

July 2015

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Recommended Citation

Huhn, Wilson R. (1987) "Ohio's "Sacred Seal of Secrecy": The Rules of Spousal Incompetency and Martial Privilege in Criminal Cases," *Akron Law Review*: Vol. 20 : Iss. 3 , Article 4.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol20/iss3/4>

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OHIO'S "SACRED SEAL OF SECRECY": THE RULES OF SPOUSAL INCOMPETENCY AND MARITAL PRIVILEGE IN CRIMINAL CASES

by

WILSON R. HUHNS*

To secure domestic tranquility, it is necessary that the highest confidence should exist between husband and wife; that all communications made in confidence, by the disclosure of which either party may be affected, should be considered as under the most sacred seal of secrecy. Ohio Supreme Court, 1849.¹

INTRODUCTION

A man stood accused of bludgeoning his twenty-two year old stepson to death. His wife testified that on the morning of September 12, 1983, she was riding in the car alone with her husband when he became enraged at her son in the belief that the son had stolen the family food stamps. In the grip of anger, the defendant "acted like a crazy man," "drove the car erratically," and "used vile language when referring to the victim."² The wife went to work, and the husband returned home and locked the house from the inside, preventing his wife and the other children from entering until early evening. Sometime during the day the stepson was beaten and stabbed to death in his bed, extensive bloodstains in the bedroom were cleaned up, and the corpse was dragged to the basement, washed, and dressed in clean clothes. There were no eyewitnesses to the crime. The body was discovered in the basement the next day. One block away the defendant's blood-splattered shirt was found discarded.

The defendant was convicted of aggravated murder. The conviction was reversed by the Ohio Supreme Court on the ground that the acts performed and communications made by the defendant in the car with his wife were "privileged," and were improperly admitted into evidence.³

The decision of the Supreme Court was an accurate application of the law. The rule of "marital privilege"⁴ bars a wife from testifying about her hus-

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¹Cook v. Grange, 18 Ohio 526, 530 (1849).

²State v. Rahman, 23 Ohio St. 3d 146, 150, 492 N.E.2d 401, 406 (1986).

³*Id.* at 150, 492 N.E.2d at 406.

⁴"Husband or wife shall not testify concerning a communication made by one to the other, or act done by either in the presence of the other, during coverture, unless the communication was made or act done in the known presence or hearing of a third person competent to be a witness, or in case of a personal injury by either the husband or wife to the other, . . . or bigamy, or failure to provide for, or neglect or cruelty of either to their children under eighteen years of age or their physically or mentally handicapped child under twenty-one years of age, or neglect or abandonment of such spouse under such sections. The presence or whereabouts of the husband or wife is not an act under this section. The rule is the same if the marital relation has ceased to exist." OHIO REV. CODE ANN. § 2945.42 (Baldwin Supp. 1986).

band's confidential acts and communications. As in the foregoing case, the rule of marital privilege can cause a miscarriage of justice. But a related rule, the rule of "spousal incompetency"⁵ is even more unjust. In another Ohio case,⁶ a woman was the only eyewitness when her husband murdered her mother. She was not permitted to take the stand against her husband, because as his spouse she was incompetent to testify.⁷

These are not isolated cases. There are other reported Ohio decisions where criminal convictions have been reversed on the ground that the testimony of the defendant's spouse was inadmissible as privileged or incompetent.⁸ No doubt there have been thousands of cases in Ohio where the prosecuting attorney, mindful of the law, has not even attempted to call the defendant's spouse as a witness, or has declined to prosecute because the defendant's spouse was the only witness.

In addition to being an impediment to justice, these rules are sexist. Although the rules of marital privilege and spousal incompetency are gender neutral on their face, in practice they benefit men more than women. Eighty-three percent of all crimes are committed by men; eighty-seven percent of all crimes against the family are committed by men.⁹ Accordingly, in the vast majority of cases, the rules of marital privilege and spousal incompetency are utilized to bar a wife from testifying against her husband. In only one reported Ohio decision has a defendant wife attempted to interpose these rules against her witness husband.¹⁰ These rules are especially egregious in cases where a wife desires to testify against her husband, such as where her husband has murdered a member of her family.

It is time to change the law, and to abolish both the rule of marital privilege and the rule of spousal incompetency.¹¹ They should be replaced with

⁵"Every person is competent to be a witness except . . . [a] spouse testifying against the other spouse charged with crimes except crimes against the testifying spouse or the children of either." OHIO R. EVID. 601(B).

⁶*Locke v. State*, 33 Ohio App. 445, 169 N.E. 833 (1929).

⁷The act occurred in the known presence of another person, namely the victim of the crime. Because the defendant's action was not confidential, the defendant could not invoke the rule of marital privilege. The defendant successfully interposed, however, an objection on the ground of his wife's incompetency to testify. *Id.* at 450, 169 N.E. at 835.

⁸*State v. Orth*, 79 Ohio St. 130, 86 N.E. 476 (1908); *Steen v. State*, 20 Ohio St. 333 (1870); *State v. Rodriguez*, 110 Ohio App. 307, 169 N.E. 2d 444 (1959); *State v. Goodin*, 60 Ohio App. 362, 21 N.E. 2d 482 (1938); *Rosser v. State*, 10 Ohio L. Abs. 69 (1931); and *Dayton v. Patton*, 24 Ohio Misc. 151, 259 N.E.2d 763 (1970).

⁹FBI Uniform Crime Reports for the United States, 1983. Men also commit eighty-three percent of violent crimes and assaults.

¹⁰This attempt was unsuccessful; the husband was permitted to testify because the wife was being prosecuted for an assault upon her husband. *Whipp v. State*, 34 Ohio St. 87 (1877).

¹¹There has been a gradual erosion over the years in the number of states allowing criminal defendants to prevent their spouses from testifying. The first state to take away the power of the defendant to prevent a spouse from testifying was Alabama. Section 5639 of the Alabama Code of 1923 provided:

The husband and wife may testify either for or against each other in criminal cases, but shall not be compelled so to do.

a single rule of spousal testimonial immunity, which would provide:

No person shall be compelled to testify against his or her spouse in a criminal case, except in cases of crimes against the testifying spouse or the children of either.

In the remainder of this essay the rules of spousal incompetency and marital privilege are compared and contrasted, the history of the rules in Ohio is traced, the underlying justifications for the rules are discussed, and a pitch is made for repeal of both rules, substituting the single rule of spousal immunity described above.

THE RULE OF SPOUSAL INCOMPETENCY CONTRASTED TO THE RULE OF MARITAL PRIVILEGE

The rule of spousal incompetency¹² bars one spouse from testifying against the other spouse in a criminal proceeding, whether or not the events which would be testified to were confidential, and whether or not they occurred prior to or during the marriage. The only requirement for application of the rule is that the witness and the defendant must be legally married at the time of trial. In short, in Ohio a person can commit a crime, then marry the witness, to keep the witness from testifying.¹³

By contrast, the rule of marital privilege¹⁴ bars a spouse or a former spouse from divulging confidential information learned during the marriage, in a civil¹⁵ or criminal proceeding where the other spouse is a party. It matters not, for purposes of applying the rule of marital privilege, whether the spouses are legally married at the time of the trial.

