¹⁰¹ Another court declined to review the question on habeas corpus.¹⁰²

6. *Testimony Against Divorced Spouse*

A divorced wife may testify against her husband.¹⁰³ In 1954 the Supreme Court made it clear that divorce ends all bars to spousal testimony.¹⁰⁴ The spouse may testify as to matters occurring before their marriage, and as to non-confidential communications occurring during their marriage.¹⁰⁵ There is a different rule as to confidential marital communications.

When the marriage has been annulled after the offense and before the trial, a spouse may testify against the other spouse.¹⁰⁶ It makes no difference whether the annulment rendered the marriage void from its inception or from the date of entry of the annulment since a divorce would be equally effective to remove the privilege.

7. *Exceptions*

In two early cases in the District of Columbia, a wife was permitted to testify that her husband had committed an assault and battery as to her.¹⁰⁷ In 1839 the Supreme Court stated in a civil case: "It is a general rule that neither a husband nor wife can be a witness for or against the other. . . . The rule is subject to some exceptions; as where the husband commits an offense against the person of his wife."¹⁰⁸ In 1851 Justice Wayne of the Supreme Court stated in a civil case:

¹⁰⁰ 19 Iowa L. Rev. 488 (1934).

¹⁰¹ *Paul v. United States*, *supra* note 62. The party-spouse was acquitted at the joint trial. If she had been previously acquitted, her husband should then have been permitted to testify. *But see* 8 Wigmore § 2236 n.2.

¹⁰² *Wilhoit v. Wyatt*, *supra* note 80, at 665.

¹⁰³ *United States v. Termini*, 267 F.2d 18, 20 (2d Cir. 1959); *Pool v. United States*, 260 F.2d 57, 64 (9th Cir. 1958); *Picciurro v. United States*, 250 F.2d 585, 589 (8th Cir. 1958); *United States v. Ashby*, *supra* note 96, at 686; *Dobbins v. United States*, 157 F.2d 257, 260 (D.C. Cir. 1946), *cert. denied*, 329 U.S. 734 (1946); *Cohen v. United States*, 120 F.2d 139 (5th Cir. 1941); *United States v. Gonella*, 103 F.2d 123 (3d Cir. 1939); *Yoder v. United States*, *supra* note 70, at 668; *Jacobs v. United States*, 161 Fed. 694, 697 (1st Cir. 1908). See 8 Wigmore § 2237.

¹⁰⁴ *Pereira v. United States*, 347 U.S. 1, 6 (1954).

¹⁰⁵ *Ibid.* See also *Dobbins v. United States*, *supra* note 103.

¹⁰⁶ *Cooper v. United States*, 282 F.2d 527, 533 (9th Cir. 1960).

¹⁰⁷ *United States v. Fitton*, 25 Fed. Cas. 1092 (No. 15106) (C.C.D.C. 1835); *United States v. Smallwood*, 27 Fed. Cas. 1131 (No. 16316) (C.C.D.C. 1836). See 8 Wigmore § 2239.

¹⁰⁸ *Stein v. Bowman*, 38 U.S. (13 Pet.) 209, 221 (1839). This view was accepted as correct in *Hawkins v. United States*, 358 U.S. 74, 75 (1958).

I know of but three exceptions to the incompetency of a wife to testify against her husband in a criminal case; they give her ample security against his abuse. She is a competent witness in an inquiry against her husband, upon a charge which affects her liberty or person. Such, for example, as a prosecution for a forcible marriage, though she may have cohabited with him . . . ; or she may be a witness for any gross injury committed on her person. . . . She may be a witness if he beats her, to protect herself from his future brutality.¹⁰⁹

A spouse could testify when an attempt was made to commit violence on the other by mailing poisoned candy.¹¹⁰

In a prosecution against the husband for violating the Mann Act where the wife was the victim, she could testify against her husband as the offense was a personal injury to her.¹¹¹ "In cases where the wife's personal rights were concerned, the exceptions to the husband's privilege should be benevolently regarded."¹¹² There was a single contrary authority,¹¹³ later overruled.¹¹⁴ It makes no difference that there was no coercion on the wife with respect to the offense.¹¹⁵

In 1914 a court held that a wife could not testify against her husband for a crime against her, violation of the Mann Act, committed before the marriage.¹¹⁶ The court stated that it was following the law of the state as it was in 1789. It made no difference that the rule might encourage marriage to escape punishment. While there were no federal precedents, the state precedents were in accord. But in 1944 a district court allowed the wife to testify.¹¹⁷

¹⁰⁹ *Gaines v. Relf*, 53 U.S. (12 How.) 472, 539-577 (1851) (dissenting opinion). See also *United States v. Jones*, 32 Fed. 569, 570 (D.D.C. 1887).

¹¹⁰ *Kerr v. United States*, 11 F.2d 227, 228 (9th Cir. 1926), *cert. denied*, 271 U.S. 689 (1926).

The cases permitting testimony where one spouse commits a crime on the other are collected in 11 A.L.R.2d 646 (1950).

¹¹¹ *Shores v. United States*, 174 F.2d 838, 839 (8th Cir. 1949); *Levine v. United States*, 163 F.2d 992 (5th Cir. 1947); *United States v. Mitchell*, 137 F.2d 1006, 1008 (2d Cir. 1943), *cert. denied*, 321 U.S. 794 (1944); *Denning v. United States*, 247 Fed. 463, 464 (5th Cir. 1918); *Cohen v. United States*, 214 Fed. 23, 29 (9th Cir. 1914); *Wilhoit v. Hiatt*, *supra* note 80, at 665; *United States v. Gwynne*, 209 Fed. 993, 994 (E.D. Pa. 1914); *United States v. Rispoli*, 189 Fed. 271 (E.D. Pa. 1911).