The rule of spousal incompetency is inapplicable in cases involving "crimes against the testifying spouse or the children of either."¹⁶ The rule of marital privilege is inapplicable in a laundry list of crimes including prosecutions for personal injury, bigamy, cruelty to, neglect of, or abandonment of the testifying spouse, and cruelty to, neglect of, or failure to provide for their

this subject may be found in 1 GREENLEAF ON EVIDENCE 472-479, § 334, fn. a (15th Ed., 1892); Note, 38 VA. L. REV. 359 (1952); and *Trammel v. United States*, 445 U.S. 40, 48 n. 9 (1980).

The drafters of the 1942 Model Code of Evidence and the 1953 Uniform Rules of Evidence favored abolition of the rule of spousal incompetency and retention of the rule of marital privilege. MODEL CODE OF EVIDENCE Rule 215 (1942); UNIF. R. EVID. 23(2) (1953).

¹²*Supra* note 5.

¹³This trial tactic worked in *Dayton v. Patton*, 24 Ohio Misc. 151, 259 N.E. 2d 763 (1970). See generally Annot., 13 A.L.R. 4th 1305.

¹⁴*Supra* note 4.

¹⁵The rule of marital privilege for civil proceedings is codified at OHIO REV. CODE ANN. § 2317.02 (D) (Baldwin 1984), the text of which is set forth in note 24, *infra*. The application of the rule of marital privilege in civil cases is not addressed in this essay. I believe, however, that if the privilege is retained in civil cases the option to exercise it ought to be with the witness spouse.

¹⁶OHIO R. EVID. 601(B), note 5 *supra*

minor children.¹⁷

In criminal cases the rule of marital privilege is almost entirely subsumed within the rule of spousal incompetency. The only possible separate applications of the marital privilege rule are in cases where the witness is divorced from the defendant spouse at the time of trial, and in cases where the victim of the crime is the adult child of one of the parties.¹⁸ In such cases, the rule of spousal incompetency does not apply, but the rule of marital privilege would bar testimony concerning confidential marital acts and communications.¹⁹

The rules of marital privilege and spousal incompetency have an important characteristic in common. Under existing Ohio law, the option to invoke these rules rests with the defendant spouse. The witness spouse has no discretion in the matter.

HISTORY IN OHIO

Civil Cases

The Ohio Supreme Court first recognized a rule excluding spousal testimony in 1849, in the civil case of *Cook v. Grange*.²⁰ In 1853, the legislature for the first time codified the rules of spousal incompetency and marital privilege²¹ as part of the Code of Civil Procedure:

The following persons shall be incompetent to testify: * * * Husband and wife, for or against each other, or concerning any communication made by one to the other during the marriage, whether called as a witness while that relation subsisted or afterward.²²

In 1870, the rule of spousal incompetency was deleted from the civil law,

¹⁷OHIO REV. CODE ANN. § 2945.42, note 4 *supra*. As noted in the text, the rule of marital privilege is inapplicable in cases involving neglect or abuse of "their children." In *State v. White*, 116 Ohio App. 522, 189 N.E. 2d 160 (1962), it was argued by the defendant husband that he ought to be able to bar his wife from testifying against him in a prosecution for "child stealing" his stepson, because this was not a crime involving "their children" within the meaning of § 2945.42. The court interpreted the term "their children" as meaning "his or her child or children." 116 Ohio App. at 526, 189 N.E.2d at 163.

¹⁸That was the situation in *State v. Rahman*, note 2 *supra*, where the defendant was accused of killing his adult stepson. The rule of spousal incompetency was inapplicable because the crime was committed against "the children of either." OHIO R. EVID. 601(B). But the rule of marital privilege was available to the defendant because it was not an offense against a *minor* child of the defendant or his wife. OHIO REV. CODE ANN. § 2945.42.

¹⁹Of course, if counsel forgets to object on the ground of spousal incompetency when the witness spouse begins to testify, the objection is waived. *Ruch v. State*, 111 Ohio St. 580, 146 N.E. 75 (1924). If this occurs, the defendant may be relegated to the marital privilege rule to exclude testimony of the witness spouse. *State v. Alexander*, No. 39783, Slip Op. at 3-4 (8th Dist. Ct. App., Dec. 13, 1979) (Unreported decision); *Locke v. State*, 33 Ohio App. 445, 169 N.E. 833 (1929) (dicta).

²⁰18 Ohio 526 (1849).

²¹1853 also marked the first time that the marital privilege for confidential communications was codified in Britain, in the EVIDENCE AMENDMENTS ACT OF 1853, St. 16 and 17 Vict. c. 83, § 3.

²²Section 314, CODE OF CIVIL PROCEDURE (1853), at 51 Ohio Laws 108-109. It also provided that persons of unsound mind and children under ten incapable of receiving just impressions or relating them truly were incompetent to testify, as well as attorneys and clergymen with respect to confidential communications.

but the rule of marital privilege was retained.²³ From that date forward husband and wife have been competent to testify for and against each other in civil cases, but may be prohibited from divulging confidential matters. The rule of marital privilege adopted in 1870 is substantially similar to the rule in effect today in civil cases, codified at Ohio Revised Code Section 2317.02(D).²⁴

Criminal Cases

In 1869, the Ohio legislature adopted a Code of Criminal Procedure which made no mention of the spousal exclusionary rules.²⁵ And in 1870, the legislature abolished the rule of spousal incompetency in civil cases.²⁶ Nevertheless, in 1870, in the case of *Steen v. State*,²⁷ the Ohio Supreme Court for the first time held that "[h]usband and wife are not competent witnesses for or against each other in criminal prosecutions."²⁸ The court cited no precedent or authority of any kind in support of its ruling, other than to say that the spousal incompetency rule "is founded upon considerations of *public policy*."²⁹

In 1889 the legislature enacted a statute codifying the marital privilege rule in criminal cases, but it repealed in part the doctrine of spousal incompetency recognized in *Steen v. State*. The statute provided:

No person shall be disqualified as a witness in any criminal prosecution by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of any crime; and husband and wife shall be competent witnesses to testify on behalf of each other in all criminal prosecutions; but husband or wife shall not testify concerning any communication made by one to the other, or act done by either, in the presence of each other during coverture unless the communication was made, or act done in the known presence or hearing of a third person competent to be a witness or unless in case of personal injury by either the husband or wife

²³1870 OHIO LAWS 111, 113-14. The rule of marital privilege was later codified at REV. STAT. 5241 and GEN. CODE 11494. As noted in the text, it is presently codified at OHIO REV. CODE ANN. § 2317.02(D) (Baldwin 1984).

²⁴The rule adopted in 1870 stated:

The following persons shall be incompetent to testify: *** Husband or wife concerning any communication made by one to the other during coverture, or any act done by either in the presence of the other during coverture, unless such communication was made or such act was done, within the known presence, hearing, or knowledge of a third person competent of being a witness, whether the husband or wife be called as a witness while that relation subsists or afterwards.

The law presently provides:

The following persons shall not testify in certain respects: *** Husband or wife, concerning any communication made by one to the other, or an act done by either in the presence of the other during coverture, unless the communication was made, or act done, in the known presence or hearing of a third person competent to be a witness; and such rule is the same if the marital relation has ceased to exist . . .

OHIO REV. CODE ANN. § 2317.02(D) (Baldwin, 1984).

²⁵66 OHIO LAWS 287, 308.

²⁶See *supra* note 24 and accompanying text.

²⁷20 Ohio St. 333 (1870).

²⁸*Id.*

to the other; and the rule shall be the same if the marital relation has ceased to exist; provided that the presence of whereabouts of the husband or wife shall not be construed to be an act under this section.³⁰

This statute had three functions. First, it eliminated the common law disqualification of witnesses who had an interest in the case, and of witnesses who had been convicted of a crime.³¹ Second, it expressly made husbands and wives competent to testify on behalf of each other. Third, it codified the rule of marital privilege in criminal cases in substantially its present form.³²

The 1889 statute did *not* expressly provide that spouses were incompetent to testify *against* each other in criminal cases. Thus, following the adoption of this statute, the question inevitably arose whether the common law rule of incompetency still obtained. Would the Ohio courts, in light of the failure of the legislature to affirmatively adopt a rule of spousal incompetency, find that husbands and wives could be called as witnesses against each other?

This question was answered in 1908 in the case of *State v. Orth*.³³ The husband in that case was being prosecuted for child neglect. The court ruled that the statute of 1889, insofar as it allowed husbands and wives to testify for each other in criminal cases, was in derogation of the common law, and ought to be strictly construed. The court refused to permit Mrs. Orth to testify against her husband, noting that it was for the legislature, not the court, to change the law.³⁴ In the following year, the legislature responded by amending the statute to expressly provide that the rule of spousal incompetency may not be invoked in prosecutions for cruelty to, neglect of, or failure to support one's children.³⁵

There the law stood for seventy years. In a single statute (Ohio Revised Code Section 2945.42) the rule of marital privilege was expressly stated, and

³⁰1889 OHIO LAWS 161 (1889).

³¹Disqualification for interest had been previously abrogated in the CRIMINAL CODE OF 1869. 1869 OHIO LAWS 287, 308. The act of 1889 reenacted that rule.

³²The only changes which have been made in the rule of marital privilege since 1889 are that a number of exceptions have been created. In addition to cases of "personal injury by either husband or wife to the other," the rule of marital privilege is also inapplicable in cases of bigamy, neglect, or abandonment of a spouse, and neglect of or cruelty to their children under eighteen years of age and handicapped children under twenty-one years of age. Compare the original marital privilege as quoted in the text accompanying note 30 *supra* with the present rule set forth in note 4, *supra*.

³³79 Ohio St. 130, 86 N.E. 476 (1908).

³⁴The Court stated:

If it had been the purpose and design of the Legislature to so relax or change this rule of the common law as to permit husband and wife to testify against each other in the cases in said statute specified, it would doubtless have so declared in express and appropriate terms, and it would not have left this purpose to be ascertained or discovered, by interpretation, or supplied by mere conjecture. With the policy of the rule that makes the wife incompetent as a witness against her husband in the present case, we are not now concerned. If the law should be changed in this behalf, so as to make husband and wife competent witnesses against each other in such cases the duty of changing it devolves upon the legislature, not upon this court. *Id.* at 135-36, 86 N.E. at 478.

the rule of spousal incompetency was implicitly recognized. Then, in 1980, the General Assembly and Supreme Court of the State of Ohio wasted a unique opportunity to jettison the spousal exclusionary rules. The Ohio Supreme Court was to draft (subject to the disapproval of the General Assembly) Rules of Evidence.³⁶ These rules of evidence would implicitly repeal any inconsistent laws. Thus, the Court and General Assembly could have abolished the spousal exclusionary rules.³⁷ Instead, the Rules defer to statutory law for definition of the evidentiary privileges,³⁸ and expressly incorporate a rule of spousal incompetency.³⁹

Accordingly, that portion of Ohio Revised Code Section 2945.42 which defines the rule of marital privilege is still the law. That portion of Ohio Revised Code Section 2945.42 which implied a rule of spousal incompetency has been repealed and replaced by the express incompetency rule of Evidence Rule 601(B).

Judicial Reluctance to Enforce the Spousal Exclusionary Rules

Despite the incorporation of the spousal exclusionary rules into our written law, and despite the clarity of their provisions, Ohio courts have fashioned a variety of "exceptions" so as to avoid applying them.

In *State v. Mowery*,⁴⁰ the Ohio Supreme Court was presented with a defendant who had shot his wife and his wife's lover. Mrs. Mowery survived, but her boyfriend did not. Under the law, Mrs. Mowery should have been considered competent to testify against her husband on the charge of attempting to murder her, but incompetent to testify on the charge of murdering her boyfriend. Evidence Rule 601(B) provides that a spouse is competent to testify against a spouse only where the defendant is charged with "crimes against the testifying spouse or the children of either." There is no exception in the Rule which would allow a spouse to testify about other crimes committed "as part of one continuous transaction" with crimes against the testifying spouse. But the

³⁶Rule-making power is vested in both the Supreme Court and the General Assembly, pursuant to OHIO CONST. art. IV, § 5(B) provides:

The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. *** Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

³⁷Congress had a similar opportunity to abolish the spousal exclusionary rules in the 1970's, when the Federal Rules of Evidence were under consideration. As originally proposed, Evidence Rule 505 would have eliminated the marital privilege, although it would have retained the rule of spousal incompetency. But Congress refused to adopt the proposed rules of evidence dealing with privileges, leaving their continued development to the courts. FED. R. EVID. 501 (effective 1975). See Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CALIF. L. REV. 1353 (1973).

³⁸OHIO R. EVID. 501.

³⁹OHIO R. EVID. 601(B).

Ohio Supreme Court adopted such an exception,⁴¹ because application of the spousal incompetency rule seemed so unjust.⁴²

Another judicial exception to the spousal exclusionary rules is one for unhappy marriages. Some courts have permitted spouses to testify in cases where the couple is estranged.⁴³ This places the court in the dubious position of deciding which marriages are worth preserving and which are not.⁴⁴

A common error of Ohio courts is to confuse the relatively strict requirements of the marital privilege rule as being necessary for application of the spousal incompetency rule. For example, courts have stated that a wife may testify in any case where the events testified to occurred in the known presence of a third person.⁴⁵ This is incorrect. Under Evidence Rule 601(B), a witness spouse is incompetent to testify to any matters, privileged or not. This error must be attributed to the understandable desire of the courts to permit the jury to hear all relevant evidence.⁴⁶

⁴¹Chief Justice Celebrezze dissented on the ground that the Court ought not to arrogate to itself the power to rewrite statutory law:

If the rule on spousal incompetency should be eliminated — as I think it should be — then the majority's *ad hoc* amendment of the rule, under the guise of judicial review, is not the legally appropriate mechanism by which to reform Ohio law on this point. Rather, pursuant to Section 5(B), Article IV of the Ohio Constitution, this court, under its constitutional rulemaking authority, should redraft Evid. R. 601(B) and submit it to the General Assembly.

1 Ohio St. 3d at 202, 438 N.E.2d at 905 (footnote omitted).

⁴²*Mowery* was followed in *State v. Fewerwerker*, 24 Ohio App. 3d 27, 492 N.E.2d 8B (1985). Fewerwerker was charged with aggravated murder of his father-in-law and felonious assault upon his wife. His wife was permitted to testify against him because both crimes were committed as part of one continuous transaction.