¹¹² *United States v. Rispoli*, *supra* note 111, at 273.

¹¹³ *Johnson v. United States*, 221 Fed. 250 (8th Cir. 1915). The trial court sustained the privilege on claim of the wife in *Lindsey v. United States*, 227 F.2d 113, 115 (5th Cir. 1955).

¹¹⁴ *Shores v. United States*, *supra* note 114, at 839, noted 48 Mich. L. Rev. 546 (1950), 29 Neb. L. Rev. 108 (1949), 3 Okla. L. Rev. 225 (1950).

¹¹⁵ *Shores v. United States*, *supra* note 114, at 841.

¹¹⁶ *United States v. Gwynne*, *supra* note 111, at 994.

¹¹⁷ *United States v. Williams*, 55 F. Supp. 375, 379 (D. Minn. 1944).

In 1959 the Supreme Court held that the defendant's wife could not testify against her husband in a Mann Act prosecution where the victim of the offense was not the wife.¹¹⁸ The Government failed in its effort to convince the Court that the privilege was only that of the wife. It made no difference that the spouses were living apart and never had lived together for any length of time.

Finally, in 1960, the Supreme Court, with three Justices dissenting, held that a wife may testify against her husband in a Mann Act prosecution where she is the victim.¹¹⁹ The marriage apparently occurred after the offense, but that was not treated as controlling. The wife must testify even though unwilling. This was the first Supreme Court decision to say that she *must* testify.¹²⁰ The Court did not say that the same rule would be applied to other offenses; each case would be separately considered in the light of the reason which has led to a refusal to recognize the defendant spouse's privilege. It is surely a commentary on the Supreme Court's unwillingness to abolish the anti-marital privilege that three members of the Court dissented even in a Mann Act case where the wife was the victim of the offense.

In a case arising in the then Territory of Hawaii, it was held that a wife could testify that her husband induced and compelled her to practice prostitution.¹²¹

A statute of 1906¹²² made a wife a competent witness against her husband in abandonment cases in the District of Columbia. She could testify in proceedings for removal in another district.¹²³

The Supreme Court has stated: "Polygamy and adultery may be crimes which involve disloyalty to the marital relation, but they are rather crimes against such relation rather than against the wife."¹²⁴

¹¹⁸ *Hawkins v. United States*, *supra* note 108, noted 45 Cornell L.Q. 131 (1959), 36 Dicta 255 (1959), 19 Fed. B.J. 85 (1959), 19 La. L. Rev. 527 (1959), 43 Marq. L. Rev. 131 (1959), 5 N.Y.L.F. 311 (1959), 10 Syracuse L. Rev. 363 (1959), 32 Temp. L.Q. 351 (1959), 33 Tul. L. Rev. 884 (1959), 12 Vand. L. Rev. 947 (1959).

¹¹⁹ *Wyatt v. United States*, 362 U.S. 525 (1960), noted 13 Ala. L. Rev. 202 (1960), 10 De Paul L. Rev. 201 (1960), 49 Geo. L.J. 148 (1960), 23 Ga. B.J. 272 (1961), 74 Harv. L. Rev. 160 (1960), 45 Minn. L. Rev. 1077 (1961), 39 Texas L. Rev. 508 (1961), 109 U. Pa. L. Rev. 448 (1961), 14 Vand. L. Rev. 643 (1961), 18 Wash. & Lee L. Rev. 980 (1961).

¹²⁰ But there was a similar holding in *Shores v. United States*, *supra* note 111, at 841.

¹²¹ *Alford v. Territory*, *supra* note 80, at 619.

¹²² 34 Stat. 86 (1906).

¹²³ *Parker v. United States*, 3 F.2d 903 (9th Cir. 1925).

¹²⁴ *Bassett v. United States*, *supra* note 93. This was quoted favorably in *Denning v. United States*, *supra* note 111, at 506.

But in 1958 the Supreme Court repudiated this view in a dictum.¹²⁵

As to offenses involving property of the spouse, there is a tendency to hold that the spouse may testify. In forgery by one spouse of the other's name, however, the victim spouse was not permitted to testify.¹²⁶ However, the facts in that case showed that the spouse actually suffered no loss. On a prosecution for transporting in interstate commerce a sum of money feloniously converted from his wife, the wife was permitted to testify.¹²⁷ An abandoned wife may testify in a prosecution for forging her name.¹²⁸

In an early case the Supreme Court stated: "It has been said, that on the grounds of state policy, the wife is a competent witness against her husband in case of treason. . . . But it has since been settled, that the wife is not bound to discover the treason of her husband."¹²⁹ The Court also stated: "It is, however, admitted in all the cases, that the wife is not competent, except in cases of violence upon her person, directly to criminate her husband."

There is authority that even if the spouse was improperly allowed to testify, it is not reversible error where the other evidence presented established guilt beyond a reasonable doubt.¹³⁰ A court of appeals offered this as an alternative ground for upholding a conviction in a Mann Act prosecution where the wife was not the victim.¹³¹ But the Supreme Court reversed after finding that it could not say "that her testimony did not have substantial influence on the jury."¹³²

In several cases federal courts have suggested an exception to the privilege where the defendant's spouse is the only available witness.¹³³ Wigmore has espoused this view.¹³⁴

¹²⁵ *Hawkins v. United States*, *supra* note 108, at 78.