The Court of Appeals for the Eighth District of the State of Ohio has taken this exception to an extreme. In *State v. Bristow*, No. 42576, Slip Op. at 8-9 (Aug. 6, 1981), the court permitted a wife to testify against her husband, in the prosecution of him for the murder of her lover. Mr. Bristow had been charged with endangering his child in the same criminal episode, *but the endangering charge was dropped at trial*. Nevertheless, the trial court permitted the wife to testify against her husband on the murder charge, and the appellate court affirmed.

The first court to adopt the "single criminal episode" exception to the spousal exclusionary rules was the New Jersey Supreme Court in *State v. Briley*, 53 N.J. 498, 251 A.2d 442 (1969). See generally Annot., 36 A.L.R. 3d 820.

⁴³*State v. Bradley*, No. 50220 (Cuy. Co. Ct. App., Feb. 19, 1986); *State v. Canitia*, No. 46946 (Cuy. Co. Ct. App., Jan. 19, 1984); *Bristow*, No. 42576 (Pryatel, J., concurring). See *United States v. Cameron*, 556 F.2d 752 (5th Cir. 1977). See generally Annot. 98 A.L.R. 3d 1285.

⁴⁴Jeffrey Eugene Jones believes that courts are capable of making this determination:

In evaluating whether a marriage is worth preserving, courts should consider when the couple married, whether the spouses have cohabited for an insubstantial period of time since marriage, and whether one spouse has threatened the other spouse not to testify.

Note, *Federal Marital Privileges in a Criminal Context: The Need for Further Modification Since Trammel*, 43 WASH. & LEE L. REV. 197, 220 (1986).

In agreement with Mr. Jones is Note *The Joint Participation Exception to the Marital Testimonial Privilege: Balancing the Interests "In Light of Reason and Experience"*, 19 IND. L. REV. 645, 662 (1986).

⁴⁵*Mowery*, 1 Ohio St. 3d at 199, 438 N.E.2d at 901 (1983) (dicta); *State v. Stevenson*, No. 40725, Slip Op. at 4-5 (8th Dist. Ct. App., June 19, 1980).

⁴⁶Judge Pryatel of the Eighth District Court of Appeals made the following argument in favor of allowing spousal testimony:

If the victim were wounded by the assailant in the presence of his [the assailant's] wife, he would be subject to prosecution by the victim, but when the victim is slain by his assailant in the presence of his wife, are we to anoint him with immunity? I hope not.

Bristow, No. 42576, (Pryatel, J., concurring).

Finally, Ohio judges have found the admission of spousal testimony to be harmless error, even in cases where the spouse was the only eyewitness to the crime,⁴⁷ and in cases where the spouse offered highly persuasive testimony against the defendant.⁴⁸

The federal courts have fashioned another exception to the spousal exclusionary rules: the "joint participation" exception. Under this doctrine, the spousal exclusionary rules do not apply in any case where the spouses are joint participants in a crime.⁴⁹ This exception has not been applied in any reported Ohio decision.

Summary

In view of the lengths to which the Ohio courts have gone in order to avoid applying the spousal exclusionary rules, it is appropriate to ask whether the rules ought not to be repealed altogether.

The year 1980 marked the first time in the history of Ohio jurisprudence that the rule of spousal incompetency was affirmatively recognized by the legislature. It is therefore no longer possible to reform the rule of spousal incompetency through a court decision. Evidence Rule 601(B), embodying the spousal incompetency rule, and Ohio Revised Code Section 2945.42, codifying the rule of marital privilege, will have to be amended.

In deciding whether to amend or repeal the spousal exclusionary rules, it is appropriate to consider the purposes served by the rules. The following section of this article explores the underlying policy considerations.

POLICY CONSIDERATIONS

Insofar as the spousal exclusionary rules exclude relevant evidence from consideration by the trier of fact, they impede the ability of the trier of fact to determine the truth. The two guiding principles of the law of evidence as formulated by James Thayer are: "(1) [T]hat nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it."⁵⁰

These principles are codified in Rule 402 of the Ohio Rules of Evidence, which states: "All relevant evidence is admissible, except as otherwise provided by [law]. Evidence which is not relevant is not admissible."

⁴⁷*Id.* at 9-10.

⁴⁸*State v. Rahman*, 23 Ohio St. 3d 146, 157-63, 492 N.E.2d 401, 411-16 (1986) (Holmes, J., dissenting).

⁴⁹The "joint participation" exception is criticized in Note, *Partners in Crime: The Joint Participants Exception to the Privilege Against Adverse Spousal Testimony*, 53 *FORDHAM L. REV.* 1019 (1985).

⁵⁰J. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW* (1898), at 264, *quoted in* James, *Relevancy, Probability, and the Law*, 29 *CAL. L. REV.* 689 (1941).

Furthermore, it is a fundamental tenet of the law of evidence that the evidentiary privileges are to be strictly construed. Wigmore phrased the principle as follows:

For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.⁵¹

Thus relevant evidence is to be admitted, and the public is entitled to every man's and woman's evidence. Is there a "clear ground of policy or law", or a "distinctly exceptional" reason which favors exclusion of a spouse's relevant testimony?

There are four arguments that have been offered by courts and commentators in support of the spousal exclusionary rules:

- (1) Husband and wife are legally one person;
- (2) A defendant's spouse is an unreliable witness;
- (3) We are protecting the institution of marriage generally and the marriage of the defendant and the witness specifically; and
- (4) We are protecting the privacy of the defendant.

Each of these justifications is examined below.

The Legal Unity of Husband and Wife

The rule that husbands and wives could not testify against each other was recognized in English common law,⁵² but the rule of marital privilege was developed in the 19th century on the recommendation of legal commentators.⁵³

⁵¹ WIGMORE, EVIDENCE 2192 (3rd Ed.), *quoted in* United States v. Bryan, 339 U.S. 323, 331 (1950), *reh'g denied*, 339 U.S. 991. Wigmore's thesis was paraphrased by Chief Justice Warren Burger in United States v. Nixon, 418 U.S. 683, 710 (1974):

Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.

⁵² The first recorded reference to the rule is in Bent v. Allot, 21 Eng. Rep. 50 (Ch. 1580), wherein the court without explanation ordered a wife's testimony against her husband to be "suppressed." In The Lady Ivy's Trial, 10 How. St. Tr. 555, 644 (K.B. 1684), the court stated:

But by the law the husband cannot be a witness against his wife, nor a wife against her husband, to charge them with anything criminal, except only in cases of high treason. This is so known a common rule, that I thought it could never have borne any question or debate.

⁵³ The rule of marital privilege was first codified in England by the EVIDENCE AMENDMENTS ACT OF 1853, *supra* note 21. In researching the history of the rule of marital privilege before 1853, Sir Wilfred Greene of the English Court of Appeals made a surprising discovery:

The authorities and text-books which I have examined in the course of this judgment are all earlier in date than the Act of 1853. I must confess to feeling some surprise at the result of that examination; since the existence of the alleged rule of common law has, I think, in modern times been assumed by many lawyers. It is not without significance that the only English text-book earlier in date than the

Sir Edward Coke expanded the scope of the spousal exclusionary rules by declaring that spouses were also incompetent to testify *in favor of each other*.⁵⁴ Coke explained that husband and wife are “*duae animae in carne una*” [two souls in one body].⁵⁵

A century later Blackstone still acknowledged the mystical unity of husband and wife as forbidding either spouse from testifying for or against the other:

But, in trials of any sort, they are not allowed to be evidence for, or against, each other: partly because it is impossible their testimony should be indifferent; but principally because of the union of person: and therefore, if they were admitted to be witnesses *for each other*, they would contradict one maxim of law, “*nemo in propria causa testis esse debet*” [no-one ought to be a witness in his own cause]; and if *against each other*, they would contradict another maxim, “*nemo tenetur seipsum accusare*” [no-one is bound to accuse himself].⁵⁶

The “legal unity” of husband and wife was an ethereal, even romantic scrim drawn over a patriarchal stage. The legal fiction masked a reality of domination. The Ohio Supreme Court in 1870 described this unity not as two equals coming together; it stated, rather, “that the legal existence of the wife is merged in that of the husband, so that, in law, the husband and wife are one person.”⁵⁷ The court went on to describe the legal status of a married woman:

The husband’s dominion over the person and property of the wife is fully recognized. She is utterly incompetent to contract in her own name. He is entitled to her society and her service; to her obedience and her property. All her personal chattels are absolutely his, and her choses in action when reduced to his possession, and the right to so reduce them at his will and pleasure. He has an unqualified right to the use of her realty during coverture, and an estate for life, in the event of her death, if she bear him a child born alive⁵⁸

Evidence, . . . where the only authority cited is the American work of Professor Greenleaf. Shenton v. Tyler, 1939 Law Rep. 620, 636 (Ch. Div. 1938). See also Guarnieri, *Husband-Wife Privileged Communications*, *Summarized*, 8 CLEV. MAR. L. REV. 531 n. 5 (1959), quoting the above passage.

Best and Greenleaf are quoted in note 63 *infra* and the accompanying text, voicing reasons in favor of excluding spousal testimony.

⁵⁴1 EDWARD COKE, A COMMENTARY UPON LITTLETON, § 6b (1628). That Coke was unable to cite precedent in support of this conclusion is not surprising. “The fact is that Lord Coke had no authority for what he states, but I am afraid we should get rid of a great deal of what is considered law in Westminster Hall if what Lord Coke says without authority is not law.” Best, C.J., *quoted in* 5 ENCYCLOPAEDIA BRITANNICA 954 (1950).

⁵⁵Coke, note 52 *supra*, § 6b. This must have been hilarious to Coke’s contemporaries. Coke and his estranged wife Lady Hackett had been the subjects of popular gossip for decades as they waged battle in the streets, the courts, and Privy Council. CATHERINE DRINKER BROWN, *THE LION AND THE THRONE*, 393-411 (1957).

⁵⁶1 W. BLACKSTONE, COMMENTARIES, Ch. 15, at 443 (1765) (emphasis in original).

⁵⁷Phillips v. Graves, 20 Ohio St. 371, 380 (1870).

⁵⁸*Id.* See also the discussion of the doctrine of the legal unity of husband and wife in this context in *Mowery*, 1 Ohio St. 3d at 193-94, 438 N.E. 2d at 898-99.

Four years later, in 1874, the Married Women's Acts⁵⁹ repealed most of the common law disabilities. However, the wifely duty of obedience was recognized by Ohio statutory law until recently. Former Ohio Revised Code Section 3103.02 provided that the husband was the "head of the household", and empowered him to choose the family's place of domicile. It was repealed in 1974.

At least since 1974, therefore, it is safe to say that Ohio does not conceive marriage as a hierarchical state. As husbands' legal power over wives disappeared, so vanished the legal unity with their wives. And, in fact, the supposed unity of spouses has never been offered by the Ohio courts as a justification for the spousal exclusionary rules. So let us proceed to the other proffered reasons for the rules.

The Unreliability of a Spouse's Testimony

An ancient function of the law of evidence was to bar the testimony of classes of persons who would have a motive to lie. Parties, convicted criminals, and any person with an interest in the proceeding, were all deemed incompetent to testify.⁶⁰ In such a system it was perfectly reasonable to bar a defendant's wife from testifying.

But the disqualification of parties and persons with an interest in the proceeding was repealed in Ohio over a century ago.⁶¹ The central premise of the contemporary law of evidence is that the trier of fact weighs the credibility of witnesses; it is not for the court to exclude classes of witnesses on the ground that their testimony is not to be trusted.⁶² The supposed unreliability of a spouse's testimony has never been offered by the Ohio courts as a primary reason for excluding it.⁶³

The Protection of the Institution of Marriage and of the Marriage of the Defendant and the Witness

In the eighteenth century, courts began to offer an alternative explana-

⁵⁹71 OHIO LAWS 47, § 28, now codified at OHIO REV. CODE ANN. §§ 3103.04, 3103.05, 3103.07, 3103.08, and 2307.09 (Baldwin, 1953).

⁶⁰It seems anomalous that a society which purported to put such great faith in the efficacy of the witness' oath to tell the truth should attempt to bar all persons with the least interest in the case from testifying. But let us judge not, lest we be judged.

⁶¹Disqualification for interest was abrogated in 1850 with the enactment of the "Statute to Improve the Law of Evidence." 48 OHIO LAWS 33. This law did retain the rule that parties and persons for whom an action were brought were incompetent to testify.

In 1853 the legislature adopted a CODE OF CIVIL PROCEDURE. 51 OHIO LAWS 108. Section 310 provided: No person shall be disqualified as a witness, in any civil action or proceeding, by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of a crime; but such interest or conviction may be shown for the purpose of affecting his credibility.

Disqualification for interest was abolished in criminal cases in 1869. See *supra* note 31.

⁶²This is the import of Thayer's two "guiding principles," quoted in the text accompanying note 50 *supra*.

⁶³But see the statement of the Supreme Court disapproving of the testimony of a divorced spouse in *Cook v. Grange*, in the text accompanying note 69, *infra*. See also Blackstone's passing reference to this matter in the text accompanying note 56 *supra*, that "it is impossible their [spouses'] testimony should be indifferent."

tion for barring spousal testimony. In Lord Hardwicke's words: "The reason why the law will not suffer a wife to be a witness for or against her husband is, to preserve the peace of families."⁶⁴

In the nineteenth century, commentators and jurists universally acclaimed the spousal exclusionary rules as "pro-family." Professor Greenleaf, a leading American authority on the law of evidence, wrote in 1866:

The rule, by which parties are excluded from being witnesses for themselves, applies to the case of *husband and wife*; neither of them being admissible as a witness in a cause, civil or criminal, in which the other is a party. This exclusion is founded partly on the identity of their legal rights and interests, and partly on principles of public policy, which lie at the basis of civil society. For it is essential to the happiness of social life, that the confidence subsisting between husband and wife should be sacredly protected and cherished in its most unlimited extent; and to break down or impair the great principles which protect the sanctities of that relation would be to destroy the best solace of human existence.⁶⁵

But surely only a person wholly unacquainted with the state of holy matrimony would consider repeal of the spousal incompetency rules to contribute to the breakdown of the family. Consider the morbidly humorous argument of Alvin Wickline, summarized by the court in Wickline's action for a writ of habeas corpus, based upon the ground that his wife had testified against him: "Wickline says that he killed Mrs. Wickline's father after a quarrel. He says further that the hostility between himself and Mrs. Wickline, already intense, was made even more acute by the killing of his father-in-law and that Mrs. Wickline has since divorced him."⁶⁶

Such a killing might put a strain upon even a happy marriage, might it not? The justification for allowing Mr. Wickline to assert the rules of marital privilege and spousal incompetency is that his marriage and other marriages will be strengthened if Mrs. Wickline is prevented from testifying against him.⁶⁷ In Wigmore's words, "[I]t is a reason which is never allowed in practice

⁶⁴Barker v. Dixie, 95 Eng. Rep. 171 (King's Bench 1736).