¹²⁶ *Paul v. United States*, 79 F.2d 561 (3d Cir. 1935).

¹²⁷ *United States v. Graham*, 87 F. Supp. 237, 238 (E.D. Mich. 1949), noted 48 Mich. L. Rev. 1223 (1950); *Herman v. United States*, 220 F.2d 219, 226 (4th Cir. 1955).

But where the prosecution was of other victims, although the wife had been an earlier victim, the wife could not testify. *United States v. Walker*, 176 F.2d 564 (2d Cir. 1949). Judge Clark, dissenting, would allow her to testify even then.

¹²⁸ *United States v. Ryno*, 130 F. Supp. 685, 688 (S.D. Cal. 1955), *aff'd*, 232 F.2d 581 (9th Cir. 1956), noted 41 Va. L. Rev. 822 (1955).

¹²⁹ *Stein v. Bowman*, *supra* note 108, at 222. See 8 Wigmore § 2239.

¹³⁰ *Ryno v. United States*, *supra* note 128, at 584. But the holding is weak as the trial was by the court, and the spouse had been abandoned and a property loss was inflicted on her.

¹³¹ *Hawkins v. United States*, 249 F.2d 735, 737 (10th Cir. 1957), *rev'd*, 358 U.S. 74 (1958).

¹³² *Hawkins v. United States*, *supra* note 108, at 79.

¹³³ *United States v. Williams*, *supra* note 117; *United States v. Graham*, *supra* note 127, at 238-41; *Eisenberg v. United States*, 273 F.2d 127, 128 (5th Cir. 1959).

¹³⁴ 8 Wigmore § 2239. See Note, 45 Minn. L. Rev. 1077, 1088 (1961).

A wife may testify against her husband at the preliminary examination in a prosecution under the Mann Act where the wife is the victim, at least where her testimony is admitted with her consent and that of her husband.¹³⁵ Prior to the Federal Criminal Rules, state law did not apply to the qualifications of witnesses at the preliminary examination. However, the existing state law happened to be the same. The case is narrow in scope, since the wife could also testify at the trial. It is not necessarily authority that the wife could testify where she could not also testify at the trial.

A federal court cited favorably a New York state case holding that an indictment should be quashed where defendant's wife was called as a witness against him by the grand jury, as this was substantial error and it was doubtful whether an indictment would have been found without the wife's testimony.¹³⁶ A federal statute of 1887¹³⁷ made a spouse a competent witness to testify before a grand jury as to polygamy, but the spouse could not be compelled to testify without the consent of the other spouse. In 1927 a court stated:

We are of the opinion that the testimony of a wife before the grand jury resulting in the indictment of her husband and plaintiffs in error for the commission of a crime was incompetent at the time it was given, and a subsequent plea of guilty of the husband cannot render the testimony competent which was incompetent when given.¹³⁸

In 1951 the Supreme Court held that a husband could claim the privilege as to marital communications as to his wife's whereabouts at a grand jury hearing.¹³⁹ The husband did not make a claim not to testify against his spouse under the anti-marital privilege. In 1936 a court held that compelling a spouse to testify before the grand jury would not be considered on habeas corpus.¹⁴⁰ In 1955 it was held that a wife could testify before the grand jury when the offense was an injury to her property rights.¹⁴¹ The court did not pass on the question whether the spouse could appear in any case irrespective of injury to her through the offense. It should be noted that in 1958 the Supreme Court stated: "Adverse testimony given in criminal proceedings

¹³⁵ *Cohen v. United States*, *supra* note 111, at 27.

¹³⁶ *United States v. Farrington*, 5 Fed. 343, 348 (N.D.N.Y. 1881).

¹³⁷ 24 Stat. 635 (1887).

¹³⁸ *Nanfito v. United States*, 20 F.2d 376, 378 (8th Cir. 1927).

¹³⁹ *Blau v. United States*, 340 U.S. 332, 333 (1951). Two dissenting Justices thought the communication not privileged because not confidential and would punish the witness for contempt.

¹⁴⁰ *Thouvenell v. Zerbst*, 83 F.2d 1003 (10th Cir. 1936).

¹⁴¹ *Herman v. United States*, *supra* note 127, at 226.

would, we think, be likely to destroy almost any marriage."¹⁴² The concept "criminal proceeding" is rather broad. A court has stated that it includes "all possible steps in the criminal case from its inception to judgment and sentence."¹⁴³ On the other hand, a motion to suppress will not lie as to statements obtained from a wife by Internal Revenue Agents after interrogation.¹⁴⁴

8. *Whose Is the Privilege*

In most states not only is the party-spouse privileged to keep the spouse-witness off the stand, but the latter has a privilege also to refuse to testify against the party though he consents.¹⁴⁵ In 1943 the Second Circuit stated in dictum that "clearly the better view is that the privilege is that of either spouse who chooses to claim it."¹⁴⁶ The privilege of excluding adverse testimony is generally regarded as belonging to both spouses. A defendant may assert the privilege in order to prevent his spouse from testifying, and a witness may decline to testify against the accused spouse.¹⁴⁷ But in one case there was a strong dictum that the wife can be compelled to testify against her husband whenever an exception to his privilege exists.¹⁴⁸ This view was followed in a subsequent case,¹⁴⁹ but the Supreme Court did not fully accept it.¹⁵⁰ A husband or wife "cannot be compelled to testify against his or her spouse and cannot be permitted to do so unless the other spouse consents."¹⁵¹ It makes no difference that the witness-

¹⁴² *Hawkins v. United States*, *supra* note 108, at 77.

¹⁴³ *United States v. Choate*, 276 F.2d 724, 727 n.6 (5th Cir. 1960). See Orfield, "The Scope of the Federal Rules of Criminal Procedure," 38 U. Det. L.J. 173, 188-189 (1960).

¹⁴⁴ *United States v. Winfree*, *supra* note 97, at 660.

¹⁴⁵ *McCormick* § 66 n.3; 8 *Wigmore* § 2241.

¹⁴⁶ *United States v. Mitchell*, *supra* note 111, at 1008. The court cited 8 *Wigmore* § 2241.

See Note, 56 Nw. U.L. Rev. 208, 219-220 (1961). The privilege of the spouse not to testify is that of the two spouses and not of third persons, such as co-defendants. *Knoell v. United States*, *supra* note 99, at 23. *But cf.* *Paul v. United States*, *supra* note 126, at 563.

¹⁴⁷ *Wyatt v. United States*, *supra* note 119, at 529; *Hawkins v. United States*, *supra* note 108, at 77; *Jackson v. United States*, 250 F.2d 897, 900 (5th Cir. 1958); *Lindsey v. United States*, 217 F.2d 113, 115 (5th Cir. 1955), *cert. denied*, 350 U.S. 1008 (1956); *United States v. Mitchell*, *supra* note 111, at 1008; *Cohen v. United States*, *supra* note 111, at 29.

¹⁴⁸ *Shores v. United States*, *supra* note 111, at 841.

¹⁴⁹ *Wyatt v. United States*, 263 F.2d 304 (5th Cir. 1959), *aff'd*, 362 U.S. 525 (1960).

¹⁵⁰ *Wyatt v. United States*, *supra* note 119, at 529. She could be made to testify in a Mann Act prosecution where she is the victim.

¹⁵¹ *Olender v. United States*, 210 F.2d 795, 800 (9th Cir. 1954).

spouse is willing to testify. The Supreme Court has stated that none of its decisions supports a distinction between compelled and voluntary testimony.¹⁵² Justice Stewart concurred in the result because the evidence did not clearly show that the witness-spouse testified voluntarily.¹⁵³ He conceded that it would often be difficult to distinguish between voluntary and compelled testimony.

9. *Waiver*

Where the wife of the defendant testified for the Government, but objection to the competency was made after the witness left the stand and after several other witnesses had been subsequently examined, the objection came too late.¹⁵⁴ At common law, an objection to the competency of a witness on the ground of interest was required to be made before his examination in chief or, if his interest was not then known, as soon as it was discovered. The trial judge is not required to enforce the privilege of his own motion.¹⁵⁵

There may be waiver by express consent to the spouse's testimony.¹⁵⁶ In one case the husband testified at the trial revealing incriminating facts. His wife took the stand to corroborate his testimony. On appeal, his objection that the court erred in admitting her testimony was overruled.¹⁵⁷ Where no objection is raised in the trial court there is a waiver.¹⁵⁸ But it has been held that a specific objection is not required; it is enough that the absence of the defendant's consent is suggested to the court.¹⁵⁹

10. *Comment on Exercise of Privilege*

Suppose there is a valid claim of privilege. May the Government comment upon its invocation? Most American cases hold that there may be no comment.¹⁶⁰ The few federal cases on the point are in

¹⁵² *Hawkins v. United States*, *supra* note 108, at 77.

¹⁵³ *Id.* at 81-82.

¹⁵⁴ *Benson v. United States*, 146 U.S. 325, 331 (1892).

The wife testified, as to six slips and two letters, that they were in the handwriting of the defendant, and that the letters were received by her through the mail.

In accord, see *United States v. Knoell*, 230 Fed. 509, 513 (E.D. Pa. 1916), *aff'd*, *Knoell v. United States*, 239 Fed. 16, 22 (3d Cir. 1917), *error dismissed*, 246 U.S. 648 (1918).

¹⁵⁵ *United States v. Knoell*, *supra* note 154, at 23.

¹⁵⁶ *Griffin v. United States*, 336 U.S. 704, 714 (1949).

¹⁵⁷ *United States v. Levy*, 153 F.2d 995, 997 (3d Cir. 1946).

¹⁵⁸ *Olender v. United States*, *supra* note 151, at 800.

¹⁵⁹ *Jackson v. United States*, *supra* note 147, at 900. While the court cited Wigmore, the present edition seems *contra*. See 8 Wigmore § 2242.