⁶⁵1 GREENLEAF ON EVIDENCE 389, § 334 (1866) (footnotes omitted).

According to Best, a leading British commentator, the spousal exclusionary rules prevent "implacable dissension":

The other persons affected by this rule of exclusion, were the husbands and wives of the parties to the suit or proceeding. Husband and wife, say our books, "*sunt duae animae in carne una*"; (t)hey "are considered as one and the same person in law, and to have the same affections and interests; from whence it has been established as a general rule, that the husband cannot be a witness for or against the wife, nor the wife be a witness for or against the husband, by reason of the implacable dissension which might be caused by it, and the great danger of perjury from taking the oaths of persons under so great a bias, and the extreme hardship of the case.

BEST ON EVIDENCE 270-271, § 175 (1878) (footnotes omitted).

⁶⁶Wickline v. Alvis, 103 Ohio App. 1, 1-2 144 N.E. 2d 207, 208 (1957).

⁶⁷In *Wickline* the petitioner claimed he should be released from confinement because his wife had offered testimony against him in the grand jury proceedings. The court denied his petition on the ground that a husband cannot collaterally attack the legality or sufficiency of the evidence used to indict him. *Id.*, 103 Ohio 13

to be logically applied."⁶⁸

In only one Ohio case was the protection of the institution of marriage offered as a justification for barring a wife's testimony. In 1849, the Ohio Supreme Court suggested that allowing a divorced spouse to testify would encourage divorces! "The frequency of divorces at the present time, is a matter . . . not to be overlooked. If either husband or wife could be made a witness against the other, as soon as divorce was obtained, it might, in some instances, have a tendency to produce that result."⁶⁹

The court's objection may be answered, of course, by permitting a spouse to testify against the other during the marriage, making divorce unnecessary. Under present law, a divorced spouse is competent to testify as to all matters which are not privileged.

Accordingly, this reason, the preservation of marriages, is neither logical nor has it been substantially relied upon by Ohio courts as a justification for the spousal exclusionary rules.⁷⁰ We now turn to the primary policy which the Ohio courts have declared that they are serving by barring spousal testimony: the policy of protecting the privacy of the defendant.

The Privacy Interest of the Defendant

This is at once the most plausible and the most cynical of the reasons offered in support of the spousal exclusionary rules. Its premise is that a person may reasonably expect that confidences shared with a spouse should remain secret.

In order to explore the soundness of this reason it is necessary to examine the earliest Ohio cases barring spousal testimony, where the justification was extensively relied upon.

The first cases in Ohio to apply the rules of spousal incompetency and marital privilege were civil cases. These were *Cook v. Grange*,⁷¹ *Stober v. McCarter*,⁷² and *Bird v. Hueston*.⁷³ These early authorities did not clearly distinguish between spousal incompetency and marital privilege. These con-

⁶⁸App. at 9-10, 144 N.E. 2d at 213. The Court of Appeals for Summit County reached the same result without citing *Wickline* in *State v. Muenick*, 26 Ohio App. 3d 3, 498 N.E. 2d 171 (1985).

⁶⁹4 WIGMORE, EVIDENCE 3039-3040 (1st Ed. 1904, 1905).

⁷⁰*Cook v. Grange*, 18 Ohio 526, 530 (1849). A detailed discussion of *Cook v. Grange* is contained in the text accompanying notes 74-78 *infra*.

⁷¹The preservation of marital harmony was the primary justification for the doctrine of spousal immunity under the law of tort. See *Lyons v. Lyons*, 2 Ohio St. 2d 243, 208 N.E. 2d 533 (1965). Interspousal immunity was abolished by the Supreme Court in the recent case of *Shearer v. Shearer*, 18 Ohio St. 3d 94, 480 N.E. 2d 388 (1985).

⁷²18 Ohio 526.

⁷³4 Ohio St. 513.

⁷⁴10 Ohio St. 418.

cepts were vaguely perceived as different aspects of the same exclusionary rule.

In *Cook v. Grange*, the first decision of the Ohio Supreme Court on this subject,⁷⁴ the Supreme Court forbade a divorced wife from taking the stand, even though her husband was not a party to the lawsuit. The facts were that in 1837, Cook leased his farm to Thomas Grange and William Gally. Grange left the premises in 1838, Gally in 1840. Cook sued Grange for unpaid rent.

Neither Cook nor Grange were competent to testify under the common law rule disqualifying parties from taking the stand. What evidence did they adduce?

For his case in chief, Cook introduced the lease, and proved that Grange had taken possession under it. In defense, Grange called Sarah Gally, who had been divorced from William Gally in 1846. She testified that in November of 1837, Cook, Grange, and Gally met at the farm and agreed that Grange should be released from his obligation on the lease, and that Gally should be solely liable for payment of rent. Her testimony was the sole evidence of the parol agreement.

Grange prevailed in Common Pleas Court on the strength of Sarah Gally's testimony. Cook appealed to the Supreme Court,⁷⁵ asserting as error that Mrs. Gally was incompetent to be a witness.

The Supreme Court held that Mrs. Gally was not a competent witness, even though Mr. Gally was not a party to the lawsuit, even though the events described were not confidential, and even though she and Mr. Gally were divorced at the time of trial. Its principal reason was that it would be "highly dishonorable" for either spouse, after a divorce, to disclose facts learned "either by confidential communication, or in any way on account of the marriage relation."⁷⁶ Marriage impresses upon its participants "the most sacred seal of secrecy."⁷⁷

The "sacred seal of secrecy" was broken six year later in *Stober v. McCarter*. During the intervening period the Ohio legislature had repealed the common law rules barring the testimony of parties and persons with an interest in the proceeding,⁷⁸ and codified the spousal exclusionary rules in civil cases.⁷⁹

⁷⁴The Court noted:

The first and most important question that arises in this record is, whether Sarah Gally was a competent witness to prove the facts testified to by her. This question comes before this court for the first time.

18 Ohio 526 at 529.

⁷⁵This was a direct appeal to the Supreme Court. Intermediate appellate courts were not created until two years later by the Ohio Constitution of 1851, art. IV, § 5.

⁷⁶*Cook*, 18 Ohio at 530.

⁷⁷*Id.*

⁷⁸See note 61 *supra*.

⁷⁹See note 23 *supra*, and accompanying text.

In *Stober* a workman, McCarter, had filed a claim against Stober's estate for work performed. McCarter called Stober's widow to the stand to help prove his claim. The Supreme Court held her testimony to be admissible on the ground that it did not harm her late husband's *reputation*.

[A] widow, if not a competent witness to prove conversations with her husband, is competent to prove other independent facts that occurred during the coverture, the statement of which by her violates no confidence, nor is in anywise *prejudicial to his reputation*. * * * Catharine Stober testified to no conversations at all, nor to anything the knowledge of which, was derived through conjugal confidence, not to anything *prejudicial to the reputation of her deceased husband*.⁸⁰

The Ohio Supreme Court saw the introduction of spousal testimony as primarily an invasion of privacy. The purpose of the rules barring such testimony is to prevent the disclosure of evidence "prejudicial to the reputation" of the husband. In support of this reasoning, the court cited the case of *Robin v. King*,⁸¹ an 1830 decision of the Virginia Court of Appeals, as an example of a case where spousal testimony was inadmissible. It is a peculiarly appropriate precedent for the spousal exclusionary rules.

Robin, a slave, sued his master for his freedom on the ground that he was Indian, not Negro. As proof he offered the testimony of the widow of his former master, who stated that her late husband had told the family that Robin's mother was Indian. The trial court excluded her testimony, and the Virginia Court of Appeals affirmed, in large part because it would have reflected badly on her husband for him to have held people in slavery unlawfully. The Virginia court found it would have a "most mischievous effect" to allow such testimony, for men's "reputation might be injured, and their children ruined, by the declarations they had made in the bosoms of their families."⁸²

The express reasoning of the Virginia Court of Appeals in this antebellum emancipation case is identical to the reasoning of the Ohio Supreme Court in *Stober v. McCarter*. This reasoning is that it is disloyal for a man's family to offer testimony which puts him in a poor light. Four years later the Ohio Supreme Court again excluded a spouse's testimony, "in order to insure con-

⁸⁰4 Ohio St., at 523 (emphasis in original omitted, new emphasis supplied).

⁸¹29 Va. (2 Leigh) 140 (1830).

⁸²The portions of the opinion cited in the text are taken from the following peroration by the court: Are we to say, that every word spoken, in the thoughtless, careless confidence of the domestic circle, is free for public disclosure, unless secrecy be expressly enjoined? Is not the converse of the proposition true? And would it not have a most mischievous effect, would it not seriously break in upon that confidence which is the charm of domestic life, if men should, from our decisions, have cause to fear, that after they were in their graves, their reputation might be injured, and their children ruined, by the declarations they had made in the bosoms of their families? This freedom from restraint or apprehension, in the intercourse of one's own fireside, seems to me so necessary to the quiet and repose of society, that I am fearful of trenching upon it in the slightest degree.

29 Va. (2 Leigh), at 144.

judal confidence".⁸³

Wigmore ridiculed this justification of the spousal exclusionary rules. He noted that testimony by a wife against her husband, in the eyes of the common law, was tantamount to "testimonial betrayal," and reminiscent of the ancient offense of petit treason — an act of violence on the head of the household.⁸⁴ This enforceable duty of a spouse to remain silent has surely passed with the duty of obedience.

Every other evidentiary privilege is based upon a legal duty to keep certain information secret. Doctors, lawyers, and priests are legally and professionally bound to respect their oaths of confidentiality.⁸⁵ Husbands and wives are under no such legal duty. They may proclaim a spouse's secrets to their friends, to the media, even to the police. The only place that they may not state what they know is in court, under oath. Clearly it is not "privacy," but control over one's spouse, that is protected by these evidentiary rules.

"Privacy" is the main justification relied upon by the Ohio courts for the rules barring spousal testimony. It grows out of a view of marriage as a proprietary relationship. If one's view of marriage is that each spouse owns the other, and has the legal right to control the other's behavior, then the spousal exclusionary rules make perfect sense.

But this proprietary view of marriage is no longer an acceptable legal model. A legal model of marriage which is consistent with contemporary mores is described in the following section, where I also suggest how the spousal exclusionary rules may be changed to conform to present values.

REFORM OF THE SPOUSAL EXCLUSIONARY RULES

None of the reasons offered in support of the spousal exclusionary rules is persuasive.⁸⁶ Ohio courts have routinely found excuses for not enforcing the rules.⁸⁷ This is proof that these rules no longer reflect values held by society.

As noted above, the adoption of the Married Women's Acts, and the repeal of the law recognizing the husband as the head of the household,

⁸³Bird v. Hueston, 10 Ohio St. 418, 429 (1859).

⁸⁴4 WIGMORE 3035 (1st Ed., 1904, 1905).

⁸⁵Moreover, the evidence excluded by the spousal exclusionary rules is far broader than information excluded by the privileges based upon the attorney-client, physician-patient, or clergyman-penitent relationships. In Ohio, the attorney-client privilege is limited to communications "made to [the attorney] by his client in that relation or his advice to this client." The physician-patient privilege is similarly limited to communications made or advice given "in that relation." The clergyman's privilege is restricted to "a confession made, or any information confidentially communicated, to him for a religious counseling purpose in his professional character." OHIO REV. CODE ANN. §2317.02(A), (B), and (C) (Baldwin 1984). The husband-wife privilege and incompetency rules are not tied to any particular subject matter, and cover acts done as well as communications made.

⁸⁶See POLICY CONSIDERATIONS section of this article.

⁸⁷See *supra* text accompanying notes 40-49.

obliterated the common law disabilities of wives in Ohio.⁸⁸ The duty of obedience lives on, however, in the spousal exclusionary rules.⁸⁹ Do current attitudes towards marriage permit one spouse to forbid another from testifying in a criminal case?

No. Recent decades have seen women and men strive for legal and social equality. Marriage is now commonly treated as a joining of equals. Strict gender roles are discouraged. Freedom of choice, for both genders, is encouraged.

Perhaps the greatest impetus for change has been the assimilation of women into the workforce.⁹⁰ This has caused noteworthy changes in our fundamental law. It is now unconstitutional for the government to pay higher benefits to a married man than to a married woman.⁹¹ It is unconstitutional for a state to award alimony to wives and not husbands.⁹² The Supreme Court of the United States has declared, "No longer is a female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."⁹³

This freedom of choice extends not only to the allocation of economic and child-rearing roles, but also to the very existence of the marriage relationship. Until recently, a person could terminate a marriage only with cause, by proving that the other spouse had committed adultery, or had abandoned, neglected or been cruel to the partner.⁹⁴ Today, however, people may agree to dissolve a marriage,⁹⁵ or if they cannot agree, one spouse may unilaterally obtain a divorce after a separation of one year.⁹⁶ Marriage is no longer a legally enforceable obligation. It is instead a voluntary undertaking. It is not a legal duty owed to another; it is an act of will performed for another.

The theory that attitudes about marriage have evolved is supported by sociological research. Forty years ago, the most common reason given by women for divorcing their husbands was that their husbands had failed to support them. Today, the most common reason given by women who have ob-

⁸⁸See *supra* notes 57-59 and accompanying text.

⁸⁹In abolishing the doctrine of spousal immunity in tort, the Supreme Court noted:

When feudal concepts of a marital entity evolve to the modern concept of the marital partnership, it is the court's duty to see that the law reflects the changing face of society.

Shearer v. Shearer, 18 Ohio St. 3d 94, 99, 480 N.E. 2d 388, 394 (1985).

⁹⁰At the turn of the century, only 18% of the working population was female. By 1984, women constituted 43% of the workforce. Over 50% of mothers with small children now work outside the home. Department of Labor, Bureau of Labor Statistics, set forth in THE 1986 INFORMATION PLEASE ALMANAC at 57.

⁹¹*Frontiero v. Richardson*, 411 U.S. 677 (1973).