¹⁶⁰ See Annot., 5 A.L.R.2d 928-933 and 8 Wigmore § 2243 n.1. There may be no comment in England. Kenny, *Outlines of Criminal Law* § 632 (17th ed. 1958).

conflict. An early decision of the Supreme Court seemed to hold that there may be no comment. A woman was present with the murderer. The defendant did not have his wife in court so that it could be determined whether she was the woman, and the husband thus identified. The Supreme Court held that no comment could be made by the Government and offered two reasons: first, that the defendant was not bound to anticipate the need, and second, because she was not competent to testify in his favor.¹⁶¹ But in a prosecution for robbery, the defendant's failure to call his wife who had material knowledge was held open to inference.¹⁶² The opinion was by Learned Hand. The facts do not reveal that there was comment by the Government or by the trial judge. It is an established principle that there may be an inference from the suppression of available testimony or from the failure to utilize it.¹⁶³ But most cases in the state courts hold that this principle is inconsistent with the marital privilege and must yield to it.¹⁶⁴ After all, the purpose of the privilege is to deny the Government the use of the spouse's testimony against her husband. It therefore seems undesirable to allow comment by the Government or by the court on the consequent inference the jury will draw. They are likely to draw an inference against the defendant even if there is no comment. It should be recalled that when a wife could not testify for her husband, a court of appeals held that the jury should be instructed on request that she cannot testify where the facts are such that the jury might otherwise draw unfavorable inferences from her failure to testify.¹⁶⁵ But the Government should have the right to call the spouse to the stand and force the claim of privilege. It is possible that the privilege will be waived if the testimony is called for.

11. *Conclusion*

In the opinion of the author of this article, the federal courts should move more speedily in the direction of permitting a spouse to testify

¹⁶¹ *Graves v. United States*, 150 U.S. 118, 120 (1893). Mr. Justice Brewer dissented.

¹⁶² *United States v. Fox*, 97 F.2d 913 (2d Cir. 1938). The court cited Wigmore § 2273. In *Dayton v. United States*, 152 F.2d 402, 403 (9th Cir. 1945), the Government was allowed to comment on the failure of the defendant's common-law wife to take the stand to support the defendant.

In *Bisno v. United States*, 299 F.2d 711, 720-722 (9th Cir. 1961), the court allowed the Government to comment on the defendant's failure to call his wife and denied the defendant an instruction against drawing inferences from the failure of the defendant's wife to testify. A concurring judge disagreed on this point, but found it harmless error.

¹⁶³ 2 Wigmore § 286; McCormick § 249. As to instructions, see Annot., 131 A.L.R. 702 (1941).

¹⁶⁴ § Wigmore § 2243.

¹⁶⁵ *Fisher v. United States*, 32 F.2d 602, 604 (4th Cir. 1929).

against the other spouse in all criminal cases. In the words of Justice Stewart:

Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice. When such a rule is the product of a conceptualism long ago discarded, is universally criticized by scholars, and has been qualified or abandoned in many jurisdictions, it should receive the most careful scrutiny. Surely "reason and experience" require that we do more than indulge in mere assumptions, perhaps naïve assumptions, as to the importance of this ancient rule to the interests of domestic tranquility.¹⁶⁸

III. THE PRIVILEGE FOR MARITAL COMMUNICATIONS

1. *History*

The Supreme Court stated in 1839: "It is, however, admitted in all the cases that the wife is not competent, except in cases of violence upon her person to criminate her husband, or to disclose that which she has learned from him in their confidential intercourse."¹⁶⁷ In a civil case the Supreme Court stated that "suits cannot be maintained which could require a disclosure of the confidences . . . between husband and wife."¹⁶⁸ While a statute of 1887¹⁶⁹ made a spouse competent to testify as to polygamy, it was provided that "such witness shall not be permitted to testify as to any statement or communication made by either husband or wife to each other, during the existence of the marriage relation, deemed confidential at common law."

2. *Policy of the Privilege*

One judge has stated:

The wise public policy, which forbids a husband or wife to testify as to confidential communications, is intended, by preserving such confidences from disclosure, to preserve unshattered the sacredness and integrity of the marriage relation, which is so vital to the stability of our civilization. The thought is that married people shall be made safe in their communications to each other by the assurance that neither will be permitted to violate such confidences. It is essential and solely for the benefit of the parties involved, and serves no further useful purpose.¹⁷⁰

¹⁶⁶ Hawkins v. United States, 358 U.S. 74, 81-82 (1958).

That most scholars reject the anti-marital privilege, see Note, 33 Tul. L. Rev. 884, 890 n.63 (1959), citing authorities.

¹⁶⁷ Stein v. Bowman, 38 U.S. (13 Pet.) 209, 222 (1839).

See Annot., 95 L. Ed. 309 (1951) on the whole topic; and as to history, see 8 Wigmore § 2333; McCormick § 82.

¹⁶⁸ Totten v. United States, 92 U.S. 105, 107 (1876).

¹⁶⁹ 24 Stat. 635 (1887).

¹⁷⁰ Adams v. United States, 259 F.2d 214, 215 (8th Cir. 1919). See 8 Wigmore § 2332; McCormick § 90.

The Supreme Court has stated that protection of the marriage relation is the basis of the rule.¹⁷¹ At the same time, the Court indicated the modern policy behind the privilege: "The privilege suppresses relevant testimony, and should be allowed only when it is plain that marital confidence cannot otherwise reasonably be preserved."¹⁷² In 1935 a court pointed out: "The wisdom of the common-law rules that held inviolate the confidence of a . . . husband in his wife, has stood the test of time. The statutes of forty-two jurisdictions provide that private communications between husband and wife are incompetent evidence, and in twenty-six of these it is expressly provided that they are incompetent during the marriage and afterwards. Such is the rule in the federal courts."¹⁷³

3. *Anti-Marital Privilege Distinguished*

The privilege covering confidential communications between husband and wife exists independently of the rule disqualifying one spouse from testifying for or against the other spouse.¹⁷⁴ While talk of the privilege goes back to 1839, there was very little use of it in early years because of the rule that a spouse was privileged not to testify at all against her spouse except in rare situations. A federal court willing to remove the bar as to anti-marital facts admitted that different considerations applied to marital communications.¹⁷⁵

4. *Privilege Applicable to Marital Status Only*

Communications between husband and wife before marriage are not privileged,¹⁷⁶ nor are communications after their divorce.¹⁷⁷

5. *Confidentiality*

The communication must be confidential. The admission of the testimony of the divorced wife of the defendant as to the contents of a lost paper, which had been handed to her by the defendant while she was still his wife during a consultation between them and others relating to matters out of which the prosecution arose, was not rever-

¹⁷¹ *Wolfe v. United States*, 291 U.S. 7, 14 (1934).

¹⁷² See *McCormick* § 90.

¹⁷³ *Yoder v. United States*, 80 F.2d 665, 668 (10th Cir. 1935).

¹⁷⁴ *Hopkins v. Grimshaw*, 165 U.S. 342, 349 (1897); *Wolfe v. United States*, *supra* note 171, at 14. See 8 *Wigmore* § 2334; *McCormick* § 66.

¹⁷⁵ *Yoder v. United States*, *supra* note 173, at 668.

¹⁷⁶ *Halback v. Hill*, 261 Fed. 1007, 1010 (D.C. Cir. 1919) (habeas corpus to obtain child); *Yoder v. United States*, *supra* note 175, at 668; *United States v. Mitchell*, 137 F.2d 1006, 1009 (2d Cir. 1943), *cert. denied*, 321 U.S. 794 (1944). See *McCormick* § 85; 8 *Wigmore* § 2335.

¹⁷⁷ *Yoder v. United States*, *supra* note 173.

sible error where it did not appear from the record that the communication was confidential, or that the paper was not read by the others present.¹⁷⁸ If the communication is only between a spouse and a third person, there is no privilege.¹⁷⁹ A court has stated that the privilege as to marital communications "has not been applied to any matter which the husband, for example, has elected to make public by saying it in the presence of third persons along with his wife."¹⁸⁰ The Supreme Court has stated that "when made in the presence of a third party, such communications are usually regarded as not privileged because not made in confidence."¹⁸¹ But in some cases they may be confidential. There is no privilege as to threats against the wife in the presence of others.¹⁸² In a civil case the Supreme Court held that a communication was confidential even though it was in the presence of a young daughter who took no part in it.¹⁸³ But in a criminal case the Supreme Court referred favorably to the rule that communications "voluntarily made in the presence of their children, old enough to comprehend them, or other members of the family circle, are not privileged."¹⁸⁴

Where the husband left a note for the wife at their home, written on a large cardboard, the message was held not confidential.¹⁸⁵ A letter from the defendant to his wife, dictated by him to a stenographer, is not privileged. The Supreme Court stated by Mr. Justice Stone: "Normally husband and wife may conveniently communicate without stenographic aid, and the privilege of holding their confidences immune from proof in court may be reasonably enjoyed and preserved without embracing within it the testimony of third persons to whom such communications have been voluntarily revealed."¹⁸⁶ The intent of the writer of the letter not to consider the communication confidential was not the basis of the decision. Instead it was that the communication

¹⁷⁸ *Jacobs v. United States*, 161 Fed. 694, 697 (1st Cir. 1908). The court cited two civil cases. *Stein v. Bowman*, *supra* note 167, at 222; *Hopkins v. Grimshaw*, *supra* note 174, at 349. See 8 Wigmore § 2336; McCormick § 84.

¹⁷⁹ *United States v. Gonella*, 103 F.2d 123 (3d Cir. 1939); *Tabbah v. United States*, 217 F.2d 528, 529 (5th Cir. 1954).

¹⁸⁰ *United States v. Guiteau*, 12 D.C. (1 Mackey) 498, 548 (1882). See also *United States v. Brunner*, 200 F.2d 276, 280 (6th Cir. 1952).

¹⁸¹ *Wolfe v. United States*, *supra* note 171, at 14.

¹⁸² *United States v. Mitchell*, *supra* note 176, at 1009.

¹⁸³ *Hopkins v. Grimshaw*, *supra* note 174, at 351.

¹⁸⁴ *Wolfe v. United States*, *supra* note 171, at 17.

¹⁸⁵ *Yoder v. United States*, *supra* note 173, at 668.

¹⁸⁶ *Wolfe v. United States*, *supra* note 171, at 16, noted 22 Calif. L. Rev. 573 (1935), 22 Geo. L.J. 623 (1934), 10 Ind. L.J. 182 (1934), 11 N.Y.U.L.Q. 644 (1934), 9 Wis. L. Rev. 426 (1934).

was not within the privilege because of its voluntary disclosure to a third person.