⁹²*Orr v. Orr*, 440 U.S. 268 (1979), *on remand*, 374 So. 29, 895 (Ala. 1979), *cert. denied*, *Ex parte Orr*, 444 U.S. 1060 (1980).

⁹³*Stanton v. Stanton*, 421 U.S. 7, 14-15 (1974).

⁹⁴See Cannell, *Abolish Fault-Oriented Divorce in Ohio — As a Service to Society and to Restore Dignity to the Domestic Relations Courts*, 4 AKRON L. REV. 92 (1971).

⁹⁵OHIO REV. CODE ANN. § 3105.61 (Baldwin, 1974).

⁹⁶*Id.* § 3105.01(K).

tained a divorce is that they simply didn't like their husbands' personality.⁹⁷

In recognition of freedom and equality in marriage Mahatma Ghandi said: "The wife is not the husband's bondslave but his companion and his helpmate and an equal partner in all his joys and sorrows — as free as the husband to choose her own path."⁹⁸

Modern theologians support this changing nature of marriage. Letty M. Russell has written:

[T]he teachings of Jesus and Paul on marriage and human relationships are not necessarily inconsistent with much of what women and men are seeking today through alternative methods of equal partnership. Men and women who challenge the hypocrisy and destructiveness of many of our marriage customs are neither causing the social dissolution of the nuclear family nor necessarily contradicting God's intentions for human development.⁹⁹

It is clear that the spousal exclusionary rules in their present form are not consistent with this contemporary model of marriage. Whatever rules are adopted today must reflect our belief in equality and freedom of choice. Does this mean that spousal testimony must be treated the same as evidence offered by other witnesses, and should be compellable in all cases?

It has been suggested that the spousal exclusionary rules are based on considerations of "sexuality and intimacy," and should be extended to all persons who love the defendant: parents, children, lovers and intimate friends.¹⁰⁰ But only three states recognize a privilege between parent and child,¹⁰¹ and none has adopted a privilege for lovers.¹⁰² For it is not passion, or even love, which justifies a rule allowing a spouse not to testify. Marriage differs from other family relationships in that it is voluntarily entered and voluntarily ended. It differs from friendship and love affairs in that it is always accompanied by an

⁹⁷Kitson & Sussman, *Marital Complaints, Demographic Characteristics, and Symptoms of Mental Distress in Divorce*, 87 J. MARRIAGE & FAM. 95 (1982).

⁹⁸THE WORDS OF GHANDI 21 (R. Attenborough ed. 1982).

⁹⁹L. RUSSELL, *THE FUTURE OF PARTNERSHIP*, 94-95 (1979).

Leonard Swidler, Professor of Catholic Studies at Temple University, has offered a new interpretation of the creation story based upon a reexamination of ancient texts. In his opinion, the original meaning was that Adam and Eve were created from a sexually undifferentiated being ("humanity"), rather than woman being fashioned from man. Interpreted in this way, the creation story "expresses the idea that it was not good for humanity to be singular, that to be fully human there must be relationships, dialogue between two equals, which function the lesser animals cannot fulfill." L. SWIDLER, *BIBLICAL AFFIRMATIONS OF WOMAN*, 75-78 (1979) (emphasis in original).

¹⁰⁰Note, *Developments in the Law — Privileged Communications*, 98 HARV. L. REV. 1454, 1590 (1985).

¹⁰¹*Id.* at 1575.

¹⁰²In an Ohio murder case, a woman was sentenced to six months in jail for refusing to testify against the man with whom she lived and she claimed was her husband. The trial court found that they were not married, and held the woman in contempt of court. *State v. Kilbane*, 61 Ohio St. 2d 201, 400 N.E. 2d 386 (1980).

express or an implied vow of loyalty, recognized by law. The true question is, should a person be permitted to observe that vow of loyalty, by refusing to testify at a spouse's trial?

The Supreme Court of the United States answered this question in the affirmative. In *Trammel v. United States*,¹⁰³ the Court abandoned its rule of spousal incompetency¹⁰⁴ and adopted a rule of spousal testimonial immunity, giving the witness spouse the option of deciding whether to testify against the defendant.¹⁰⁵ The Court reasoned: "When one spouse is willing to testify against the other in a criminal proceeding — whatever the motivation — their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony to preserve."¹⁰⁶

Eight decades ago Wigmore disagreed. He saw no reason to retain a rule forbidding or excusing a spouse from testifying.¹⁰⁷ As for our "natural repugnance" at forcing one spouse to testify against the other, he called it "not more than a sentiment." He ascribed the rule to the "general spirit of sportsmanship" which pervades the adversary process, and stated that the rules owe their existence to the opinion that "[t]he expedient of convicting a man out of the mouth of his own wife is . . . poor sport, and we shall not stoop to it." He reminds us that litigation is not a game, and that we should not let sentiment or a contrived notion of sportsmanship interfere with the search for truth.¹⁰⁸

In my opinion the courts should not compel a person to testify against a spouse. Remember the agony of Elizabeth Proctor, who had never told a lie, compelled to testify against her husband at the climax of *The Crucible*.¹⁰⁹ There is something in the marriage relationship which transcends the right of the state to "every man's evidence." This transcendent principle is not a right in the defendant spouse to seal the lips of the witness with a betrothal kiss. Instead, it is the right of a witness to remain silent, observing a vow of loyalty to his or her spouse. The choice to testify must rest with the witness spouse.

One remaining problem is to identify the cases in which a witness spouse ought to be compelled to testify. Present law recognizes that spousal testimony is compellable in cases of crimes against the testifying spouse or the children of either. It is appropriate to continue these exceptions for the protection of the

¹⁰³445 U.S. 40 (1980).

¹⁰⁴*Trammel* modified *Hawkins v. United States*, 358 U.S. 74 (1958), in which the Court had held that one spouse may not testify against the other unless both consent.

¹⁰⁵For an extensive description of the *Trammel* decision, see Note, *Evidentiary Privilege: Privilege of Defendant to Prevent Adverse Spousal Testimony Abolished — Trammel v. United States*, 6 U. DAYTON L. REV. 147 (1981).

¹⁰⁶445 U.S. at 52. The court left intact the rule of marital privilege. *Id.* at 45, n. 5.

¹⁰⁷Wigmore did, however, favor retention of the rule protecting confidential marital communications. 8 WIGMORE 642, § 2332 (1961 McNaughton Rev.).

¹⁰⁸4 WIGMORE 3040 (1st Ed., 1904, 1905).

¹⁰⁹ARTHUR MILLER, *THE CRUCIBLE*, Act III.

family.¹¹⁰

Accordingly, the following rule of spousal testimonial immunity is proposed, in place of the present rules of spousal incompetency and marital privilege: "No person shall be compelled to testify against his or her spouse in a criminal case, except in cases of crimes against the testifying spouse or the children of either."

¹¹⁰The Ohio Supreme Court has proposed in dicta that the spousal exclusionary rules should not be applied in any cases involving crimes against children. *State v. Mowery*, 1 Ohio St. 3d 192, 194-5, n. 1, 438 N.E. 2d 897, 899, n. 1 (1982). Those who favor broadening the number of cases in which a spouse may be compelled to testify should consider whether they favor outright abolition of the rules limiting the testimony of spousal witnesses.