Where communications between spouses are in private, they are assumed to be confidential unless the subject of the communication or the circumstances indicate the contrary.¹⁸⁷ The presumption may be overcome by proof that it was not intended to be private, or the presence of a third party, or the intention that the information be transmitted to a third person.¹⁸⁸ Testimony may be given by either spouse as to the known presence of a third person.¹⁸⁹

6. *Nature and Scope of Communication*

On a prosecution for transporting a wife in interstate commerce for purposes of prostitution, it was held that the wife's testimony as to the act of the husband in taking money from her was not privileged.¹⁹⁰ In 1954 the Supreme Court stated "the privilege, generally, extends only to utterances, and not to acts."¹⁹¹ A communication between a spouse and a third person is an act and not privileged.¹⁹² A divorced wife may testify that the defendant was not living with her to prove draft evasion by false statements that the defendant was living with his wife.¹⁹³ The former wife's testimony dealt with her residence with her parents and the membership of their household. The privilege does not apply to testimony by a wife as to the conduct of her husband before annulment of the marriage.¹⁹⁴ There can be no claim of marital privilege as to records of the husband turned over by the estranged wife to the Internal Revenue Service as they are not a marital communication between spouses, and are not confidential between them.¹⁹⁵ A motion to suppress will not be granted as to information obtained by Internal Revenue agents from their interrogation of the wife of the defendant.¹⁹⁶

The privilege protects against indirect disclosure of the com-

¹⁸⁷ *Blau v. United States*, *supra* note 139, at 333.

¹⁸⁸ *Pereira v. United States*, 347 U.S. 1, 6 (1954); *Picciurro v. United States*, 250 F.2d 585, 589 (8th Cir. 1958).

¹⁸⁹ *Ibid.*

¹⁹⁰ *United States v. Mitchell*, *supra* note 176, at 1009. See 8 Wigmore § 2237; McCormick § 83; Annot., 10 A.L.R.2d 1389 (1950).

¹⁹¹ *Pereira v. United States*, *supra* note 188, at 6. The court cited 8 Wigmore § 2337. *But cf.* Note, 47 J. Crim. L. 205 (1956); Annot., 10 A.L.R.2d 1389 (1950).

¹⁹² *Pool v. United States*, 260 F.2d 57, 64 (9th Cir. 1958); *Tabbah v. United States*, 217 F.2d 528, 529 (5th Cir. 1955).

¹⁹³ *United States v. Termini*, 267 F.2d 18, 20 (2d Cir. 1959).

¹⁹⁴ *Cooper v. United States*, 282 F.2d 527, 533 (9th Cir. 1960).

¹⁹⁵ *United States v. Ashby*, 245 F.2d 527, 533 (9th Cir. 1957).

¹⁹⁶ *United States v. Winfree*, 170 F. Supp. 659 (E.D. Pa. 1959).

munication. Where a husband is asked where his wife now is, he need not disclose this fact when he learned it solely from her secret communication.¹⁹⁷ The wife was hiding out to avoid Government process. Thus, the privilege possibly extends to future or continuing criminal conduct.

A divorced wife may testify that she saw no indications of insanity during her marriage with the defendant. The court stated: "We think that the exhibition of sanity or insanity is not a communication at all, in the sense of the rule which protects the privacy and confidence of the marriage relation, any more than the height or color, or blindness, or the loss of an arm of one of the parties is a communication."¹⁹⁸ The communicator has no choice. Yet there was communication in the sense that the wife became aware of his condition. The interest of preserving confidence is served by protecting the communication of one unable to help himself and also unable to conceal because of the close relationship of marriage. A number of state courts give a privilege as to acts performed with the intent to convey information, the intent being implied from the proximity of the marital relation.¹⁹⁹

7. *Exceptions*

In a leading case, Chief Judge Learned Hand stated: "We do not forget that a wife from the earliest times was competent to testify against her husband, when the crime was an offense against her person. . . . The same exception probably extends to the privilege against the admission of confidential communications."²⁰⁰ But this view was not followed in a case involving abandonment and property injury.²⁰¹

A federal civil case has suggested that there be applied to marital communications the rule applied in cases of confidences between attorney and client that a communication made for the purpose of effecting a fraud or crime is not privileged.²⁰² The Uniform Rules of

¹⁹⁷ *Blau v. United States*, 340 U.S. 332 (1951). Two Justices dissented.

The lower court had denied the privilege. *Rogers v. United States*, 179 F.2d 559, 564 (10th Cir. 1950).

¹⁹⁸ *United States v. Guiteau*, *supra* note 180, at 547. See Annot., 10 A.L.R.2d 1389, 1401 (1950).

¹⁹⁹ See Note, 56 Nw. U.L. Rev. 208, 221-222 (1961); McCormick § 83.

²⁰⁰ *United States v. Walker*, 176 F.2d 564, 568 (2d Cir. 1949). See McCormick § 88; 8 Wigmore § 2338; Note, 56 Nw. U.L. Rev. 208, 227 (1961).

²⁰¹ *United States v. Ryno*, 130 F. Supp. 685, 690 (S.D. Cal. 1955), *aff'd*, 232 F.2d 581 (9th Cir. 1956).

²⁰² *Fraser v. United States*, 145 F.2d 139, 143 (6th Cir. 1945), *cert. denied*, 324 U.S. 842 (1945). Such an approach is advocated in McCormick § 83.

Evidence so provide in Rule 28(2). But possibly the Supreme Court has indicated otherwise.²⁰³

The privilege may be invoked at a grand jury proceeding,²⁰⁴ as well as at the trial. A statute of 1887²⁰⁵ provided that a spouse need not testify before the grand jury in a bigamy prosecution as to marital communications. In this respect the rule may be different from the privilege for anti-marital facts.

An objection that the question was incompetent and called for hearsay does not raise an objection that it called for confidential communications between husband and wife.²⁰⁶ An appellate court will not consider the issue of privileged communication if it is not properly raised in the trial court.

8. *Documents Obtained by Third Persons*

Suppose the spouse to whom a letter is addressed dies, and the letter is found among the effects of the deceased. May the personal representative be required or permitted to produce it in court? In this situation there is no betrayal or connivance by the deceased spouse. Furthermore this is not a disclosure against which the sender could take precautions. Since most courts hold the privilege survives the death of a spouse, the privilege should be upheld.²⁰⁷ But a federal court held, on the trial of a husband for the murder of his wife, that a letter to his wife found by a third person among her effects was admissible. "The letter, having come into the hands of the prosecution through a third party, thereby lost its privileged character."²⁰⁸ Yet there are civil cases giving protection.²⁰⁹

²⁰³ *Blau v. United States*, *supra* note 197. See Morgan, Maguire, and Weinstein, *Cases and Materials on Evidence*, 839 n.11 (4th ed. 1957).

²⁰⁴ *Blau v. United States*, *supra* note 197, at 333. Two Justices dissented because they thought the communication was not confidential.

²⁰⁵ 24 Stat. 635 (1887).

²⁰⁶ *Proffitt v. United States*, 264 Fed. 299, 302 (9th Cir. 1920).

²⁰⁷ *McCormick* § 86; 8 *Wigmore* § 2339.

²⁰⁸ *Dickerson v. United States*, 65 F.2d 824, 827 (1st Cir. 1933). The court cited *Halback v. Hill*, 261 Fed. 1007 (D.C. Cir. 1919), but there the letters were written prior to the marriage. The court also cited *Bassett v. United States*, 137 U.S. 496 (1890), but that case held the spouse incompetent to testify; letters and death of a spouse were not involved.

²⁰⁹ *Bowman v. Patrick*, 32 Fed. 368 (E.D. Nev. 1887); *New York Life Ins. Co. v. Ross*, 30 F.2d 80, 81 (6th Cir. 1928). These cases were cited in *Wolfe v. United States*, *supra* note 171, at 13, not, however, involving the precise point, and the Court left open the point whether third persons may testify.

9. *Holder of the Privilege*

A federal civil case has suggested that the communicating spouse is the holder of the privilege.²¹⁰ This is the view of writers on evidence.²¹¹ A single federal criminal case, however, held that the privilege was that of both spouses, but the testimony was admissible if either one waived.²¹²

10. *Waiver*

A failure of the holder to assert the privilege by objection, or a voluntary revelation by such holder on the stand, may be a waiver. A federal civil case has gone even further and held that when the husband claims the privilege on the stand, but answers when the court orders, this is a waiver.²¹³ The remedy of the witness was to stand on his claim of privilege, subject himself to contempt proceedings, and then take an appeal or apply for habeas corpus.

11. *Death*

A federal civil case held that the death of the communicating spouse did not terminate the privilege.²¹⁴ Another federal criminal case did not pass on the precise point, but held that a letter to a deceased wife, having come into the hands of the Government through a third party, thereby lost its privileged character.²¹⁵

12. *Divorce*

May a divorced wife testify as to a confidential communication? One court found it unnecessary to decide the point, as it concluded that the communication was not confidential.²¹⁶ Another court stated that she may not testify.²¹⁷ In 1954 the Supreme Court accepted Wigmore's view that divorce does not terminate the priv-

²¹⁰ *Fraser v. United States*, *supra* note 202, at 144. See also *Stickney v. Stickney*, 131 U.S. 227, 237 (1888).

²¹¹ 8 Wigmore § 2340(1); McCormick § 87.

²¹² *United States v. Mitchell*, *supra* note 176, at 1008. The court cited 8 Wigmore § 2241 (3d ed. 1940) which, however, deals with the anti-marital privilege.

²¹³ *Fraser v. United States*, *supra* note 202, at 144. It has been concluded that this is questionable. McCormick § 87.

For a criminal case finding a waiver because of a failure to object properly, see *Proffitt v. United States*, *supra* note 206, at 302.

²¹⁴ *Brooks v. Francis*, 10 D.C. (3 McArthur) 109, 112 (1879). See also *Stein v. Bowman*, 38 U.S. (13 Pet.) 209, 223 (1839); McCormick § 89; 8 Wigmore §2341.

²¹⁵ *Dickerson v. United States*, *supra* note 208, at 827. See McCormick § 86.

²¹⁶ *United States v. Gonella*, *supra* note 179.

²¹⁷ *United States v. Walker*, *supra* note 200, at 567. The court cited 8 Wigmore § 2341(2) (3d ed. 1940). See also McCormick § 89.

ilege.²¹⁸ In this respect the privilege differs from the anti-marital privilege. The Uniform Rules of Evidence, Rule 28 (1), limit the confidential communication privilege "during the marital relationship."

CONCLUSION

The federal courts should retain the privilege for confidential communications. The federal courts should make it clear that there is no such privilege where the offense is against the person or property of the other spouse. There should be no privilege where the communication was intended to enable or aid any person to commit or plan to commit a crime or a tort. The concept of "communication" should be broad enough to cover not only verbal exchanges and acts performed with manifest intent to convey information, but also acts performed with the intent to convey information where such intent is implied from the propinquity of the marriage relation. Aside from this, the scope of the privilege should be strictly limited. The courts should move in the direction of a rule that the privilege is a qualified one which must yield if the trial court finds that the evidence of the communication is required in the due administration of justice.

²¹⁸ *Pereira v. United States*, *supra* note 188, at 6.

Perhaps an annulment does not terminate the privilege either. *Cooper v. United States*, 282 F.2d 527, 533 (9th Cir. 1960).